Lutheran Immigration and Refugee Service

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UNIVERSAL PERIODIC REVIEW SUBMISSION TO HUMAN RIGHTS COUNCIL

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PROHIBITION OF ARBITRARY DETENTION IN THE U.S. MIGRATION CONTEXT

About LIRS: Lutheran Immigration and Refugee Service (LIRS) is a champion for all uprooted people. Since 1939 Lutheran Immigration and Refugee Service has worked to create welcoming communities for newcomers—immigrants and refugees who have been forced to leave their homes and begin anew. We help people seeking safety from persecution in their home countries and reunite families torn apart by conflict. We resettle refugees. We protect vulnerable children who arrive alone in the United States. We advocate for compassion and justice for all migrants.

About this submission: This submission summarizes Lutheran Immigration and Refugee Service's key concerns with the United States' compliance with its international human rights obligations in the context of the detention of migrants, specifically the prohibition from arbitrary detention under the International Covenant for Civil and Political Rights Article 9.

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Existing Scenario in the U.S.: Lack of Safeguards against Unnecessary Detention

Though international law recognizes that control over migration is an essential and necessary power of the government, it does not allow unfettered discretion to use arbitrary and prolonged detention by the State authorities.

In the past decade, the use of detention as a migration enforcement mechanism has tripled, with detention becoming more the norm than the exception in U.S. immigration enforcement policy.[1] In FY 1996, the United States had a daily immigration detention capacity of 8,279 beds

[1] See A/HRC/7/12/Add.2. Report on the mission to the United States by UN Special Rapporteur on the human rights of migrants, Jorge Bustamante. 5 March 2008. p. 12. He notes that detention appears as "the primary enforcement strategy relied upon by the United States immigration authorities."

and held 108,000 individuals in detention over the course of the year.[2] By FY 2010, that daily capacity had increased to 33,400 with plans for future expansion[3] and the U.S. government estimates that 442,941 detainees will be held in Immigration and Customs Enforcement (ICE) custody by the end of FY 2010.[4] Since the creation of ICE in 2003, more than 1.7 million individuals have passed through U.S. detention facilities.[5]

The conditions and terms of immigration detention in the U.S. are equivalent to prison, where freedom of movement is restricted; detainees wear prison uniforms, and are kept in a punitive setting. This is the case even though those held in immigration detention are charged with a civil immigration violation, not a crime.

Arbitrary detention of non-citizens is against the basic tenets of human rights norms as enshrined under the preamble of the UN Charter and Article 3, 9 and 14 of the Universal Declaration on Human Rights. The prohibition from arbitrary detention in Article 9 of ICCPR states that detention may be justified only after the government has met its burden to articulate that detention is 1) necessary as a last resort, when it is prescribed by law, and 2) proportional to need to deprive any individual of their liberty. Additionally, anyone deprived of liberty is entitled to court review of this decision.

Lack of Individualized Assessments for Need to Deprive Liberty

Article 9(1) of the ICCPR requires that the decision to detain someone be made on a case-by-case basis after an individualized assessment of the functional need of detaining that individual. The burden falls to the government to articulate that detention of immigrants is necessary to achieve the goals for which it is used. Those goals include the protection of community safety or national security, ensuring the appearance of individuals at immigration hearings, or guaranteeing the enforcement of orders of removal.[6] In cases of non-citizens, deprivation of liberty is lawful and justifiable only after the government has articulated its need to detain a person based on an individualized assessment to screen for the following i) to verify identity; ii) to protect national security or public safety; or iii) when the there is a risk that a person will not appear at immigration court proceedings.[7]

Yet, the increasing reliance of U.S. authorities on detention as an enforcement strategy has resulted in many individuals being unnecessarily detained for prolonged periods without any individualized determinations that they are either a danger to society or a flight risk. The Special Rapporteur on Human Rights of Migrants reported that the U.S. immigration detention system lacked the procedural safeguards to prevent the detention of non-citizens from being

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[2] GAO-09-308R DHS Resources for ICE Detainee Health Care, p. 8. http://www.gao.gov/new.items/d09308r.pdf

[3] Statement of Dora Schriro, Special Advisor to Secretary Napolitano before the House Appropriations Committee Subcommittee on Homeland Security, March 3, 2009

[4] Statement of James T. Hayes, Jr., Director, Office of Detention and Removal Operations before the House Appropriations Committee Subcommittee on Homeland Security, March 3, 2009

[5] *Id.*

[6] See *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006); *Matter of Adeniji*, 22 I&N Dec. 1102, 112-13 (BIA 1999).

[7] *Id*.

arbitrary within the meaning of the ICCPR.[8] The report found that many non-citizens remain detained for months or even years as they go through procedures to decide whether they are eligible to stay in the U.S. or, others after being issued a final order of removal, as the U.S. arranges for their deportation. The report concluded that "the overuse of immigration detention in the U.S. violates the spirit of international laws and conventions and, in many cases, also violates the actual letter of those instruments."[9]

The Department of Homeland Security (DHS) currently has broad authority from Congress to release many individuals from detention on parole, bond or recognizance.[10] Unfortunately DHS has not maximized the use of these options and annually detains thousands of individuals who could be eligible for release, if properly screened, including vulnerable groups, such as those with medical conditions, the elderly and asylum seekers. The rapid increase in detention numbers is due, in part, to DHS's failure to offer this critical procedural safeguard that would inform and encourage greater utilization of these release options.

Failure to Use Least Restrictive Means to Ensure Compliance with Immigration Processes

Pursuant to Article 9(2), when applying any limitation on freedom, a State is not to use more restrictive means than are required for the achievement of the stated need to detain. Deprivation of liberty must be considered reasonable and necessary when compared with the benefits of the goal achieved by that deprivation. Under the principle of proportionality, any restrictive measure must be the least intrusive option to achieve the desired result, which in the immigration context includes the following: i) to verify identity; ii) to protect national security or public safety; or iii) when the there is a risk that a person will not appear at immigration court proceedings.[11] For example, posting a bond can mitigate a risk of non-appearance at a court hearing for an individual who may not have a permanent address.

The availability of effective alternatives renders unnecessary the increasing reliance on detention as an immigration enforcement mechanism. There are many less restrictive forms of detention and many alternatives to detention that would serve the law enforcement purpose, while still complying with international human rights law and ensuring the just and humane treatment of migrants in the U.S.

Recently, the U.S. government has made efforts to initiate change in the existing immigration detention system by supporting "alternative to detention" programs in what the federal government has termed the Intensive Supervision Appearance Program (ISAP). In 2002, ICE's Office of Detention and Removal Operations created the Alternatives to Detention unit. According to ICE, these programs have shown tremendous promise in ensuring individuals' attendance at immigration proceedings, while helping the agency use detention space more

[8] See A/HRC/7/12/Add.2. Report on the mission to the United States by UN Special Rapporteur on the human rights of migrants, Jorge Bustamante. 5 March 2008.
[9] *Id.*
[10] Immigration and Nationality Act, Section 236.
[11] *See Supra, note 5.*

efficiently.[13] The program, however, is more accurately an 'alternate *form* of detention' than an alternative *to* detention. Rather than using proven community-based models[12], the U.S. relies heavily on technologies, such as electronic ankle devices with 24 hour GPS monitoring. Other elements of ISAP include telephonic reporting, home arrest (curfews), unannounced home visits and unannounced employment verification. As implemented, ISAP significantly restricts the liberty of movement of individuals and does not provide any articulation that such restrictions on liberty are necessary.

Overuse of Electronic Monitoring Devices

When properly applied to populations that might otherwise be subject to continued detention, electronic monitoring may be an effective, cost-saving alternative custodial program. However, the U.S. regularly uses electronic monitoring devices on individuals who do not need high level monitoring, such as individuals eligible for release on recognizance, bond, or parole, or enrolled in an alternatives program that is far less restrictive.

Electronic monitoring programs constitute severe restrictions on individual's liberty. Article 12 of the ICCPR applies to restrictions on movement short of deprivation of liberty and has been interpreted to mean that at a certain point restrictions on movement may be considered a deprivation of liberty. Several investigative news reports have anecdotally described the stigma and indignity experienced by particular participants in electronic monitoring programs. These devices further impose substantial burdens by making it extremely difficult for the individual to participate in daily life activities. For this reason, electronic monitoring should be used only when the government demonstrates that it is necessary to ensure public safety or to ensure the individual appearance at immigration proceedings.

Lack of Access to Court Review of Custody

Institutionalized access to an independent judicial body is a critical procedural safeguard to prevent detention of non-citizens from being arbitrary within the meaning of the ICCPR, yet access to judicial review is not currently provided to all individuals detained on the basis of civil immigration violations. U.S. law mandates detention of many non-citizens, including asylum seekers as they arrive to the U.S. The existence of these statutes directly controvert Article 9(4) of the ICCPR which provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." These statutory mandates disallow prosecutorial discretion by either law enforcement or judicial bodies, deny any meaningful review before a court of custody decisions, and render detention in this context arbitrary.

[12] A pilot project conducted by the Vera Institute for Justice from 1997 to 2000 found that alternatives to detention averaged $12/day while yielding a 91% appearance rate of those released to a supervision program at all of their hearings. http://www.vera.org/download?file=615/finalreport.pdf.

Recommendations

We hope that the Universal Periodic Review of the United States will reflect the concerns outlined in our submission and include the following recommendations in its outcome document:

- **Urge the U.S. to provide safeguards against unnecessary and inappropriate detention of non-citizens.**
    - Urge the U.S. to make individualized detention determinations for all non-citizens. The U.S. must immediately assume the burden to articulate why the detention of a person is necessary and proportional to a compelling government or public interest.
    - Urge the U.S. to provide prompt court review of custody decisions: The U.S. mandates for automatic detention deprive individuals of discretionary review by an independent judicial body to which they are entitled. The U.S. must afford all non-citizens in detention with meaningful custody determination hearings before an Immigration Judge.

- **Urge the U.S. to Use the Least Restrictive Means Necessary to Ensure Compliance with Immigration Processes.** Immigration detention is the least humane government option for ensuring compliance with the immigration process. Release is preferred whenever possible; alternatives to detention are a second preference; and detention should serve as a last resort. Any use of detention should be in the least restrictive and most non-penal setting possible.

- **Urge the U.S. to Increase the Use of Custodial and Community-Based Alternatives to Penal-Like Detention.** Rather than relying upon costly detention beds in an ever-expanding immigration detention business, eligible non-citizens should be released on recognizance or orders of supervision, complemented by appearance assistance services by reputable and experienced community-based and not-for-profit organizations. Such services have been shown to increase compliance with immigration processes.

    - The U.S. should expand genuine alternatives to detention for those who are otherwise eligible for release but lack community ties.
    - Urge the U.S. to minimize use highly restrictive conditions on release, such as electronic monitoring or home arrest, turning to these appropriately and only when the government has articulated a need to restrict liberty.

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