



The United States of America's Compliance with the Convention on the Elimination of Racial Discrimination

Parallel Report on Immigration and Racial Discrimination

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. The Advocates provides pro bono legal services to people seeking asylum and protection from other harms, survivors of trafficking, unaccompanied minors, and people in immigration detention. The Advocates routinely trains lawyers on immigration representation and advocate at all levels for changes to immigration, detention and trafficking law and policies that ensure the protection of human rights.

EXECUTIVE SUMMARY

1. Despite welcome changes in immigration policy since 2020, U.S. immigration law continues to allow detention, expulsion and denial of protection. Immigration policy appears to either involve racial discrimination in the implementation of laws or have racially disparate impacts. The Ukrainian crisis and resulting migration have shed stark light in how the U.S. chooses to wield immigration law and policy differently depending on the race of the migrant group.
2. For example, Cameroonian migrants were forced to advocate for months before being granted Temporary Protected Status, while the government moved to provide the same protections sua sponte just weeks after Ukrainians were forced to flee. Photos and reports of Haitian migrants being forcibly prevented from entry by U.S. Border Patrol Agents as compared to the treatment many Ukrainians met at the same border ports of entry reflect concerns of discriminatory treatment of asylum seekers and those seeking protection. Similarly, Afghans displaced by the U.S. withdrawal have repeatedly been denied humanitarian parole protections and did not have TPS granted for several months. This compared to the rapid and robust parole program for Ukrainians raises concerns. Furthermore, our reports found that Black and Brown noncitizens were disproportionately detained, given higher bond amounts to get release, and obtained fewer wins in immigration court proceedings as compared to white noncitizens.
3. Due to entangling of criminal and immigration systems, U.S. immigration law disproportionately impacts racial minorities. U.S. policy changes on priorities for removal and detention made some important improvements; however, racial minorities represented a disproportionate number that remained subject to immigration bars and mandatory detention for extensive criminal grounds that fail to take into consideration the known systemic racism inherent in the criminal justice systems and policing.¹ Department of Homeland Security guidelines from 2021 aimed to establish that the basis for arrest and deportation should not solely depend on living without authorization in the US; this step was among many needed interventions to limit U.S. Immigration and Customs Enforcement arrests. A June 2022 Texas Court decision ruled against this policy, however,² further enjoining criminal and immigration proceedings.
4. U.S. immigration proceedings and policies raise human rights concerns across people of all races and further appear to disproportionately impact BIPOC communities. As the Committee on the Elimination of Racial Discrimination (“the Committee”) noted in 2014, militarization of the border and immigration enforcement operations remained a concern.³ Detention for administrative immigration violations resulted in due process violations and arbitrary detention concerns. Immigration court proceedings lack crucial due process protections such as government-appointed counsel and independent judges.

¹Department of Homeland Security, *DHS Begins Implementation of Immigration Enforcement Priorities*, (November 29, 2021), <https://www.dhs.gov/news/2021/11/29/dhs-begins-implementation-immigration-enforcement-priorities>.

² Joel Rose, *A federal judge in Texas blocks a major DHS policy limiting immigration enforcement*, National Public Radio, (June 10 2022), <https://www.npr.org/2022/06/10/1104340619/a-federal-judge-in-texas-blocks-a-major-dhs-policy-limiting-immigration-enforcem?t=1657906205018>.

³ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, adopted by the Committee at its 2317th session (26 August 2014), U.N. Doc CERD/C/USA/CO/7-9, ¶ 18.

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5. U.S. immigration policy also resulted in vulnerabilities to trafficking in persons, and the government failed to provide adequate protections for victims.

The United States fails to uphold its obligations under the Convention on the Elimination of Discrimination in regard to the Rights of Non-Citizens and Immigrants (List of Themes paragraphs 26-29, 13)

6. In its 2014 Concluding Observations, the Committee noted with concern the “increasingly militarized approach to immigration law enforcement, leading to the excessive and lethal use of force by the CBP personnel”⁴ The Committee was also concerned about racial profiling by law enforcement, mandatory detention, and “deportation of undocumented immigrants without adequate access to justice.”⁵
7. In its 2021 State Party Report, the U.S. noted a range of executive orders and policies enacted after the election of President Biden, including Executive Order 13993, Revision of Civil Immigration Enforcement Policies and Priorities, and a Department-wide memorandum, Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities.⁶
8. While these were welcome changes, serious problems remain with U.S. immigration policies that must be addressed to comply with obligations under CERD.

I. Racial Discrimination in Immigration Policies (List of Themes paragraph 27)

9. In its List of Themes, the Committee requested information on access to “fair and efficient asylum procedures without discrimination based on race, colour, descent, or national or ethnic origin.”⁷ U.S. immigration policies have a disproportionate impact on racial minorities within non-citizen communities. In part, this is due to other racially discriminatory actions such as racial profiling that place BIPOC communities in criminal proceedings that result in immigration consequences.⁸ In other areas, such as expedited removal and immigration

⁴ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, adopted by the Committee at its 2317th session (26 August 2014), U.N. Doc CERD/C/USA/CO/7-9, ¶ 18.

⁵ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, adopted by the Committee at its 2317th session (26 August 2014), U.N. Doc CERD/C/USA/CO/7-9, ¶ 18. The Committee also expressed concern about the practice of racial profiling of racial or ethnic minorities by law enforcement officials, including border enforcement officials in ¶ 8.

⁶ Committee on the Elimination of Racial Discrimination, *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, (2 June 2021), U.N. Doc. CERD/C/USA/10-12, ¶ 17.

⁷ Committee on the Elimination of Racial Discrimination, *List of themes in relation to the combined tenth to twelfth reports of the United States of America* (24 June 2022), U.N. Doc. CERD/C/USA/Q/10-12, ¶ 27.

⁸ 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).

proceedings not related to criminal issues, the same discriminatory outcomes have been observed.⁹

10. 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.¹⁰ Black immigrants made up 7% of the total immigration population from 2003-2015 but made up 10% of the deportations, and Black immigrants make up more than 20% of peoples facing deportation on criminal grounds.¹¹ In 2020, Haitian families constituted almost half of the families detained by ICE. Haitian families made up 44% of families detained¹². Haitian immigrants were found to be paying higher bonds than other immigrants in ICE facilities. Bonds paid by Haitian immigrants were 54% higher than bonds paid by other immigrants¹³. While the average bond for other immigrants was \$10,500, the average bond for Haitian immigrants was \$16,170¹⁴. This unfortunately results in Haitian immigrants being detained for a longer period of time or being deported. The Advocates’ Court Observation volunteers have documented similar discrimination faced by all Black migrants in detention and facing deportation, who appear to experience higher rates of detention, higher bonds and lower rates of release.¹⁵
11. 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 confinement¹⁶. 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 years¹⁷. Additionally, Haitians had the second highest U.S. asylum denial rate at 87%.¹⁸
12. 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

⁹ See, e.g. *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>.

¹⁰ 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/>.

¹¹ Bill Ong Hing, *Addressing the Intersection of Racial Justice and Immigrant Rights*, 9 Belmont L. Rev. 357, 362 (2022).

¹² 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/>.

¹³ Id.

¹⁴ Id.

¹⁵ 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>.

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.

prevent them from entering the U.S. to obtain asylum.¹⁹ By contrast, the U.S. recently opened special lanes for Ukrainians seeking safety at the Mexico-U.S. border.²⁰ 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.

13. 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 shortly after the Russian invasion. The disparate treatment raises concerns about discrimination.²¹
14. Nothing has highlighted racial disparities in U.S. immigration policy more than the recent influx of Ukrainians at the same time as Afghans who have been displaced and other groups of impacted people. 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/medicals.²² Compare this with parole for Afghans and others. It 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.” The U.S. also sua sponte establish Temporary Protected Status for Ukrainians within one month of the crisis.²³
15. 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 Afghans have been forced to apply for parole through lengthy processes that require fees and which have seen approval rates of less than 10 percent. Afghans have been calling for long-term protections since August, but still have no path to residence. Cameroonians had been calling for TPS for nearly one year before they were granted, and the procedures for TPS for Cameroonians and Afghans were delayed in publication, resulting in people being unable to

¹⁹ *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>.

²⁰ 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>.

²¹ 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/>

²² <https://www.uscis.gov/ukraine>

²³ <https://foreignpolicy.com/2022/04/05/biden-cameroon-tps-ukraine-refugees-asylum-immigration-homeland-security/>

²⁴ <https://www.markey.senate.gov/download/oversight-letter-redisparate-treatment-of-afghan-and-ukrainian-refugees>

submit applications. While we applaud the U.S. response to Ukraine as a model for what can be done with political will, it highlights racial inequities that must be eliminated.

II. Immigration Detention (List of Themes paragraph 26)

16. The Committee condemned mandatory detention of immigrants in its 2014 Concluding Observations; in its List of Themes, the Committee asked for information on efforts to address mandatory detention and conditions of detention.²⁵ The State Party report states that non-citizens are provided an opportunity to request bond and that “if an ICE officer denies bond (or sets a bond the non-citizen considers too high), a non-citizen may ask an Immigration Judge for a redetermination of the custody decision, per 8 U.S.C. § 1226. The non-citizen or ICE may also appeal the Immigration Judge’s custody redetermination to the Board of Immigration Appeals.”²⁶
17. 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,²⁷ non-citizens convicted of certain crimes,²⁸ and certain refugees awaiting adjudication of their applications for permanent residence.²⁹ These categorical detention determinations violate international norms of proportionality and non-discrimination.³⁰
18. 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.³¹ 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.³² In practice, the U.S. immigration system allows arbitrary detention for long period, with some remaining in detention for years.³³

²⁵ Committee on the Elimination of Racial Discrimination, *List of themes in relation to the combined tenth to twelfth reports of the United States of America* (24 June 2022), U.N. Doc. CERD/C/USA/Q/10-12, ¶ 26.

²⁶ Committee on the Elimination of Racial Discrimination, *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, (2 June 2021), U.N. Doc. CERD/C/USA/10-12, ¶ 88.

²⁷ Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV).

²⁸ 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.

²⁹ 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>.

³⁰ Frey & Zhao, *supra* note ix, 310-11.

³¹ Court Observer Observations March 2020-October 2021.

³² 8 CFR § 1003.19(e)

³³ 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/>.

19. 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.³⁴ 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 \$5000.³⁵ National data for the first part of FY 2018 shows median bond amounts across the country ranging from \$5000 to \$15,000.³⁶ This practice leads not only to lengthy detention, but also to prolonged separation of families.
20. Furter, U.S. law fails to meet the Mandela Rules for minimum standards of treatment in detention, allowing for individuals with mental health concerns and trauma to remain detained, prolonged solitary confinement, improper facilities for transgender people,³⁷ and numerous reports of inadequate medical care, religious freedom, access to outdoor space, access to legal libraries and calling to family, and abuse.³⁸ Moreover, reports indicate some detainees are victims of forced labor, with private detention centers paying \$1/day to some detainees for menial labor.³⁹ During the COVID-19 pandemic, The Advocates documented that individuals with underlying health conditions were detained without protocols.⁴⁰

III. Due Process and Legal Representation in Immigration Proceedings (List of Themes paragraph 29)

21. In its 2014 Concluding Observations, the Committee noted with concern deportation of undocumented immigrants without adequate access to justice and called on the U.S. to ensure that the rights of non-citizens are guaranteed in law and practice by, inter alia, "...Undertaking thorough and individualized assessment for decisions concerning detention and deportation and guaranteeing access to legal representation in all immigration-related matters."⁴¹ In the List of Themes, the Committee again asked for information on measures to guarantee the right to fair trial for detainees.⁴²

³⁴ 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>

³⁵ Information on file with The Advocates for Human Rights, Sept. 26, 2019.

³⁶ 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/>

³⁷ 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>.

³⁸ 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.

³⁹ 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.

⁴⁰ 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.

⁴¹ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America, adopted by the Committee at its 2317th session* (26 August 2014), U.N. Doc CERD/C/USA/CO/7-9, ¶ 18 (b).

⁴² Committee on the Elimination of Racial Discrimination, *List of themes in relation to the combined tenth to twelfth reports of the United States of America* (24 June 2022), U.N. Doc. CERD/C/USA/Q/10-12, ¶ 29.

22. The State Party Report indicates that: “As a general matter, when a non-citizen is placed in removal proceedings before an immigration court, the U.S. government is required to provide that non-citizen fair access to contest removability. This may include the ability to apply for any form of relief or protection for which the non-citizen may be eligible, including asylum, withholding of removal, and protection from removal under regulations implementing U.S. obligations under the Convention Against Torture.”⁴³
23. The U.S. State Party notes that “Pursuant to EO 14012, DOS, DHS, and DOJ are developing plans to remove barriers that impede access to immigration benefits and fair, efficient adjudications of those benefits, and to identify and make recommendations regarding whether to rescind any actions that fail to promote access to the legal immigration system.”⁴⁴ The State Party also indicates that it has “taken steps to modernize its legal immigration system and its humanitarian components, such as improving services for applicants, reducing burdens on employers, and modernizing the information technology infrastructure underlying the visa processing system. . .” and identifies various programs, such as Legal Access Initiative, aimed at addressing some of the due process concerns related to lack of counsel and complexity of proceedings.⁴⁵
24. These plans and programs, while a welcome change from overtly discriminatory and anti-immigrant policies, fail to address the structural deficiencies of the system that allow for sweeping violations. Programs, such as LOP and provisions of counsel for certain individuals are pilot programs that are limited to certain jurisdictions based on limited funding.⁴⁶ Even where those programs operate, they lack resources to adequately ensure people in complex proceedings obtain sufficient due process and are additionally hamstrung by other unaddressed due process concerns. Immigration policies left to the good will and political desire of administrations to address barriers to due process will never fully address these concerns.
25. We welcome the efforts of the U.S. to begin processing people who were forced to “remain in Mexico” while their asylum claims were adjudicated under the Migrant Protection Protocols” and finally, after three harmful years, ending the Title 42 expulsions under the guise of public health. Though, we recognize that asylum seekers remain at risk of Title 42 expulsions due to proposed congressional legislation.⁴⁷
26. 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

⁴³ Committee on the Elimination of Racial Discrimination, *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, (2 June 2021), U.N. Doc. CERD/C/USA/10-12, ¶ 84.

⁴⁴ Committee on the Elimination of Racial Discrimination, *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, (2 June 2021), U.N. Doc. CERD/C/USA/10-12, ¶ 86.

⁴⁵ Committee on the Elimination of Racial Discrimination, *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, (2 June 2021), U.N. Doc. CERD/C/USA/10-12, ¶ 89.

⁴⁶ American Immigration Council, “Legal Orientation Program Overview,” Sept. 6, 2018, <https://www.americanimmigrationcouncil.org/research/legal-orientation-program-overview>.

⁴⁷ Press Release, Arizona Senator Mark Kelly, Kelly, Sinema, Bipartisan Group of Senators Introduce Bill Delaying End of Title 42, Ensuring Coordination and Communication with Arizona Border Communities (Apr. 7, 2022), <https://www.kelly.senate.gov/press-releases/kelly-sinema-bipartisan-group-of-senators-introduce-bill-delaying-end-of-title-42-ensuring-coordination-and-communication-with-arizona-border-communities/>

they may apply for asylum before an immigration judge.⁴⁸ 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.⁴⁹

27. 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.⁵⁰
28. 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 claims, failures of interpretation, and lack of counsel to protect due process rights.⁵¹ 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.⁵² While the regulation contains some positive changes, the overarching legal framework of expedited removal must be changed in order to allow adequate protections.
29. 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.”⁵³ Representation of detained migrants in removal proceedings, insofar as it is

⁴⁸ Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV).

⁴⁹ Immigration and Nationality Act (INA) § 236(c).

⁵⁰ 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).

⁵¹ American Immigration Council. “A Primer on Expedited Removal,” Jul. 22, 2019,

<https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

⁵² *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>.

⁵³ 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).

available, is provided by NGOs. Only an estimated 14% of detained migrants receive legal representation.⁵⁴

30. The Biden Administration's recent request for FY23 funding to pilot a project to provide legal representation to vulnerable persons in proceedings is a positive development, but Congress must make this a priority and the U.S. government must take steps to ensure government-paid counsel is accessible for all by expanding this pilot.
31. 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 convictions for aggravated felonies,⁵⁵ false claims to United States citizenship,⁵⁶ illegal reentry following unlawful presence in the United States,⁵⁷ reinstatement of prior orders of removal,⁵⁸ findings by an immigration judge of a frivolous asylum claim,⁵⁹ and other reasons. U.S. law also provides only narrow avenues for appeal, compounding these harms.⁶⁰ 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 be passed into law.

IV. Collateral Immigration Consequences of Racially Disparate Criminal Justice System (List of Themes paragraph 13)

32. As the Committee has noted, BIPOC communities are disproportionately targeted by the criminal justice system. In its 2014 Concluding Observations, the Committee expressed ongoing concern about racial disparities, especially for Black people, in the criminal justice system. These concerns included disproportionately high rates of arrest, incarceration, and

⁵⁴ 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>.

⁵⁵ 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).

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ Deportable 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.

⁵⁹ 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.

⁶⁰ 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.

harsh sentencing.⁶¹ Because of the collateral immigration consequences for criminal histories the state party imposes, these disparities result in greater immigration impacts on BIPOC people as compared to non-BIPOC noncitizens.

33. In its 2021 State Party Report, the United States cites the First Step Act of 2018 as a reform “help[ing] to address racial disparities in the federal criminal legal system.”⁶² This is indeed a helpful first step, especially because it indicates the United States is aware that its “facially neutral” laws disproportionately harm BIPOC people and can act to remedy these disparate impacts. In its List of Themes, the Committee requested further information on efforts to eliminate racial disparities in the criminal justice system, including addressing Collateral Legal Consequences.⁶³
34. Some jurisdictions in the U.S. have made positive developments toward ensuring greater racial justice in criminal proceedings. These advances are the exception, however, and not the rule. Further, reforms to date have not addressed the discriminatory impact of Collateral Legal Consequences (CLCs).
35. BIPOC communities in the U.S. face racial discrimination in the criminal justice system before, during, and after criminal proceedings.⁶⁴ These racial disparities shape outcomes before, during, and after someone enters the criminal justice system, perpetuate ongoing cycles of poverty and racial discrimination.⁶⁵ BIPOC people are charged more frequently by prosecutors and held in pretrial detention, which harms their prospects for trial.⁶⁶ 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 offenses⁶⁷ for longer periods of time. Department of Justice data reflect that in 2019, the Black to white ratio of incarcerated people was 4.8:1.⁶⁸ Extreme disparities still exist in 20

⁶¹ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America, adopted by the Committee at its 2317th session* (26 August 2014), U.N. Doc CERD/C/USA/CO/7-9, ¶ 20.

⁶² Committee on the Elimination of Racial Discrimination, *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, (2 June 2021), U.N. Doc. CERD/C/USA/10-12, ¶ 114.

⁶³ Committee on the Elimination of Racial Discrimination, *List of themes in relation to the combined tenth to twelfth reports of the United States of America* (24 June 2022), U.N. Doc. CERD/C/USA/Q/10-12, ¶ 13.

⁶⁴ 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/>.

⁶⁵ 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/>.

⁶⁶ 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/>.

⁶⁷ 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/>.

⁶⁸ 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)”.

states,⁶⁹ 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 9.7:1.⁷⁰

36. 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.
37. 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.
38. As laws across the U.S. allow consideration of prior convictions in sentencing, CLCs can impact sentencing. 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.⁷¹ 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—they are at a higher risk of receiving a harsher sentence, which can lead to a host of additional CLCs.⁷²
39. 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.
40. 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

⁶⁹ 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>

⁷⁰ 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)”.

⁷¹ Minnesota Sentencing Guidelines Commission, *MINNESOTA SENTENCING GUIDELINES AND COMMENTARY*, (Saint Paul, Minnesota: September 2021), https://mn.gov/sentencing-guidelines/assets/2021Sept15MinnSentencingGuidelinesCommentary_tcm30-497682.pdf.

⁷² 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).

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.

V. Immigration and Human Trafficking (List of Themes paragraph 28)

41. As the Committee noted in its Concluding Observations, failures in U.S. immigration policies result in trafficking, particularly among racial and ethnic minorities such as Latinos. Our experience has reflected the Committee's observations that "workers entering the State party under the H-2B work visa programme are at high risk of becoming victims of trafficking and/or forced labour, and that some children from racial and ethnic minorities, particularly Hispanic/Latino children, are employed in the agriculture industry and may face harsh and dangerous conditions."⁷³ In its List of Themes, the Committee requested information on efforts to protect migrants from exploitative labor, establishing mechanisms to seek recourse for illegal conditions, and to improve access to health care services.⁷⁴
42. The State Party has reported that "The Blue Campaign, DHS's unified voice to combat human trafficking, has produced human trafficking training and awareness materials ..."⁷⁵ While these training and policy efforts around awareness of trafficking are important, the effectiveness of resources for victims and the likelihood of prosecution remain dependent on the discretion of the agent. Over the prior years, this resulted in agencies failing to investigate and provide benefits to trafficking victims that did not fit the agent's image of a trafficking victim who deserves care. This had a disproportionate effect on non-white noncitizens against whom agents had biases and who were more likely to be in the criminal justice system due to racial profiling and overpolicing of racial minorities.
43. While we agree that the H-2 visa programs must be revised to eliminate gaps that give rise to trafficking, we also note the serious concerns inherent in the J visa program. 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.
44. The State Party also fails to adequately protect noncitizens from trafficking and abuses outside of those on visas. Recently, more than 53 migrants were found dead in San Antonio, Texas

⁷³ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, adopted by the Committee at its 2317th session (26 August 2014), U.N. Doc CERD/C/USA/CO/7-9, ¶ 18.

⁷⁴ Committee on the Elimination of Racial Discrimination, *List of themes in relation to the combined tenth to twelfth reports of the United States of America* (24 June 2022), U.N. Doc. CERD/C/USA/Q/10-12, ¶ 28.

⁷⁵ Committee on the Elimination of Racial Discrimination, *Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention, due in 2017*, (2 June 2021), U.N. Doc. CERD/C/USA/10-12, ¶ 90.

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.⁷⁶ 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.

45. The State Party must 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 easy and equal access to care. Moreover, victims of labor trafficking have often suffered workplace harms for which they must obtain care.
46. 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.
47. At present, U.S. policy provides only limited financial and social supports to victims of trafficking who are noncitizens, and often fails to grant additional discretionary benefits to “imperfect victims,” which overwhelmingly includes BIPOC people who may be more likely to have criminal or immigration histories. As a result, accessing housing and health care is more problematic for BIPOC victims of trafficking.

Children and exploitative labor

48. The State Party, in its 2022 stakeholder meeting, recognized the right to education without discrimination based on immigration status and nationality. While The Advocates welcomes the 40th anniversary of the Supreme Court case that enshrined this right, we note that gaps remain.
49. Unaccompanied minors who are placed with sponsors 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.

Suggested recommendations relating to immigration and trafficking:

- Undertake a review of policies vis-à-vis how decisions are made regarding programs based on nationalities and issue regulations that ensure racially discriminatory or disparate impacts are considered and addressed.
- 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.

⁷⁶ <https://www.nytimes.com/live/2022/06/28/us/migrants-san-antonio-tractor-killed>

- Conduct a thorough review of data showing detention and removal rates by race. Update policies and trainings to ensure detention and removal decisions are not disproportionately impacting BIPOC communities.
- Work to disentangle immigration and criminal justice systems by eliminating enforcement priorities and regulations that tie negative immigration decisions to criminal histories.
- Eliminate 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. Update law and policy to ensure no torture survivors are held in detention and that use of detention, especially solitary confinement, comply with the Mandela Rules.
- Ensure due process and racial equity 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.
- Update law and policy to eliminate discretionary decisions for law enforcement to provide interim benefits to victims of trafficking in order to reduce instances of racial discrimination.
- Ensure funding is equally allocated to enforcement and victim services and update public benefits programs to ensure trafficking victims have access to healthcare, education, and employment to reduce trauma and risks of re-trafficking.
- 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.