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**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,  
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING  
THE RIGHT TO DEVELOPMENT**

**Written statement\* submitted by the American Civil Liberties Union (ACLU),  
a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is  
circulated in accordance with Economic and Social Council resolution 1996/31.

[23 February 2008]

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- This written statement is issued, unedited, in the language(s) received from the  
submitting non-governmental organization(s).

## **ABUSE OF THE HUMAN RIGHTS OF MIGRANTS IN THE UNITED STATES**

The American Civil Liberties Union (ACLU) urges the Human Rights Council to address widespread violations of the human rights of migrants in the United States and call for the adoption of appropriate measures to protect their human rights. The ACLU calls on the Council to urge the United States to take concrete measures to address the following concerns:

### **Immigration detention**

#### *Overuse of immigration detention*

In Fiscal Year 2007, the U.S. Department of Homeland Security (DHS) detained 322,000 migrants, including both undocumented migrants and legal permanent residents.<sup>1</sup> There are over 30,000 migrants currently in detention.<sup>2</sup> Although held pursuant to civil, not criminal, immigration laws, these detainees often face conditions equivalent to those in prisons and jails, as freedom of movement is restricted and detainees wear prison uniforms while kept in a punitive setting.

Immigrants may remain detained for months or years as they undergo proceedings to decide whether they are eligible to stay in the U.S., or as the U.S. arranges for their deportation following a final order of removal. While the average length of stay in adult Immigration and Customs Enforcement (ICE) detention was 37.6 days in Fiscal Year 2007,<sup>3</sup> this figure reflects the overwhelming majority of immigrants who choose not to challenge their removal and thus are detained for only a few days or weeks. Immigrants who challenge their removal – such as asylum seekers and longtime lawful permanent residents – routinely spend months or years in detention while they fight their cases. For example, a study conducted by Physicians for Human Rights in 2003 found that the asylum seekers in their study who were eventually granted asylum spent an average of 10 months in detention, with the longest period being 3.5 years.<sup>4</sup>

In addition, although the U.S. Supreme Court has twice struck down the Government's policy of indefinitely detaining immigrants who have been ordered removed and whose removal cannot be effectuated within a reasonable period of time, the DHS Office of Inspector General found that ICE fails to consistently and systematically apply these rulings to migrants who are eligible for release.<sup>5</sup>

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<sup>1</sup> Testimony by Gary Mead before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Feb. 13, 2008, *available at* [http://www.ice.gov/doclib/pi/news/testimonies/garymead\\_testimony\\_ice\\_interrogation\\_detention\\_and\\_removal\\_procedures.pdf](http://www.ice.gov/doclib/pi/news/testimonies/garymead_testimony_ice_interrogation_detention_and_removal_procedures.pdf).

<sup>2</sup> Anna Gorman, *Immigration Detainees are at Record Levels*, L.A. TIMES, Nov. 5, 2007.

<sup>3</sup> U.S. Government Accountability Office, *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance*, GAO-07-875 (July 2007), p. 48, *available at* <http://www.gao.gov/new.items/d07875.pdf> (hereinafter "GAO Report").

<sup>4</sup> Physicians for Human Rights and the Bellevue/NYU Center for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (2003).

<sup>5</sup> See Office of Inspector General, DHS, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, Feb. 2007, *available at*

*Poor conditions of detention*

The growth in immigration detention has resulted in highly problematic conditions of confinement, such as grossly inadequate health care, physical and sexual abuse, overcrowding, discrimination, and racism. DHS's Office of Inspector General released an audit report in December 2006 finding that four of the five detention facilities audited were non-compliant with health care standards.<sup>6</sup> The U.S. Government Accountability Office issued a report in July 2007 that similarly identified serious problems at detention facilities around the country, including denial of approval for necessary off-site medical and mental health care, overcrowding, and potential use of force violations including the potential for use of dogs and/or Tasers.<sup>7</sup> Reports of poor medical care and avoidable deaths in immigration custody – at least 70 since the beginning of Fiscal Year 2004 – have received public attention over the past year.<sup>8</sup>

*Arbitrary detention under mandatory detention laws and limitations on access to due process and counsel*

A high percentage of immigrant detainees are held due to mandatory detention laws that require the detention of all immigrants charged with a ground of “inadmissibility” or “deportability” while in removal proceedings, without any individualized determination that they pose a danger or flight risk justifying such detention.<sup>9</sup> These grounds involve criminal offenses, including minor or first-time, non-violent offenses for which the immigrant spent no time in jail. Also subject to de facto mandatory detention are “arriving aliens,” individuals arriving at a port of entry seeking admission to the U.S. This includes

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[http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_07-28\\_Feb07.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-28_Feb07.pdf). In *Zadvydas v. Davis*, 533 U.S. 678 (2001), and reaffirmed in *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court held that the U.S. does not have the power to hold non-citizens indefinitely and that six months was a reasonable amount of time for the U.S. Government to effect removal of non-citizens. As a result of *Zadvydas*, regulations were promulgated establishing a post-final-order custody review process to determine if continued detention was authorized. See 8 C.F.R. § 241.13. Unfortunately, these reviews have never operated effectively and most detainees do not receive timely custody reviews. In a series of reports, the Catholic Legal Immigration Network, Inc. (CLINIC) tracked these review programs and found them to be empty promises for most indefinite detainees.

<sup>6</sup> Office of Inspector General, DHS, *Treatment of Immigrant Detainees Housed at Immigration and Customs Enforcement Facilities*, Dec. 2006, pp. 3-7, available at [http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_07-01\\_Dec06.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-01_Dec06.pdf).

<sup>7</sup> GAO Report at 18, 10.

<sup>8</sup> The 70<sup>th</sup> death in custody is reported in Sandra Hernandez, *Decision to Expand Detention Center Follows Man's Death*, DAILY JOURNAL, Dec. 21, 2007. See also Robert MacMillan, *U.S. Care for HIV Detainees Falls Short—Report*, REUTERS, Dec. 7, 2007; Lesley Clark, *Immigration Detention Centers' Care Under Scrutiny*, MIAMI HERALD, Oct. 5, 2007; Darryl Fears, *3 Jailed Immigrants Die in a Month; Medical Mistreatment Alleged; Federal Agency Denies Claims*, WASHINGTON POST, Aug. 15, 2007; Greg Krikorian, *Dead Detainee's Family Alleges Medical Mistreatment*, L.A. TIMES, Aug. 11, 2007; Editorial, *An Immigration Basic*, WASHINGTON POST, July 6, 2007; Editorial, *Immigration Lockup a Serious Health Risk*, MIAMI HERALD, July 3, 2007; Editorial, *Gitmos Across America*, N.Y. TIMES, June 27, 2007; Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES, June 26, 2007; Darryl Fears, *Illegal Immigrants Received Poor Care in Jail, Lawyers Say*, WASHINGTON POST, June 13, 2007; Nina Bernstein, *One Immigrant Family's Hopes Lead to a Jail Cell Suicide*, N.Y. TIMES, Feb. 23, 2007.

<sup>9</sup> INA § 236(c).

asylum seekers placed in expedited removal proceedings<sup>10</sup> and returning lawful permanent residents.<sup>11</sup>

While the immigration statute permits arriving aliens' release on discretionary "parole," the U.S. Government has interpreted its parole authority very narrowly. Moreover, because such individuals are not entitled to an independent review of their detention by an immigration judge,<sup>12</sup> in practice their detention is essentially mandatory.<sup>13</sup>

Mandatory detention frequently results in immigrants abandoning their challenges to removal because they cannot endure further detention.<sup>14</sup> Furthermore, detention impairs migrants' ability to obtain counsel and present their case in removal proceedings, and the majority of immigration detainees go through removal proceedings without representation.<sup>15</sup>

### **Expansion of immigration and border enforcement**

In response to DHS enforcement initiatives, ICE has expanded existing programs to apprehend undocumented workers and others in violation of immigration laws through massive workplace and early morning actions at immigrants' homes. In a strategic planning document for "Operation Endgame," ICE stated that its goal is to deport all removable aliens by the year 2012.<sup>16</sup> Congress has appropriated at least \$204,842,510 to fund these efforts, starting with \$9,333,519 in 2003, to \$110,638,837 in 2006.<sup>17</sup>

There has been a substantial increase in the number of worksite enforcement-related arrests since 2002. These workplace "raids" or "sweeps" are carried out with massive law

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<sup>10</sup> INA § 235. "Expedited removal" is a process that speeds up deportation by significantly reducing access to lawyers, hearings and judges.

<sup>11</sup> Jonathan D Montag, *Detention and Bond Issues in Immigration Law*, AILA Immigration Law Today, Vol. 25/No. 6, pg 20, Nov./Dec. 2006.

<sup>12</sup> 8 C.F.R. § 3.19 (h)(2)(ii).

<sup>13</sup> Asylum seekers are technically eligible for parole, but the authority to grant parole rests with ICE, the same authority that detains asylum seekers, and there is no independent review of parole decisions. On November 6, 2007, ICE issued a new directive relating to the detention and parole of asylum seekers in the United States. The directive rescinds prior guidance that provided that asylum seekers should be considered for parole if they satisfy a set of criteria (including that their identities are established, that they present no risk of flight, that they have community ties, and they present no danger of harm to the community). Under the new directive, parole is available only in "limited circumstances," and asylum seekers would have to meet an additional set of very narrow and/or undefined criteria. The new directive is expected to make it more difficult for victims of persecution to receive parole from immigration jails. Even before issuance of the new directive, the majority of parole release rates were very low and varied widely, ranging from districts that have rather liberal parole policies to districts that parole virtually no one. See U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Washington, D.C., Feb. 8, 2005.

<sup>14</sup> Brief of Amici Curiae, on behalf of Citizens and Immigrants for Equal Justice (CIEJ), et al., p. 5, *Demore v. Kim*, 538 U.S. 510 (2003).

<sup>15</sup> Elizabeth Amon, *INS Fails to See the Light*, National L.J., March 5, 2001 at A1.

<sup>16</sup> The document is no longer available on the ICE website; available at [http://www.aclum.org/issues/ice\\_doc\\_gallery.html](http://www.aclum.org/issues/ice_doc_gallery.html).

<sup>17</sup> Office of the Inspector General, DHS, *An Assessment of United States Immigration and Customs Enforcement's Fugitive Operations Teams*, March 2007, pp. 1-6.

enforcement presence. In these raids ICE arrests immigrants without warrants and based on insubstantial evidence about immigration status, including racial profiling.

ICE uses local law enforcement to enforce federal immigration laws, particularly in border regions. Under current federal law, ICE can enter into Memoranda of Understanding (MOU) with state and local enforcement agencies, allowing designated officers to carry out immigration law enforcement functions. Over 21,485 officers nationwide are participating in the program, and more than 40 municipal, county, and state agencies have applied. This program resulted in 6,043 arrests in Fiscal Year 2006. Enforcement raids carried out pursuant to this program raise human rights concerns. For example, civil rights groups sued New Mexico's Otero County Sheriff's Department for violations committed during immigration sweeps in September 2007, in which Sheriffs' deputies raided homes without search warrants, interrogated families without evidence of criminal activity, and targeted households on the basis of race and ethnicity.

Furthermore, cities and towns across the country have enacted anti-immigrant ordinances that subject immigrant residents to special legislation and selective enforcement. These ordinances impose penalties on businesses and non-profits that do business with, employ, or contract with undocumented workers, and penalize landlords who lease or rent property to undocumented immigrants. In the past two years, more than 30 towns nationwide have enacted such laws.<sup>18</sup>

### **Diminished federal protection of migrant workers' rights and discrimination against undocumented migrant workers**

Exploitation of migrant workers is a serious problem in the U.S. and is exacerbated by government policies that discriminate against migrant workers and fail to protect undocumented workers from employer discrimination. Most of the industries that employ immigrant workers pay low wages, maintain dangerous working conditions, and frequently violate labor and anti-discrimination laws. Moreover, domestic and agricultural laborers, most of whom are migrants, are explicitly excluded from basic worker protections including overtime compensation and minimum wage requirements under the National Labor Relations Act, the Occupational Health and Safety Act, the Fair Labor Standards Act, and state labor laws.<sup>19</sup> Migrant domestic workers employed by foreign diplomats are denied judicial remedies by the legal doctrine of diplomatic immunity, placing them at risk of exploitation and labor trafficking.<sup>20</sup>

*De facto* discrimination against undocumented workers exists due to judicial decisions beginning with the *Hoffman Plastics* U.S. Supreme Court case in 2002.<sup>21</sup> Pursuant to the

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<sup>18</sup> Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, available at <http://www.nytimes.com/2007/09/26/nyregion/26riverside.html?hp>.

<sup>19</sup> The excluded occupations are (1) home care workers, including child care workers and health aids, the vast majority of whom are immigrant women, and (2) agricultural workers, who are largely immigrant. See, e.g., *Long Island Care at Home v. Coke*, 127 S.Ct. 2339 (2007); National Labor Relations Act, 29 U.S.C. § 152(3); Fair Labor Standards Act, 29 U.S.C. § 213(b)(21); Occupational Safety and Health Act, 29 C.F.R. § 1975.6 (1972).

<sup>20</sup> Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf).

<sup>21</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

*Hoffman Plastics* decision and subsequent federal and state court decisions, the estimated 11.5-12 million undocumented migrant workers in the U.S.<sup>22</sup> have lost anti-discrimination protection, available remedies when injured or killed on the job, overtime pay, workers' compensation, family and medical leave, and other fundamental safeguards.<sup>23</sup>

In addition, post-*Hoffman* litigation has made immigration status a focal point in all employment-related litigation, which has had a chilling effect that undermines the ability of all migrant workers to enforce their workplace rights to freedom from discrimination, a fair wage, overtime compensation, and compensation for work-related injuries.

**We therefore make the following recommendations:**

- We urge the Council to call upon the United States to adopt concrete measures to protect the human rights of migrants, including
  - the development of alternatives to detention to decrease the number of migrants detained and/or subject to ICE supervision
  - the improvement of detention conditions through creation and enforcement of binding detention standards
  - the improvement of medical and psychiatric care in immigration detention
  - reform of immigration law and policy on mandatory detention to ensure its compliance with human rights standards regarding arbitrary detention
  - adoption of all necessary measures to ensure meaningful access to justice for detained migrants
  - reform and oversight to ensure that border enforcement activities are conducted in a manner consistent with human rights standards
  - requiring states to refrain from enforcing federal immigration laws
  - enforcement of existing labor laws to protect the labor rights of migrant workers; and
  - legal reform to eliminate discriminatory laws and ensure equal protection for all migrant workers, including undocumented workers, under federal and state labor laws

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<sup>22</sup> Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, Pew Hispanic Center, March 7, 2006, available at <http://pewhispanic.org/reports/report.php?ReportID=61>.

<sup>23</sup> State courts in New Jersey, Kansas, New York, California, Pennsylvania, Michigan, Illinois, Florida, and other states have restricted the rights of undocumented workers in response to *Hoffman*.