

## **United States Compliance with the Convention Against Torture**

### **Human Rights Violations Against Immigrants in Criminal Custody**

53<sup>rd</sup> Session of the Committee Against Torture

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#### **I. Reporting Organization**

The Immigrant Defense Project (IDP), a non-profit organization based in New York City, promotes fundamental fairness for immigrants accused or convicted of crimes. We seek to minimize the harsh and disproportionate immigration consequences of contact with the criminal justice system by 1) working to transform unjust deportation laws and policies and 2) educating and advising immigrants, their criminal defenders, and other advocates.

#### **II. Issues Summary and Legal Framework**

The convergence of criminal and immigration law has radically expanded the grounds for deportation and created significant barriers to relief for immigrants and refugees.<sup>1</sup> Immigrants who have come into contact with the criminal justice system are detained and deported, a double punishment that disparately affects noncitizens.<sup>2</sup> Since the 1996 legislative changes to immigration law, more than 4.5 million noncitizens have been deported from the United States.<sup>3</sup>

Over the last several years, there has also been a dramatic increase in the aggressive use of local police to enforce a broken immigration system. The collaboration between federal and state law enforcement endangers community security, ignores whether arrests were the result of racial profiling and whether non-citizens who have been swept into the detention-deportation are adequately represented or understand the immigration consequences of criminal convictions.<sup>4</sup>

Due to the overbroad category of “aggravated felony,” which includes offenses that are neither “aggravated” nor “felonies,” many noncitizens at risk for deportation only qualify for relief under the Convention Against Torture (CAT).<sup>5</sup> However, the U.S.’s narrow definition of torture, which is inconsistent with CAT, has limited relief and resulted in deportation to countries where there is a substantial ground to believe that a noncitizen will be subjected to torture.<sup>6</sup>

These laws and policies raise serious concerns about U.S. human rights obligations under the Convention Against Torture. The U.S. government has failed to protect noncitizens from torture or degrading treatment (Article 1); prevent and punish torture (Article 2); comply with the principle of non-refoulment (Article 3); and provide appropriate redress to victims of torture (Article 14).<sup>7</sup> Law

enforcement in the U.S. continue to engage in torture, as defined by the Convention as “acts by which pain or suffering, whether physical or mental, is intentionally inflicted on a person” as well as acts constituting cruel, inhuman, or degrading treatment.<sup>8</sup>

This shadow report focuses on how immigrants right to liberty, dignity and equality<sup>9</sup> are eroded by the use of racial profiling, detainers, overbroad definition of “conviction” and denial of protection against refoolment.

Consistent with national data and IDP’s interviews with non-citizens in correctional facilities, we identify four major violations: 1) racial profiling 2) prolonged detention because of ICE detainers 3) lack of access to rehabilitative or diversion programs and 4) deportation due to the narrow definition of “torture” under U.S. law.

1. Local authorities’ enforcement of federal immigration law is tied to practices of racial profiling and violates CAT Articles 2 and 11.

As the U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, affirmed “Racism and racial discrimination have profoundly and lastingly marked and structured American society. The United States has made decisive progress... [h]owever, the historical, cultural and human depth of racism still permeates all dimensions of life of American society.”<sup>10</sup>

Racial profiling is pervasively used by law enforcement to target noncitizens that appear or sound foreign.<sup>11</sup> Studies reveal that police officers often inquire about immigration status to identify and funnel individuals into the deportation pipeline.<sup>12</sup> This has disproportionately affected Latinos, as well as other immigrants of color who otherwise bear the brunt of racial profiling in the United States, and had a chilling effect on crime reporting amongst immigrant communities.<sup>13</sup> Immigrants are less likely to seek police protection and report criminal activity, fearful that such contact will trigger questions about immigration status.<sup>14</sup>

The enforcement of immigration laws by using race or ethnicity is unconstitutional and undermines U.S. compliance with its obligations under the Convention against Torture. Under Article 2 and 11 of CAT, the U.S. government is required to prevent torture and cruel treatment of persons subject to arrest, detention or imprisonment (Article 2 and 11).<sup>15</sup>

2. Failure to prevent torture and ill-treatment in custody

The Immigration and Customs Enforcement (ICE), the agency within the Department of Homeland Security tasked with detaining and deporting immigrants, uses local law enforcement and jails to target noncitizens.<sup>16</sup> Detainers, one of the cornerstones of the government’s deportation policies, are used by federal immigration officials to apprehend noncitizens in criminal custody.<sup>17</sup> A detainer is a request by ICE to local and state enforcement agencies to maintain custody of a person against whom ICE seeks to take enforcement action.<sup>18</sup> An individual subject to an ICE detainer remains in custody of the local law enforcement agency up until the moment of ICE arrest. Because of the

complicated intersection of federal, state, and local legislation that applies to noncitizens held in the custody of local law enforcement pursuant to ICE detainers, detention of noncitizens under these circumstances can become significantly prolonged. Non-citizens are sometimes incarcerated for weeks after serving their sentence in order for ICE to have time to pick them up for deportation.<sup>19</sup> A 2010 study in New York found that individuals with immigration detainers spend, on average, an extra 72 days in pre-trial custody compared to individuals without detainers.<sup>20</sup> In Texas, there is evidence that arrestees subject to ICE detainer requests spend three times longer (65-76 days) than others (22-26 days)<sup>21</sup> while in Los Angeles, inmates subject to ICE detainer requests spent an average of 20.6 more days in jail than other inmates.<sup>22</sup> The federal judiciary has begun to recognize the deprivation of rights that ensues an individual noncitizen's incarceration becomes extended because of a detainer.<sup>23</sup>

The obligation to prevent torture and ill treatment under Article 2 are “indivisible, interdependent, and interrelated.”<sup>24</sup> Thus, “State parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct” is prevented.<sup>25</sup> In violation of Article 1 prohibition against cruel and extreme punishment and Article 2 protection against indefinite detention, the U.S. government unlawfully detains noncitizens.

Detaining non-citizens past their release date and without any proof that an inmate is removable from the country also violates constitutional protections provided by the Fourth and Fifth Amendments.<sup>26</sup> ICE's failure to obtain a judicial determination of probable cause prior to a detainer and subsequent detention is prohibited by the Fourth Amendment. The lack of procedures or notification before issuing a detainer directly impacts the Fifth Amendment's due process rights and procedural protections against the deprivation of liberty.<sup>27</sup>

Greg, a 56 year old green card holder from Barbados is currently being held at Hudson County Correctional Facility in New Jersey. He came to the U.S. in 1995 and has two U.S. citizen adult children. Due to detainer, he was transferred to ICE custody after serving his sentence. He is currently facing mandatory deportation because of conviction for possession of small amounts of cocaine. Now in immigration detention, he is facing imminent separation from his family and a serious heart condition.

3. The barriers to noncitizens participation in therapeutic courts put noncitizens physical and mental health at grave risk, which may constitute cruel and inhuman treatment
  - a. Overbroad definition of “conviction

In 2007, the ABA Commission on Effective Criminal Sanctions developed policy recommendations urging jurisdictions to develop alternatives to incarceration and community based treatment programs for person with substance abuse and/or mental illness.<sup>28</sup> Many jurisdictions, including New York, have established drug courts or mental health treatment programs to rehabilitate

or/redress wrong doing. But noncitizens who apply for deferred adjudication programs face deportation and other harsh immigration consequences.<sup>29</sup>

Whether a noncitizen is removable does not depend on state law's definition of "conviction" but rather, the Immigration Nationality Act.<sup>30</sup> Thus, deferred adjudications, conditional dismissal involving a guilty plea that is later vacated, and suspended entries of sentences are all considered convictions for immigration purposes.<sup>31</sup> A noncitizen can also be deported if he or she admits to committing certain crimes or immigration authorities have reason to believe that he or she has engaged in certain criminal activities despite a lack of any conviction.<sup>32</sup>

The definition of "conviction" in immigration law has broadened to include case dispositions that are not considered convictions under state law. This includes participation in drug treatment programs, where defendants are typically required to plead guilty to the charges against them, but upon successful completion, the charges are dismissed. Although it results in dismissal, noncitizens defendants who complete the program will remain "convicted" under federal immigration law for a deportable offense.<sup>33</sup> Under CAT, the U.S. is obligated to prevent torture and ill-treatment and protect marginalized individuals who are especially at risk.<sup>34</sup>

Oscar came to the U.S. from Mexico as a teenager in 1999. He married a U.S. citizen wife 11 years and has 2 U.S. children. Several years ago, he started to struggle with alcohol and received convictions for driving under the influence. He had been sober for 2 years and was going to Alcoholics Anonymous when he was stopped for driving without a license. He is subject to mandatory detention even though he has been rehabilitated and is participating in AA.

b. Detainers bar access to pre-plea diversion programs

The rights of noncitizens in criminal proceedings is compromised by the increasing participation of state and local law enforcement officials in immigration law enforcement. The expansive use of detainers has allowed ICE to vastly increase deportations at local communities' expense, including long-time green card holders with U.S. citizen spouses and children. Individuals with detainers lodged against them are unable to enter into a pre-plea diversion programs.<sup>35</sup> Since most of the diversion programs and therapeutic courts require the person be released in order to participate, noncitizens' transfer to ICE custody due to a detainer bars access.

Detainers deny noncitizens equal access to treatment and prevent them from seeking alternatives to incarceration. Preventing non-citizens' entrance into diversion programs prioritizes ICE objectives to the detriment of ensuring treatment and equal protection, fractures families and increases costs to the criminal justice system. It also fails to reduce recidivism because drug addictions and mental health issues are not addressed.

David is a 30 year old from Columbia who came to the U.S. when he was four years old. He entered the U.S. with his mother and later became an LPR. He is currently facing deportation due to multiple convictions for marijuana. He has severe mental disabilities and resides in New York with his USC parents because he is unable to take care of himself.

#### 4. U.S. application of the Convention Against Torture is inconsistent with treaty obligations

##### a. Definition of torture

The Convention Against Torture (CAT) has an absolute prohibition against expelling, returning, or extraditing a person to another State where there is a risk of torture.<sup>36</sup> The Convention broadly defines torture, which requires that the act be “intentionally inflicted” and result in severe pain or suffering but the U.S. adopted a narrow definition. According to the U.S. government, torture must include a *specific intent* to inflict severe physical or mental pain or suffering.<sup>37</sup> Moreover, mental pain, a practice not specified by CAT, must include “prolonged mental harm.”<sup>38</sup> This limits what constitutes torture by failing to recognize instances where an individual may experience mental pain or suffering but the torture does not fall under one of the causes of harm specified in the U.S. definition. The U.S. definition has also been interpreted to limit compliance with the principle of non-refoulement and thus, deny noncitizens protection under Article 3.<sup>39</sup>

##### b. The U.S.’s “more likely than not” test inconsistent with Convention’s substantial ground test

The Convention’s definition of torture includes not only acts committed by public officials, but also those acts to which they acquiesced. Contrary to Article 3 which grants protection to individuals who have substantial grounds to fear torture,<sup>40</sup> U.S. law imposes a heightened standard regarding government acquiescence in torture. For such suffering to constitute torture, the claimant must show that he or she is “more likely than not to be tortured”<sup>41</sup> which is inconsistent with the Convention’s “substantial grounds test,” which takes 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>42</sup> The “more likely than not” standard employed in U.S. non-refoulement procedures improperly limits protection against refoulement by refusing to extend protection to individuals who fear torture by private entities that the government is unable to control.<sup>43</sup>

In 1999, the former Immigration Naturalization Services (now restructured and known as the Department of Homeland Security) implemented regulations outlining procedures to handling CAT cases. Non-citizens seeking relief from removal to countries where they will be subjected to indefinite detention and substandard prison conditions have been denied CAT protection due to a limited recognition of what constitute torture. In accordance with the “more likely than not to be tortured” test, indefinite detention in substandard prison conditions has been recognized as not constituting torture when there is no evidence that such conditions are intentional and deliberate.<sup>44</sup> Reliance on these protections by aliens in removal proceedings has been frequent but unsuccessful. In 2013, for example, immigration courts considered 26,317 applications for CAT relief of which about 2% were granted.<sup>45</sup>

For example, although it is well documented that Haitian authorities mandatorily detain and abuse deportees with criminal convictions from the U.S.,<sup>46</sup> the courts have ruled that the authorities did not detain deportees with the intent to inflict torture. In such cases, U.S. courts and administrative

bodies have denied protection, ruling that there is no specific intent to inflict severe pain and suffering because there is “no evidence that Haitian authorities are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture.” In the seminal decision *re J-E* involving a Haitian deportee who was convicted of selling cocaine and ordered removed from the United States, the U.S. Board of Immigration of Appeals<sup>47</sup> determined that noncitizen’s fear that he would be tortured upon return did not entitle him to relief under CAT.<sup>48</sup> In considering whether the Haitian authorities’ actions fall with the definition of torture, the Court examined whether there was a specific intent to torture. Although, the State Department reports and articles demonstrated that upon refolement, the noncitizen would face prolonged and indefinite detention in overcrowded where there is inadequate food, medical care and brutality, including burning inmates with cigarettes and electro shock, BIA determined, using the Black Law’s Dictionary of specific intent, that there was no “intent to accomplish the precise criminal act that one is later charged with.”<sup>49</sup> It did not address the fact that deportees are held with the intent that the act (i.e. imprisonment) cause severe pain and suffering.

In other cases involving Ugandan and Ethiopian citizens, the BIA has used the same reasoning to rule that substandard prison conditions are not the basis for CAT relief since the conditions are due to poverty rather than to inflict pain and suffering on inmates.<sup>50</sup> The second, third and eleventh circuits have deferred to the BIA’s interpretation of “specific intent” and declined to extend protection to cases involving indefinite detention in substandard prison conditions.<sup>51</sup>

Since deportees have already served their sentences in the U.S., their imprisonment is a second unfair punishment. Limiting CAT protection under Article 3 due to a dictionary definition of “specific intent” fails to recognize that inhumane prison conditions can be used as by authorities to inflict severe pain and suffering.<sup>52</sup>

Roland came to the U.S. as a green card holder when he was 7 years old. He has spent the last 15 years working as a lab technician. He is married to his wife, who is a U.S. citizen, and has 2 USC children. In 2001, he was pulled over while driving. Because he owed money on a prior ticket, Roland panicked and signed his cousin’s name who had been sitting next to him in the passenger seat. Roland then admitted this to the police officer and was arrested and charged with forging public records. He received a 1 and a half year suspended sentence for each ticket he signed. He served no time in jail. This was the only criminal conviction Roland has ever had. He is in removal proceedings for an “aggravated felony,” based on an offense that happened over ten years ago. Ronald faces deportation to Haiti, a country he left as a child. Because of all the stress related to his deportation, Roland has gone from a happy-go-lucky person to losing weight and needing medical care related to stress and depression.

### III. U.S. Government Response

In its prior recommendations, the Committee advocated that the U.S. enact a federal crime of torture that comports with Article 1 of the Convention, including a more expansive reading of

“mental harm.”<sup>53</sup> However, the U.S. did not address its restrictive definition of torture or allegations that law enforcement personnel act with impunity and commit torture and other degrading acts. It did respond to the Committee’s concerns about its failure to provide detainees protection against refoulment and cease rendition of suspects to States where individuals are at risk of torture. The government stated that CAT has limited applications and that the test for non refoulment is the “more likely than not” rather than the “real risk” of torture.<sup>54</sup>

The U.S.’s response to the Committee’s list of issues in 2013 mirrors its 2006 report.<sup>55</sup> There is continued failure to comply with the Convention’s definition of torture.<sup>56</sup> Derogation from the complete prohibition of torture undermines the principle of non-refoulment. The U.S. is required to protect marginalized individuals and actively investigate acts of torture and ill-treatment but the high incidence of racial profiling and refoulment puts noncitizens physical and mental health at risk.

#### IV. Recommended Question:

1. What are procedural mechanisms are in place to monitor and ensure that local law enforcement agencies cooperating with immigration do not result in unequal treatment under the law for noncitizens.
2. What measures has the government taken to clarify the “specific intent” requirement for torture and ensure that individuals who have a real risk of torture are not expelled to countries where they will be subjected to torture? Is the government considering further reform of its non-refoulment procedures to bring them into conformity with the Convention Against Torture?

#### V. Suggested Recommendations

1. Collaboration between local law enforcement and immigration authorities interferes with non-citizens’ ability to receive equal treatment in the criminal justice system. The Department of Homeland Security should terminate the use of state and local criminal justice system, including detainers, to enforce immigrations laws.
2. Given the well-documented problem of racial profiling by local law enforcement and the increased risk of deportation for non-citizens that encounter the criminal justice system, the U.S. government should end all programs that share data between local law enforcement and immigration, including but not limited to Secure Communities.
3. End disproportionate double punishment by changing the definition of “conviction” under immigration law to comport with definition of conviction under state law.
4. Expand the definition of “torture” to ensure that U.S. interpretation is consistent with the Convention against Torture and also conforms with international human rights standards.

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<sup>1</sup> Teresa A. Miller, "Blurring the Boundaries between Immigration and Crime Control after September 11th," Boston College Third World Law Journal, 2005, at 81-123.

<sup>2</sup> Immigrant Legal Resource Center, Principle for immigrant reform that promote fairness for all immigrants, available at [http://www.ilrc.org/files/documents/ijn\\_documents\\_final.pdf](http://www.ilrc.org/files/documents/ijn_documents_final.pdf)

<sup>3</sup> Marc R. Rosenblum and Doris Meissner, The Deportation Dilemma: Reconciling Tough and Human Enforcement, Migration Policy Institute, April 2014, available at <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>

<sup>4</sup> National Immigration Law Center, Ice Entangled with Local Justice Systems, March 2014, available at <http://www.nilc.org/localjusticeandice.html>

<sup>5</sup> Aarti Kohli, Peter L. Markowitz and Lisa Chavez, Secure Communities by the Numbers: An Analysis of Demographics and Due Process, The Chief Justice Earl Warren Institute on Law and Social Policy, October 2011, available at [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf)

<sup>6</sup> David Luban and Henry Shue, Mental Torture: A critique of Erasures in U.S. Law, Georgetown Public Law and Legal Research Paper, 2011, available at

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1619&context=facpub>

<sup>7</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter "CAT"].

<sup>8</sup> CAT, supra note 7, article 1 (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.")

<sup>9</sup> New York Civil Liberties Union (NYCLU), Immigrants' Rights are Human Rights: Universal Guarantees of Rights to All People, 2009, available at <http://www.nyclu.org/publications/immigrants-rights-are-human-rights-universal-guarantees-of-rights-all-people-2009>

<sup>10</sup> American Civil Liberties Union (ACLU), The Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination, August 2009, available at [https://www.aclu.org/files/pdfs/humanrights/cerd\\_finalreport.pdf](https://www.aclu.org/files/pdfs/humanrights/cerd_finalreport.pdf)

<sup>11</sup> ACLU, Racial Profiling, 2011, available at <https://www.aclu.org/racial-justice/racial-profiling>

<sup>12</sup> Aarti Kohli et al., Secure Communities By the Numbers: An Analysis of Demographics and Due Process, Chief Justice Earl Warren Institute on Law & Social Policy (2011), [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf)

<sup>13</sup> American Immigration Council, Immigration Impact, Local Immigration Enforcement Harms Community Policing and Public Safety, September 13, 2013, available at <http://immigrationimpact.com/2013/09/13/local-immigration-enforcement-harms-community-policing-and-public-safety/>

<sup>14</sup> Cecilia Menjivar and Leisy Abrego, Center for American Progress, Legal Violence in the Lives of Immigrants: How Immigration Enforcement Affects Families, Schools, and Workplaces, December 2012, available <http://cdn.americanprogress.org/wp-content/uploads/2012/12/MenjivarLegalViolenceReport.pdf>

<sup>15</sup> CAT, supra note 1, Article 2 (duties to prevent acts of torture in any territory under its jurisdiction) and 11 (each state must take measures to engage in systematic review of interrogation rules, instructions, methods, and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture).

<sup>16</sup> National Immigration Law Center, Ice Entangled with Local Justice Systems, March 2014, available at <http://www.nilc.org/localjusticeandice.html>

<sup>17</sup> National Immigration Justice Center, Challenge Unjust Immigration Detainers, available at <http://www.immigrantjustice.org/detainers#Background>

<sup>18</sup> See 8 C.F.R. 287.7(a)-(e).

<sup>19</sup> National Immigration Forum, Quick information on Immigration Detainers, March 2011, available at <http://immigrationforum.org/images/uploads/2010/DetainersBackgrounder.pdf>

<sup>20</sup> Aarti Shahani, New York City Enforcement of Immigration Detainers Preliminary Findings, October 2010, available at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NYC%20Detainer%20Report.pdf>

<sup>21</sup> National Immigration Forum, Immigrants Behind Bars: How, Why, and How Much, March 2011, available at [http://immigrationforum.org/images/uploads/2011/Immigrants\\_in\\_Local\\_Jails.pdf](http://immigrationforum.org/images/uploads/2011/Immigrants_in_Local_Jails.pdf)

<sup>22</sup> Judith A. Greene, The Cost of Responding to Immigration Detainers in



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California: Preliminary Findings, August 2012, available at <http://www.justicestrategies.org/publications/2012/cost-responding-immigration-detainers-california>

<sup>23</sup> See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST., 2014 WL 1414305 (D. Or. Apr. 11, 2014).

<sup>24</sup> Committee against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, (39<sup>th</sup> Sess., 2007), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 381, para. 20, U.N. Doc. HIR/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter *CAT Committee, Gen. Comment No. 2*].

<sup>25</sup> *CAT Committee, Gen. Comment No. 2*, para. 4.

<sup>26</sup> <http://www.immigrationpolicy.org/perspectives/faulty-legal-arguments-behind-immigration-det>

<sup>27</sup> Karen Lucas and Anu Joshi, American Immigration Lawyers Association, AILA's Take on Civil Immigration Detainers, May 2014, available at <http://www.aila.org/content/default.aspx?bc=25667%7C48591>

<sup>28</sup> American Bar Association, Commission on Effective Criminal Sanctions, August 2006, available at <http://csgjusticecenter.org/documents/0000/0348/ABA.2006.recommendations.pdf>

<sup>29</sup> Jason Alexis Cade, "The Plea Bargain Crisis for Noncitizen in Misdemeanor Court," New York University Public Law and Legal Theory Working Papers, June 2013, available at <http://csgjusticecenter.org/documents/0000/0348/ABA.2006.recommendations.pdf>

<sup>30</sup> See INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

<sup>31</sup> New York City Bar, The Immigration Consequences of Deferred Adjudication Programs in New York City, June 2007, available at <http://www.nycbar.org/pdf/report/Immigration.pdf>

<sup>32</sup> Sara Elizabeth Dill, "Unbalanced Scales of Justice: How Ice is preventing Noncitizens from Having Equal Access to Diversion Programs and Therapeutic Courts," Family Court Review, October 2012 at 629-637, available at <http://federaldefendersny.org/Sara%20Elizabeth%20Dill.%20Unequal%20access%20to%20therapeutic%20courts.pdf>

<sup>33</sup> New York City Bar, The Immigration Consequences of Deferred Adjudication Programs in New York City, June 2007, available at <http://www.nycbar.org/pdf/report/Immigration.pdf>

<sup>34</sup> *CAT Committee, Gen. Comment No. 2*, para. 21 "States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above."

<sup>35</sup> Sara Elizabeth Dill, "Unbalanced Scales of Justice: How Ice is preventing Noncitizens from Having Equal Access to Diversion Programs and Therapeutic Courts," Family Court Review, October 2012 at 629-637, available at <http://federaldefendersny.org/Sara%20Elizabeth%20Dill.%20Unequal%20access%20to%20therapeutic%20courts.pdf>

<sup>36</sup> CAT, *supra* note 7. Article 1 defines torture as "any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain is inflicted by or at the acquiescence of a public official or other person acting in an official capacity.

<sup>37</sup> SEN. EXEC. RPT. 101-30, Resolution of Advice and Consent to Ratification, (1990) [hereinafter "Sen. Resolution"].

<sup>38</sup> Sen. Resolution. (1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

<sup>39</sup> David Luban and Henry Shue, Mental Torture: A critique of Erasures in U.S. Law, Georgetown Public Law and Legal Research Paper, 2011, available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1619&context=facpub>

<sup>40</sup> CAT, *supra* note 7, Article 3.

<sup>41</sup> See 8 CFR 208.17

<sup>42</sup> CAT, *supra* note 7, Article 3.

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<sup>43</sup> See *Zheng v. Ashcroft*, 332 F.3d 1186 (9<sup>th</sup> circ. 2003); *Ochao v. Gonzales*, 406 F.3d 1166 (9<sup>th</sup> circ. 2005); *Perez v. Loy*, 356 F. Supp.2d 172 (D. Conn. 2005).

<sup>44</sup> *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).

<sup>45</sup> U.S. Department of Justice, Executive Office for Immigration Review, FY 2013 Statistics Yearbook, April 2014, available at <http://www.justice.gov/eoir/statspub/fy13syb.pdf>

<sup>46</sup> U.S. Department of State, Country Reports on Human Rights Practices 2013, Haiti, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>; Refworld, Haiti: Information on Conditions in Haiti Prisons and treatment of criminal deportees, 2002, available at <http://www.refworld.org/publisher,USCIS,,HTI,3dec98224,0.html>

<sup>47</sup> The Board of Immigration Appeals (BIA) is the highest administrative body in the United States for interpreting and applying immigration laws

<sup>48</sup> *In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002).

<sup>49</sup> *Id.*

<sup>50</sup> *Settenda v. Ashcroft*, 377 F.3d 89, 96 (1st Cir. 2004);

<sup>51</sup> *Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007); *Pierre v. Att’y Gen.*, 528 F.3d 180 (3d Cir. 2008); *Jean-Pierre v. Att’y Gen.*, 500 F.3d 1315 (11th Cir. 2007)

<sup>52</sup> *Alemu v. Gonzales*, 403 F.3d 572, 574-75 (8th Cir. 2005).

<sup>53</sup> Convention Against Torture, Conclusions and recommendations of the Committee against Torture, 2006, available at <http://www.ushrnetwork.org/sites/ushrnetwork.org/files/catrecommendations2006.pdf>

<sup>54</sup> U.S. Response to Specific Recommendation Identified by the Committee Against Torture, 2006, available at [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/us\\_response\\_to\\_cat\\_conclusions\\_and\\_observations\\_2006.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/us_response_to_cat_conclusions_and_observations_2006.pdf)

<sup>55</sup> Convention Against Torture, List of Issues Prior to the Submission of the Fifth Periodic Report of United States of America, 2010, available at <http://www.ushrnetwork.org/sites/default/files/catlistofissues2010.pdf>

<sup>56</sup> United Nations Committee Against Torture, Periodic Report of the United States of America, August 2013, available at <http://www.ushrnetwork.org/sites/ushrnetwork.org/files/periodic.pdf>