

THE COST OF (NON)COMPLIANCE:
AN EXPOSÉ OF THE UNITED STATES'
IMMIGRATION DETENTION POLICY AND ITS
FAILURE TO COMPLY WITH INTERNATIONAL
STANDARDS ON TORTURE

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Introduction

The persistence of brutal warfare sparked an international movement against torture at the turn of the twentieth century. By 1948, the Universal Declaration of Human Rights (UDHR) introduced a ban on torture.¹ Two decades later, the International Covenant on Civil and Political Rights (ICCPR) followed suit, prohibiting member States from subjecting individuals to torture.² However, in decades following said treaties, brutal dictatorships proved that short provisions in international documents are not enough to prevent torture.

The plight of Chilean dictator Augusto Pinochet illustrated the weaknesses of the international framework on torture. Despite the heinous acts of torture committed under his regime, Pinochet enjoyed impunity at the international level. Torture needed its own treaty. Inspired by gruesome reports of electrocutions and forced disappearances in Chile, Amnesty International launched a global campaign to end torture.³ Over time, the campaign against torture

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¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 5 (Dec. 10, 1948).

² International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*].

³ 'No Safe Haven for Torturers' – *The Rocky Road to the Convention Against Torture*, AMNESTY INTERNATIONAL (Nov. 19, 2014), <https://www.amnesty.org/en/latest/news/2014/11/no-safe-haven-torturers-rocky->

gained momentum.⁴ Sweden proposed a treaty to the United Nations (U.N.) that eventually became the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (Torture Convention).⁵

I. The Torture Convention

The United States (U.S.) signed the Torture Convention on April 18, 1988.⁶ As the name suggests, the Torture Convention aims to promote an end to torture, cruel and inhumane punishment through regulation of domestic law and strict accountability among members States.⁷ Part I of the Torture Convention establishes universal jurisdiction among member States to prosecute those suspected of crimes.⁸ This provision allowed for Pinochet to be prosecuted under the Convention.⁹

Member States to the Torture Convention must submit a report every four years to the Committee Against Torture (Committee).¹⁰ The report should detail how the rights of the Convention are being implemented and protected in a State's domestic affairs.¹¹ The Committee reviews a member State's report and issues "Concluding Observations" to address concerns and recommendations to that State.¹² The Committee also looks at reports

road-convention-against-torture/.

⁴ AMNESTY INTERNATIONAL, *supra* note 3.

⁵ Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*].

⁶ Ronald Reagan, Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment (May 20, 1988) (transcript available at: <http://www.presidency.ucsb.edu/ws/?pid=35858>).

⁷ *Convention Against Torture*, *supra* note 5, at preamble.

⁸ *Id.* at Part I.

⁹ *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/campaigns/chile98/precedent.htm> (last visited Jun. 21, 2016).

¹⁰ *Convention Against Torture*, *supra* note 5, at art. 19(1).

¹¹ *Id.* at art. 19(3).

¹² *Convention Against Torture*, *supra* note 5, at art. 19.

from non-governmental organizations (NGOs) including individual reports or complaints under the Convention when drafting the Concluding Observations.¹³ The main purpose of the Committee's Concluding Observations is to put a State on notice of domestic practices that may conflict with a State's obligations under the Torture Convention, and to provide guidance to that State on how to correct those practices.¹⁴

The Committee released the latest Concluding Observations for the U.S. on November 20, 2014. The Committee identified twenty-one topics as "principal subjects of concern and recommendation," including immigration detention.¹⁵ The Committee identified articles from the Convention that are jeopardized by the current American immigration detention policy.¹⁶ Those articles concern the requirement of member States to prevent torture through legislation, the treatment of persons in custody, and the responsibility to protect persons from torture or other cruel and inhuman acts committed at the hands of public officials.¹⁷

A. *Immigration Detention*

Generally, immigration detention is the practice of detaining immigrants arrested under administrative immigration law in prison-like facilities until their court date arrives. Immigration detention is not new to the U.S., but recent legislation has revolutionized its role.¹⁸ From 1995 to 2013, the average daily population of immigrant detainees in custody of Immigration Customs Enforcement (ICE) has

¹³ *CAT Shadow Reports*, U.S. HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/cat-shadow-reports> (last visited Jan. 30, 2017).

¹⁴ *Preventing Torture: An Operational Guide for National Human Rights Institutions*, OFFICE OF THE HIGH COMMISSION OF HUMAN RIGHTS (OHCHR), at 1, 65, available at http://www.ohchr.org/Documents/Countries/NHRI/Torture_Prevention_Guide.pdf [hereinafter *OHCHR*].

¹⁵ Comm. Against Torture, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. C/USA/CO/3-5 (2014) [hereinafter *Concluding Observations*].

¹⁶ *Id.* at ¶¶ 19-20.

¹⁷ *Id.* at ¶¶ 18-20.

¹⁸ *Convention Against Torture*, *supra* note 5, at art. 2(2) & art. 10(1).

318 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 12]

more than quadrupled, and nearly 60% of those in ICE custody are held in private, for-profit prisons.¹⁹

Recent scandals have propelled immigration detention centers into the public eye.²⁰ Reports of sexual abuse, deaths due to insufficient medical care,²¹ forced labor with low to no pay,²² and lack of access to counsel²³ and to the outside world²⁴ captured the attention of various human rights groups and spurred legislation proposals.²⁵ Immigration detention conditions also attracted the attention of the Committee.²⁶ The remainder of this paper will analyze how the U.S. has complied with the Committee's suggestions in the latest Concluding Observations to reform immigration detention.

¹⁹ See Doris Meissner et al., *Immigration Enforcement in the U.S.: The Rise of a Formidable Machinery*, MIGRATION POLICY INSTITUTE 126 (2013), <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf> (INS detained 85,730 in fiscal year 1995).

²⁰ Carl Takei, *Written Statement of the American Civil Liberties Union Before the U.S. Commission on Civil Rights*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (2015), at 1-2, http://www.usccr.gov/OIG/Carl_Takei_Immigration_Detention_ACLUWrittenStatement_FINAL.pdf.

²¹ See generally *supra* notes 15-18.

²² Michael Muskal, *Detention Conditions 'Similar, if Not Worse' Than Migrants' Home Countries,' Report Says*, L.A. TIMES (Sept. 18, 2015), <http://www.latimes.com/nation/la-na-immigrant-detention-centers-civil-rights-20150917-story.html>.

²³ Venice Buhain, *Judge OKs Forced Labor Lawsuit Against Detention Center Contractor*, SEATTLE GLOBALIST (Jul. 9, 2015), <http://www.seattleglobalist.com/2015/07/09/judge-oks-forced-labor-lawsuit-against-detention-center-contractor/39203>.

²⁴ *United States v. Lopez-Chavez*, 757 F.3d 1033, 1040 (9th Cir. 2014) ("There is no constitutional right to counsel in deportation proceedings.") (citing *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000)).

²⁵ *Reopen Immigrant Visitation Program at Alabama Detention Center*, SOUTHERN POVERTY LAW CENTER (Aug. 25, 2015), <https://www.splcenter.org/news/2015/08/25/splc-reopen-immigrant-visitation-program-alabama-detention-center>.

²⁶ Patrick McGreevy, *'It's a Nightmare Inside': Bill Would Place New Restrictions on Private Immigrant Detention Center*, L.A. TIMES (Apr. 1, 2016), <http://www.latimes.com/politics/la-pol-sac-immigrant-detention-20160401-story.html>.

II. Observations

The Committee gave five suggestions to the U.S. regarding immigration detention: (1) review mandatory detention, (2) expand alternatives to detention, (3) comply with ICE directives, (4) prevent sexual assault, and (5) implement effective oversight measures.²⁷

A. Review Mandatory Detention Policy

The first recommendation made by the Committee was to review the use of mandatory detention for certain categories of immigrants.²⁸ Currently, U.S. law mandates that an immigration judge may detain immigrants who arrive here without proper documentation and bond pending review.²⁹ This policy of mandatory detention applies to all undocumented immigrants, including asylum-seekers and small children.³⁰ Ironically, part of the mandatory detention policy is called “expedited removal,” but has created a backlog of cases, causing many individuals and families to remain in detention for months, sometimes years, before seeing the Immigration Judge.³¹

Even a person lawfully in the U.S., but not a U.S. citizen, is subject to mandatory detention if he or she has been convicted of an “aggravated felony,” crime of moral turpitude or other miscellaneous national security violations.³² Under the current definition of “aggravated felony,” a lawful permanent resident can be detained for failing to appear in court for mail fraud.³³

²⁷ *OHCHR*, *supra* note 14, at 19.

²⁸ *Concluding Observations*, *supra* note 15.

²⁹ *Id.*

³⁰ 8 U.S.C. § 1226 (1952).

³¹ *Facts About Mandatory Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/sites/default/files/Mandatory%20Detention%20Fact%20Sheet.pdf> (last visited on Jan 24, 2017).

³² *Immigrants Face Long Detention, Few Rights*, NBC NEWS (Mar. 5, 2009), http://www.nbcnews.com/id/29706177/ns/us_news-security/t/immigrants-face-long-detention-few-rights/#.Vv56KsdlnoA.

³³ *See* 8 U.S.C. § 1101(a)(43) (1986).

320 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 12]

In criminal proceedings, a judge can look to the nature of the crime, as well as evaluate a potential flight risk, to determine if a person should be held in jail or released on bond until their hearing date.³⁴ Yet, the most problematic and controversial piece of the mandatory detention policy is that a judge does not make that determination.³⁵ Officials do not investigate the specific circumstances of an immigrant's case to determine an appropriate placement because the law requires anyone who can be detained under the law, *must* be detained.³⁶

As of September 2016, the U.S. mandatory detention policy has not changed. The Committee's suggestion was merely to "review" the practice, not necessarily to change it. It is difficult to say whether or not the U.S. "reviewed" the policy of mandatory detention, but ICE continues to grant contracts to private prison corporations for immigration detention centers, despite the Committee's request to review this practice requiring new detention facilities.³⁷

In May 2015, the U.S. had an opportunity to review the policy of mandatory detention, when Congressman Adam Smith introduced the Accountability in Immigration Detention Act to the House.³⁸ However, the bill was promptly referred to the Subcommittee where it received little attention. GovTrack gave the Accountability in Immigration Detention Act³⁹ a 1% chance of being enacted.⁴⁰ By and large, the United States has not heeded the

³⁴ § *N.6 Aggravated Felonies*, IMMIGRATION LEGAL RESOURCE CENTER, at 109, https://www.ilrc.org/sites/default/files/resources/n.6-aggravated_felonies.pdf (last visited Oct. 16, 2016).

³⁵ 18 U.S.C. §3141(g); *see also*, *United States v. Salerno*, 481 U.S. 739, 742-743 (1987).

³⁶ 8 U.S.C. § 1226.

³⁷ *Id.*

³⁸ Lael Henterly, *GEO Group Signs New 10 Year Contract for the Northwest Detention Center*, SEATTLE GLOBALIST (Oct. 2, 2015), <http://www.seattleglobalist.com/2015/10/02/geo-group-signs-new-10-year-contract-for-the-northwest-detention-center/41992>.

³⁹ Accountability in Immigration Detention Act of 2015, H.R. 2314, 114th Cong. §3 (2015).

⁴⁰ *H.R. 2314 (114th): Accountability in Immigration Detention Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr2314> (last visited Apr.

2017] THE COST OF (NON)COMPLIANCE 321

Committee's suggestion to review the policy of mandatory detention.

B. Expand Alternatives to Detention

The Committee's second recommendation is for the U.S. to develop and expand community-based alternatives to immigration detention.⁴¹ Specifically, the Committee suggested to expand the use of foster care for unaccompanied children, and to halt the expansion of family detention with an eye towards eliminating it completely.⁴²

1. Alternatives to Detention Progress

Community-based alternatives to detention (ATDs) refer to programs, which place immigrants back in the community while waiting for their court date.⁴³ Such programs release immigrants on bond, using formal monitoring programs.⁴⁴ Prior to the Committee's suggestion, ICE already had discretion to use one form of ATD — the Intensive Supervision Appearance Program (ISAP).⁴⁵ Despite being far more cost effective and efficient than detention, the data shows that ICE rarely exercises its discretion to use ISAP (currently known as "ISAP II").⁴⁶ In fiscal year (FY) 2013, ISAP II enrolled a little over 40,000 immigrants — less than one-tenth the number of immigrants ICE detains annually.⁴⁷

15, 2017).

⁴¹ *Concluding Observations*, *supra* note 15.

⁴² *Id.*

⁴³ *Alternatives to Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/alternatives> (last visited Oct. 7, 2016).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *The Math of Immigration Detention*, NATIONAL IMMIGRATION FORUM (Aug. 22, 2013), <https://immigrationforum.org/blog/themathofimmigrationdetention/>.

⁴⁷ *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, ACLU, https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf (last visited on Dec. 24, 2016).

322 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 12]

In September 2014, BI Incorporated, a subsidiary of GEO Group, renewed a five-year contract with Department of Homeland Security (DHS) to continue servicing ISAP II.⁴⁸ GEO Group is a corporation that runs many immigration detention centers,⁴⁹ and thus profits from immigrants being detained in their facilities. The use of ATDs like ISAP II hurts GEO Group's initiative, because it removes immigrants from their facilities.⁵⁰ In FY 2013, the conflict of interest between GEO Group and the use of ISAP suggests that the program will be used less than before.

Still, many attempts were used to increase the use of ATDs. In a FY 2016 budget proposal, the Obama administration acknowledged the superior cost efficiency and effectiveness of ATD programs by requesting a \$12 million dollar increase in funding for the program(s), totaling \$122 million.⁵¹ Congress rejected this proposal, and kept ATD funding at the same level as previous years.⁵² By granting the ISAP II contract to a company with a financial stake in the program's disuse and rejecting funding proposals for additional ATDs, the U.S. cannot expand community-based ATDs as requested by the Committee.

2. *Family Detention Progress*

Despite the Committee's suggestion to work towards ending family detention, the U.S. has significantly expanded family

⁴⁸ *The GEO Group Awarded Contract by U.S. Immigration and Customs and Enforcement for the Continued Provision of Services under Intensive Supervision and Appearance Program* (Sept. 10, 2014), <http://www.businesswire.com/news/home/20140910005643/en/GEO-Group-Awarded-Contract-U.S.-Immigration-Customs#.VCzPTCtJNh5>.

⁴⁹ *Id.*

⁵⁰ ACLU, *supra* note 47; *see also* 8 U.S.C. § 1226.

⁵¹ Letter from Shaun Donovan, Exec. Office of Management and Budget, to the Honorable Hal Rogers, Chairman of Comm. on Appropriations (Jul. 7, 2015), *available at* http://www.foodpolitics.com/wp-content/uploads/OMB-on-AgApprop_15.pdf.

⁵² Lazaro Zamora, *What You Need to Know: Immigration Family Detention*, BIPARTISAN POLICY (Aug. 27 2015), <http://bipartisanpolicy.org/blog/what-you-need-to-know-immigrant-family-detention/>.

detention to be larger than ever.⁵³ ICE opened a new family detention center in FY 2014 and announced the inception of another family detention center with 2,400 beds.⁵⁴ The South Texas Family Residential Center opened with more beds than any other existing family detention center.⁵⁵ The facility opened in December 2014, just a few weeks after the Committee suggested to halt family detention.⁵⁶ Congress has already approved a budget proposal for FY 2017 that includes funding for maintaining the 2,760 beds in family detention centers⁵⁷ — again, directly counteracting the Committee’s suggestion.

Nearly a year after the Concluding Observations were released, the United States Commission on Civil Rights (USCCR) published a report on the state of civil rights in immigration detention that echoed many of the same concerns articulated in the Concluding Observations a year earlier.⁵⁸ Among other suggestions, the USCCR demanded that ICE release those in family detention because families are not being individually assessed to determine whether or not detention is necessary.⁵⁹ Also, there are numerous reports of the subpar living conditions and sexual abuse that occurs

⁵³ *Costly Family Detention Denies Justice to Mothers and Children*, NATIONAL IMMIGRANT JUSTICE CENTER (Mar. 2015), http://immigrantjustice.org/sites/immigrantjustice.org/files/Family%20Detention%20Factsheet%202015_03_09.pdf.

⁵⁴ Zamora, *supra* note 52.

⁵⁵ Amanda Peterson Beadle, *New Family Detention Facility Opens in Dilley, Texas, Despite Due Process Problems*, IMMIGRATION IMPACT (Dec. 18, 2014), <http://immigrationimpact.com/2014/12/18/new-family-detention-facility-opens-dilley-texas-despite-due-process-problems/>.

⁵⁶ *Id.*

⁵⁷ Zamora, *supra* note 52.

⁵⁸ *U.S. Commission on Civil Rights Releases Report on Condition in Immigration Detention Centers and Family Detainees*, U.S. COMMISSION ON CIVIL RIGHTS (Sept. 17, 2015), http://www.usccr.gov/press/2015/PR_Report_ReleasedCCR_9-17-15.pdf.

⁵⁹ *The State of Civil Rights at Immigration Detention Facilities Before the U.S. Comm. on Civ. Rts.*, 114th Cong. (2015) (Statement of Martin R. Castro, Chairman, U.S. Comm. on Civ. Rts.), *available at* http://usccr.gov/OIG/Commission-Briefing-Transcript-Immigration-RM-Edits_2015_09-15.pdf.

in family detention centers.⁶⁰

USSCR mimicked many of the same concerns about family detention in the Concluding Observations a year later, which demonstrates that little regard had been given to the Committee's suggestions pertaining to family detention.

3. Expansion of Foster Care

Upon releasing the Concluding Observations, the U.S. Department of Health and Human Services Office of Refugee Resettlement (ORR) maintained a foster care program for unaccompanied youth. This program places unaccompanied children without documentation in the care of a family member or volunteer, in lieu of detaining children.⁶¹

The Department of Human Health and Services reports that in FY 2014 the ORR program received more than 57,000 unaccompanied minors from DHS custody, but then dropped to 33,000 in FY 2015.⁶² Although the number of referrals to ORR foster care from DHS shrank in FY 2015, it does not reflect a shrinkage in the size of the program, because the overall numbers of children immigrating to the U.S. shrank significantly.⁶³ Since this program is funded through several federal agencies, state offices, and volunteers, it is difficult to gauge whether the program has expanded in compliance with the Committee's Concluding Observations.

⁶⁰ *Id.*

⁶¹ *Unaccompanied Refugee Minors*, U.S. OFFICE OF REFUGEE RESETTLEMENT (Aug. 16, 2012), <http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-refugee-minors>.

⁶² *Fact Sheet*, U.S. ADMINISTRATION FOR CHILDREN AND FAMILIES (Jan. 2016), https://www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf.

⁶³ *Southwest Border Unaccompanied Alien Children Statistics FY 2015*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015>, (last visited Oct. 7, 2016).

C. Compliance with Directives

The third suggestion made by the Committee is to ensure compliance with two internal ICE documents: the 2013 Directive on the Appropriate Use of Segregation in U.S. Immigration and Customs Enforcement detention facilities, and the 2011 Performance Based National Standards in all immigration detention facilities.⁶⁴

1. 2011 Performance Based National Standards

The 2011 Performance Based National Standards Directive (PBNSD) is a seven-part document containing guidelines for everything from marriage requests to key and lock control.⁶⁵ The preamble to the PBNSD states that it was crafted to improve medical services, access to counsel, communication with detainees and other human rights concerns addressed by NGOs and agency employees.⁶⁶

As of January 2015, PBNSD applied to all dedicated ICE facilities and 60% of the other facilities that house ICE detainees.⁶⁷ The three existing family detention centers are subject only to the Family Residential Standards, an adapted version of the detention guidelines tailored to facilities detaining women and children.⁶⁸

Even if the PBNSD and standards did apply to all facilities housing any ICE detainees, the Committee's recommendation of *ensuring* compliance would not be achieved. The PBNSD is not legally enforceable.⁶⁹ While all facilities are audited for their

⁶⁴ *Concluding Observations*, *supra* note 15.

⁶⁵ *Performance Based National Standards 2011*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) (rev. Feb. 2013), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>.

⁶⁶ ICE, *supra* note 65, at preface.

⁶⁷ Kevin Landy, *Written Statement of Kevin Landy Assistant Director for the ICE Office of Detention Policy and Planning (ODPP)*, U.S. COMMISSION ON CIVIL RIGHTS (Jan. 30, 2015), [http://www.usccr.gov/OIG/Kevin_Landy_USCCR_Opening_Statement_\(1-30-2015\).pdf](http://www.usccr.gov/OIG/Kevin_Landy_USCCR_Opening_Statement_(1-30-2015).pdf).

⁶⁸ *Family Residential Standards*, ICE (Mar. 25, 2011), <https://www.ice.gov/factsheets/facilities-residential-stds>.

⁶⁹ *Detention Oversight: Detention Oversight is Ineffective, Putting People's*

326 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 12]

compliance, there is no punishment or punitive action taken when a facility is not fully compliant with the PBNSD, or whichever directive applies to that facility.⁷⁰

A DHS report stated many of the contracts with city and county facilities that house ICE detainees do not even mention the National Standards.⁷¹ Some facilities are not contractually bound by ICE directives because various contracts even pre-date the formation of ICE.⁷² Because of this oversight, thousands of ICE detainees may not be subject to the carefully structured agency rules designed to protect them, and instead are at the mercy of the private prison contractors and county jail guards.

Some audit reports are made available to the public to appear transparent, but others can only be obtained through a time-consuming FOIA request.⁷³ However, there is no enforcement mechanism.⁷⁴ Most facilities do not fully comply with the PBNSD or Family Residential Standards, but private contractors are granted contracts for new detention centers despite deficiencies at their facilities.⁷⁵

2. *Directive on the Appropriate Use of Segregation*

The Directive on the Appropriate Use of Segregation was developed in the wake of controversy over detention facilities using solitary confinement as control and protective measures for

Lives At Risk, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-oversight>, (last visited on Jan 24, 2017).

⁷⁰ New York University School of Law Immigrant Rights Clinic, *Locked Up But Not Forgotten*, AMERICAN FRIENDS SERVICE COMMITTEE (Apr. 2010), at 28, <https://afsc.org/sites/afsc.civicaactions.net/files/documents/LockedUpFINAL.pdf>.

⁷¹ Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, ICE (Oct. 6, 2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

⁷² Schriro, *supra* note 71.

⁷³ *National Security Archive briefing Book No. 505*, THE NATIONAL SECURITY ARCHIVE (Mar. 13, 2015), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB505/>.

⁷⁴ DETENTION WATCH NETWORK, *supra* note at 69.

⁷⁵ Henterly, *supra* note 38.

vulnerable detainees, such as those who identified as LGBT.⁷⁶ There were also reports of solitary confinement being used for punitive purposes, after a detainee helped another detainee file a complaint.⁷⁷ The directive establishes a procedure for placing detainees in solitary confinement longer than fourteen days, as well as only permitting solitary confinement for “vulnerable” detainees if no other viable housing options exist.⁷⁸

Similar to the other ICE directives, the Directive on Appropriate Use of Segregation directive has no enforcement mechanism or penalties for facilities. The internal policy memo that introduced the directive included a statement at the end of the document notifying readers that nothing in the directive is intended to be a right enforceable at law by any party.⁷⁹ The Appropriate Use of Segregation directive made a feeble attempt at oversight by merely establishing an online database for facilities to document their solitary confinement decisions.⁸⁰

Both the PBNDS and Directive on Appropriate Use of Segregation are no more than words on paper, mere suggestions, without an enforcement mechanism. The U.S. is not abiding by the Committee’s suggestion to *ensure* compliance with the directives. Since there is no method of legally enforcing these facilities to comply or a punitive component for noncompliant facilities, the U.S. fails miserably to “ensure” compliance with directives.

⁷⁶ Dereck Gilna, *ICE Directive May Limit Solitary Confinement of Immigrant Detainees*, PRISON LEGAL NEWS (Nov. 15, 2013), <https://www.prisonlegalnews.org/news/2013/nov/15/ice-directive-may-limit-solitary-confinement-of-immigrant-detainees/>.

⁷⁷ Sandra Lilley, *New ICE Directive Limiting Solitary Confinement a Good Step, but Issue is Compliance, Say Rights Groups*, NBC LATINO (Sept. 6, 2013), <http://nbclatino.com/2013/09/06/new-ice-directive-limiting-solitary-confinement-a-good-step-but-issue-is-compliance-say-rights-groups/>.

⁷⁸ *Review of the Use of Segregation for ICE Detainees*, ICE (Sept. 4, 2013), https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

⁷⁹ *Id.* at 13.

⁸⁰ *Detention Reform Accomplishments*, ICE (rev. Aug. 2016), <https://www.ice.gov/detention-reform#tab1>.

D. Prevention of Sexual Assault

ICE's poor track record of sexual assault prevention is illustrated by the case of Tanya Guzman.⁸¹ Guzman, a transgender woman, was detained in an all-male pod in ICE's Eloy Detention Center.⁸² In 2009, a male guard, who was later convicted of the crime, sexually assaulted her.⁸³ Despite the guard's conviction, Guzman remained in the all-male pod and was sexually assaulted yet again by a male detainee.⁸⁴

Tanya Guzman was not the first or last victim of sexual assault in immigration detention.⁸⁵ The problem of sexual violence in immigration detention centers has proven to be a lasting one.⁸⁶ In fact, the Committee's previous Concluding Observations, issued in 2006, recognized the high volume of sexual assault reports in immigration detention as a concern.⁸⁷

It is not surprising that the Committee's fourth recommendation for the U.S. is to prevent sexual assault in all immigration detention centers and ensure that all facilities with immigration detainees are in full compliance with Prison Rape Elimination Act (PREA) standards.⁸⁸

PREA passed in 2003 to provide the resources to prevent the

⁸¹ María Inés Taracena, *Report: Immigration and Customs Enforcement Ignores Detainees' Abuse Allegations, Pretty Much Investigates Itself*, TUCSON WEEKLY (Oct. 23, 2015), <http://www.tucsonweekly.com/TheRange/archives/2015/10/23/report-immigration-and-customs-enforcement-ignores-detainees-abuse-allegations-pretty-much-investigates-itself>.

⁸² Taracena, *supra* note 81.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Sexual Abuse in Immigration Detention Facilities*, ACLU, <https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities> (last visited Apr. 15, 2017).

⁸⁶ *Id.*

⁸⁷ Comm. Against Torture, Conclusions and Recommendations of the Committee against Torture, United States of America, ¶ 32, U.N. Doc. CAT/C/USA/CO/2 (Jul. 25, 2006), available at <http://www.state.gov/documents/organization/133838.pdf>.

⁸⁸ *Concluding Observations*, *supra* note 15.

incidence of and to protect individuals from prison rape.⁸⁹ Initially, the Act applied only to Department of Justice facilities, but in 2012, the Obama administration directed all other agencies and departments with federal confinement facilities to institute regulations that promote the principles of PREA.⁹⁰

1. DHS PREA Rule

Since the Committee's previous recommendations were published, DHS has responded to Obama's directive and released their finalized PREA rule in February 2014.⁹¹ DHS also allocated funds for PREA compliance managers in dedicated ICE facilities⁹² and issued a memorandum regarding the care of transgender detainees.⁹³

As of January 2015, only six detention centers were contractually bound by the DHS PREA Rule.⁹⁴ DHS PREA Rule's preamble states that ICE should have all their facilities fully compliant with the rule within eighteen months of May 2014. By January 2015, only six out of eighty-one facilities were contractually

⁸⁹ *Prison Rape Elimination Act*, NATIONAL PREA RESOURCE CENTER <http://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea>, (last visited Apr. 15, 2017).

⁹⁰ President Barack Obama, *Presidential Memorandum—Implementing the Prison Rape Elimination Act*, THE WHITE HOUSE (May 17, 2012), <https://www.whitehouse.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act>.

⁹¹ *DHS Announces Finalization of Prison Rape Elimination Act Standards*, DEPARTMENT OF HOMELAND SECURITY (Feb. 28, 2014), <https://www.dhs.gov/news/2014/02/28/dhs-announces-finalization-prison-rape-elimination-act-standards>.

⁹² Letter from James D. Adams, Jr., Contracting Officer, to Hal C. Hawes, General Counsel to Williamson County (T Don Hutto) (May 28, 2015), *available at* https://agenda.wilco.org/mindocs/2015/COM/20150616_1158/1100_ICE%20Modification%20Agreement%20for%20PREA%20Standards.pdf.

⁹³ *Further Guidance Regarding the Care of Transgender Detainees*, ICE (Jun. 19, 2015), <https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf>.

⁹⁴ Landy, *supra* note 67.

bound to the DHS PREA rule.⁹⁵ The PREA Rule's language states that the standards set forth in it shall apply to existing contracts when "substantively modified."⁹⁶ The Rule does not mandate that existing contracts are bound to the standards within it.⁹⁷

2. *Sexual Abuse Prevention*

Despite the implementation of the DHS PREA Rule, sexual assault in immigration detention facilities continues to be a major problem. The portion of the Rule pertaining to reporting and investigation of sexual abuse is vaguely written and merely instructs individual facilities to introduce reporting measures for detainees.⁹⁸

Since the Rule does not provide any specific or uniform way for facilities to collect data on sexual abuse reports, there is no reliable, accurate data available on sexual abuse in immigration detention centers. In May 2014, ICE issued a directive in response to the DHS PREA Rule, which mandated the collection of sexual abuse data in detention facilities. However, that data can only be released to the public pending ICE Director approval.⁹⁹ The directive states once the data is approved by the Director, it will be released as an annual report available on the ICE website.¹⁰⁰ A search using the ICE.gov search bar nets no results pertaining to sexual abuse in detention centers.

⁹⁵ See *id.*; *Detention Facility Locator*, ICE, <https://www.ice.gov/detention-facilities?state=All&title=> (last visited Nov. 7, 2016).

⁹⁶ Standards To Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13100, 13101 (Mar. 7, 2014).

⁹⁷ *Id.*

⁹⁸ DHS PREA Rule, 6 C.F.R. § 115.22 (2016).

⁹⁹ ICE Policy No.11062.2: Sexual Abuse and Assault Prevention and Intervention, ICE (May 22, 2014), <https://www.ice.gov/doclib/detention-reform/pdf/saapi2.pdf> [hereinafter *ICE Policy*]

¹⁰⁰ *ICE Policy*, *supra* note 99, at 20.

E. Oversight and Investigations

The Committee's final suggestion for immigration detention was to establish an effective and independent oversight mechanism to ensure adequate investigation into all allegations of violence and abuse in detention centers.¹⁰¹ Detention center oversight is done through audits. The audit structure is complex, confusing and inconsistent. There are two main offices of ICE involved in the annual audits for detention centers holding at least fifty ICE detainees: Enforcement and Removal Operations (ERO) audits and Office of Detention Oversight (ODO) audits.¹⁰² ERO audits rely on several smaller ICE offices and contractors to monitor detention compliance with appropriate PBNDS.¹⁰³ The ODO audits occur on an as-needed basis, usually after ERO audits have identified areas of noncompliance in a facility.¹⁰⁴ Facilities housing less than fifty ICE detainees or any detainee less than seventy-two hours, are subject only to self-assessments.¹⁰⁵

Published audits are not the only form of detention oversight. ICE established the On-site Detention Compliance Oversight Program, which places Detention Service Managers (DSMs) at "major" ICE facilities to oversee compliance with PBNDS in day-to-day operations. As of January 2015, there were DSMs at facilities that housed 80% of immigrants in ICE custody.¹⁰⁶

In February 2016, the Government Accountability Office (GAO) released a report on the management and oversight of medical care in immigration detention facilities. It identified that 99% of the average daily population in FY 2015 was subject to at

¹⁰¹ *Concluding Observations*, *supra* note 16.

¹⁰² *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse*, DETENTION WATCH NETWORK, at 7 (Oct. 2015), http://www.detentionwatchnetwork.org/sites/default/files/reports/Lives%20in%20Peril_NIJC%2C%20DWN.pdf.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Landy, *supra* note 67.

332 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 12]

least two different oversight mechanisms.¹⁰⁷ This report focused exclusively on medical care oversight and not overall compliance, but displays the breadth of the programs used for oversight in immigration detention.¹⁰⁸

Despite the use of auditing and other ICE oversight measures, the Committee's suggestion of "effective" and "independent" oversight has hardly been achieved. Most audits are conducted by either ICE employees or paid employees of a contractor in the private prison industry¹⁰⁹ -- ruining the credibility of auditing process because the auditors have a stake in the outcome.

In 2009, Congress added a provision in the Department of Homeland Security Appropriations Act requiring if a contracted facility fails two consecutive audits they cannot renew their contract with ICE.¹¹⁰ Suspiciously, rates of audit failure dropped significantly after the law was enacted, and no facility has failed twice in a row since.¹¹¹ The sudden halt of audit failures suggests biased auditors prioritized their financial stake in facilities' passing inspection.

Without effective and independent oversight mechanisms, the Committee's suggestion of ensuring adequate investigation of abuse cannot be achieved. This is evidenced by facilities with documented human rights abuses or detainee deaths that have continued to pass inspections and audits.¹¹²

¹⁰⁷ U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-231, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF DETAINEE MEDICAL CARE 24 (2016).

¹⁰⁸ *Id.*

¹⁰⁹ DETENTION WATCH NETWORK, *supra* note 102.

¹¹⁰ Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, 122 Stat. 359.

¹¹¹ DETENTION WATCH NETWORK, *supra* note 102.

¹¹² *Id.*

III. *International and Domestic Law*

The immigration detention policies and practices that do not align with the Committee's suggestions also implicate other domestic and international obligations.¹¹³ The policy of mandatory detention is at odds with the U.S. obligations under the ICCPR.¹¹⁴ Additionally, the use of family detention contradicts a settlement agreement binding on the DHS.¹¹⁵ These violations strengthen the case for why the U.S. should adhere to the Committee's suggestions.

A. *Mandatory Detention*

U.S. policy of mandatory detention raises concerns under treaties other than the Convention Against Torture.¹¹⁶ The International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary detention in Article 9.¹¹⁷ Critics argue that detaining immigrants for months before they can see a judge is nothing more than the type of arbitrary detention prohibited under Article 9.¹¹⁸ In 2007, Jorge Bustamante, the U.N. Special Rapporteur on Human Rights of Migrants, agreed with those critics. In Bustamante's report, the U.S. was not fully compliant with its obligations under the ICCPR because U.S. detention and deportation policies lacked the needed safeguards and case assessment to insure that detention of immigrants was not "arbitrary" under the meaning

¹¹³ See generally *infra* notes 117-125.

¹¹⁴ ICCPR, *supra* note 2, at art. 9.

¹¹⁵ *Migration-Related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-Seekers and Refugees*, AMNESTY INTERNATIONAL (Nov. 2007), at 22-23, <https://www.amnesty.org/en/documents/pol33/005/2007/en/>.

¹¹⁶ Jorge Bustamante (Special Rapporteur on Human Rights of Migrants), *Addendum to Report Mission to the United States of America*, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008).

¹¹⁷ ICCPR, *supra* note 2, at art. 9.

¹¹⁸ *Arbitrary Detention of Asylum Seekers and U.S. Commitments under the International Covenant on Civil and Political Rights (ICCPR)*, HUMAN RIGHTS FIRST (Aug. 2010), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-ICCPR-submission.pdf>.

of Article 9.¹¹⁹

The Human Rights Committee reviewed two cases of asylum-seekers, who were detained under Australia's mandatory detention policy, which mirrors U.S. policy.¹²⁰ The Human Rights Committee concluded in both Australian cases that the detention was arbitrary under Article 9 of ICCPR¹²¹ because decisions to detain must be open for review periodically, and factors such as likelihood of cooperation or absconding should be considered.¹²² Since the U.S. policy of mandatory detention shares the same characteristics of Australia's policy that were found to be arbitrary under Article 9, the U.S. policy also amounts to arbitrary detention, and thus a violation of international obligations under the ICCPR.¹²³

B. Family Detention

The continued use of family detention defies not only the recommendations of the Committee, but also an existing, binding settlement agreement – the Flores Settlement Agreement.¹²⁴ In 1997, a U.S. District Court in California approved a settlement agreement in a class action suit brought by detained minors against the INS.¹²⁵ The Flores Settlement Agreement created guidelines for federal immigration agencies, regarding the release, detention and treatment of children in custody.¹²⁶ The agreement was approved when Immigration and Naturalization Service (INS) oversaw all immigration decisions.¹²⁷ The agreement is now binding on DHS, and the Health and Human Services office of ORR.¹²⁸

¹¹⁹ Bustamante, *supra* note 116.

¹²⁰ AMNESTY INTERNATIONAL, *supra* note 115.

¹²¹ *Id.*

¹²² *Id.*

¹²³ AMNESTY INTERNATIONAL, *supra* note 115.

¹²⁴ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px), (E.D. Cal. 1997).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Flores v. Reno*, *supra* note 124.

¹²⁸ *Flores Settlement Agreement & DHS Custody*, LUTHERAN IMMIGRATION

The Flores Settlement Agreement mandates that DHS release children in custody to reunify them with family or place them in community-based sponsored ATDs *unless* the child is a flight risk or to protect the safety of the child or of others when detention is necessary.¹²⁹ It articulated many other standards for children, and most of the provisions of the agreement have been codified.¹³⁰

The continued use of family detention directly contradicts the Flores Settlement Agreement.¹³¹ As mandated by said agreement, children are routinely detained for more than a 72-hour period when they are placed in family detention with their parent(s). However, children in family detention are not being individually assessed to determine if their detention is necessary for safety.

IV. Conclusion

Almost two years have passed since the Committee issued its recommendations to alter immigration detention; however, the U.S. has not fully complied with any of the five suggestions. This lack of progress can be explained by entrusting public government work to private, for-profit businesses.

A closer look at U.S. immigration detention policy will uncover that the most powerful player in policymaking is not the U.S. government, but the private prison industry. Because they are for-profit, private prison corporations are more concerned with their business interests than adhering to the international obligations of the United States.

The practical implications of the Committee's five suggestions would reduce the need for detention facilities, shrink the DHS budget, and create costs for private prisons by forcing them to implement oversight mechanisms. For these reasons, the private

REFUGEE SERVICES, <https://lirs.org/wp-content/uploads/2014/12/Flores-Family-Detention-Backgrounder-LIRS-WRC-KIND-FINAL1.pdf> (last visited Apr. 15, 2017).

¹²⁹ *Id.*

¹³⁰ *See* Detention and Release of Juveniles, 8 C.F.R. § 236.3 (2016).

¹³¹ Flores v. Reno, *supra* note 124.

336 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 12]

prison industry has done everything possible to prevent adherence to the Committee's Concluding Observations.

Two of the largest private prison corporations in the U.S., Corrections Corporation of America (CCA) and GEO Group, are also recipients of many ICE contracts for detention facilities.¹³² Between 2008 and 2014, CCA spent more than \$10 million dollars on lobbying, including lobbying the DHS Appropriations Subcommittee and immigration detention issues.¹³³ In quarters when CCA lobbied immigration issues, more than 77% of their lobbying expenditures were used.¹³⁴ When combined with GEO Group, more than \$11 million dollars was spent by the private prison industry on immigration-related issues.¹³⁵ In addition to those shocking numbers, CCA¹³⁶ and GEO Group¹³⁷ have both listed in their 10-K filings to the SEC that immigration reform is a threat to business. Taken together, this data shows that corporate greed is at odds with compliance with international law.

Without dismantling the financially symbiotic relationship between private prison contractors and ICE, it is not likely the U.S.

¹³² Matt Stroud, *What Private Prisons Companies Have Done to Diversify in the Face of Sentencing Reform*, BLOOMBERG (May 12, 2015), <https://www.bloomberg.com/news/articles/2015-05-13/what-private-prisons-companies-have-done-to-diversify-in-the-face-of-sentencing-reform>.

¹³³ Bethany Carson and Elena Diaz, *Lobbying: Private Prison Corporations' Shady but Lucrative "Investments"*, GRASSROOTS LEADERSHIP (Apr. 2015), <http://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota#5>.

¹³⁴ Esther Yu Hsi Lee, *Millions Spent Lobbying By Private Prison Corporations To Keep A Quota Of Arrested Immigrants, Report Says*, THINK PROGRESS (Apr. 16, 2015), <https://thinkprogress.org/millions-spent-lobbying-by-private-prison-corporations-to-keep-a-quota-of-arrested-immigrants-report-c68e82916819>.

¹³⁵ *Id.*

¹³⁶ *Corrections Corporation of America Annual Report (Form 10-K)*, U.S. SECURITIES AND EXCHANGE COMMISSION (Feb. 25, 2015), http://www.sec.gov/Archives/edgar/data/1070985/000119312515061839/d853180d10k.htm#fin853180_1

¹³⁷ *The GEO Group, Inc. Annual Report (Form 10-K)*, U.S. SECURITIES AND EXCHANGE COMMISSION (Feb. 25, 2015), at 36, <http://quote.morningstar.com/stockfiling/AnnualReport/2014/12/31/t.aspx?t=XNYS:GEO&ft=10K&d=28a59a1705dea99e02cd90f5c8ae0faf>.

immigration detention policy will ever comply with the Committee's suggestions.

A. Department of Justice Commits to End Use of Private Prisons

In August 2016, the U.S. Department of Justice (DOJ) announced its decision to discontinue the use of private prisons.¹³⁸ Deputy Attorney General Sally Yates directs the Bureau of Prisons (BOP) to start terminating, declining to renew, and narrowing the scope of existing private prisons contracts because they have not proved as efficient as government-run BOP facilities.¹³⁹

The decision by DOJ has no bearing on DHS's use of private detention centers, though it does signal a move in the right direction towards compliance with the Convention. However, even the DOJ's decision was motivated by cost efficiency – the same theory that arguably creates tension between private immigration detention centers and compliance with the Convention.¹⁴⁰

B. Department of Homeland Security's Response

DHS responded to the DOJ memo by forming a subcommittee to review the use of private immigration detention facilities.¹⁴¹ DHS Secretary Jeh Johnson released a short notice on the new subcommittee's tasks.¹⁴² The description of the subcommittee's tasks was vague, but specifically noted "fiscal

¹³⁸ Matt Zaposky & Chico Harlan, *Justice Department says it will end use of private prisons*, THE WASHINGTON POST (Aug. 18, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons/?utm_term=.b5e44e093924.

¹³⁹ Letter from Sally Q. Yates, Deputy Attor. Gen., to Lee Lofthus, Asst. Attor. Gen. (Aug. 18, 2016) (on file with the U.S. Department of Justice), available at <https://www.justice.gov/opa/file/886311/download>.

¹⁴⁰ *Id.*

¹⁴¹ Homeland Security Advisory Council—New Tasking, 81 Fed. Reg. 171, 60713 (Sept. 2, 2016).

¹⁴² *Id.*

338 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 12

considerations” as a topic for the subcommittee to address.¹⁴³

The federal government’s evaluation of the use of private prisons could be the starting point of the path towards compliance with the Convention. But, as long as international obligations take a backseat to “fiscal considerations” in immigration detention, compliance with the Convention remains unlikely.

¹⁴³ *Statement by Secretary Jeh. C. Johnson on Establishing a Review of Privatized Immigration Detention*, DEPARTMENT OF HOMELAND SECURITY (Aug. 29, 2016), <https://www.dhs.gov/news/2016/08/29/statement-secretary-jeh-c-johnson-establishing-review-privatized-immigration>.