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Health Care and Sanitation Rights of Asylum Seekers in United States Immigration Detention: How the United States is in Violation of International Human Rights Law and International Norms

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HEALTH CARE AND SANITATION RIGHTS OF ASYLUM SEEKERS IN UNITED STATES IMMIGRATION DETENTION: HOW THE UNITED STATES IS IN VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL NORMS

*Jari L. Rubio**

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INTRODUCTION

Since its founding, the United States has been a destination for immigrants all over the world to seek a better opportunity. More than 44.7 million immigrants lived in the United States in 2018.¹ However, since January 2017, there have been major policy shifts regarding immigration and refugee law via executive orders, agency memoranda, and changes to existing programs and practice.² This shift includes a historic reduction in refugee admissions, dropping admissions to the lowest level since the passage of the United States Refugee Act in 1980, and an increase in mandatory detention for asylum-seekers.³ Asylum can be sought for a variety of reasons, including economic reasons or escaping persecution and torture.⁴ Under international law, states can establish their own immigration policies and deportation procedures.⁵ However, in establishing these immigration policies, procedures, and practices, states have an obligation to protect the human rights of immigrants, whether detained or not.⁶ Even though detention is supposed to be temporary until a successful claim is processed,

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1. Jeanne Batalova et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Feb. 14, 2020), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states> [https://perma.cc/75FY-E68U].
 2. *See generally* Sarah Pierce & Andrew Selee, *Immigration under Trump: A Review of Policy Shifts in the Year Since the Election*, MIGRATION POL'Y INST. (Dec. 2017), <https://www.migrationpolicy.org/research/immigration-under-trump-review-policy-shifts> [https://perma.cc/TZ9Y-4JFM].
 3. *Id.*
 4. *Refugees, Asylum-Seekers and Migrants*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> [https://perma.cc/B22W-36ND].
 5. *Immigration & Migrants' Rights*, INT'L JUST. RES. CTR., <https://ijrcenter.org/thematic-research-guides/immigration-migrants-rights/> [https://perma.cc/X9EX-BYMX]. Although the norm of non-refoulement is *jus cogens* (non-derogable) in international law. *See* Convention and Protocol Relating to the Status of Refugees art. 33, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; 8 U.S.C. §1231(b)(3)(A).
 6. *See* Convention and Protocol Relating to the Status of Refugees art. 33, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

detention can last for years, resulting in a decline in physical and mental health for those detained.⁷

This paper will focus on how the current U.S immigration detention system violates international treaties, international human rights norms, and due process rights by failing to provide detainees with adequate healthcare and conditions. It is clear that the current U.S. immigration detention system, with its de facto mandatory detention policy, falls short of international human rights standards by subjecting detainees to inhumane conditions, failing to provide adequate medical care, and subjecting detainees to arbitrary detention.⁸ By failing to meet international human rights standards and norms, the U.S. government violates immigrants' rights to human dignity and fair treatment, including the right to be free from torture, and inhumane treatment.

Part I provides an introduction and background to the U.S. immigration detention system. This background will provide a detailed examination of the current detention system, focusing on the history of inadequate healthcare and current conditions of confinement. This paper will also discuss the negative mental health impact on detainees caused by detention through psychological study data. Part II contains a legal framework and examines international treaties, domestic statutory law, and regulations that sets limits on civil detention of immigrants and its processes. Here, international treaties and human rights law from which the international human right to sanitation and access to healthcare is derived, will also be discussed. Part III discusses the conditions of confinement and the extent to which these conditions violate certain provisions of international treaties and violate established domestic regulations for minimum standards for conditions of detention. Part IV examines how the U.S. government can remedy the shortcomings of current healthcare practices and change these practices to no longer be in violation of ratified international treaties.

I. BACKGROUND

A. *Structure of the U.S. Immigration System and Asylum Process*

Refugees, by the definition established in the 1951 United Nations Refugee Convention, are individuals who have fled their home country and are unable or unwilling to return due to fear of persecution based on race, religion, nationality, political opinion, or membership in a

7. Nazish Dholakia, *Witness: A Needless Death in US Immigration Detention: Officials Ignored Suicide Attempt, Mental Health Concerns*, HUM. RTS. WATCH (May 8, 2017), <https://www.hrw.org/news/2017/05/08/witness-needless-death-us-immigration-detention> [perma.cc/67EE-XVGZ].

8. *Id.*

particular social group.⁹ In the U.S., an asylum-seeker is an individual who is physically present in the U.S, applying for the right to remain in the country based on the same fears outlined above, or a limited number of other factors.¹⁰

This paper focuses primarily on individuals going through the defensive asylum process, as those applicants are at risk of detention. Defensive asylum is for individuals who have been apprehended for alleged irregular status and for whom their request for asylum is their defense to removal.¹¹ An individual applies for defensive asylum if the U.S. government has placed him or her in expedited¹² removal (or deportation) proceedings, meaning he or she must attend a court hearing.¹³ The defensive asylum process applies to persons who cross the border of the United States without lawful permission and people who apply for asylum at U.S. borders and points of entry.¹⁴ In 2019, estimates showed that 149,779 defensive asylum applications were filed with the Department of Justice's immigration court system, known as the Executive Office for Immigration Review ("EOIR").¹⁵ According to United States Citizenship and Immigration Services ("USCIS") data, in 2019, only 29% of these petitions were approved, versus 43% approval in 2016, 37% approval in 2017, and 33% approval in 2018.¹⁶

Those who request to apply for asylum—or express a fear of persecution or torture when they make contact with immigration enforcement—are put in the expedited removal procedures, and are

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9. Convention Relating to the Status of Refugees art. 1, Jul. 28, 1951, 189 U.N.T.S. 137, 19 U.S.T. 6259.
 10. 8 U.S.C. § 1101(a)(42). Limited factors include "special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*
 11. PENN STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC ET AL., SELF HELP ASYLUM GUIDE: SEEKING PROTECTION IN THE UNITED STATES 39 (2020).
 12. This piece will be focused on asylum-seekers who are in expedited removal proceedings.
 13. PENN STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC ET AL., *supra* note 11 at 39.
 14. Batalova et al., *supra* note 1.
 15. *Id.*
 16. *Id.*

referred for a credible fear interview with a USCIS asylum officer.¹⁷ At this point, detention of potential asylees is mandatory.¹⁸ If the individual is able to demonstrate to the officer that he or she has a credible fear of persecution or torture, they may no longer be subject to expedited removal, and the individual will have the opportunity to see an Immigration Judge to apply for asylum.¹⁹ It is only at this point that he or she may seek bond or parole.²⁰ If they fail to convince the asylum officer that they have a credible fear of persecution or torture, they may be subject to expedited removal and deported.²¹

If the individual does not pass the interview and is in the expedited removal process, he or she may ask for an Immigration Judge to review the asylum officer's decision.²² This allows the individual one more chance to tell his or her story, this time in front of a judge, often remotely, who will decide if there is a credible fear.²³ If the individual does not appeal the asylum officer's decision, they will be scheduled for deportation.²⁴

After passing the credible fear interview, detention becomes discretionary and the asylum-seeker may be eligible for bond or parole, depending on the method of entry to the U.S.²⁵ This means that he or she may be released from detention while he or she fights the asylum case.²⁶ However, if the individual cannot afford the bond amount, or if a judge believes that the individual might not attend future immigration hearings, or the individual might try to move with the intent of not being found, the government can deny a bond.²⁷ The vast majority of the detained population—71% as of the first month of fiscal year in 2018—were automatically detained without individualized

17. PENN STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC ET AL., *supra* note 12 at 58.

18. 8 U.S.C. §1225(b)(1)(B)(iii)(IV).

19. PENN STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC ET AL., *supra* note 11 at 58.

20. 8 U.S.C. §1225(b)(2)(B)(ii).

21. 8 USC §1225(b)(2)(B)(iii).

22. PENN STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC ET AL., *supra* note 11 at 58.

23. *Id.* at 69.

24. 8 U.S.C. §1125(b)(1)(B)(iii)(I).

25. PENN STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC ET AL., *supra* note 11 at 72.

26. 8 U.S.C. §1226(a)(2).

27. PENN STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC ET AL., *supra* note 11 at 71.

consideration of whether they posed a risk or should be detained.²⁸ ICE itself classified 51% of the detained population in that month as posing “no threat.”²⁹

Detention is mandatory in the expedited removal stage.³⁰ But outside of expedited removal proceedings, the U.S. Department of Homeland Security (“DHS”) has the discretionary authority to detain noncitizens present in the U.S. pending a determination of their immigration status.³¹ Under DHS, there are two agencies responsible for apprehending and detaining noncitizens: Customs and Border Protection (“CBP”), and Immigration and Customs Enforcement (“ICE”).³² CBP apprehends individuals at the U.S. border and ports of entry for suspected criminal activity, unlawful entry into the U.S.—or presence without status—and CBP has the power to put individuals in short-term detention.³³ ICE apprehends individuals in the interior of the U.S., takes custody of some individuals apprehended by CBP at the border, and runs the long-term detention system;³⁴ the agency subcontracts with county jails and private prisons for most of the detention space.³⁵ ICE’s use of privately-owned detention centers has been highly criticized.³⁶ Without the government’s direct involvement, human rights abuses can go unmonitored and be difficult to uncover.³⁷ The privatization model is based on profit maximization, meaning more

28. *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, HUM. RTS. WATCH (June 20, 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration> [perma.cc/WT8V-CYZF].

29. *Id.*

30. 8 U.S.C. §1125(b)(1)(B)(iii)(IV).

31. 8 U.S.C. §1226(a)(2).

32. PENN STATE LAW CTR. FOR IMMIGRANTS’ RTS. CLINIC ET AL., *supra* note 11 at 63.

33. *About CBP*, U.S. CUSTOMS & BORDER PROT. (Nov. 21, 2016), <https://www.cbp.gov/about> [perma.cc/U943-M5FN].

34. AM. IMMIGR. COUNCIL, *SEEKING RELEASE FROM IMMIGR. DETENTION 1* (2019).

35. Lora Adams, *State and Local Governments Opt Out of Immigrant Detention*, CTR. FOR AM. PROGRESS (July 25, 2019, 9:00 AM) <https://www.americanprogress.org/issues/immigration/news/2019/07/25/472535/state-local-governments-opt-immigrant-detention/> [perma.cc/6VJU-QGLV].

36. *Id.*

37. Anna Gorman, *Immigrant Detention Facility is Considered*, L.A. TIMES (Feb. 3, 2009), <https://www.latimes.com/archives/la-xpm-2009-feb-03-me-ladeta3-story.html> [perma.cc/ZW29-UD97].

detainees result in more money for the private companies contracted to operate these facilities.³⁸ An attorney from the American Civil Liberties Union (“ACLU”) stated, “it’s much more expensive to detain people rather than supervise them to ensure that they appear for their removal proceedings and for deportation if necessary.”³⁹

There have been four general “eras” of immigration detention in the United States.⁴⁰ The first era was prior to 1980, when approximately 30 people per day were in immigration detention.⁴¹ The second era, from 1980 to 2002, experienced an increase in immigration detention due to a massive influx of immigrants and a change in policy.⁴² In the third era, 2002 to 2008, former President George W. Bush’s administration formed the DHS and granted it authority over immigration services and enforcement functions.⁴³ During the fourth era, former President Obama’s administration imposed the first national detention bed quota.⁴⁴ The U.S. is currently entering a fifth era, marked by a historically high number of detentions⁴⁵ in the fall of 2016 following the election of President Donald J. Trump.⁴⁶ Under President Trump, there have been dramatic changes in enforcement priorities and calls for increased immigration detention through Executive Orders and implementing memoranda.⁴⁷ Despite the high cost of immigration detention, President Trump has called for expanded enforcement priorities and immigration detention.⁴⁸

38. *Id.*; Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, CTR. FOR AM. PROGRESS (Aug. 30, 2019, 9:02 AM), <https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profiting-trump-administration/> [https://perma.cc/56ER-YD63].

39. Anna Gorman, *Immigrant Detention Facility is Considered*, L.A. TIMES (Feb. 3, 2009, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2009-feb-03-me-ladetain3-story.html> [perma.cc/ZW29-UD97].

40. PENN STATE L. CTR. FOR IMMIGRANTS’ RTS. CLINIC, IMPRISONED JUSTICE: INSIDE TWO GA. IMMIGRANT DET. CTRS.15 (2017) [hereinafter IMPRISONED JUSTICE].

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. See J. RACHEL REYES, IMMIGR. DET.: RECENT TRENDS AND SCHOLARSHIP 16 fig. 2 (2018).

46. IMPRISONED JUSTICE, *supra* note 40.

47. *Id.*

48. *Id.* at 19.

Currently, the US maintains the capacity to hold 34,000 noncitizens in civil detention at any one time via an expansive network of more than 200 facilities including county jails, privately run detention centers, and a handful of federal lockups.⁴⁹ Within this detention network, where mistreatment and medical neglect have been widely documented, roughly 400,000 detainees pass through 32,000 beds each year.⁵⁰ Thus, discretionary detention in the U.S. system continues to greatly increase.

*B. Healthcare and Sanitation Problems Within the United States
Immigration Detention System*

Since 2004, there have been 193 detainee deaths under ICE custody.⁵¹ Over the past decade, there have been many criticisms of the severe lack of medical care and clean conditions within detention centers, with poor healthcare in particular contributing to the death count.⁵² Despite this, little has been done to remedy the inadequate healthcare and conditions. Immigrant detainee deaths as a result of medical neglect have occurred for decades.⁵³ In 2007, ICE left a Guinean detainee, who had a skull fracture, in an isolation cell with no treatment for 13 hours before an ambulance was called, ultimately resulting in his death.⁵⁴

In another case that year, investigators from the DHS's Office of Professional Responsibility concluded that "unbearable, untreated

49. *US: Deaths in Immigration Detention*, HUM. RTS. WATCH (July 7, 2016, 12:00 AM), <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention> [perma.cc/AN92-6WQY].

50. Nina Bernstein, *Immigrant Jail Tests U.S. View of Legal Access*, N.Y. TIMES (Nov. 1, 2009), https://www.nytimes.com/2009/11/02/nyregion/02detain.html?_r=1&scp=1&sq=Immigrant%20Jail%20Test%20U.S.%20View%20of%20Legal%20Access&st=cse [https://perma.cc/4C23-6XH2].

51. Alex Nowrasteh, *8 People Died in Immigration Detention in 2019, 193 Since 2004*, CATO INSTITUTE, (Jan. 8, 2020, 3:05 PM), <https://www.cato.org/blog/8-people-died-immigration-detention-2019-193-2004> [https://perma.cc/M9CG-EUG2].

52. CLARA LONG & GRACE MENG, SYSTEMIC INDIFFERENCE: DANGEROUS & SUBSTANTIAL MEDICAL CARE IN US IMMIGRATION DETENTION 1–2 (2017).

53. *Detention: A Death Sentence?*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/medical-neglect> [https://perma.cc/89VF-N2R6].

54. Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. TIMES (May 5, 2008), <https://www.nytimes.com/2008/05/05/nyregion/05detain.html> [https://perma.cc/Q3XZ-VKZW].

pain” had been a significant factor in the suicide of a 22-year-old detainee at the Bergen County Jail in New Jersey, and that ICE ran the medical unit so poorly that other detainees were at risk.⁵⁵ The investigation further found that jail medical personnel had falsified a medication log to show that the detainee, a Salvadoran man, had been given Motrin.⁵⁶ However, when ICE reportedly administered the medicine, the man was already dead.⁵⁷ Further, from 1998 to 2014, at least seven immigrants committed suicide in immigrant-only contract prisons.⁵⁸

More recently, interviews with detained immigrants at the Stewart Detention Center and at the Irwin County Detention Center in Georgia revealed a plethora of inadequate hygienic conditions and a severe lack of medical care.⁵⁹ Upon admission to Stewart, the Detention Center provides detained immigrants basic hygiene products and clothing.⁶⁰ However, after receiving the initial items, some immigrants reported having their requests for refills on toiletries, undergarments, and toilet paper ignored.⁶¹ The food and water conditions, reported by both detainees and attorneys, were alarming; food was reported to be spoiled, rancid, expired, and sometimes contained foreign objects such as “hair, plastic, bugs, and rocks.”⁶² A Honduran immigrant detainee stated that “the food is rancid,” and that he lost 70 pounds since being detained at Stewart.⁶³ He further explained that he “found a worm in the ground beef once. On top of all of that, the water smells like feces and the showers are covered in mold.”⁶⁴ Further, detainees with dietary restrictions, some due to medical needs such as diabetes, received the

55. William Fisher, *PLN Associate Editor Quoted in TruthOut Article on Private Prisons*, PRISON LEGAL NEWS (July 1, 2011), <https://www.prisonlegalnews.org/in-the-news/2011/pln-associate-editor-quoted-in-truthout-article-on-private-prisons/> [https://perma.cc/XK25-7DGU].

56. *Id.*

57. *Id.*

58. Seth Freed Wessler, *This Man Will Almost Certainly Die*, THE NATION (Jan. 28, 2016), <http://www.thenation.com/article/privatized-immigrant-prison-deaths> [https://perma.cc/A8H2-5C35].

59. IMPRISONED JUSTICE, *supra* note 40, at 33–36.

60. *Id.* at 33.

61. *Id.*

62. *Id.* at 31.

63. *Id.*

64. *Id.*

same meal as other immigrants.⁶⁵ The water was also unclean.⁶⁶ The water was described as “green, non-potable, smelling of feces, or completely shut off.”⁶⁷ Some detainees reported getting rashes from showering.⁶⁸ This combination of poor food quality and quantity, lack of clean water, and unhygienic conditions creates an environment where bacteria can flourish, causing detained immigrants to develop health issues.⁶⁹

Medical care in the facilities is also inadequate. In 2012, ICE specifically found Stewart’s medical care to be inadequate.⁷⁰ However, care continues to be inadequate.⁷¹ ICE requires there to be a physical exam of every detained immigrant within fourteen days of arrival.⁷² While most of the detained immigrants reported receiving an initial check-up, some report having medical conditions that have not been adequately addressed.⁷³ Despite ICE’s official requirements for care, many detained immigrants claimed that pain killers, particularly ibuprofen, were prescribed when physical exams or other medical care was medically required.⁷⁴ For example, ibuprofen was prescribed when the detainee required a bandage, and then also prescribed for broken bones.⁷⁵ Detained immigrants also report issues with the amount of time it takes to receive medical care and to see an actual doctor.⁷⁶ One man reported that it may take up to six months before detained immigrants see a doctor, and that his last consultation with a doctor was conducted by video conference.⁷⁷

In addition to inadequate general medical care, mental healthcare is severely lacking in detention facilities.⁷⁸ Mental health services are either not provided or are severely inadequate. The denial of mental healthcare has led to mental instability, the exacerbation of already-

65. *Id.* at 32.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 33.

70. *Id.* at 35.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 35–36.

77. *Id.* at 36.

78. *Id.*

present mental illness in detainees, and in some cases, suicide attempts.⁷⁹ For instance, researchers found high rates of clinical depression, post-traumatic stress disorder (“PTSD”), and anxiety disorders among detained immigrant children.⁸⁰ More importantly, the mental stress inflicted on asylum-seekers from detainment subsequently impacts effective legal representation and the success of a credible fear claim. According to multiple psychology studies, asylum-seekers held in detention experience high mental distress and symptoms of PTSD.⁸¹ PTSD symptoms include distressing nightmares and flashbacks, and avoidance behavior (such as avoiding people, places, or thoughts that relate to the trauma).⁸²

In addition to the suffering that asylum-seekers may experience in detention, such mental suffering may also impact their asylum claims. PTSD symptoms include an inability to remember specific details of the traumatic event (described as *dissociative amnesia*) and a distorted understanding of the causes of a traumatic event (sometimes leading the individual to inappropriately blame themselves).⁸³ Survivors of sexual violence, physical assaults, and kidnappings are at risk for PTSD, as well as individuals with direct exposure to death, widespread violence, or war zones.⁸⁴ Refugees and asylum-seekers, who flee these circumstances, unsurprisingly exhibit a very high rate of PTSD.⁸⁵

In addition to difficulties with remembering information, PTSD sufferers have difficulties with the structure of memories.⁸⁶ The traumatic experience can be cognitively organized on an implicit and perceptual level, rather than in a neat narrative structure expected by an asylum interviewer.⁸⁷ Stories may be told in a fractured and disjointed manner, both logically and chronologically.⁸⁸ Studies have found that the trauma narratives presented by PTSD patients are consistently rated as more disorganized than both the non-trauma

79. *Id.*

80. Sarah McLean et al., *Mental Health of Children Held at a United States Immigration Detention Center*, SOC. SCI. & MED. (2019).

81. *See, e.g.*, Ben McVane, *PTSD in Asylum-Seekers: Manifestations and Relevance to the Asylum Process*, 284 PSYCHIATRY RSCH. 1, 1 (2020).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 2.

87. *Id.*

88. *Id.*

narratives of these same patients or the trauma narratives of individuals without PTSD.⁸⁹

According to a systemic review by Ben McVane, a medical doctor at Elmhurst Hospital Center, during the credible fear interview, PTSD symptoms can become problematic.⁹⁰ In fact, the very process of seeking asylum may also contribute to the asylum-seekers' psychological distress, as survivors are required to participate in potentially retraumatizing asylum interviews or adversarial immigration hearings.⁹¹ The initial credible fear interview statements are later referenced against subsequent statements or testimonies, and any deviation is considered a strike against the claim.⁹² This method poses a significant challenge for the PTSD-afflicted recollection process. Compounding the above problems, statements and testimonies are elicited throughout the asylum process in an adversarial manner, under challenging circumstances by CBP personnel who are minimally trained in trauma and its symptoms.⁹³ This is especially problematic for asylum seekers who are already highly anxious from being in detention and who suffer from PTSD.⁹⁴ The dissociative amnesia that can occur from PTSD can prevent the asylum seeker from remembering necessary details from a prior traumatic event during the interview.⁹⁵ Without proper training and knowledge of how the human brain responds to trauma, this lack of detail may be misinterpreted as fabrication in the asylum-seeking process.⁹⁶ These findings are significant as they show that the mental health of the detainee can play a large role in the success or failure of their asylum claim. Detention has also had negative effects on children's mental and physical development, resulting in anxiety, depression, and long-term cognitive damage.⁹⁷ Because these negative mental health effects are present and then exacerbated when a person is held in detention, the asylum-seeker's claim is potentially harmed, and the asylum-seeker could be deported back to the dangerous environment in their home country.

89. *Id.*

90. *Id.* at 1.

91. Sarah McLean et al., *supra* note 80, at 304.

92. 8 U.S.C. § 1158(b)(1)(B)(iii).

93. McVane, *supra* note 81, at 1–2.

94. *Id.* at 2.

95. *Id.*

96. *Id.*

97. Kalina Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 500 (2014).

II. LEGAL BACKGROUND

A. *International Law Background*

This section will first discuss the non-binding resolutions and international treaties, not ratified by the United States, which create a right to sanitation and health. Then, this section will discuss the international human rights treaties the United States has ratified that disallow the current conditions of detention. Sub-section 2 will address the International Covenant on Civil and Political Rights. Sub-section 3 will discuss the Protocol Relating to the Status of Refugees. Finally, sub-section 4 will discuss the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Convention against Torture” or “CAT”).

1. The International Human Right to Sanitation and Healthcare as emerging customary law

Article 25 of the Universal Declaration of Human Rights declares that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family . . . including medical care.”⁹⁸ This was the first recognition of the right to health as a customary norm.⁹⁹ The U.N. also defined the right to sanitation as the right for all people to have “physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, and socially and culturally acceptable and that provides privacy and ensures dignity.”¹⁰⁰ The human right to water and sanitation was first recognized as a human right by the United Nations General Assembly (“UNGA”) in 2010.¹⁰¹ Later, a 2015 UNGA resolution recognized the two rights as separate but equal.¹⁰² The 2015 resolution states, “that the human rights to safe drinking water and sanitation are derived from the right to an adequate standard of living and are inextricably related to the right to the highest attainable standard of physical and mental health, as well as to the right to life and human dignity.”¹⁰³

98. G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

99. Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156, 1156 (2005).

100. U.N. Water, *Human Rights to Water and Sanitation*, UNITED NATIONS, <https://www.unwater.org/water-facts/human-rights> [<https://perma.cc/89AM-MRGM>].

101. *Id.*

102. G.A. Res. 70/169 (Dec. 17, 2015). (“Acknowledging the importance of equal access to safe drinking water and sanitation as an integral component of the realization of all human rights.”)

103. *Id.*

The International Bill of Human Rights does not explicitly recognize a right to sanitation, however, international treaties have enumerated a right to health.¹⁰⁴ The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) enumerates a right to the access to healthcare for women.¹⁰⁵ Article 12 of CEDAW provides that, “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services”¹⁰⁶ The preamble of CEDAW recognizes that, “human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.”¹⁰⁷ CEDAW does not create new rights for women exclusively, but instead attempts to eliminate a discrepancy in the enjoyment of existing rights for women.¹⁰⁸ This helps us understand that Article 12 comes from an already existing foundation of implicit right to healthcare and access to healthcare, in order for women to equally enjoy the right to access healthcare. Article 24 of the Convention on the Rights of the Child also enumerates a right to health.¹⁰⁹ Article 24 states that children have a right “to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”¹¹⁰ Within Article 24, the right to clean water, adequate food, and hygienic and environmental sanitation are specifically mentioned.¹¹¹

Underscoring the right to sanitation and health is the notion of human dignity. In fact, the preamble of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)¹¹² recognizes that all human rights derive from the inherent dignity of the human

104. OFF. U.N. HIGH COMM’R HUM. RTS, THE RIGHT TO WATER, FACT SHEET NO. 34 5–6 (2010).

105. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women, at art. 12 (Dec. 18, 1979).

106. *Id.*

107. *Id.* at pmb1.

108. *Id.* at art. 1.

109. G.A. Res. 44/25, Convention on the Rights of the Child, at art. 24(1) (Nov. 20, 1989).

110. *Id.*

111. *Id.* at 24(2)(c).

112. The U.S. has not ratified the International Covenant on Economic, Social and Cultural Rights. Marsha F. Davis, *Bringing It Home: Human Rights Treaties and Economic, Social, and Cultural Rights in the United States*, 41 A.B.A. (2015).

person.¹¹³ Despite this centrality, there is no consensus on a definition of “human dignity” in human rights law.¹¹⁴ A deprivation of basic needs and the inability to be physically clean can be a source of humiliation, shame, and insecurity.¹¹⁵ This close link between human dignity and sanitation further reinforces the interpretation that the right to sanitation is an implicit component of the right to an adequate standard of living. The U.S. has not ratified the ICESCR, CEDAW, or the Convention on the Rights of a Child.¹¹⁶ However, it is clear that international human rights law and international treaties have recognized the right to sanitation.

The U.S. has signed and ratified some international human rights treaties.¹¹⁷ Upon ratification, the treaty language becomes “the supreme law of the land” under the Supremacy Clause of the U.S. Constitution—meaning that ratified treaties are as binding as domestic federal law.¹¹⁸ The United States Supreme Court reaffirmed the United States’ obligations to international law in *The Paquete Habana*, holding that “international law is part of U.S. law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”¹¹⁹ The Supreme Court further stated that,

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.¹²⁰

This paper will discuss the U.S.’s obligations under the signed and ratified International Covenant on Civil and Political Rights

113. G.A. Res. 2200A (XXI), at pmb. (Dec. 16, 1966).

114. Pawel Lukow, *A Difficult Legacy: Human Dignity as the Founding Value of Human Rights*, 19 HUM. RTS. REV. 313, 313 (2018).

115. KERN MASSEY, INSECURITY AND SHAME 8 (2011).

116. Davis, *supra* note 112.

117. *Treaty Ratification*, ACLU, <https://www.aclu.org/issues/human-rights/treaty-ratification> [<https://perma.cc/UT7C-AEZV>].

118. U.S. CONST. art. VI, cl 2.

119. *The Paquete Habana*, 175 U.S. 677, 700, (1900).

120. *Id.*

(“ICCPR”),¹²¹ the Convention and Protocol Relating to the Statue of Refugees,¹²² and the Convention Against Torture.¹²³

2. Obligations Under the International Covenant on Civil and Political Rights

The United States ratified the ICCPR in 1992.¹²⁴ The ICCPR outlines fundamental civil and political rights, including the right to be free from torture, the right to life and human dignity, and the right to be free from arbitrary detention.¹²⁵ These fundamental rights apply to all individuals as they “derive from the inherent dignity of the human person.”¹²⁶ Because the ICCPR has the same binding authority of federal law, the United States is obligated to adhere to its language.¹²⁷ The ICCPR applies to all government entities and agents, which includes all state and local governments in the United States.¹²⁸ It also applies to private contractors who carry out governmental actions.¹²⁹ Article 4 of the ICCPR provides that, “no derogation from articles 6, 7, 8, 11, 15, 16, and 18 may be made” even in the event of a public emergency “which threatens the life of the nation.”¹³⁰ Article 7 of the ICCPR codifies the right to be free from “torture or to cruel, inhuman or degrading treatment or punishment.”¹³¹ Because Article 7 is non-derogable, the United States must honor the norm of humane treatment at all times.¹³² Article 10 further provides that, “all persons deprived of

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

122. *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNHCR, <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html> [https://perma.cc/4XAC-B9Q7]. The U.S. is a party only to the 1967 Protocol.

123. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 3 I.L.M. 1027, 1465 U.N.T.S. 85.

124. See ICCPR, *supra* note 121.

125. ICCPR, *supra* note 121, at art. 3, 6, 7, 9, 10.

126. *Id.* at pmb1.

127. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/other/faq-covenant-civil-political-rights-icpr> [https://perma.cc/E7GG-4AGB].

128. *Id.*

129. *Id.*

130. ICCPR, *supra* note 121, at art. 4(2).

131. *Id.* art. 7.

132. *Id.* art. 4(2).

their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹³³

3. Obligations under the Convention and Protocol Relating to the Status of Refugees

The United States is also a party to the Protocol Relating to the Status of Refugees (“Protocol”), and by incorporation by reference, bound to provisions of the 1951 Convention Relating to the Status of Refugees (“Convention”).¹³⁴ Whereas the Convention restricted refugee status to those whose circumstances had come about “as a result of events occurring before 1 January 1951”¹³⁵ and primarily to European refugees, the Protocol removed both temporal and geographic restrictions but otherwise incorporated all the other substantive provisions of the Convention.¹³⁶ Under Article 16 of the Convention, a refugee is to enjoy free access to the courts and is to enjoy the same treatment as a state citizen in matters pertaining access to the courts.¹³⁷ Article 31 additionally states that contracting States cannot impose penalties on refugees who enter illegally, or without authorization, directly from “a territory where their life or freedom was threatened in the sense of Article 1 . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”¹³⁸

4. Obligations under the Convention Against Torture

The U.S. signed and ratified the Convention Against Torture.¹³⁹ Article 1 of CAT enumerates the definition of torture, which is,

an act by which severe pain of suffering, whether physical or mental, is intentionally inflicted of a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed . . . when such pain or

133. *Id.* art. 10(1).

134. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

135. Convention Relating to the Status of Refugees, Jul. 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter, Refugee Convention].

136. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

137. *See* Refugee Convention, *supra* note 135, at art. 1.

138. *Id.* at art. 31.

139. *See generally* MICHAEL JOHN GARCIA, CONG. RSCH. SERV., THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS (2009).

suffering is inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity.¹⁴⁰

Article 2 further declares that the state must “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” and that no exceptional circumstances may be invoked as a justification for torture.¹⁴¹ Article 12 of CAT states that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”¹⁴² Additionally, Article 13 states that “[e]ach State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities.”¹⁴³ Under Article 16, each State must

undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment—which do not amount to torture as defined in Article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁴⁴

B. *Domestic Law Background*

The Immigration and Nationality Act is the statutory structure for how the United States admits asylum-seekers.¹⁴⁵ However, it is silent on conditions of detention.¹⁴⁶ Other domestic law includes executive orders and internal agency regulations.¹⁴⁷ Despite this, there are

140. Convention Against Torture, *supra* note 123, at art. 1.

141. *Id.* at art. 2.

142. *Id.* at art. 12.

143. *Id.* at art. 13.

144. *Id.* at art. 16.

145. *See generally* 8 U.S.C. §1158.

146. The INA will not be discussed at length here, as it was discussed above in the “Structure of the U.S. Immigration System and Asylum Process” section of the Background. *See generally* 8 U.S.C. §1101.

147. *See, e.g.*, Exec. Order No. 13768, 82 C.F.R. 8799 (2017); *see also* Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches, 85 Fed. Reg. 45,968 (July 31, 2020) (to be codified at 8 C.F.R. pt. 103).

currently no formally binding regulations or statutory laws governing the standards of care at ICE detention facilities.¹⁴⁸

Recently, there has been a weakening of health standards for ICE detention facilities.¹⁴⁹ ICE currently uses three sets of detention standards that serve as guidance.¹⁵⁰ ICE does not require contractors to adopt the most recent standards when it enters into new contracts or contract extensions.¹⁵¹ This has resulted in a “patchwork” system, as facilities are subject to differing standards and some are not subject to standards at all.¹⁵²

These standards include three different variations of the National Detention Standards for Non-Dedicated Facilities (“NDS”).¹⁵³ The NDS governs the treatment of immigrant detainees held in almost 140 facilities in 44 states.¹⁵⁴ According to the ACLU, the new 2019 version no longer requires ICE facilities governed by the NDS to maintain current accreditation with the National Commission on Correctional Health Care (“NCCHC”).¹⁵⁵ The new version also no longer prohibits the use of “hog-tying, fetal restraints, [or] tight restraints” on detainees.¹⁵⁶

Although ICE has been criticized for inadequate medical and mental health staffing, the new NDS no longer requires healthcare and medical facilities at these jails to be under the direction of a licensed physician, but instead it is sufficient for supervision to be provided by

148. Haddy Gassama et al., *A Guide for Members of Congress Visiting ICE Jails*, NAT’L IMMIGR. JUST. CTR. (May 22, 2019), <https://www.immigrantjustice.org/research-items/toolkit-immigration-detention-oversight-and-accountability> [https://perma.cc/XSS3-DZPT].

149. Eunice Cho, *The Trump Administration Weakens Standards for ICE Detention Facilities*, AM. C.L. UNION (Jan. 14, 2020), <https://www.aclu.org/news/immigrants-rights/the-trump-administration-weakens-standards-for-ice-detention-facilities> [https://perma.cc/W4NM-QNLV].

150. Gassama et al., *supra* note 148.

151. *Id.*

152. *Id.*

153. *See* Gassama et al., *supra* note 148; *see also* *National Detention Standards for Non-Dedicated Facilities*, U.S. IMMIGR. & CUSTOMS ENF’T (2019), <https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf> [https://perma.cc/A6HT-W7DZ] [hereinafter, *National Detention Standards*].

154. Cho, *supra* note 149.

155. *Id.*

156. *Id.*

a “Health Services Administrator.”¹⁵⁷ Additionally, ICE also eliminated standards that help to preserve detainees’ basic dignity.¹⁵⁸ For instance, ICE no longer requires that hold rooms have toilets with modesty panels and removed the ratios for the number of detainees per toilet.¹⁵⁹ ICE has also removed language requiring that new contract facilities have outdoor recreation facilities, meaning that more detainees could be held for years without time outdoors as they wait for their cases to be processed.¹⁶⁰

ICE describes its revisions as a set of “streamlined,” and “updated, modernized standards.”¹⁶¹ In contrast, the new NDS weakens critical protections and lowers oversight requirements, which could have disastrous consequences for the health and safety of thousands of people in immigration detention.¹⁶² ICE’s own Civil Rights and Civil Liberties Office noted that ICE has “systematically provided inadequate medical and mental healthcare and oversight to immigration detainees in facilities throughout the U.S.”¹⁶³

III. ANALYSIS: US DETENTION PRACTICES ARE IN VIOLATION OF RATIFIED HUMAN RIGHTS TREATIES

By neglecting medical care and allowing unsanitary conditions, the U.S. is not only contributing to inhumane treatment and deprivation of due process, but also contributing to behavior that rises to the level of mental torture. These practices are in violation of the U.S.’s obligations under the ICCPR, the CAT, and the Refugee Protocol.¹⁶⁴

ICE has done little to address the negligence in medical care resulting in deaths of asylum-seekers in detention in the U.S. This clear mistreatment is violative of Article 7 of the ICCPR, which prohibits inhumane and degrading treatment.¹⁶⁵ 193 deaths since 2004 shows that ICE has not implemented enough safeguards to remedy medical

157. *National Detention Standards*, *supra* note 153.

158. Cho, *supra* note 149.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. See INT’L L. ASS’N (AM. BRANCH) TASK FORCE ON IMMIGRANT HUM. RTS. & WOMEN’S RTS. ET AL., U.S. COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS 4-5 (2019).

165. ICCPR, *supra* note 121, at. art. 7.

negligence.¹⁶⁶ By depriving detainees of the ability to be clean and denying minimal bathroom privacies, ICE deprives detainees of their inherent dignity as human beings. These deprivations cause shame, humiliation and degradation to individuals in ICE custody.

ICE's practices also violate Article 16 of CAT: the prohibition on cruel, inhuman or degrading treatment or punishment.¹⁶⁷ The CAT Article 1 definition of torture includes the infliction, by or with the consent with the consent of a public official or other person acting in an official capacity, of mental suffering.¹⁶⁸ The definition also requires that the torture be intentional and done to punish the individual for an act he or a third party committed or is suspected of having committed.¹⁶⁹ ICE's practices meet the CAT's definition as it is apparent that the lack of healthcare and unsanitary conditions are being used to punish detainees for either coming to the U.S. or to deter other asylum-seekers by making immigration detention so abhorrent that no one will want to seek refuge in the U.S. The acts of making immigration detention conditions so repugnant in order to make asylum-seekers regret coming to the U.S., and to deter others, satisfy the formerly mentioned requirements of the definition of torture. It is also arguable that, when ICE neglects an individual in such severe physical pain and that individual commits suicide to alleviate the physical pain, it is both mental and physical torture under the definition in Article 1.¹⁷⁰

Numerous governmental officials have argued that current detention practices are necessary to deter migration from Latin American countries.¹⁷¹ As a party to the CAT, the U.S. has an obligation to prevent abuses in government custody.¹⁷² Under Article 2, "no exceptional circumstances may be invoked as a justification for

166. See Nowrasteh, *supra* note 51.

167. Convention Against Torture, *supra* note 123, at art. 16.

168. *Id.* at art. 1.

169. *Id.*

170. See generally Office of the High Commissioner for Human Rights, Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies (2010), https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf [<https://perma.cc/6RMX-598Y>].

171. DETENTION WATCH NETWORK, ENDING THE USE OF IMMIGRATION DETENTION TO DETER MIGRATION 1 (Apr. 2015), <https://www.detentionwatchnetwork.org/pressroom/reports> (scroll down and select the "Ending the Use of Immigration Detention to Deter Migration" link) [<https://perma.cc/FJH9-PVYM>].

172. Convention Against Torture, *supra* note 123, at art. 9–10.

torture.”¹⁷³ Therefore, a perceived “border crisis” legally cannot be used as an excuse to mistreat asylum-seekers as a means of deterrence to future asylum-seekers. In fact, there is “no empirical evidence that the threat of [detainment] deters irregular migration or discourages people from seeking asylum,” thus making the “deterrent practices” void, unnecessary, and an illegal justification for torture.¹⁷⁴

Opponents may argue that the definition in Article 1 also states that torture does not include “pain or suffering arising only from, inherent in or incidental to lawful sanctions,” and because immigration detention is a lawful sanction, this does not constitute torture.¹⁷⁵ However, as seen in the Stewart Detention Center and others, facility practices are not even adhering to the National Detention Standards and are thus not meeting ICE-mandated standards.¹⁷⁶ Therefore, the facility conditions are not lawful and not protected under this exception.

Article 16 of the CAT requires States to prevent cruel, inhuman or degrading treatment or punishment—which do not amount to torture as defined in Article 1, when such acts are committed by or with the consent of a public official or other person acting in an official capacity.¹⁷⁷ Thus, even if severe medical neglect and substandard sanitary conditions do not meet the Article 1 standard, the U.S. is still obligated by international law to prevent the cruel and degrading treatment of asylum-seekers by ICE, which is acting in an official capacity for the United States.¹⁷⁸

Further, it can be argued that by severely failing to provide for basic needs, ICE is effectively hindering asylum hearings and thus depriving detainees of their right to due process and fair court access. Not only are mental stress and trauma inflicted by detention practices violative of CAT, but they also violate Article 16 of the Protocol—fair

173. *Id.* at art. 2.

174. Vivian Tan, *UNHCR Urges States to Avoid Detaining Asylum-Seekers*, U.N. HIGH COMM’R FOR REFUGEES (May 12, 2011) (quoting Erika Feller, the UNHCR’s Assistant High Commissioner for Protection), <https://www.unhcr.org/4dcbef476.html> [<https://perma.cc/TB9N-Z452>].

175. Convention Against Torture, *supra* note 123, at art. 1; see also CONG. RSCH. SERV., IMMIGRATION DETENTION: A LEGAL OVERVIEW 31 (2019).

176. See generally OFF. OF INSPECTOR GEN., HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (2017).

177. Convention Against Torture, *supra* note 124, at art. 16.

178. Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

access to the courts.¹⁷⁹ By exacerbating symptoms of PTSD, as found in the aforementioned psychological studies, U.S. immigration officials are effectively hindering the asylum-process and the right to apply for asylum. The psychological studies found that the mental impacts of custody have an effect on hearings and the asylum process success.¹⁸⁰ If a detainee is unable to form a linear narrative due to trauma, then they effectively cannot apply for asylum.

These numerous violations of international law, which holds the same authority as federal law,¹⁸¹ work to delegitimize the U.S.'s authority by displaying an intentional disregard for legal commitment.

IV. REMEDIES TO THE LACK OF ADEQUATE HEALTHCARE

There are various ways to remedy the severe lack of healthcare and sanitation within the U.S. immigration detention system. First, the federal government can implement more thorough investigations and stricter rules on detention centers to prevent medical negligence. Second, if resources cannot be better allocated, lowering rates of detention¹⁸² and using alternative methods to detention will ease stress on the medical care system.

A. *Implementation of a codified standard of care and more accountability for detention center negligence*

The most ideal way to curb human rights abuses would be a uniform standard of care for public and privately-owned detention centers codified in statutory law. This way, there are no discrepancies in detention conditions. Further, there must be a remedy in this statutory scheme in order to keep personnel accountable and to ensure adherence to the law. A codified standard of care and subsequent enforcement would also satisfy Article 2 of the Convention Against Torture.¹⁸³

Advocates have suggested stronger Congressional oversight and unannounced Congressional visits to detention centers.¹⁸⁴ This is because announced visits allow ICE and the facilities to temporarily

179. Convention Relating to the Status of Refugees, art. 16, Jul. 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

180. Rachel Kronick, *Mental Health of Refugees and Asylum Seekers: Assessment and Intervention*, 63(5) CAN. J. PSYCHIATRY 290, 291 (2017).

181. See U.S. CONST. art. VI. See also *The Paquete Habana*, 175 U.S. 677, 700 (1900).

182. 8 U.S.C. § 1226(a)(2) authorizes the possibility of bond/parole for asylees who have passed their credible-fear interview.

183. Convention Against Torture, *supra* note 123, at art. 2.

184. Gassama et al., *supra* note 148.

remedy visible harmful conditions.¹⁸⁵ Immigrants in detention frequently report that during the day of a visit by a Congressional member, the facility conditions including food service, and access to medical care, significantly improve.¹⁸⁶ ICE field staff has explained to the DHS Office of the Inspector General that announced inspections “allow facility management to temporarily modify practices to ‘pass’ an inspection.”¹⁸⁷ Unannounced visits will allow for an accurate and unhampered view of what occurs inside detention centers.¹⁸⁸ Congress should also act to curtail human rights abuses by obligating ICE to decrease rather than expand detention, and by monitoring and engaging in strong oversight through frequent information requests, hearings, and investigations.¹⁸⁹ “States and localities have a role to play as well by declining to contract with detention facilities in their jurisdictions, and [by] creating state and local monitoring programs to expose abuse in detention and provide accountability.”¹⁹⁰

The Office of the Inspector General, after an investigation into “concerning” conditions, recommended that, “the Acting Director of U.S. Immigration and Customs Enforcement ensure that Enforcement and Removal Operations field offices that oversee the detention facilities” improve “ICE’s oversight of detention facility management and operations.”¹⁹¹

Additionally, in order to further curb mental trauma on detainees and the inhibition of due process, ICE officials must be given sensitivity training and basic psychology training to better understand how mental trauma effects a person’s credible fear claim and how to mitigate these effects.

B. More utilization of alternatives to detention will ease strain on the medical care systems in detention centers and decrease inhumane treatment of detained individuals.

If higher accountability and stringency cannot be implemented, it is possible to lessen the use of detention, which would then take the strain off medical resources.¹⁹² A wide variety of alternatives to detention have long existed as an option the government could use,

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. HUM. RTS. WATCH, *supra* note 28.

190. *Id.*

191. OFF. OF INSPECTOR GEN., *supra* note 176.

192. 8 U.S.C. § 1226(a)(2).

rather than mass detention.¹⁹³ Advocates have called for greater use of Alternatives to Detention Programs (“ATD”).¹⁹⁴ The ATD monitors lower-risk noncitizens in a non-detention method through intensive supervision or electronic monitoring.¹⁹⁵ These methods can include parole, release on own recognizance, bond, check-ins at ICE offices, home visits and check-ins, telephonic monitoring, and GPS monitoring through an electronic ankle bracelet.¹⁹⁶

Not only are ATD’s much more cost-efficient than mass detention, but they are also very effective at ensuring compliance.¹⁹⁷ With regard to cost, DHS estimated in its Congressional Budget Justification for fiscal year (“FY”) 2018 that it costs the taxpayers \$133.99 per day to hold an adult immigrant in detention and \$319.37 for an individual in family detention.¹⁹⁸ In FY 2018, DHS estimated that the average cost per ATD participant was about \$4.16 per day.¹⁹⁹ In 2014, a Government Accountability Office (“GAO”) report calculated that the daily rate of ATD was less than 7% of that of detention.²⁰⁰

Although participants may be enrolled in ATD for a longer period of time due to court delays when they are not detained, [the] GAO found that an individual would have . . . to be on ATD for 1,229 days before time on ATD and time in detention cost the same amount.²⁰¹

193. *The Real Alternatives to Detention*, NAT’L IMMIGRANT JUST. CTR., <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf> [https://perma.cc/8J8S-MU76]

194. *Id.*

195. *See Alternatives to Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/alternatives> [https://perma.cc/F2X5-JQRG].

196. NAT’L IMMIGRANT JUST. CTR., *supra* note 193.

197. *Id.*

198. DEP’T HOMELAND SEC., *U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW* 14 (2018); Ruthie Epstein, *The Tried-and-True Alternatives to Detaining Immigrant Families*, ACLU (June 22, 2018, 4:30 PM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/tried-and-true-alternatives-detaining> [https://perma.cc/YZT7-SW7S].

199. AUDREY SINGER, CONG. RSCH. SERV., *IMMIGRATION: ALTERNATIVES TO DETENTION (ATD)* 15 (2019).

200. U.S. GOV’T ACCOUNTABILITY OFF., *ALTERNATIVES TO DETENTION*, 35 (2014).

201. NAT’L IMMIGRANT JUST. CTR., *supra* note 193.

With regard to compliance, ICE's current ATD and many community supported programs have had extremely high rates of compliance with immigration check-ins, hearings, and even removal.²⁰² Over 95% of those on "full-service" ATDs (which include case management) were found to appear for their final hearings.²⁰³ Data from Contract Year 2013 from Behavioral Interventions,²⁰⁴ the private contractor who operates some of the government's ATD programming, showed a 99.6% appearance rate at immigration court hearings for those enrolled in its "Full Service" program and a 79.4% compliance rates with removal orders for the same population.²⁰⁵

Community support programs, which are not funded by ICE, provide case management and referrals to legal and social services providers for non-detained individuals.²⁰⁶ Studies have shown that this support helps people understand their legal obligations and improves court appearance rates and compliance with final case outcomes, while minimizing negative mental and physical health effects, and damages to families and communities caused by institutional detention.²⁰⁷ Additionally, legal representation is a strong indicator of compliance with court dates.²⁰⁸ Finally, the use of ATD greatly reduces mental stress and trauma on asylum-seekers, thereby ensuring a more fair immigration process and satisfying Article 16 of the Convention.²⁰⁹

Releasing individuals who exhibit no public safety risks allows them the opportunity to obtain legal counsel to navigate the difficult immigration process while receiving support from family members in the community. It also promotes family unity by allowing parents to care for their children.²¹⁰

202. *Id.*

203. *Id.*

204. Behavioral Interventions is a for-profit firm owned by the private prison company GEO Group.

205. Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock Up, AM. CIV. LIBERTIES UNION 2, <https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-atd> [<https://perma.cc/XL97-W9RY>].

206. NAT'L IMMIGRANT JUST. CTR., *supra* note 193.

207. *Id.*

208. *Id.*

209. The Convention Relating to the Status of Refugees, art. 16, Apr. 22, 1954, 189 U.N.T.S 137 (ensures refugees free access to the courts).

210. *Id.*

It is recommended that ICE screen every apprehended individual to establish a need to detain using the existing risk classification assessment tool. Anyone not deemed a flight risk or whose flight risk ICE can lessen by an ATD should not be detained, regardless of available bed space.²¹¹ With fewer people in detention, medical resources can be better allocated to those whose detention is required. Naturally, with less crowding, conditions will likely be more sanitary as well.

Although ICE has taken steps to respond to the increasing reports of abuse and mistreatment in immigration detention facilities,²¹² these efforts are not enough. To remedy these failings, the U.S. government should consider the fact that asylum-seekers are a particularly vulnerable population.²¹³ By allocating more resources towards alternative methods of detention—including increasing the use of ankle bracelets—releases on bond, and reporting requirements, the U.S. government can start to correct the failings in the immigration detention system. Furthermore, by reducing the number of detainees and relying on more effective alternative methods of monitoring, the government would benefit economically and save millions.²¹⁴ In general, immigration officials should only detain immigrants whose release would pose a danger to the community, either because of past violent criminal convictions, public safety concerns, or individuals carefully considered a flight risk.

The current U.S. immigration policy of high utilization of discretionary detention, which inevitably leads to a failure of healthcare and lack of sanitation, violates international law. By failing to meet international human rights standards, the United States is violating the non-derogable right of immigrants to human dignity and fair treatment, including the right to be free from torture and inhumane treatment, and the customary norm to be clean and to live in clean conditions. ICE should use the detention of immigrants, particularly vulnerable groups like asylum-seekers, only as a method of last resort in order to mitigate violations of international law relating to health and

211. AM. CIV. LIBERTIES UNION, *supra* note 205, at 3.

212. *See 2011 Operations Manual ICE Performance-Based National Detention Standards*, U.S. IMMIGR. CUSTOMS ENF'T, art. 2.11 (Dec. 2016), <https://www.ice.gov/detention-standards/2011> [<https://perma.cc/T27Q-25UU>].

213. Refugees and Asylum Seekers, SOC. PROT. HUM. RTS., <https://socialprotection-humanrights.org/key-issues/disadvantaged-and-vulnerable-groups/refugees-and-asylum-seekers/> [<https://perma.cc/CSP4-HNYZ>].

214. DEP'T HOMELAND SEC., *supra* note 196.

sanitation. If ICE increases the use of ATDs, it naturally follows that detention centers will be less crowded, thus mitigating the strain on the medical care systems in detention centers, and likely improving the psychological and physical health of many asylum-seekers. Further, when individuals are released from ATDs, they are likely to suffer the psychological impacts of detention, which can then in turn, affect their asylum-claims.