



**The United States of America's
Compliance with the International Covenant on Civil and Political Rights: Non-
discrimination, Human Trafficking and Forced Labor, Non-Refoulement and Immigration
Enforcement and Detention**

Submitted by The Advocates for Human Rights
a non-governmental organization in special consultative status with ECOSOC since 1996

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The Advocates for Human Rights (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Established in 1983, The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. Since 2007, The Advocates has worked to document both sex and labor trafficking in the state of Minnesota and develop statewide protocols to provide protection and services for victims. The Advocates is committed to ensuring protection for refugees around the world and provides legal services to more than 800 asylum seekers and youth survivors of labor trafficking in the Upper Midwest region of the United States. Through the National Asylum Help Line, The Advocates has also provided referrals for legal services throughout the United States to more than 1500 Central American women upon their release from family detention.

The United States fails to uphold its obligations under the International Covenant on Civil and Political Rights

1. 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 (Covenant or ICCPR). Although the U.S. government has made dramatic shifts in policy since January 2021, it continues to implement immigration policies that violate human rights principles. The Human Rights Committee's (Committee) review of the U.S. comes at a time when the Biden Administration is appealing a court decision that struck down its proposed ban on nearly all cases of asylum at the southern US border.

I. NON-DISCRIMINATION (Arts. 2, 9, 14 and 26)

A. Collateral Immigration Consequences of Racial Disparities in Criminal Justice System (CO para. 6, LOIPR paras. 6-7)

2. In its 2014 Concluding Observations, the Committee expressed ongoing concern about racial disparities at different stages in the criminal justice system that disproportionately impact BIPOC communities in the U.S.¹ The Committee called on the U.S. to “step up its efforts to robustly address racial disparities in the criminal justice system, including by amending regulations and policies leading to racially disparate impact at the federal, state and local levels.”²
3. In its List of Issues Prior to Review (LOIPR), the Committee asked the State party to provide information on the steps taken to address these racial disparities in the U.S. criminal justice system, including the overrepresentation of individuals belonging to racial and ethnic minorities in detention, the disproportionate representation of minorities in pretrial detention, including on account of the bail system, and the disproportionate length of sentences for racial and ethnic minorities.³
4. Some jurisdictions in the U.S. have taken positive steps towards ensuring greater racial justice in criminal proceedings. These advances are the exception, however. Further, reforms to date have not addressed the discriminatory impact of Collateral Legal Consequences (CLCs).
5. BIPOC communities in the U.S. face racial discrimination in the criminal justice system before, during, and after criminal proceedings.⁴ These racial disparities shape outcomes before, during, and after someone enters the criminal justice system, perpetuate ongoing cycles of

¹ UN Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America* (23 April 2014), U.N. Doc. CCPR/C/USA/CO/4, ¶ 6.

² UN Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America* (23 April 2014), U.N. Doc. CCPR/C/USA/CO/4, ¶ 6.

³ UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America* (18 April 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 7.

⁴ Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, SENTENCING PROJECT 10-12, 15-18 (2015) <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/>.

poverty and racial discrimination.⁵ BIPOC people are charged more frequently by prosecutors and held in pretrial detention, which harms their prospects for trial.⁶ As a result, members of BIPOC communities are more likely to take plea deals or face racial discrimination at trial. Upon sentencing, Black and Latino/a people are more likely to be sentenced for more serious offenses⁷ for longer periods of time. Extreme disparities still exist in 20 states,⁸ including The Advocates' headquarters state of Minnesota, which ranks 47th in the nation in overall incarceration rates, yet the Black to white rate of incarceration is 9.7:1.⁹

6. Despite representing 13 percent of the U.S. population, Black people make up 27 percent of people arrested for drug possession and distribution. This disparity is even more marked for sentencing decisions: 31 and 38 percent of people sentenced to state and federal prison (respectively) for drug-related crimes are Black. White people make up 73 percent of the population, and while they are proportionally represented in drug arrests, their sentencing rate represents 31 percent for state sentences and 22 percent for federal sentences.
7. Because of the complexity of the U.S. criminal justice system, the harsh consequences of CLCs often have an impact beyond that understood or intended. For example, the list of crimes considered “felonies” that trigger extensive CLCs, included extensive immigration bars, mandatory detention and immigration enforcement actions, has expanded beyond violent and dangerous crimes, triggering severe infringements on rights.
8. As laws across the U.S. allow consideration of prior convictions in sentencing, CLCs can impact sentencing. For example, under the 2021 Minnesota Sentencing Guidelines and Commentary, criminal history (ranging from juvenile adjudications to felonies) is a basis for making a recommendation to impose a higher sentence.¹⁰ If someone has several minor convictions—which could have arisen as a result of living in a neighborhood where they were subjected to racial profiling and disproportionately high risks of involvement with police—

⁵ The Sentencing Project, “Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance” (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

⁶ The Sentencing Project, “Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance” (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

⁷ The Sentencing Project, “Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance” (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>

⁸ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT 6,9 (2021) <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>

⁹ The Sentencing Project, “State-by-State Data,” accessed May 12, 2022, <https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=Minnesota> “Racial/Ethnic Disparity in Imprisonment (2019)”.

¹⁰ Minnesota Sentencing Guidelines Commission, *MINNESOTA SENTENCING GUIDELINES AND COMMENTARY*, (Saint Paul, Minnesota: September 2021), https://mn.gov/sentencing-guidelines/assets/2021Sept15MinnSentencingGuidelinesCommentary_tcm30-497682.pdf.

they are at a higher risk of receiving a harsher sentence, which can lead to a host of additional CLCs.¹¹

9. U.S. immigration law includes significant bars to benefits, entry and protections for those with criminal histories. For example, a person with a “particularly serious crime” conviction is barred from asylum protections and eligible only for lesser, mandatory protections under the Convention Against Torture. People otherwise eligible for immigration benefits through family or employers are barred unless they can obtain a waiver in limited circumstances. Individuals seeking protection as victims of crimes and trafficking are barred unless they can obtain a limited discretionary waiver. Individuals who would otherwise be eligible for naturalization may be barred or forced to wait based on certain crimes. And, as detailed elsewhere in this report, people may be subject to mandatory (read, arbitrary) detention for certain criminal convictions.
10. The immigration collateral consequences for criminal convictions are heavily tied to criminal laws with racial underpinning. This is particularly the case for drug crimes. Even a “reason to believe” a person is a drug trafficker can trigger mandatory detention. Because drug laws are known to have racially discriminatory underpinnings and be wielded such that BIPOC communities are more likely to face arrest, conviction and harsher penalties, BIPOC noncitizens are also more likely to face immigration consequences on account of their race.

B. Racial Discrimination in Immigration Policies (LOIPR para 8)

11. In its LOIPR, the Committee asked the U.S. to explain how Presidential Proclamation 9645 “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats”, commonly known as the Muslim ban, is compatible with the non-discrimination and non-refoulement provisions of the Covenant.¹²
12. While Presidential Proclamation 9645 has been rescinded, reports indicate that there have not been adequate measures taken to address the impact. As a result, there is ongoing harm in that individuals remain outside the U.S. in backlogs of consular processing. Remedial measures are still needed to address the harms caused to those impacted and provide a path to immigrate.
13. Although the Muslim ban has been rescinded, discrimination continues to exist in many areas of U.S. immigration policies. For example, Black migrants receive disparate treatment—being blocked from access the U.S., experiencing higher rates of detention and solitary confinement, receiving higher bond amounts, and ultimately losing their cases requesting protection at higher rates.¹³ Black immigrants made up 7% of the total immigration population from 2003-

¹¹ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT 14 n.52 (2021) <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> (citing Frase, R. & Roberts, J. V. (2019). *Paying for the past: The case against prior record sentencing enhancements*. Oxford University Press).

¹²UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America* (18 April 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 8.

¹³ Black immigrant lives are under attack. RAICES. (n.d.). Retrieved July 6, 2022, from <https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/>.

2015 but made up 10% of the deportations, and Black immigrants make up more than 20% of peoples facing deportation on criminal grounds.¹⁴ In 2020, Haitian families constituted almost half of the families detained by ICE. Haitian families made up 44% of families detained¹⁵. Additionally, Haitians had the second highest U.S. asylum denial rate at 87%.¹⁶

14. Bonds paid by Haitian immigrants were 54% higher than bonds paid by other migrants in ICE detention facilities.¹⁷ While the average bond for other migrants was \$10,500, the average bond for Haitians was \$16,170.¹⁸
15. Black non-citizens also face higher rates of detention and deportation than other immigrant populations. A study from 2021 found that Black detainees in Immigration and Customs Enforcement (ICE) custody were more likely to have lengthy detentions and were six times more likely to be sent to solitary confinement¹⁹. African or Caribbean immigrants made up only 4% of those held by ICE from 2012 to 2017, yet they accounted for 24% of all solitary confinement lockups. While the average longest length of detention in 2019 was 55 days for other immigrants, the average length for immigrants from Kenya and Rwanda was about 10 years²⁰.
16. The Advocates for Human Rights has direct information from our Immigration Court Observation Project that documents similar discrimination. Court observers at the Fort Snelling court reported that all Black migrants in detention and removal proceedings at the Fort Snelling immigration court, which serves the Upper Midwest region, appeared to experience higher rates of detention, higher bond amounts, as well as lower rates of release.²¹
17. Additionally, in October 2021, US Customs and Border Protection (CBP) agents were photographed physically beating back Haitian migrants on the Mexico-U.S. border in order to

¹⁴ Bill Ong Hing, Addressing the Intersection of Racial Justice and Immigrant Rights, 9 Belmont L. Rev. 357, 362 (2022).

¹⁵ Black immigrant lives are under attack. RAICES. (n.d.). Retrieved July 6, 2022, from <https://www.raicestexas.org/2020/07/22/black-immigrant-lives-are-under-attack/>.

¹⁶ Black Alliance for Just Immigration and NYU School of Law Immigrant Rights Clinic, *The State of Black Immigrants* by Juliana Morgan-Trostle, Kexin Zheng, and Carl Lipscombe, (2022), <https://www.immigrationresearch.org/system/files/sobi-fullreport-jan22.pdf>; see also Spencer Woodman, *U.S. isolates detained immigrants from majority, black countries at high rate, study finds*, International Consortium of Investigative Journalists, Apr. 21, 2020, <https://www.icij.org/investigations/solitary-voices/u-s-isolates-detained-immigrants-from-majority-black-countries-at-high-rate-study-finds/>

¹⁷ Id.

¹⁸ Id.

¹⁹ Black Alliance for Just Immigration and NYU School of Law Immigrant Rights Clinic, *The State of Black Immigrants* by Juliana Morgan-Trostle, Kexin Zheng, and Carl Lipscombe, (2022), <https://www.immigrationresearch.org/system/files/sobi-fullreport-jan22.pdf>; see also Spencer Woodman, *U.S. isolates detained immigrants from majority, black countries at high rate, study finds*, International Consortium of Investigative Journalists, Apr. 21, 2020, <https://www.icij.org/investigations/solitary-voices/u-s-isolates-detained-immigrants-from-majority-black-countries-at-high-rate-study-finds/>.

²⁰ Id.

²¹ The Advocates for Human Rights, *Bearing Witness in the Moment: Report from the Immigration Court Observation Project*, (Minneapolis, Minnesota: 2020), <https://www.theadvocatesforhumanrights.org/res/byid/8597>.

prevent them from entering the U.S. to obtain asylum.²² By contrast, the U.S. opened special lanes for Ukrainians seeking safety at the Mexico-U.S. border.²³ The U.S. has promised to investigate and punish those responsible for beating the Haitian migrants, but has not attempted to resolve overarching, systemic racism that accounts for the disparate treatment received by Haitians and other Black migrants at the border.

18. Cameroonians waited months for approval of Temporary Protected Status (TPS) to allow them to stay in the U.S. instead of returning to violent armed conflict in Cameroon. Similarly, TPS designation on the basis of violent armed conflict or climate change has been slow for countries such as Ethiopia and Mauritania. By contrast, the U.S. designated TPS for Ukrainians within one month of the Russian invasion.²⁴ The disparate treatment raises concerns about discrimination.²⁵
19. Racial disparities in U.S. immigration policy have been particularly stark in the disparate treatment of displaced Ukrainians and Afghans. The U.S. response to Ukrainians demonstrates the important ways in which the State Party can—and should—provide protections for people fleeing harms. The U.S. has set-up a generous program for humanitarian parole that allows Ukrainians to enter the U.S. That program allows broad categories of individuals to sponsor a Ukrainian, has had rapid processing and approval rates, is not subject to individual case processing and backlogs at USCIS, does not require the individual be outside of home country to complete process, does not require a fee (which is normally \$535 per applicant), does not require applicants show strong positive factors and significant evidence of threat of imminent harm, allows families to apply together, and does not require in person appointments, biometrics, or vaccinations/medical.²⁶ Ukrainians were provided re-parole many months before their statuses were set to expire while Afghan re-parole was open for application just two months before most parolees were set to lose status and work authorization in 2023. Afghans have been calling for long-term protections since August 2021, but still have no path to residence. The US also excluded Ukrainians from policies at the border which are preventing other asylum seekers from entering, such as Title 42 COVID expulsions and the “Migrant Protection Protocols.” Comparing these policies to those for Afghans, Cameroonians, and BIPOC migrants, The Advocates and others are concerned about racial discrimination in U.S. immigration policy.²⁴

20. Suggested recommendations to the State party:

²² *The inquiry into border agents on horseback continues. Critics see “broken” system*, MPR News, Nov. 6, 2021, <https://www.npr.org/2021/11/06/1052786254/border-patrol-agents-horseback-investigation-haitian-immigrants>.

²³ Kate Morrissey and Alexandra Mendoza, *CBP begins rapid processing of Ukrainians at PedWest border crossing*, The San Diego Union Tribune, Apr. 6, 2022, <https://www.sandiegouniontribune.com/news/border-baja-california/story/2022-04-06/cbp-ukrainians-pedwest>.

²⁴ <https://foreignpolicy.com/2022/04/05/biden-cameroon-tps-ukraine-refugees-asylum-immigration-homeland-security/>

²⁵ Rebecca Beitsch, *Critics decry double standard on migrants amid Ukraine crisis*, The Hill, March 31, 2022, <https://thehill.com/policy/national-security/600440-critics-decry-double-standard-on-refugees-amid-ukraine-crisis/>

²⁶ <https://www.uscis.gov/ukraine>

- Provide information on any special, remedial measures it is taking to address the harms caused Presidential Proclamation 9645 and take corrective action to ensure individuals harmed by Muslim Bans and other racially discriminatory programs receive adequate remedies and compensation to immediately process their cases.
- Work to disentangle immigration and criminal justice systems by eliminating enforcement priorities and regulations that tie negative immigration decisions to criminal histories, including passing legislation such as the New Way Forward Act.
- Take immediate action to initiate termination of employment for any immigration officers proven to have violated equal protection laws and ensure all contracts are updated to include such provisions.
- Undertake a review of decision making about nationality-based immigration programs and issue regulations that ensure racially discriminatory or disparate impacts are considered and addressed.
- Conduct a thorough review of data showing detention and removal rates by race and update policies and trainings to ensure detention and removal decisions are not disproportionately impacting BIPOC communities.

II. ELIMINATION OF SLAVERY AND SERVITUDE (art. 8)

A. Human Trafficking (CO paras. 14-15, LOIPR para 18)

21. The Committee expressed concerns in its 2014 Concluding Observations about trafficking of persons in the U.S., including children, for purposes of labour and sexual exploitation.²⁷ In its LOIPR, the Committee asked the U.S. to “indicate what steps have been taken to strengthen preventative measures against trafficking in persons, increase victim identification, systematically and vigorously investigate allegations of trafficking, prosecute and punish those responsible, and provide effective remedies to victims. In addition, indicate what steps the State party has taken to prevent the criminalization of victims of sex trafficking, including child victims.”²⁸
22. **Promising practices exist, but require buy-in, to effectively prevent, identify, investigate, prosecute, and provide effective remedies for human trafficking.** As the result of significant changes in policies since the shift in administrations in January 2021 The Advocates has noted that more victims are identified, confident in coming forward, cases are investigated and benefits are provided. We particularly welcome the U.S. government’s new Deferred Action policy that allows individuals who are victims of workplace crimes to access short-term benefits that create confidence in participating in the investigation and prosecution of harms.

²⁷UN Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America* (23 April 2014), U.N. Doc. CCPR/C/USA/CO/4, ¶ 14-15.

²⁸UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America* (18 April 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 18.

That program allows individuals to apply without significant involvement from law enforcement, avoiding biases and disparate exercises of discretion.

23. Practices that strengthen networks between workers' associations, service providers, and law enforcement are important to combat trafficking. Law enforcement, however, remains hesitant to work and share information with civil society. Instances in which law enforcement has worked with service providers - community partners with expertise in trafficking cases and understanding of the dynamics at play – have resulted in positive outcomes for stopping trafficking and protecting victims. Collaboration is the best means of identifying, referring, supporting, and prosecuting cases of trafficking. Sufficient government funding of experienced and trusted service providers has led to a significant increase in identification and reporting of trafficking cases.
24. The State party should, however, do more to carefully review cases reported to it to better identify trends and areas for early intervention. In one example, The Advocates is receiving increasing reports of individuals being trafficked or exploited in legal marijuana operations in states that have legalized marijuana. These marijuana operations are illegal federally, however, leaving a gap in protections against labor trafficking and forced labor and exploitation.
25. In terms of criminalization of victims of sex trafficking on prostitution-related charges, it should be noted that, while many jurisdictions have worked to decriminalize prostitution for victims, victims of forced criminality remain punished for the acts they have been forced to commit by traffickers. The U.S. government must also address failures in equal access to health for trafficking victims. Sex trafficking victims often have unique medical needs due to the exploitation and abuse they have suffered. Yet, the State party fails to ensure effective and equal access to health care. Moreover, victims of labor trafficking have often suffered workplace harms for which they must obtain care.
26. The State party has also failed to ensure access to housing for trafficking victims, which has disproportionately impacted BIPOC victims who often has less access to other benefits, community supports or may be barred from some housing options due to criminal bars that disproportionately target BIPOC communities.
27. While the U.S. government has taken some measures to address vulnerabilities to trafficking and exploitation by providing interim benefits and immigration protections to victims in some cases, community partners report these protections are too inaccessible to many victims and rely heavily on the subjective discretion of law enforcement officers—barring protections for “imperfect victims” as well as those that may be unable or too fearful to articulate their story early on. Additional training and clearer policy guidance should be formulated to address these issues and ensure benefits are not provided in a disparate or discriminatory manner. This is particularly likely given the racial disparities in arrests, charging and convictions for crimes, which may result in law enforcement failing to exercise discretion to support benefits for those with criminal histories will overwhelmingly be male-presenting and BIPOC.
28. For example, the U.S. government denied one of our client's interim benefits because the client was unable to provide the specific names or contact information of traffickers after one

interview with law enforcement. Law enforcement agents that lack an understanding of the effects of trauma and the nuances of trafficking schemes fail to utilize protections that allow benefits to be provided at the start of an investigation. These benefits may help gain a victim's trust to fully participate in the investigation. Until these systems are encouraged and independently administered, they will fall short of their purpose in combating trafficking.

29. **Insufficient protections for non-citizen victims of human trafficking.** The U.S. government fails to adequately prevent and protect noncitizens from human trafficking. In June 2022, more than 53 migrants died in San Antonio, Texas after they were abandoned in the baking Texas heat in a trailer they could not escape. Similarly, in the Minnesota winter of 2022, several migrants were found dead along the northern U.S. border.²⁹ These cases were investigated as human smuggling crimes gone awry. Yet, they are the result of deeper issues with U.S. immigration policy that has forced people to take riskier routes, falling prey to exploitation. These policies have disproportionately impacted BIPOC people who are often less likely to be able to obtain entry through limited, regular visa channels.
30. For foreign national victims of trafficking, protections against detention and removal by immigration enforcement are crucial to allowing them to exit a trafficking situation. Federal law recognizes this importance by providing several avenues for victims to receive both temporary and permanent immigration status in the United States. Unfortunately, these protections are undermined by requirements for victim cooperation, strict quotas, uneven application by both federal and state law enforcement, and a disproportionate focus on the removal of suspected deportable immigrants instead of the prosecution of traffickers.³⁰
31. Both victims and prosecutors state that requiring victims to cooperate with law enforcement in order to receive immigration protections and other benefits serves to undermine both the criminal cases against the traffickers and protections for the victims. Some law enforcement officials reported to The Advocates' researchers that they believe that immigrants falsely report crimes in an attempt to gain immigration status, making them reluctant to certify that victims have cooperated with an investigation.³¹ One law enforcement official described a belief among some law enforcement agencies that immigration attorneys coach people so they can get legal status to stay in the United States.³² The link undermines victim credibility, not only limiting the ability of victims to secure immigration protections, but also reducing the number of prosecutions for labor trafficking.
32. Even when law enforcement officials or prosecutors find the victim credible, defense attorneys use victim requests for immigration status to undermine their testimony. As a result, one government agency in Minnesota changed its practice to only certifying at the completion of a case "to avoid having the defense attorney use the status request to damage the victim's

²⁹ <https://www.nytimes.com/live/2022/06/28/us/migrants-san-antonio-tractor-killed>

³⁰ The Advocates for Human Rights, *Asking the Right Questions: A Human Rights Approach to Combatting Labor Exploitation and Labor Trafficking* (2016), https://www.theadvocatesforhumanrights.org/labor_trafficking_report.

³¹ The Advocates for Human Rights, *Asking the Right Questions: A Human Rights Approach to Combatting Labor Exploitation and Labor Trafficking* (2016), https://www.theadvocatesforhumanrights.org/labor_trafficking_report.

³² The Advocates for Human Rights, *Asking the Right Questions: A Human Rights Approach to Combatting Labor Exploitation and Labor Trafficking* (2016), https://www.theadvocatesforhumanrights.org/labor_trafficking_report.

credibility. We certified once or twice in advance and those cases settled [instead of going to trial]. The certification may have been part of why the prosecutor did not seek a trial.”³³ While certification of victim cooperation by law enforcement at the completion of the criminal case may mitigate the problem of victim credibility at trial, this practice leaves victims without access to stable immigration status, family reunification, work authorization, and public assistance throughout the duration of the legal proceedings.

33. The federal Trafficking Victims Protection Act (TVPA) created the T visa, which allows foreign victims of trafficking to remain in the United States for up to four years. Once a victim has obtained a T visa they will be able to work in the United States and have access to various government services. The T visa also provides a path to citizenship. However, this visa is only given to victims willing to “comply with any reasonable request for assistance” with criminal investigations into their perpetrators, though there are exceptions for victims under 18 and those unable to cooperate as a result of trauma. Additionally, the program is grossly underutilized. As of 2018, the U.S. government had issued less than 2,000 T visas per year over the last decade, despite the TVPA’s allotment of 5,000 visas per year.³⁴
34. The TVPA also provides important protection against deportation and work authorization through U nonimmigrant status. This status provides protection for individuals who are victims of serious crimes that may not rise to the level of federal trafficking qualifying for a T visa. The U visa requires that an authorized official of the certifying law enforcement agency confirm that the victim was helpful, currently is being helpful, or will likely be helpful in the investigation or prosecution of the case. The U visa status is limited by a statutory cap that allows only 10,000 visas to be issued each year. Once the cap is reached, applicants are put on a waiting list to receive a visa the following year. As of October 2018, 128,079 victims and 89,999 family members had pending U visa applications.³⁵ While the State party has recently updated the process to provide interim work visas and deportation protections to U visa applicants with bona fide claims, those determinations are still taking more than three years, leaving victims with uncertainty and without protections from ongoing exploitation during that time.
35. **Key immigration protections for trafficking victims, such as continued presence and the U visa, require law enforcement requests or certification. Law enforcement agencies, however, do not consistently apply the law, resulting in the denial of assistance to eligible victims.** Wide variation exists among law enforcement agencies about what cases to certify, with some agencies creating internal guidelines about which cases to certify and others refusing to certify any cases at all. For instance, one agency reported to The Advocates that they would

³³ The Advocates for Human Rights, *Asking the Right Questions: A Human Rights Approach to Combatting Labor Exploitation and Labor Trafficking* (2016), https://www.theadvocatesforhumanrights.org/labor_trafficking_report.

³⁴ United States Citizenship and Immigration Services, “Number of Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status 2008-2018,” accessed November 12, 2018 https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2018_qtr3.pdf.

³⁵ https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2018_qtr3.pdf.

not provide certifications to anyone with a criminal record, even though determining whether a criminal record makes an immigrant inadmissible is a complicated determination and one conducted by U.S. Citizenship and Immigration Service (USCIS) after receiving a U status application.³⁶ In another case, the agency would not provide a certification because the perpetrators had fled and so would not be prosecuted, even though a successful prosecution is not a condition for certification.³⁷ One agency required that the criminal case be closed prior to providing a certification, while another required that the case still be ongoing.³⁸

36. Protections for labor trafficking victims are only effective when victims are routinely identified by government agencies that come into contact with vulnerable populations at high risk for trafficking. A particularly high risk population is immigrants without stable, permanent legal status in the United States. Traffickers often deploy threats of arrest and deportation to keep victims trapped. These threats are effective because the agency charged with arresting and deporting people who have violated U.S. immigration laws, ICE's Enforcement and Removal Office (ERO), does not prioritize identifying trafficking victims. While the 2008 Trafficking Victims Protection Reauthorization Act requires ICE to screen some unaccompanied immigrant children for trafficking, there is no mandate or reported protocol for screening others for human trafficking before initiating removal proceedings, negotiating stipulations of removal, or reinstating removal orders, even when those individuals have been reported to ICE by an employer in potential retaliation for a labor complaint.
37. **Children, and unaccompanied minors (UACs) in particular, are particularly vulnerable to trafficking and forced labor.** Many UACs are placed in foster homes or short-term care in remote or rural areas, often with sponsors that may not be adequately vetted or have a strong connection to the child. UACs who are placed with sponsors, or who end up with extended family, out of immigration custody often are prevented from attending school by sponsors. The Advocates has had two cases in the last two years alone in which children reported being prevented from attending school by sponsors who instead required them to work. The United States' failure to adequately monitor and follow-up with UACs, as well as lack of special provisions for support, contribute to these concerns.
38. Distant relatives brought one of The Advocates' minor clients to the U.S., promising that the child could attend school and make lots of money. Upon arrival, however, the family member refused to let the child attend school and forced him to work at a nearby pig farm. The family member took the child's paycheck and told the child he was unable to get a bank account

³⁶ The Advocates for Human Rights, *Asking the Right Questions: A Human Rights Approach to Combatting Labor Exploitation and Labor Trafficking* (2016), https://www.theadvocatesforhumanrights.org/labor_trafficking_report

³⁷ The Advocates for Human Rights, *Asking the Right Questions: A Human Rights Approach to Combatting Labor Exploitation and Labor Trafficking* (2016), https://www.theadvocatesforhumanrights.org/labor_trafficking_report

³⁸ The Advocates for Human Rights, *Asking the Right Questions: A Human Rights Approach to Combatting Labor Exploitation and Labor Trafficking* (2016), https://www.theadvocatesforhumanrights.org/labor_trafficking_report

without status in the U.S. The child never received his wages and eventually escaped due to severe physical and emotional harm.

39. The Advocates has also received numerous other reports of UACs who are forced to work in meatpacking plants in rural areas—an issue that has increased during the COVID-19 pandemic. Despite the U.S. government announcing shortly thereafter that it would institute new measures aimed at targeting child labor exploitation, The Advocates found that children were too fearful to come forward. The State party must take steps to increase trust building and design programs that dispel rumors and fears which prevent victims, especially children and noncitizens, from coming forward. In addition, it must address underlying causes that drive children to seek work in the first place. Unmet economic, social and cultural rights should be prioritized in order for the State Party to prevent and suppress trafficking.
40. Educators who have been trained in how to identify trafficking of minors play a key role in helping link minor students with attorneys and support systems that can protect and guide them. Their ability to assist, however, is limited due to children’s fears of immigration consequences and the lack of robust government responses and resources in that regard.
41. Funding from the “Office of Trafficking in Persons” allows minors to access government benefits and social workers who can link them with legal counsel and other resources that aid minors in leaving trafficking situations. Special visas for juveniles and trafficking victims are also important solutions but remain difficult to obtain due to government bureaucracy and anti-immigrant policies.

B. Protection Against Forced Labor (CO paras. 14-15, LOIPR para 19)

42. In its 2014 Concluding Observations, the Committee expressed concern that workers entering the United States of America under the H-2B work visa programme are also at a high risk of becoming victims of trafficking and/or forced labour.³⁹ In its LOIPR, the Committee asked the State party to indicate how it is “ensuring full protection against forced labour for all categories of worker and effective oversight of labour conditions for those participating in temporary visa programmes.”⁴⁰
43. **Migrant visa regimes, such as H-2 visa programs, leave serious gaps in protection that are exploited by traffickers.** Our concerns go beyond the H2B work visa, however, as the H2A visa also has significant issues. Any visa that ties an individual to a specific employer/sponsor, or creates a power dynamic where an employer could threaten deportation or other immigration consequences, is ripe for exploitation. Agricultural and domestic workers are particularly vulnerable due to the power relationships and the dynamics of their work arrangements. Women and LGBTIQ+ individuals also face nuanced challenges and harms. The Advocates had an LGBTIQ+ client whose trafficker used threats of revealing the victim’s LGBTIQ+ status to people in his home country—a place that carries serious criminal penalties

³⁹UN Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America* (23 April 2014), U.N. Doc. CCPR/C/USA/CO/4, ¶ 14-15.

⁴⁰UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America* (18 April 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 19.

for such—as a means of exerting control and threatening him to remain in the trafficking situation.

44. The Advocates has provided legal counsel for numerous groups of H-2 visa (migrant visa) workers who did not know their rights, never receiving information from consular or other U.S. government officials on their rights and how to enforce them. A lack of Know Your Rights (KYR) trainings for workers, investigations and oversight of employers and meaningful punishments for violators of laws aimed to stop trafficking are serious gaps in migrant worker visa programs in the U.S. Migrant workers' lack of knowledge of their rights or connection to any trusted government support leaves significant leeway for employers to threaten deportation or other harms, which makes many workers vulnerable to trafficking.
45. Many employers force agricultural workers to pay for housing and food, despite the employers being required to pay these costs under the visa program. They also exploit workers by denying them medical care or safety equipment, which employers are also required to provide.
46. At least five of our clients suffered serious workplace injuries and failed to obtain medical care until their situation either became emergent or they interacted with a civil society group that helped get them care and explain their rights.
47. The U.S. government has undertaken insufficient investigations and monitoring of employers at all stages of the process—from application by prospective sponsors to follow-up with offending employers. The employer-vetting process prior to migrant workers' arrival is not robust enough to guarantee workers' housing meets basic human rights standards or that employers have sufficient facilities to provide protections, such as adequate food, water and safety equipment, for applicants.
48. Several of The Advocates' clients reported that they were housed in inadequate housing locations—trailers fit for one family housing thirty people, housing locations lacking heat in cold locations or air conditioning in hot locations, inadequate bathroom facilities, or insufficient cooking facilities where an employer promised to provide kitchens in lieu of food.
49. Systemic gaps in the program also produce hierarchical systems that exploit workers by involving numerous contactors and recruiters who change at each stage of the migration process. The Advocates worked with two trafficked clients who were recruited for H-2 visas on a blueberry farm by one person, transferred to another person for visa processing, another met them to travel within the home country, another met them in the U.S., and then numerous others interacted with them at the farm—none providing sufficient contacts or time to have knowledge of their names, contact information or identities, leading law enforcement to conclude it was unable to investigate and prosecute the trafficking.
50. Even when an employer does face investigation, penalties and follow-up fall short and allow for ongoing exploitation. The Advocates had a client who was trafficked from 2011-2013 and reported the harm they experienced. A Freedom of Information Act (FOIA) request revealed the employer had been investigated and cited by the U.S. Department of Labor (DOL) for fraud in foreign labor contracting and similar harms often associated with trafficking. DOL only

cited and issued a warning to the employer, yet they were permitted to continue filing H-2 applications, allowing them to continue such abuses as recently as 2021.

51. Gaps in monitoring also exist due to the remoteness and isolation of agricultural locations and farms. Numerous clients have reported that, after arriving to the location on their visa paperwork, they were taken to different remote work sites in small towns where no one spoke their language. Clients lack transportation and access to driver's licenses and traffickers do not provide phone or internet options.
52. The U.S. government also fails to monitor or conduct drop-in reviews of agricultural locations. In only one of more than 100 of The Advocates' cases did U.S. government agencies visit a farm for compliance checks or to provide KYR information to known visa-holders.
53. **The J-1 visa program also presents a significant area of concern for potential forced labor.** While many J-1 programs offer important training opportunities for exchange visitors, too often they are used to circumvent short-term agricultural worker visas and other labor and immigration protections, resulting in visitors in forced labor situations. Exchange visitors pay for their own trips and medical insurance on the promise of an opportunity to learn valuable skills and get paid a livable wage. Yet, they often arrive in remote towns, have no access to transport or language services, and are forced into menial labor jobs with long or irregular working hours and living conditions. Many visitors feel they cannot leave due to threats of deportation or debts incurred to cover program costs.
54. The pay that the J-1 program promises to provide is often cut due to seasonal conditions and the exchange visitor is unable to cover basic costs. J-1 visa holders frequently incur debt in order to cover program costs. Despite these concerns, the U.S. Department of State reports an inability and insufficient resources to adequately monitor and enforce host program obligations.
55. In the past five years, The Advocates has had three cases in which an individual paid to participate in a J visa apprenticeship through which they were promised to obtain skills in their industry through work experience paid at a rate to cover necessary living expenses. Yet, after arriving in often very rural communities, these clients found that they were instead forced to do menial labor unrelated to the specialized training program, suffered threats and abuse by their program sponsors, failed to make sufficient wages to cover expenses, and felt they could not complain as they had often taken loans to pay for the program fees. When The Advocates inquired, the State Party reported it had too few investigators to ensure site visits and screening, and we found that pre-departure and post-arrival training and resources lacked information about protections. In these cases, we found BIPOC people were the victims of these abuses.
56. **Forced labor in immigration detention centers.** The Voluntary Work Program at ICE and private corporation detention centers constitutes forced or compulsory labor for thousands of detained migrants in the U.S. ICE states that the program will reduce the "negative impact of confinement" by decreasing idleness, improving morale, and ensuring "fewer disciplinary

incidents.”⁴¹ Individuals in the Voluntary Work Program do the work necessary for the upkeep of detention centers, including cooking and cleaning, with private detention centers paying about \$1 per day for menial labor.⁴² This is work that would otherwise be sourced from individuals outside the detention centers, who would necessarily receive state or federal minimum wage,⁴³ from \$7.25 to \$12 an hour.⁴⁴ Private immigration detention centers operate with contracts issued by the DHS⁴⁵ and make millions by implementing the “Dollar-a-Day” system with detainees.⁴⁶

57. In practice, detained individuals’ work is not voluntary. To extract compliance and labor, they are threatened with solitary confinement.⁴⁷ Detainees are regularly charged for basic goods like food, water, and hygiene products. Without wages from the Voluntary Work Program, most detainees would not have access to these necessities. Many detainees are also forced to work in order to contact their families, as they are charged for phone cards. If they want to stop working, detainees are likely to be threatened with disciplinary action.⁴⁸ For some, refusal to work results in deprivation of privacy. Should a detained individual refuse to work, they can be moved from a two-person room to an open dorm with “round-the-clock lighting and frequent fights.”⁴⁹

58. Suggested recommendations to the State party:

- Carefully review reported cases to better identify trends and areas for early intervention.
- Strengthen networks between workers’ associations, service providers, and law enforcement to improve identification of trafficking victims.
- Ensure law enforcement agents are trained and held accountable for ensuring protections for trafficking victims equally and with an understanding of how trauma increases interactions with the criminal justice system.

⁴¹ U.S. Immigration and Customs Enforcement, *2011 Operations Manual ICE Performance-Based National Detention Standards*; 2011, Revised 2016. <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>

⁴² Martin Kaste, *Detainees Who Earned Just \$1 a Day Are Owed \$17 Million in Back Pay, A Jury Says*, MPR News, Oct. 29, 2021, www.npr.org/2021/10/29/1050520220-detainees-who-earned-just-1-a-day-are-owed-17-million-in-back-pay-a-jury-orders&usg=AOvVaw2guUgLrorQONBQ6H1t-a6P. See also

Levy, Alexandra, “Fact Sheet: Human Trafficking & Forced Labor in For-Profit Detention Facilities,” The Human Trafficking Legal Center; 2018

⁴³ “SPLC Sues Private Prison Company That Uses Forced Labor of Detained Immigrants in Georgia to Boost Profits.” Southern Poverty Law Center, 17 Apr. 2018, www.splcenter.org/news/2018/04/17/splc-sues-private-prison-company-uses-forced-labor-detained-immigrants-georgia-boost.

⁴⁴ Wage and Hour Division, “Consolidated Minimum Wage Table,” United States Department of Labor; 2019

⁴⁵ Levy, Alexandra, “Fact Sheet: Human Trafficking & Forced Labor in For-Profit Detention Facilities,” The Human Trafficking Legal Center; 2018

⁴⁶ “SPLC Sues Private Prison Company That Uses Forced Labor of Detained Immigrants in Georgia to Boost Profits.” Southern Poverty Law Center, 17 Apr. 2018, www.splcenter.org/news/2018/04/17/splc-sues-private-prison-company-uses-forced-labor-detained-immigrants-georgia-boost.

⁴⁷ Levy, Alexandra, “Fact Sheet: Human Trafficking & Forced Labor in For-Profit Detention Facilities,” The Human Trafficking Legal Center; 2018

⁴⁸ Cole, Alexandra, “Prisoners of Profit Immigrants and Detention in Georgia,” American Civil Liberties Union of Georgia; 2012

⁴⁹ Levy, Alexandra, “Fact Sheet: Human Trafficking & Forced Labor in For-Profit Detention Facilities,” The Human Trafficking Legal Center; 2018

- Update law and policy to ensure interim benefits to victims of trafficking are mandatory, rather than discretionary by law enforcement
- Ensure funding is equally allocated to enforcement and victim services.
- Update public benefits programs to ensure trafficking victims have access to healthcare, education, and employment to reduce trauma and risks of re-trafficking. Ensure trafficking victims are not re-victimized due to long delays in accessing benefits such as work authorization.
- Review visa programs, especially H and J visas, for risks to trafficking and take into consideration lived experience of victims to update pre-departure, recruitment, monitoring and victim resources to address risks of trafficking.
- Develop standards and monitoring to ensure that the Voluntary Work Program in ICE detention facilities is truly voluntary and complies with state and federal wage and hour laws.

III. TREATMENT OF FOREIGN NATIONALS, INCLUDING REFUGEES AND ASYLUM SEEKERS (arts. 2, 6, 7, 9, 10, 13, 14, 17, 23, 24, and 26)

A. Non-Refoulement (CO para. 13, LOIPR para. 8)

59. In its 2014 Concluding Observations, the Committee noted that the State party does not provide sufficient safeguards to comply with the Covenant’s absolute prohibition against refoulement. The Committee expressed concern “at the State party’s position that the principle of non-refoulement is not covered by the Covenant, despite the Committee’s established jurisprudence and subsequent State practice”⁵⁰ In its LOIPR, the Committee asked the U.S. to explain how Presidential Proclamation 9645, commonly known as the Muslim ban, is compatible with the non-discrimination and non-refoulement provisions of the Covenant.⁵¹
60. While Presidential Proclamation 9645 has been rescinded, the State party reiterated its position on foreign nationals and non-refoulement in its 2021 response to the Committee’s LOIPR.⁵² The U.S. government continues to ignore its non-refoulement obligations and routinely bars, turns away, or returns individuals who are at risk of persecution or torture in their home countries.
61. **Asylum Ban of May 2023.** While the Biden Administration moved to withdraw Title 42 expulsions, it instead introduced and finalized a new regulation that seeks to bar asylum for the majority of those who enter at or through the Southern U.S. border. The regulation was proposed in March and finalized in May—taking just two months to review the more than 50,000 comments it received that highlighted the illegality and harm inherent. With slight changes, the rule essentially mirrors that which President Trump had issued, but which was

⁵⁰ UN Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America* (23 April 2014), U.N. Doc. CCPR/C/USA/CO/4, ¶ 13.

⁵¹ UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America* (18 April 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 8.

⁵² UN Human Rights Committee, *Fifth periodic report submitted by the United States of America under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020*, (11 November 2021), U.N. Doc. CCPR/C/USA/5, ¶ 22.

struck by U.S. courts and condemned by UNHCR. As finalized, the rule will bar asylum protections for individuals presenting at or through the border who either 1) transited through another Convention or Protocol Country and did not receive a final asylum decision; or 2) entered without utilizing another legal pathway, such as CBP One App or parole. In response, several organizations filed a lawsuit, and the Ninth Circuit issued summary judgement in July 2023. Yet, shortly thereafter, the Biden Administration appealed and received an interim order allowing the harmful policy to continue until the appeal is decided. In its comment opposing the proposal, The Advocates identified concerns that the proposed rule would violate the U.S.’ international human rights obligations by barring the ability of individuals to access protections from return to face persecution and/or torture.

62. Expedited administrative removal procedures and streamlined criminal prosecution programs. While there had been some temporary improvements prior to the 2023 Asylum Ban, the United States has continued to rely on expedited administrative removal procedures and streamlined criminal prosecution programs that put individuals at risk of being returned to countries where they reasonably believe they will be in danger of torture or persecution. These summary procedures bypass a hearing in front of an immigration judge, afford little opportunity to consult with legal counsel, and risk depriving individuals of notice of potential refugee protection. Summary removal procedures include expedited removal of “arriving aliens” including asylum seekers,⁵³ reinstatement of prior removal orders,⁵⁴ expedited removal of persons convicted of aggravated felonies,⁵⁵ and stipulated removal, which typically is negotiated between a detained individual and an Immigration Customs Enforcement (ICE) Enforcement and Removal Officer without affording access to counsel.⁵⁶ In addition, there were some changes to the expedited removal process in 2022 that restricted access to immigration judges. Of particular concern is the United States’ continued use of expedited

⁵³ INA §235(b). In FY 2013, ICE deported about 101,000 people through the expedited removal process, according to the American Immigration Council at <http://immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>.

⁵⁴ INA §241(a)(5). In FY 2013, ICE deported 159,634 individuals based on a reinstated removal order, according to the American Immigration Council, which describes reinstatement as applying to noncitizens who return illegally to the United States after having previously been deported, at <http://immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>.

⁵⁵ INA §238(b) (permitting noncitizens who have not been admitted as lawful permanent residence to the United States and who have been convicted of any of a wide array of crimes defined by INA §101(a)(42) as “aggravated felonies” to be removed without a hearing).

⁵⁶ INA §240(d). Persons who are formally charged and placed in removal proceedings before an immigration judge can give up their right to a hearing and agree to being deported by stipulating to the removal charges against them. These agreements are reviewed on paper by an immigration judge, but no hearing is held to determine eligibility for protection under the Refugee Convention or the Convention Against Torture. According to analysis by the American Immigration Council, the vast majority of stipulated removal orders are entered against noncitizens in detention who have little access to legal counsel or information about their Convention rights and who are subject to inherently coercive conditions when agreeing to be deported without a hearing. See <http://immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>

removal and fast-track removal dockets for unaccompanied children and families with children from Central America who are seeking asylum.

63. In addition, the Streamline initiative (created in 2005 as Operation Streamline to criminally prosecute people who illegally enter the United States in certain geographic regions along the U.S.-Mexico border) allows for criminal prosecution, conviction, and sentencing prior to being afforded an opportunity to seek protection in violation of U.S. obligations under the Covenant. Recently, there has been a proposal to increase the use of criminal prosecutions. Under Streamline, asylum-seekers may be criminally charged, convicted, and sentenced for illegal entry or illegal re-entry prior to being afforded the right to seek asylum or protection from torture, even though the illegal entry or re-entry is a direct result of their flight.
64. **Expansion of Bars to Asylum.** In 2018, the Board of Immigration Appeals (BIA) issued two decisions which present challenges for asylum seekers who provided even minimal assistance to terrorist organizations, even under extreme duress. The BIA's decision in *Matter of A-C-M*⁵⁷ affirmed that no duress exception is available to the bar to asylum for individuals who are considered to have afforded material support to a terrorist organization and held for the first time that even extremely minimal support provided under duress will bar asylum seekers from eligibility. This decision has been criticized by many observers as "turning Congressional intent on its head by punishing the victims of terrorism, and adds insult to injury by labeling these victims as terrorists themselves."⁵⁸ Given the extremely broad definitions under U.S. law of terrorist activity and terrorist organizations, this decision is likely to bar numerous asylum seekers with legitimate claims from protection.
65. In *Matter of Negusie*⁵⁹, the BIA narrowed the duress exception to the "persecutor bar" for asylum. In 2020, Attorney General Barr vacated that limited exemption, ruling that there is no duress exception to the "persecutor bar". The Biden administration has stayed the BIA's order and is reviewing the case.
66. **Indefinite Detention as Deterrence.** The U.S. uses prolonged, indefinite detention to deter people from seeking asylum and to coerce immigrants, refugees, and asylum seekers into giving up claims to remain in the United States and agreeing to be deported. The United States routinely denies parole requests and holds asylum seekers in detention throughout the pendency of their asylum proceedings.⁶⁰
67. **Asylum Backlog.** Despite U.S. law providing a 180-day processing time for asylum decisions, this deadline is routinely missed as the asylum backlog has grown in both affirmative cases and defensive, court cases. The Advocates has seen most asylum cases facing three to five *years* before one even receives an *interview* for their asylum application, and then *years* after for a decision to be issued by the U.S. Asylum Office. If the case is denied or if the person is presenting their asylum case in immigration court, the person is then facing additional *years*

⁵⁷ 27 I&N Dec. 303 (BIA 2018)

⁵⁸ See e.g. Former Immigration Judge Jeffrey Chase, *Punishing the Victims: Matter of A-C-M*, June 9, 2018, available at <https://www.jeffreyschase.com/blog/2018/6/9/punishing-the-victims-matter-of-a-c-m>

⁵⁹ 27 I&N Dec. 347 (BIA 2018),

⁶⁰ See, e.g. 2017 Brief for Human Rights First as Amicus Curiae, p. 16, *Jennings v. Rodriguez*, 583 U.S. ___ (2018).

of waiting as immigration courts currently have more than one million cases nationwide⁶¹. According to USCIS, “Approximately 73 percent of all pending asylum applications were filed in or after FY 2018, while the remaining 27 percent were filed before FY 2018.”⁶²

68. Such backlogs threaten meaningful access to asylum, threaten loss of evidence, cause mental anguish for applicants, result in prolonged and arbitrary detention for individuals detained awaiting decisions, and keep families separated and facing harm as individuals are unable to process derivative asylum applications until asylum has been granted. As one example of the backlog, the Biden Administration recently settled *Ahmed v. DHS*, N.D. Cal. No. 4:23-cv-1892, a class action suit challenging USCIS’s delays in adjudicating asylum applications filed by Afghan people who entered the United States under Operation Allies Welcome. While representing only a small proportion of the asylum cases to be decided in the U.S., the case demonstrates the systemic issue in the U.S. asylum system.
69. **Conducting Fear Interviews Without Protections and Due Process.** The current administration has started conducting fear interviews while individuals remain detained in CBP custody, rather than waiting to conduct such interviews until individuals are transferred to ICE custody. This practice is rife with documented concerns, including lack of access to counsel, lack of meaningful opportunity to prepare for interview, ongoing trauma and health concerns as interviews are conducted within 24-48 hours of arrival at the border from long and traumatizing journeys, and more.⁶³

B. Immigration Enforcement and Detention (CO para. 15, LOIPR paras. 20-21)

70. The Committee condemned mandatory detention of immigrants in its 2014 Concluding Observations,⁶⁴ and recommended that the State party take action to address “mandatory detention and deportation of certain categories of immigrants in order to allow for individualized decisions; take measures to ensure that affected persons have access to legal representation; and identify ways to facilitate access to adequate health care....”⁶⁵
71. In its LOIPR, the Committee asked for information on the State Party’s “commitment to criminal immigration enforcement”, as well as efforts to address separation of migrant families and deaths of migrant children in the care and custody of the Customs and Border Protection authorities.⁶⁶ The Committee also asked the U.S. to provide information on the conditions

⁶¹ In 2022, the immigration courts saw 1.5 million cases (<https://trac.syr.edu/reports/705/>)

⁶² https://www.uscis.gov/sites/default/files/document/foia/Asylum_backlog-Representative_Barr.pdf

⁶³ <https://www.aila.org/advo-media/aila-correspondence/2023/letter-highlighting-concerns-regarding-conducting>

⁶⁴ UN Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America* (23 April 2014), U.N. Doc. CCPR/C/USA/CO/4, ¶ 15.

⁶⁵ UN Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America* (23 April 2014), U.N. Doc. CCPR/C/USA/CO/4, ¶ 15.

⁶⁶ UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America* (18 April 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 20.

within immigrant detention facilities, both publicly and privately owned, including access to health care.⁶⁷

72. **Mandatory Detention.** The U.S. has continued to impose mandatory detention without discretion to release or to place on bond or other supervised release conditions and without access to an individualized custody determination by a court in an overly broad array of cases, including for arriving asylum seekers,⁶⁸ non-citizens convicted of certain crimes,⁶⁹ and certain refugees awaiting adjudication of their applications for permanent residence.⁷⁰ These categorical detention determinations violate international norms of proportionality and non-discrimination.⁷¹
73. 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.⁷² Individuals subject to mandatory detention are not entitled to a bond hearing before an immigration judge or to independent review of their custody determination by a court while awaiting a credible fear review.⁷³
74. Following a determination of credible fear, asylum seekers who are “arriving aliens” – such as those attempting to come into the United States at a port-of-entry – 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 by regulation from having an immigration judge assess the need for continued custody.⁷⁴
75. In expedited removal, however, a non-citizen is provided minimal opportunity to present their claim for protection and the system is rife with reported issues of undue influence to abandon

⁶⁷ UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America* (18 April 2019), U.N. Doc. CCPR/C/USA/QPR/5, ¶ 21.

⁶⁸ Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV).

⁶⁹ 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 Immigration and Nationality Act (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 Immigration and Nationality Act (INA) § 212(a)(3)(B) or deportable under Immigration and Nationality Act (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.

⁷⁰ Human Rights Watch, *Costly and Unfair: Flaws in the US Immigration Detention Policy* (May 2010), 8-9. Also available at: <https://www.hrw.org/report/2010/05/06/costly-and-unfair/flaws-us-immigration-detention-policy>.

⁷¹ Frey & Zhao, *supra* note ix, 310-11.

⁷² Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV).

⁷³ Immigration and Nationality Act (INA) § 236(c).

⁷⁴ See Human Rights First, *Renewing U.S. Commitment to Refugee Protection: Recommendations for Reform on the 30th Anniversary of the Refugee Act 10* (Mar. 2010). (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), *available at* http://www.uscirf.gov/index.php?option=com_content&task=view&id=2891&Itemid=126. (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).

claims, failures of interpretation, and lack of counsel to protect due process rights.⁷⁵ Expedited removal proceedings allow the government to process noncitizens for removal without providing access to a judge. The U.S. Department of Homeland Security recently issued a new regulation that proposes to change the way in which people apply for asylum in expedited removal proceedings.⁷⁶ While the regulation contains some positive changes, the overarching legal framework of expedited removal must be changed in order to allow adequate protections.

76. Even when the law does not mandate detention, the U.S. government routinely denies bond. Individuals charged with domestic violence, driving while under the influence, and various non-violent crimes are held without bond or have bonds set so high as to not be able to access release.⁷⁷ In addition, the law is applied such that a person may only request bond once unless their case materially changes as determined by the immigration judge.⁷⁸ In practice, the U.S. immigration system allows arbitrary detention for long period, with some remaining in detention for years.⁷⁹
77. Excessive bond amounts lead to prolonged and arbitrary detention for those not subject to mandatory detention laws. ICE officials and immigration judges deny bond requests and set bonds well above the \$1,500 required minimum.⁸⁰ The Advocates' court observers at the Immigration Court in Bloomington, MN report that bonds are routinely set much higher, with the minimum bond amount usually set at \$5000.⁸¹ National data for the first part of FY 2018 shows median bond amounts across the country ranging from \$5000 to \$15,000.⁸² This practice leads not only to lengthy detention, but also to prolonged separation of families.
78. **Lack of Discretion for Immigration Judges.** Mandatory deportation laws, automatic prosecutorial programs and streamlined immigration procedures have stripped immigration judges of discretion to consider family ties or length of time in the U.S. in cases involving

⁷⁵ American Immigration Council. "A Primer on Expedited Removal," Jul. 22, 2019, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

⁷⁶ Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 FR 18078, available online at <https://www.federalregister.gov/documents/2022/03/29/2022-06148/procedures-for-credible-fear-screening-and-consideration-of-asylum-withholding-of-removal-and-cat>.

⁷⁷ Court Observer Observations March 2020-October 2021.

⁷⁸ 8 CFR § 1003.19(e)

⁷⁹ Shalini Bhargava Ray, *Justices Will Revisit Whether Certain Noncitizens in Lengthy Detention Are Entitled to Bond Hearings*, SCOTUSblog, Jan. 10, 2022, <https://www.scotusblog.com/2022/01/justices-will-revisit-whether-certain-noncitizens-in-lengthy-detention-are-entitled-to-bond-hearings/>.

⁸⁰ Daniel Bush, *Under Trump, higher immigration bonds mean longer family separations*, PBS NewsHour, accessed Jun. 28, 2018, Available online at: <https://www.pbs.org/newshour/politics/under-trump-higher-immigration-bonds-mean-longer-family-separations>

⁸¹ Information on file with The Advocates for Human Rights, Sept. 26, 2019.

⁸² Transactional Records Access Clearinghouse, "ICE Focus Shifts Away from Detaining Serious Criminals," 2nd July 2019, Accessed October 1st, 2019, <https://trac.syr.edu/immigration/reports/519/>

convictions for aggravated felonies,⁸³ false claims to United States citizenship,⁸⁴ illegal reentry following unlawful presence in the United States,⁸⁵ reinstatement of prior orders of removal,⁸⁶ findings by an immigration judge of a frivolous asylum claim,⁸⁷ and other reasons. U.S. law also provides only narrow avenues for appeal, compounding these harms.⁸⁸ While the recent introduction in U.S. Congress of the Real Courts, Rule of Law Act, which would create independent courts to process immigration matters, is welcome, it has yet to passed into law.

79. **Access to Legal Representation.** The United States fails to ensure that migrants in removal proceedings have access to counsel, a fair trial and fully understand their rights. Migrants in detention, including children and families, lack access to counsel. U.S. law provides that migrants in removal proceedings have “the privilege of being represented,” but representation must be “at no expense to the Government.”⁸⁹ Representation of detained migrants in removal proceedings, insofar as it is available, is provided by NGOs. The United States also fails to provide consistent information about how to access free legal services to people in detention, with information about how to access pro bono legal services often spread through word of mouth.⁹⁰ Only an estimated 14% of detained migrants receive legal representation.⁹¹
80. In the FY23 budget, the Biden Administration’s requested funding to pilot a project to provide legal representation to vulnerable persons in removal proceedings, but it was not included in

⁸³ Deportable Aliens, 8, United States Code, § 1227(a)(2)(A)(iii) states that any alien who has been convicted of an “aggravated felony” as defined by Deportable Aliens, 8, United States Code, § 1101(a)(43) is deportable. Aliens who are unlawfully present in the United States and are convicted of an aggravated felony are deportable subject to expedited proceedings, without a hearing before an immigration judge, pursuant to Deportable Aliens, 8, United States Code, § 1228. A person convicted of an aggravated felony is barred from seeking cancellation of removal pursuant to 8 U.S.C. § 1229b(a)(3).

⁸⁴ Deportable Aliens, 8, United States Code, § 1227(a)(3)(D) states that any alien who falsely claimed U.S. citizenship is deportable. No waiver of inadmissibility is available for false claims to United States citizenship, effectively rendering individuals unable to qualify for cancellation of removal.

⁸⁵ Deportable Aliens, 8, United States Code, § 1182(a)(9)(C)(i)(I) renders permanently inadmissible an individual who is present in the United States for more than 1 year, subsequently departs the United States, and attempts to or does reenter the United States without being admitted.

⁸⁶Deportable Aliens, 8, United States Code, § 1231(a)(5) provides that if the attorney general finds that an alien has illegally reentered the United States after having been removed or departed voluntarily under an order of removal, the original order shall be reinstated and is not subject to reopening.

⁸⁷ Deportable Aliens, 8, United States Code, 1158(d)(5) states that if the attorney general finds that an applicant for asylum has made a frivolous asylum application, the alien shall be permanently ineligible for any immigration benefits in the United States.

⁸⁸ American Immigration Council, *Judicial Review Provisions of the REAL ID Act: Practice Advisory* by the Legal Action Center (Washington, D.C., 2005). Also available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/realid6705.pdf.

⁸⁹ INA § 292. See also, American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, Feb. 2010, 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).

⁹⁰ Interview 1, Oct. 20, 2015.

⁹¹ Helen Eisner, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14:2 *Journal of Constitutional Law* 511, 511-536 (Dec. 2011) <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1044&context=jcl>.

FY24 funding request and instead the Biden Administration requested additional funding for removal and CBP.

81. Provision of information about legal rights is limited and inadequate. The U.S. Department of Justice Executive Office for Immigration Review (EOIR) funds a formal Legal Orientation Programs (LOP) at 38 U.S. detention centers to provide basic legal information and limited referrals to those detained migrants who appear before the immigration courts.⁹² While EOIR should be commended for developing the LOP program, the program does not ensure that all detained migrants in the U.S. receive information about their legal rights. Detained migrants subject to summary expulsion proceedings and all migrants detained by CBP fall outside the scope of this effective but limited program.
82. The rural location of immigration detention centers also impedes detainees' access to legal counsel. Any progress that has been made in ensuring access to legal representation has been the result of a concerted effort of pro bono attorneys around the country who travel to these facilities, often at personal expense to provide representation to families in detention. Additionally, while the facilities offer law libraries to the detainees, the resources in these libraries are primarily in English.⁹³
83. **Immigration Detention Conditions.** The U.S. government subjects many immigrants to cruel, inhuman, and degrading conditions of detention and subjects some immigrants to prolonged solitary confinement. U.S. law fails to meet the Mandela Rules for minimum standards of treatment in detention, using a penal model for immigrant detention that allows for individuals with mental health concerns and trauma to remain detained and includes the use of solitary confinement. The U.S. incarcerates people in locked cells where they wear prison jumpsuits, are shackled during court appearances, and are subject to surveillance and strip searches.⁹⁴ The U.S. also fails to provide appropriate facilities for transgender people.⁹⁵

⁹² See Vera Institute of Justice, Legal Orientation Program available at <http://www.vera.org/project/legal-orientation-program>

⁹³ U.S. Commission on Civil Rights, *With Liberty And Justice For All*, Sept. 2015, http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf, 102, last visited Sept. 30, 2015.; Inter-American Commission on Human Rights, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, July 24, 2015, Organization of American States, <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>, last visited Nov. 3, 2015, ¶ 148.

⁹⁴ See, e.g. 2017 Brief for Americans for Immigrant Justice, et al. as Amicus Curiae, p. 16, *Jennings v. Rodriguez*, 583 U.S. ___ (2018).

⁹⁵ Sam Levin, *A Trans Woman Detained by ICE for Two Years Is Fighting for Freedom: 'I've Been Forgotten'*, The Guardian, June 9, 2021, <https://www.theguardian.com/us-news/2021/jun/09/a-trans-woman-detained-by-ice-for-two-years-is-fighting-for-freedom-ive-been-forgotten>.

According to ICE's own data, detained immigrants were placed in solitary confinement more than 14,000 times over four years from 2015 to 2019.⁹⁶

84. Migrants in detention report limitations on their religious freedom, access to outdoor space, access to legal libraries, ability to call family, and abuse.⁹⁷ Sexual assault and abuse of migrants in detention, as well as the lack of investigations, remain serious concerns.⁹⁸
85. The U.S. engages in medical neglect of migrants in its custody. Reports of inadequate medical care, including delayed or denied medical care, are pervasive. During the COVID-19 pandemic, The Advocates documented that individuals with underlying health conditions were detained without protocols.⁹⁹ Reproductive abuse is reportedly a serious problem in the immigration detention system, with detained women reporting that they were denied medical care while in labor, unable to access an abortion, experienced miscarriages, or underwent sterilizing procedures without their knowledge or consent.¹⁰⁰ No announced punitive action has been taken as a result of any investigation of these reports.

86. Suggested Recommendations to the State Party

- End litigation defending the proposed changes to asylum that bans individuals from seeking protection based on manner of entry and third country transit in violation of the Covenant and other international standards.
- Provide specific information about the training received by Border Patrol, Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE) officers regarding obligations prohibiting refoulement under articles 6 and 7 of the Covenant.
- Cease conducting fear interviews for individuals in CBP custody, instead waiting until such individuals are transferred to ICE custody and have had a meaningful opportunity to access counsel and prepare for the interview. Address concerns raised regarding due process and human rights protections in CBP custody for people claiming fear of persecution and torture.

⁹⁶ Department of Homeland Security's Office of Inspector General (OIG), *ICE Needs to Improve Its Oversight of Segregation Use in Detention Facilities*, (Oct. 13, 2021)

⁹⁷ National Immigration Project of the National Lawyers Guild, *Report: Abuse, Neglect Common at Immigration Detention Centers in the South*, https://www.nationalimmigrationproject.org/pr/2016_21Nov_pr-shad-rpt.html.

⁹⁸ Zeba Warsi, *Hundreds of immigrants have reported sexual abuse at ICE facilities. Most cases aren't investigated*, (PBS NewsHour, July 21, 2023). See also American Civil Liberties Union, *Sexual Abuse in Immigration Detention Facilities*, <http://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities> (last visited Aug. 28, 2013) (detailing findings of a Freedom of Information Act request relating to complaints of sexual abuse); see also Carrie Johnson, "All Things Considered: Immigration Detainees Seek Prison-Rape Protection" (Nat'l Public Radio broadcast Dec. 13, 2011), available at <http://www.npr.org/2011/12/13/143638236/immigration-detainees-seek-prison-rape-protection>.

⁹⁹ The Advocates for Human Rights, James H Binger Center for New Americans, and Minnesota Immigrant Health Alliance, *Immigration, Detention, and COVID-19 in Minnesota: Illuminating Human Rights Concerns in Minnesota Jails*, (Minneapolis, Minnesota: March 2021), https://www.theadvocatesforhumanrights.org/Res/ice_detention_covid-19_and_mn_jails_final%205.pdf.

¹⁰⁰ 2. Brigitte Amiri, *Reproductive Abuse is Rampant in the Immigration Detention System*, ACLU, Sept. 23, 2020 (<https://www.aclu.org/news/immigrants-rights/reproductive-abuse-is-rampant-in-the-immigration-detention-system>, last visited Sept. 11, 2023).

- Please provide specific information about how the U.S. Attorney’s Offices in jurisdictions which continue to utilize the Streamline prosecution initiative will ensure that no individual is criminally prosecuted for illegal entry or re-entry which has resulted from their flight from persecution.
- Provide age-appropriate information about rights and assistance to children to ensure they understand how they can seek protection in the United States at all stages of interactions with U.S. immigration officials.
- Stop arbitrary detention by eliminating mandatory detention provisions, setting reasonable bond amounts, ensuring access to justice in custody review and bond proceedings, and updating ICE detention guidance and oversight to comply with international best practice.
- Ensure due process in removal proceedings by providing counsel to indigent people facing removal and updating immigration judge guidance and training to include cultural sensitivity, trauma-informed processes, racial justice and due process consideration.
- Tie immigration judge retention to due process standards rather than case completion rates.
- Pass the Real Courts, Rule of Law Act and fund counsel for vulnerable individuals.
- Take steps to use administrative fixes to correct violations of Covenant obligations, particularly those related to immigration detention.
- Request federal budget allocations to fund pilot projects to provide legal representation to vulnerable persons in removal proceedings and expand legal representation and LOP program to all persons detained on civil immigration charges, including persons detained by Customs and Border Protection in short-term detention facilities and by Immigration and Customs Enforcement.
- Redirect funds requested for border enforcement and detention to address due process concerns and asylum access.
- Update law and policy to ensure no torture survivors are held in detention and that use of detention, especially solitary confinement, complies with the Mandela Rules.
- Monitor all facilities which hold people in immigration custody to ensure they meet standards outlined in the 2011 Operations Manual on ICE Performance-Based National Standards and terminate contracts for facilities which fail to meet standards.
- Publish information about the use of solitary confinement in immigration custody, including the average number of days people were held in solitary confinement. Please include information about persons held under “administrative segregation,” “disciplinary segregation,” or other similar status.
- Effectively investigate all reports of sexual violence of persons held in immigration custody and take steps to discipline and file criminal charges against alleged perpetrators. Ensure that victims are provided with appropriate services for survivors of sexual assault, including certification as crime victims for purposes of U-nonimmigrant status in the United States.