



Asamblea General

Distr.
GENERAL

A/HRC/7/12/Add.2
5 de marzo de 2008

ESPAÑOL
Original: INGLÉS

CONSEJO DE DERECHOS HUMANOS
Séptimo período de sesiones
Tema 3 de la agenda

**PROMOCIÓN Y PROTECCIÓN DE TODOS LOS DERECHOS HUMANOS,
CIVILES, POLÍTICOS, ECONÓMICOS, SOCIALES Y CULTURALES,
INCLUIDO EL DERECHO AL DESARROLLO**

**Informe del Relator Especial sobre los derechos humanos
de los migrantes, Sr. Jorge Bustamante**

Adición

MISIÓN A LOS ESTADOS UNIDOS DE AMÉRICA * **

* El resumen del documento se distribuye en todos los idiomas oficiales. El informe, que figura en el anexo del resumen se distribuye únicamente en el idioma en que se presentó.

** El presente documento se presenta con retraso a fin de incluir la información más reciente.

Resumen

Este informe se presenta de conformidad con la resolución 2001/52 de la Comisión de Derechos Humanos, tras la visita oficial del Relator Especial sobre los derechos humanos de los migrantes a los Estados Unidos de América (los Estados Unidos) realizada entre el 30 de abril y el 18 de mayo de 2007.

La misión tenía por objeto examinar la situación de los derechos humanos de los migrantes que viven en los Estados Unidos e informar al respecto. A efectos del informe, se entiende por "migrantes" quienes viven en los Estados Unidos sin ser ciudadanos, incluidos, entre otros, los no nacionales indocumentados y los no nacionales legalmente autorizados a residir en el país, como los residentes permanentes legales, los titulares de visados de trabajos y las personas que tienen condición de refugiados. El Relator Especial agradece al Gobierno de los Estados Unidos por haberle invitado a realizar esa misión. Sin embargo, le decepcionó la anulación posterior de sus visitas programadas y aprobadas al Centro de Detención Hutto de Texas y el Centro de Detención Monmouth en Nueva Jersey, sin una justificación satisfactoria.

Si bien toma nota del interés del Gobierno por resolver algunos de los problemas relativos a los derechos humanos de los migrantes, el Relator Especial considera muy inquietante la situación de los migrantes en el país, especialmente en el contexto de ciertos aspectos de las políticas de expulsión y detención y en relación con determinados grupos, como los trabajadores migrantes de Nueva Orleans y la costa del Golfo tras el huracán Katrina, los trabajadores agrícolas migrantes y los migrantes internados en centros de detención.

El Relator Especial destaca el hecho de que, según los testimonios que recogió, no eran raros los casos de detención indefinida, incluso de migrantes que huían de una situación adversa en su país de origen. El Relator Especial fue informado por defensores de los derechos humanos de la falta de garantías procesales para los no ciudadanos en los procedimientos de expulsión de los Estados Unidos y su incapacidad para impugnar la legalidad o la duración de su detención, como también sobre la situación de los solicitantes de asilo detenidos, antiguos residentes permanentes y los padres de menores que son ciudadanos de los Estados Unidos. En algunos casos los inmigrantes detenidos pasan días en aislamiento, con las luces encendidas durante las 24 horas y a menudo sometidos a calor y frío extremos. Según fuentes oficiales, las autoridades de los Estados Unidos detienen a más de 230.000 personas al año, más del triple de los detenidos hace nueve años.

El Relator Especial observa con pesar que desde el 11 de septiembre de 2001 recrudecieron la xenofobia y el racismo contra los migrantes en los Estados Unidos. El actual clima de xenofobia tiene consecuencias negativas para muchos sectores de la población migrante y efectos especialmente discriminatorios y devastadores para muchos de los grupos más vulnerables de la población migrante, como los niños, los menores no acompañados, los migrantes haitianos y otros afrocaribeños y los migrantes que son, o parecen ser, musulmanes u originarios del Asia meridional o el Oriente Medio.

El Relator Especial observa que los Estados Unidos no tienen una estrategia clara, coherente y de largo plazo para realzar el respeto de los derechos humanos de los migrantes. Aunque hay leyes nacionales que prohíben la discriminación, no hay un marco legislativo y político nacional de protección efectiva de los derechos humanos de los migrantes que sirva de

referencia a la evaluación de los programas y estrategias federales y locales, a fin de determinar el grado en que las autoridades respetan los derechos humanos de los migrantes.

En vista de los numerosos problemas descritos en el informe, el Relator Especial ha llegado a la conclusión de que los Estados Unidos no se han atendido a sus obligaciones internacionales de otorgar prioridad nacional a los derechos humanos de los 37,5 millones de migrantes que viven en el país (según datos del censo oficial de 2006), aplicando una política nacional integral y coordinada que sea coherente con obligaciones internacionales claras. El principal aspecto de esa política nacional debería consistir en reconocer que, con excepción de ciertos derechos relativos a la participación política, los migrantes disfrutaban prácticamente de la misma protección de los derechos humanos que los ciudadanos, lo que supone, entre otros, dar primordial importancia a las necesidades de los grupos más vulnerables.

El Relator Especial ha entregado una lista detallada de recomendaciones y conclusiones, destacando que es necesaria una institución a nivel federal cuyo mandato se limite exclusivamente a los derechos humanos de los migrantes, un órgano nacional que represente verdaderamente las opiniones y preocupaciones de la población migrante y que podría ocuparse de las causas subyacentes de la migración y los problemas de derechos humanos de los migrantes en los Estados Unidos.

Annex

**REPORT OF THE SPECIAL RAPPORTEUR ON THE HUMAN
RIGHTS OF MIGRANTS, JORGE BUSTAMANTE, ON HIS
MISSION TO THE UNITED STATES OF AMERICA
(30 April-18 May 2007)**

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1 - 8	5
I. INTERNATIONAL LAW AND STANDARDS	9 - 25	7
A. Right to fair deportation procedures	10 - 20	7
B. Right to liberty of person	21 - 24	9
C. Labour rights	25	10
II. UNITED STATES OF AMERICA IMMIGRATION POLICY AND PRACTICE	26 - 88	10
A. Legal and political background	26 - 45	10
B. Deportation policy	46 - 56	14
C. Local enforcement operations	57 - 58	15
D. Detention and removal system	59 - 67	16
E. Mandatory detention	68 - 87	17
III. THE PLIGHT OF MIGRANT WORKERS: THE CASE OF HURRICANE KATRINA	88 - 103	20
A. Background	88 - 96	20
B. Institutional responsibility	97 - 103	22
IV. CONCLUSIONS	104 - 108	23
V. RECOMMENDATIONS	109 - 131	24

Introduction

1. Pursuant to his mandate the Special Rapporteur on the human rights of migrants visited the United States of America (the United States) from 30 April to 18 May at the invitation of the Government.

2. Inhabiting a large geographic area, the migrant population of the United States is complex. Hence, the Special Rapporteur did not have time to conduct a comprehensive investigation of all the issues related to the various migrant populations residing in the United States. The Special Rapporteur met with a great variety of organizations, State, national and local agencies, officials, and individuals. These included the following: the Indigenous Front of Binational Organizations and California Rural Legal Assistance; religious leaders and representatives; people whose homes were raided by the Department of Homeland Security's agency for Immigration and Customs Enforcement; the National Immigration Law Centre; members of the Youth Justice Coalition; Homies Unidos (which led tours of Pico Union, MacArthur Park and Koreatown in Los Angeles); the Florence detention centre in Arizona; officials at the U.S. Border Patrol; Nogales, Arizona; Dr. Bruce Parks, Pima County's Medical Examiner (who provided statistics and information about migrant deaths due to exposure); the Coalición de Derechos Humanos and other non-governmental organizations (NGOs) in the Phoenix area, including the Macehalli Day Labor Center and the Florence Immigrant and Refugee Rights Project; members of local Native American groups; advocates for migrant domestic workers in Maryland and elsewhere; the Farmworker Association of Florida in Immokalee; (while in Florida he also discussed detention and deportation procedures with the Haitian community); the US Human Rights Network and several of its member organizations; community members and advocates. Furthermore, numerous migrants provided testimonials about conditions directly experienced by themselves or by their migrant family members.

3. During his visit, the Special Rapporteur toured the United States border with Mexico and watched United States immigration officials at work. He met there with officials from the U.S. Customs and Border Protection (CBP), a division of the Department of Homeland Security (DHS), spending half a day with Border Patrol officers at the San Diego sector.¹ In Los Angeles the Special Rapporteur conducted site visits, listened to presentations and witnessed community testimony on the system of immigration enforcement (including on raids and detention, workers' rights, deportation procedures, and the criminalization of immigrants).

4. In Tucson, Arizona, the Special Rapporteur met with advocates and lawyers who informed him of the practice of subjecting immigrants to disproportionate criminal charges in addition to

¹ The San Diego sector consists of more than 7,000 square miles and 66 linear miles of international boundary with Mexico. It encompasses many kinds of terrain from coastal beaches and expansive *mesas* to coastal and inland mountains, rugged canyons and high desert. Directly to the South of San Diego lie the Mexican cities of Tijuana and Tecate, Baja California with a combined population of more than 2 million. Although it is the smallest Border Patrol sector geographically, more than 40 per cent of national apprehensions have taken place there. For decades, this area was the preferred corridor for immigration due to the highly populated neighbourhoods north and south of the border. This region has gained national attention with the inception of an enforcement strategy called Operation Gatekeeper, launched on 1 October 1994.

civil charges for violation of the immigration laws of the United States. In particular, the Special Rapporteur learned that immigration authorities and federal prosecutors are now charging some non-citizens with civil violations for being in the country illegally, as well as for the overly-broad charge of “self-smuggling” themselves into the country. This latter criminal charge is defined as a felony and therefore the migrant can be sentenced to prison upon conviction.

5. In Atlanta, Georgia, the Special Rapporteur attended a regional NGO briefing, “Directly Impacted Community Members Briefing and Press Conference”, organized by the National Network of Immigrant and Refugee Rights and its member organizations the Georgia Latino Alliance for Human Rights (GLAHR), the Latin American and Caribbean Community Center (LACCC) and the American Civil Liberties Union (ACLU) of both Georgia and New York. He also attended a reception in Atlanta where he was able to meet with Georgia State Representatives and Senators. During the NGO briefings in Atlanta, the Special Rapporteur heard from migrants and migrant human rights advocates from different organizations and who travelled from across the southern United States, including the Mississippi Immigrant Rights Alliance (MIRA), the New Orleans Workers’ Center for Racial Justice, the Southern Poverty Law Center (SPLC), Queer Progressive Agenda (QPA), Raksha (South Asian community organization), the Mexican American Legal Defense and Education Fund (MALDEF), the Georgia Department of Education Program, and the Roman Catholic Archdiocese of Atlanta. Migrants and NGO advocates from these and other organization informed the Special Rapporteur of the plight of migrants in the south of the United States, where the migrant population is booming.

6. The Special Rapporteur also attended a public hearing in New York on the rights of migrants organized by the ACLU of New York, regional NGOs and grass-roots organizations. In New York, the Special Rapporteur heard several individuals testify about the post-9/11 backlash, including the experiences of the some 750 migrants arrested and subjected to arbitrary and lengthy detention subsequent to the September 11, 2001 attacks on the United States.

7. The visit concluded with meetings with senior officials of the Department of Homeland Security and the State Department in Washington, D.C. On the last day of his visit, the Special Rapporteur was informed that the cancellation of his visits to the detention facilities in Texas and New Jersey was due to a pending lawsuit filed against both facilities, in which the United States Government was not allowed to interfere. A statement was subsequently published in the press suggesting that the cancellation was because the “Special Rapporteur declined the invitation”; the Special Rapporteur made clear that this latter allegation was false.

8. Migrant rights issues raised in these various meetings included, but were not limited to, the following: indefinite detention; arbitrary detention; mandatory detention; deportation without due process; family separation; anti-immigrant legislation; racial profiling; linguistic, racial, ethnic, gender and sexual-orientation discrimination; State violence; wage theft; forced labour; limited access to health and education; the growing anti-immigrant climate (including the post-9/11 backlash); and significant limitations on due process and judicial oversight. Most of these issues are addressed in this report.

I. INTERNATIONAL LAW AND STANDARDS

9. Since the early stages of the nation State, control over immigration has been understood as an essential power of government. In recent history, governments have allowed limits to be placed on their power regarding immigration policy, recognizing that it may only be exercised in ways that do not violate fundamental human rights. Therefore, while international law recognizes every State's right to set immigration criteria and procedures, it does not allow unfettered discretion to set policies for detention or deportation of non-citizens without regard to human rights standards.

A. Right to fair deportation procedures

10. The governmental power to deport should be governed by laws tailored to protect legitimate national interests. United States deportation policies violate the right to fair deportation procedures, including in cases in which the lawful presence of the migrant in question is in dispute, as established under article 13 of the International Covenant on Civil and Political Rights (ICCPR). These deportation policies, particularly those applied to migrants lawfully in the United States who have been convicted of crimes, also violate (a) international legal standards on proportionality; (b) the right to a private life, provided for in article 17 of the ICCPR; and (c) article 33 of the Convention relating to the Status of Refugees, which prohibits the return of refugees to places where they fear persecution, with very narrow exceptions.

11. The ICCPR, which the United States ratified in 1992, states in article 13 (to which the United States has entered no reservations, understandings or declarations): "An alien lawfully in the territory of a State Party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

12. The Human Rights Committee, which monitors State compliance with the ICCPR, has interpreted the phrase "lawfully in the territory" to include non-citizens who wish to challenge the validity of the deportation order against them. In addition, the Committee has made this clarifying statement: "... if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13." and further: "An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one."²

13. Similarly, article 8, paragraph 1 of the American Convention on Human Rights, which the United States signed in 1977, states that "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law ... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

² Human Rights Committee general comment No. 15 (1986) on the position of aliens under the Covenant, paras. 9 and 10.

14. Applying this standard, the Inter-American Commission on Human Rights has stated that detention and deportation proceedings require “as broad as possible” an interpretation of due process requirements and include the right to a meaningful defence and to be represented by an attorney.

15. Because United States immigration laws impose mandatory deportation without a discretionary hearing where family and community ties can be considered, these laws fail to protect the right to private life, in violation of the applicable human rights standards.

16. Article 16, paragraph 3, of the Universal Declaration of Human Rights and article 23, paragraph 1, of the ICCPR state that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Furthermore, article 23, paragraph 3 states that the right of men and women to marry and found a family shall be recognized. This right includes the right to live together. Article 17, paragraph 1 of the International Covenant on Civil and Political Rights states that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence ...”.

17. As the international body entrusted with the power to interpret the ICCPR and decide cases brought under its Optional Protocol, the Human Rights Committee has explicitly stated that family unity imposes limits on the power of States to deport.

18. The American Declaration of the Rights and Duties of Man features several provisions relevant to the question of deportation of non-citizens with strong family ties. Article V states that “Every person has the right to the protection of the law against abusive attacks upon ... his private and family life.” Under article VI, “Every person has the right to establish a family, the basic element of society, and to receive protection therefor.” The American Convention on Human Rights, to which the United States is a signatory, contains analogous provisions. The case of *Wayne Smith and Hugo Armendáriz v. United States of America*, which came before the Inter-American Commission on Human Rights in 2006 relies on several of these provisions to challenge the United States policy of deporting non-citizens with criminal convictions without regard to family unity. In light of these international standards, the United States has fallen far behind the practice of providing protection for family unity in deportation proceedings.

19. Moreover, the rights of children to live together with their parents are violated by the lack of deportation procedures in which the State’s interest in deportation is balanced against the rights of the children. United States mandatory deportation laws harm the human rights of children of non-citizen parents.

20. United States restrictions on relief for refugees convicted of crimes violate the Convention and the Protocol relating to the Status of Refugees.³ The United States provides two forms of relief for refugees fleeing persecution - withholding of removal, which provides bare protection against refoulement, and more robust asylum relief, which provides a pathway to permanent

³ Although petitioners’ cases do not involve claims for refugee protection, a discussion of the effect of United States immigration laws on non-citizens with criminal convictions would be incomplete without an exploration of the effect of the laws on non-citizen refugees.

residence.⁴ Even the weaker form of relief - withholding of removal - is per se unavailable to non-citizens with aggravated felonies sentenced to an aggregate term of at least five years' imprisonment and to those whom the Attorney General determines have been convicted of a particularly serious crime.⁵ United States law denies these refugees even a hearing for their refugee claims, instead denying relief on a categorical basis. United States laws therefore contravene the due process and substantive protections of the Declaration of the Rights and Duties of Man and the Convention and the Protocol relating to the Status of Refugees, which allow for exceptions to non-refoulement in only a narrow set of cases and after individualized hearings.⁶

B. Right to liberty of person

21. Pursuant to the Immigration and Nationality Act, U.S. Immigration and Customs Enforcement (ICE) may detain non-citizens under final orders of removal only for the period necessary to bring about actual deportation. Additionally, two United States Supreme Court decisions, *Zadvydas v. Davis*,⁷ and *Clark v. Martinez*,⁸ placed further limits on the allowable duration of detention. As a result of those decisions, ICE may not detain an individual for longer than six months after the issuance of a final removal order if there is no significant likelihood of actual deportation (for example, because the home country refuses repatriation) in the reasonably foreseeable future.

22. Although these two court decisions limit the ability of ICE to detain non-citizens indefinitely, in practice, United States policy is a long way out of step with international obligations. Immigration enforcement authorities have failed to develop an appropriate appeals procedure, and for all practical purposes have absolute discretion to determine whether a non-citizen may be released from detention. Furthermore, those released from detention as a result of a post-order custody review are released under conditions of supervision, which in turn are monitored by ICE deportation officers. Again, ICE officers have absolute authority to determine whether an individual must return to custody. Given that these discretionary decisions are not subject to judicial review, current United States practices violate international law.

⁴ See US Code, Title 8, Chapter 12, Subchapter II, Part 1, § 1158 (asylum) and Part IV, § 1231 (b) (3) (Restriction on removal to a country where alien's life or freedom would be threatened).

⁵ Ibid.

⁶ The principle of non-refoulement is enshrined in article 33 of the Convention relating to the Status of Refugees. See Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement", Office of the United Nations High Commissioner for Refugees.

⁷ Ref. 533 U.S. 678 (2001).

⁸ Ref. 125 S. Ct. 716 (2005).

23. The Special Rapporteur wishes to stress that international conventions require that the decision to detain someone should be made on a case-by-case basis after an assessment of the functional need to detain a particular individual. He notes that the individual assessment of cases does not appear to be sufficient and that detention policies in the United States constitute serious violations of international due process standards. Based on individual testimonies, the Government's own admissions and reports he received, the Special Rapporteur notes that the violations include:

- Failing to promptly inform detainees of the charges against them
- Failing to promptly bring detainees before a judicial authority
- Denying broad categories of detainees release on bond without individualized assessments
- Subjecting detainees to investigative detention without judicial oversight
- Denying detainees access to legal counsel

24. In sum, in the current context the United States detention and deportation system for migrants lacks the kinds of safeguards that prevent certain deportation decisions and the detention of certain immigrants from being arbitrary within the meaning of the International Covenant on Civil and Political Rights (ICCPR), which the United States has signed and ratified.

C. Labour rights

25. The labour rights of migrants affected by conditions in certain portions of the labour market, including the tomato workers in Florida and migrants in regions of the country devastated by Hurricane Katrina, are also included in the Universal Declaration of Human Rights and ICCPR. The United States Government has committed itself to protecting these rights.

III. UNITED STATES OF AMERICA IMMIGRATION POLICY AND PRACTICE

A. Legal and political background

26. With regard to deportation policy, under current United States immigration law, individuals arriving in the United States without the necessary visas or other legal permission to enter, including asylum-seekers and refugees, are subject to mandatory detention. In addition, persons subject to deportation procedures after being lawfully present in the United States, including legal permanent residents who have been convicted of crimes, are subject to detention. All of these persons are detained in immigration detention centres, county jails or private prisons under contract with immigration enforcement agencies for months, and sometimes years. According to testimonies heard by the Special Rapporteur, United States citizens erroneously

identified as non-citizens, long-time lawful permanent residents, non-citizen veterans, and vulnerable populations with a regular legal status have also been detained for months without sufficient due process protections, including fair individualized assessments of the reasons for their detention.

27. In 2006, the Department of Homeland Security arrested over 1.6 million migrants, including both undocumented migrants and legal permanent residents, of which over 230,000 were subsequently held in detention.

28. On average, there are over 25,000 migrants detained by immigration officials on any given day. The conditions and terms of their detention are often prison-like: freedom of movement is restricted and detainees wear prison uniforms and are kept in a punitive setting. Many detainees are held in jails instead of detention centres, since the United States uses a combination of facilities owned and operated by ICE, prison facilities owned and operated by private prison contractors and over 300 local and county jails from which ICE rents beds on a reimbursable basis. As a result, the majority of non-criminal immigrants are held in jails where they are mixed in with the prison's criminal population. This is the case despite the fact that under United States law an immigration violation is a civil offence, not a crime. The mixture of criminal and immigrant detainees in these jails can result in the immigrants being treated in a manner that is inappropriate to their status as administrative, as opposed to criminal, pretrial or post-conviction inmates.

29. In 1996, the Immigration and Naturalization Service had a daily detention capacity of 8,279 beds. By 2006, that had increased to 27,500 with plans for future expansion. At an average cost of US\$ 95 per person per day, immigration detention costs the United States Government US\$ 1.2 billion per year.

30. ICE reported an average stay of 38 days for all migrant detainees in 2003. Asylum-seekers granted refugee status, spend an average of 10 months in detention, with the longest period in one case being three and a half years. There are instances of individuals with final orders of removal who languish in detention indefinitely, such as those from countries with whom the United States does not have diplomatic relations or that refuse to accept the return of their own nationals. Under United States law, migrant detainees about whom the United States has certain national security concerns are subject to the possibility of indefinite detention, in contravention of international standards.

31. Migrants in detention include asylum-seekers, torture survivors, victims of human trafficking, long-term permanent residents facing deportation for criminal convictions based on a long list of crimes (including minor ones), the sick, the elderly, pregnant women, transgender migrants detained according to their birth sex rather than their gender identity or expression, parents of children who are United States citizens, and families. Detention is emotionally and financially devastating, particularly when it divides families and leaves spouses and children to fend for themselves in the absence of the family's main financial provider.

32. Immigrants are also often transferred to remote detention facilities, which interferes substantially with access to counsel and to family members and often causes great financial and emotional hardship for family members who are not detained. Thousands of those held in immigration detention are individuals who, by law, could be released.

33. Detention has not always been the primary enforcement strategy relied upon by the United States immigration authorities, as it appears to be today. In 1954, the Immigration and Naturalization Service announced that it was abandoning the policy of detention except in rare cases when an individual was considered likely to be a security threat or flight risk. This reluctance to impose needless confinement was based on the concepts of individual liberty and due process, long recognized and protected in the American legal system, and also enshrined in international human rights standards.

34. Sweeping changes in immigration laws in 1996 drastically increased the number of people subject to mandatory, prolonged and indefinite detention. The increasing reliance of the United States authorities on detention as an enforcement strategy has meant that many individuals have been unnecessarily detained for prolonged periods without any finding that they are either a danger to society or a flight risk. These practices have continued despite attempts by the United States Supreme Court to limit the Government's discretion to indefinitely detain individuals.

35. Certain provisions of the Immigration and Nationality Act, as amended by two laws passed in 1996 (the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)) require mandatory detention, pending removal proceedings, of virtually any non-citizen who is placed in proceedings on criminal grounds, as well as of persons who arrive at the country's borders in order to seek asylum from persecution without documentation providing for their legal entry into the country. These two laws have significantly increased the number of migrants subject to mandatory detention on a daily basis, since AEDPA requires the mandatory detention of non-citizens convicted of a wide range of offences, and IIRAIRA has further expanded the list of offences for which mandatory detention is required.

36. As a result of these legislative changes, minor drug offences - such as possession of paraphernalia - as well as minor theft or other property-related offences, can result in mandatory detention and in the past decade the use of detention as an immigration enforcement mechanism has become more the norm than the exception in United States immigration enforcement policy.

37. The policy of mandatory detention also strips immigration judges of the authority to determine during a full and fair hearing whether or not an individual presents a danger or a flight risk. Instead, certain previous convictions (and in some cases, merely the admission of having committed an offence) automatically trigger mandatory detention without affording non-citizens an opportunity to be heard as to whether or not they merit release from custody.

38. This policy also deprives immigration judges - and even the Department of Homeland Security - of the authority to order the release of an individual, even when it is clear that he or she poses no danger or flight risk that would warrant such detention.

39. In its landmark decision, *Zadvydas v. Davis*,⁹ the Supreme Court held that indefinite immigration detention of non-citizens who have been ordered deported but whose removal is not reasonably foreseeable would raise serious constitutional problems.

⁹ See footnote 7 above.

40. Prior to *Zadvydas*, the Government had a policy of detaining individuals even when there was virtually no chance they would actually be removed (this has been especially common with migrants from countries such as Cuba, Iraq, the Islamic Republic of Iran, the Lao People's Democratic Republic, the former Soviet Union and Viet Nam). The Government often referred to these individuals as "lifers", in recognition of the fact that their detention was indefinite and potentially permanent. In the aftermath of *Zadvydas*, new regulations were promulgated in order to comply with the Supreme Court's decision. Under these regulations, if the Department of Homeland Security cannot remove a migrant within the 90-day removal period, the Government is required to provide a post-order custody review to determine if the individual can be released. If the individual remains in detention six months after the removal order has become final, another custody review is to be conducted. Once it is determined that removal is not reasonably foreseeable, the regulations require the individual to be released under conditions of supervision.

41. Unfortunately, many problems plague the post-order custody review process. For example, some detainees never receive notice of their 90-day or 6-month custody reviews, and therefore do not have the opportunity to submit documentation in support of their release. Others never receive timely custody reviews at either the 90-day or 6-month mark. In addition, decisions to continue detention are often based on faulty reasoning and erroneous facts, ignore the law outlined by the Supreme Court in *Zadvydas*, or are essentially rubber-stamp decisions that fail to cite any specific evidence in support of their conclusion.

42. Frequently, these decisions ignore documentation (including letters from the detained individual's consulate) that proves that there is no significant likelihood of removal in the reasonably foreseeable future. In other cases, the Department of Homeland Security has failed to present evidence of the likelihood of removal and instead blames detainees for failing to facilitate their own removal.

43. The Special Rapporteur notes that according to the law, individuals can be released on parole regardless of their immigration status. In practice, however, because migrants are not entitled to a review of their custody by an immigration judge, or are subjected to rubber-stamp administrative custody review decisions, their detention is essentially mandatory.

44. The Special Rapporteur acknowledges that the mission for the Department of Homeland Security is to "lead the unified national effort to secure America" through its Immigration and Customs Enforcement agency (ICE). ICE is the largest investigative branch of the Department of Homeland Security; and seeks to protect the United States against terrorist attacks by targeting undocumented immigrants, whom the agency considers to be "the people, money and materials that support terrorism and other criminal activities".

45. In that context, the ICE has recently shifted its approach to enforcement by bringing criminal charges against employers of irregular migrant workers, seizing their assets and charging them with money laundering violations.

B. Deportation policy

46. With regard to deportation policy, following changes to United States immigration law in 1996, non-citizens in the United States have been subjected to a policy of mandatory deportation upon conviction of a crime, including very minor ones. These persons are not

afforded a hearing in which their ties to the United States, including family relationships, are weighed against the Government's interest in deportation. According to Government sources, hundreds of thousands of persons have been deported since these laws went into effect in 1996.

47. One case that has been brought to the attention of the Special Rapporteur is that of a male migrant, originally from Haiti, who enlisted in the United States military in 1970. A lawful permanent resident, or green card holder, this individual served his adopted country for four years. Now a 52-year-old veteran with four United States citizen sons, two of whom are in the military themselves, he faces mandatory deportation because he was convicted of the possession and sale of small amounts of crack cocaine in the mid-1990s, for which he spent 16 months in prison.

48. Some 672,593 immigrants in the United States - many of whom, like the Haitian migrant described above, were legal residents - have been deported from the country under the 1996 legislation that requires mandatory deportation of non-citizens convicted of a crime after they have served their sentence. It does not matter whether the non-citizen has lived in the United States legally for decades, built a home and family, run a business, or paid taxes. And these laws do not apply only to serious crimes, but also to minor offences.

49. The 1996 laws added new crimes to the aggravated felony ground of deportation. First, Congress added 17 additional types of crimes to the category when it passed AEDPA in April 1996. IIRIRA added four more types of crimes to the aggravated felony definition and lowered certain threshold requirements. Before IIRIRA, for example, theft offences and crimes of violence were treated as aggravated felonies only if the term of imprisonment was five years or more; IIRIRA reduced the term of imprisonment provision to a one-year threshold.

50. Estimates based on the United States census find that 1.6 million adults and children, including United States citizens, have been separated from their spouses and parents because of the 1996 legislation and the expansion of the aggravated felony definition. Families have been torn apart because of a single, even minor misdemeanour, such as shoplifting or drug possession.

51. Certain immigrants, for example those convicted of selling drugs and given a five-year sentence, are subject to deportation without consideration of the fact that they would be returned to persecution. This is the case under United States law, despite the fact that under the Convention relating to the Status of Refugees (a treaty binding on the United States), only refugees who have been convicted of a "particularly serious crime" and who "constitute a danger to the community" of the United States may be returned to places where they fear persecution.

52. The 1996 legislation prevents judges from considering whether there are compelling reasons for immigrants to remain in the United States even though they have broken the law. It prevents judges from striking a balance between the reasons for deportation - i.e. the seriousness of the crime - and the length and breadth of an immigrant's ties to the United States.

53. Out of the 1.6 million family members left behind by criminal deportees, it is estimated that 540,000 are United States citizens by birth or naturalization.

54. Despite the fact that the relevant laws were passed 10 years ago, data on the underlying convictions for deportations were released for the first time by ICE at the end of 2006 for

fiscal year 2005. These data show that 64.6 per cent of immigrants were deported for non-violent offences, including non-violent theft offences; 20.9 per cent were deported for offences involving violence against people; and 14.7 per cent were deported for unspecified other crimes.

55. Applying these percentages from 2005 to the aggregate number of persons deported reveals that some 434,495, or nearly a half million people, were non-violent offenders deported from the United States in the 10 years since the 1996 laws went into effect. In addition, some 140,572 people were deported during that same decade for violent offences.

56. Human rights law recognizes that the privilege of living in any country as a non-citizen may be conditional upon obeying that country's laws. However, no country should withdraw that privilege without protecting the human rights of the immigrants it previously allowed to enter. Human rights law requires a fair hearing in which family ties and other connections to an immigrant's host country are weighed against that country's interest in deporting him or her.

C. Local enforcement operations

57. While migration is a federal matter, ICE is actively seeking the assistance of State and local law enforcement in enforcing immigration law. Under a recent federal law, ICE has been permitted to enter into agreements with state and local law enforcement agencies through voluntary programmes which allow designated officers to carry out immigration law enforcement functions. These state and local law enforcement agencies enter into a memorandum of understanding (MOU) or a memorandum of agreement (MOA) that outlines the scope and limitation of their authority. According to ICE, over 21,485 officers nationwide are participating in this programme, and more than 40 municipal, county, and state agencies have applied. In 2006, this programme resulted in 6,043 arrests and so far in 2007, another 3,327.

58. Local law enforcement agencies that have signed MOUs so far are:

- Florida Department of Law Enforcement (the first to enter into the agreement)
- Alabama Department of Public Safety
- Arizona Department of Corrections
- Los Angeles, County Sheriff's Department
- San Bernardino County Sheriff-Coroner Department

D. Detention and removal system

59. On 2 November 2005 the Department of Homeland Security announced to the public a multi-year plan called the Secure Border Initiative (SBI) to increase enforcement along the United States borders and to reduce illegal migration. The SBI is divided into two phases.

60. The first phase includes a restructuring of the detention and removal system through the expansion of expedited removal and the creation of the "catch and return" initiative, in addition to greatly strengthening border security through additional personnel and technology.

61. The second phase, the interior enforcement strategy, was unveiled to the public on 20 April 2006. It is through this initiative that U.S. Immigration and Customs Enforcement (ICE) has expanded operations that target undocumented workers and individuals who are in violation of immigration law. The operations also target all non-citizens, including refugees, legal permanent residents, and others with permission to reside in the United States, who have any of a long list of criminal offences on their records, including minor offences, which result in the mandatory detention and deportation of these individuals in accordance with the immigration laws passed in 1996.¹⁰

62. The primary goal of the IES is to “Identify and remove criminal aliens, immigration fugitives and other immigration violators.” According to the Office of Detention and Removal Operations:

- A criminal alien is a non-citizen who has been convicted of a crime while residing in the United States, either legally or illegally. This includes charges ranging from shoplifting to work document fraud and murder. After having served their sentence, these individuals face a separate administrative procedure to determine whether they should be removed from the United States.
- An immigration fugitive is someone who has been ordered deported by an immigration judge but has not complied with the order. In actuality, a number of these deportation orders were issued in absentia and often mailed to incorrect mailing addresses.
- Other immigration violators or non-fugitive violators are people who are in some way in violation of current immigration law, but have not been issued a final order of deportation. This includes people who are undocumented, have overstayed their visas, or are in violation of an immigration law that might not have existed at the time of their original entry.

63. Increasing workplace and household raids by ICE agents have terrorized immigrant communities. Besides their frequent disregard of due process, these raids have left an indelible mark by forcibly separating many families.

64. In practically every state in the country, ICE raids have separated children from their parents. Testimonies from children and parents, as well as from social service providers, faith leaders, and elected officials, speak of the widespread social devastation caused by ICE raids.

65. The Special Rapporteur is particularly concerned about the stepped up strategy of arresting deportable immigrants through early morning actions at their homes. In many cases, ICE enters a home with a warrant to arrest one or several immigrants and then proceeds to sweep the entire building, knocking on other doors and demanding to see immigration papers from all the inhabitants. In one case three young boys, aged three, four and seven were awakened at six in the morning to find that their parents were being taken away by immigration officers. ICE carries out these raids in a forceful fashion and uses them not only as an enforcement mechanism but to deter others from being in the United States. These raids are carried out as coordinated efforts

¹⁰ Immigration and Nationality Act, section 287 (g).

with a massive law enforcement presence and have considerable impact on affected families and communities.

66. The Special Rapporteur heard accounts from victims that ICE officials entered their homes without a warrant, denied them access to lawyers or a phone to call family members and coerced them to sign “voluntary departure” agreements.

67. Many who are subject to these raids and subsequent mandatory detention are long-time permanent residents who know far more about the country from which they are facing removal - the United States - than the country to which they may be removed. Although lawful permanent status is not terminated with detention, but only when a final order of removal is entered against an individual, lawful residents can be detained until there is a final resolution in their case.

E. Mandatory detention

68. Detention impairs an individual’s ability to obtain counsel and present cases in removal proceedings. In 2005, 65 per cent of immigrants appeared at their deportation hearings without benefit of legal counsel. Despite the adversarial and legally complex nature of removal proceedings and the severe consequences at stake, detainees are not afforded appointed counsel.

69. Moreover, detention impacts an individual’s ability to earn income, thereby also impeding the ability to retain counsel. To make matters worse, the Department of Homeland Security often transfers detainees hundreds or thousands of miles away from their home cities without any notice to their attorneys or family members, which violates the agency’s own administrative regulations on detention and transfer of detainees. Non-citizens are often detained in particularly remote locations. Many private attorneys are put off from taking cases where clients are detained in such locations. Onerous distances, inflexible visitation schedules and advance notice scheduling requirements by facilities are all obstacles that impede the ability of detainees to secure and retain legal assistance.

70. Detention severely impairs the right of a respondent in removal proceedings to present evidence in her or his own defence. Extensive documentation is often required, including family ties, employment history, property or business ties, rehabilitation or good moral character. Obtaining admissible supporting documents from family members, administrative agencies, schools and hospitals, can be burdensome for anyone, but often practically impossible for detainees. Access to mail and property is often limited and can also create significant obstacles for detainees.

71. Faced with the prospect of mandatory and prolonged detention, detainees often abandon claims to legal relief from removal, contrary to international standards that require non-citizens to be able to submit reasons against their deportation to the competent authorities. Mandatory detention operates as a coercive mechanism, pressuring those detained to abandon meritorious claims for relief in order to avoid continued or prolonged detention and the onerous conditions and consequences it imposes.

72. United States immigration law allows for detention of migrants that is often neither brief nor determinate, and adjudication of defences against removal can be complicated and lengthy. An appeal to the Board of Immigration Appeals by either party extends the period of mandatory

detention for many additional months. A petition for review to the Court of Appeals also extends mandatory detention, often for a period of years. A non-citizen is subject to mandatory detention even after being granted relief by the immigration judge, simply upon the filing of a notice of intent to appeal by Government counsel. In fact, it is often the most meritorious cases that take the longest to adjudicate, and in which migrants spend the longest amount of time in detention. Often the cases subject to continuing appeals are cases where individuals may have the strongest ties to the United States and risk the severest consequences if removed.

73. Mandatory detention also extends to United States citizens who have not yet officially proven their citizenship status or whose status is pending approval. That is because, for those who are not born in the United States, proving citizenship can be a legally and factually intensive process, requiring documentation of their own and their family's history over many years. United States citizenship may be acquired or may exist in derivative form and therefore legally complex determinations must be made in order for citizenship to be established. Mandatory detention policies often prevent a citizen's ability to gather proof of citizenship at all, or in an expedited manner. Even in cases where individuals were born in the United States, verification of citizenship can be burdensome and take months or more, and individuals may remain detained in the process.

74. In addition to the devastating effect that mandatory detention has on detained individuals, the policy has an overwhelmingly negative impact on the families of detainees, many of whom are citizens of the United States.

75. Those who will eventually be removed are prevented from resolving their affairs and making preparations with their families for departure, to the detriment of the wider community.

76. Mandatory detention and mandatory deportation prevent migrants from fulfilling responsibilities they have to family members, to employers, and to the wider communities that may rely on them for various reasons. Children can suffer trauma and severe loss from the sudden, prolonged, and sometimes permanent absence of that parent. The absence of a family member can result in irreparable economic and other injury to an entire family structure. Additionally, health conditions and medical situations specific to certain families are not considered when individuals are subjected to mandatory detention.

77. Mandatory detention and deportation policy, therefore, has significant effects on United States citizens and the children of permanent residents, and other family members. Families consistently bear many of the psychological, geographic, economic, and emotional costs of detention and deportation.

78. Immigration laws are known for being particularly complex. It may take a non-citizen subject to mandatory detention months and sometimes years to ultimately prove that he or she was not deportable.

79. In one case a lawful permanent resident of the United States was detained for approximately three and a half years, subject to mandatory detention, for offences that the Court of Appeals for the Ninth Circuit ultimately found not to constitute deportable offences. Three and a half years after being placed in the custody of the Department of Homeland Security and charged as having been convicted of an aggravated felony, this person was released by the

Department, as it was clear that nothing in his case made him removable and that removal proceedings would therefore be terminated.

80. The Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (the STRIVE Act),¹¹ introduced by Congress on 22 March 2007, is an example of recently proposed legislation that would further expand mandatory detention and indefinite immigration detention, and was an attempt to create comprehensive immigration reform through policy. It required that the Department of Homeland Security significantly increase the number of facilities for the detention of non-citizens, adding a minimum of 20 detention facilities with the capacity to detain an additional 20,000 non-citizens.

81. The STRIVE Act would have essentially overruled the limitations on indefinite detention outlined by the United States Supreme Court in *Zadvydas v. Davis*¹² by specifically authorizing the Department of Homeland Security to indefinitely detain certain non-citizens who have been ordered removed, even when their removal is not reasonably foreseeable. The STRIVE Act would also have increased the number of people subject to mandatory detention by further expanding the kinds of crimes that constitute an aggravated felony and providing the basis for such detention. During the Special Rapporteur's mission to the United States the bill died in the Congressional Subcommittee on 5 May 2007 as it did not come to a vote.

82. Despite efforts by activists, community members, lawyers, and other advocates to repair the significant damage resulting from the legislation introduced in 1996, the legislation and its effects have not been reversed nor mitigated. Moreover, at both state and federal levels, the anti-immigrant climate has resulted in legislation that leads to increased mandatory detention of non-citizens even before they are in Department of Homeland Security custody.

83. For example, in November 2006, Arizona voters approved Proposition 100, which became effective on 7 December 2006 upon its codification in Arizona Revised Statutes §13-3961. That section now provides that a person who is in criminal custody shall be denied bail "if the proof is evident or presumption great" that the person is guilty of a serious felony offence and the person "has entered or remained in the United States illegally". In addition to the serious due process and equal protection issues this provision raises, by mandating different treatment for non-citizens and citizens in criminal proceedings and requiring state officials with little understanding of the complexity of immigration laws to enforce those laws, it also virtually ensures the eventual transfer of these individuals to Department of Homeland Security custody (even if they are never convicted), further increasing the number of people potentially subject to mandatory, prolonged, and indefinite detention.

84. Immigrants indefinitely detained are left uncertain of their status, their rights and their futures. Indefinite detention subjects the families of detained immigrants to the agony of not knowing when their loved one will be released or removed. It exacerbates existing mental health problems and retraumatizes individuals who have been subjected to torture or other forms of persecution in their home countries.

¹¹ H.R. 1645.

¹² See paragraph 40 above.

85. A March 2007 Department of Homeland Security's Office of Inspector General (OIG) report revealed that ICE is non-compliant with regulations governing the review of post-order cases following the two Supreme Court rulings on indefinite detention.

86. The OIG study further found that ICE failed to provide detainees with prior notice of custody reviews, information about how they can cooperate in removal efforts or decisions that clearly explain why supervised release has been denied. OIG attributed many of these failures to inadequate staffing both at local ICE field offices and headquarters, leading to insufficient oversight of local custody decisions.

87. Without the ability to comply uniformly with the current regulations there can be no reasonable expectation that ICE has the capacity to handle its large caseload resulting in part from the efforts of the Department of Homeland Security to secure the border.

III. THE PLIGHT OF MIGRANT WORKERS: THE CASE OF HURRICANE KATRINA

A. Background

88. In the aftermath of Hurricane Katrina, which devastated New Orleans and other areas of the United States Gulf Coast in 2005, several hundred thousand workers, mostly African Americans, lost their jobs and their homes, and many became internally displaced persons (IDPs). Since the storm, these IDPs have faced tremendous structural barriers to returning home and to finding the employment necessary to rebuild their lives. Without housing, they cannot work; without work, they cannot afford housing. Since Hurricane Katrina, tens of thousands of migrant workers, most of them undocumented, have arrived in the Gulf Coast region to work in the reconstruction zones. They have made up much of the labour to rebuild the area, to keep businesses running and to boost tax revenue. To support their families, migrant workers often work longer hours for less pay than other labourers. For some migrant workers, wages continue to decrease. Jobs are becoming scarcer because the most urgent work, gutting homes and removing debris, is mostly finished.

89. These migrant workers, like their original local counterparts, are finding barriers to safe employment, fair pay, and affordable housing, and in some cases, experience discrimination and exploitation amounting to inhuman and degrading treatment. In fact, many workers are homeless or living in crowded, unsafe and unsanitary conditions, harassed and intimidated by law enforcement, landlords and employers alike.

90. Migrant workers on the Gulf Coast are experiencing an unprecedented level of exploitation. They often live and work amid substandard conditions, homelessness, poverty, environmental toxicity, and the constant threat of police and immigration raids, without any guarantee of a fair day's pay. They also face structural barriers that make it impossible to hold public or private institutions accountable for their mistreatment; most have no political voice.

91. The dramatically increased presence of migrant workers in the region has fuelled local tensions over language barriers, education and health-care needs in a public services system strained by Katrina. The low-wage workers rebuilding New Orleans and the Mississippi Gulf Coast are almost entirely people of African, Asian and Hispanic and/or indigenous descent,

many of whom are recent migrants from Latin America and Asia and many of whom are not proficient in English. African American residents are often pitted against migrant workers new to the area, with racial and ethnic tensions between marginalized minority groups in the region escalating. Moreover, as some internally displaced persons return to the region, concern is rising that migrant labourers have diminished job prospects for pre-Katrina residents. Day labourers shared stories with the Special Rapporteur about how they are paid less than promised, or not at all. They note that they are trying to rebuild a city that welcomed them when the most dangerous work needed to be done; only to rebuff them as the pace of rebuilding diminishes.

92. The stories of workers across the New Orleans metro area and the Gulf Coast after Katrina are not simply tales of personal plight. They are also stories about institutional responsibility. In the days following the hurricane, certain agencies of the federal Government came under fierce criticism for being slow to act. Yet, in actuality, other parts of the federal Government sprang into action quite quickly with a range of policy initiatives that were breathtaking in their scope and impact on workers.

93. The treatment of workers in New Orleans constitutes a national human rights crisis. Because these workers are typically migrant, displaced, undocumented, or have temporary work authorization, they have little chance to hold officials and private industry accountable (e.g., many cannot vote, while displaced New Orleanais continue to experience barriers to voting). New Orleans is being rebuilt on the backs of underpaid and unpaid workers perpetuating cycles of poverty that existed pre-Katrina. Hurricane Katrina helped create a situation where there is no Government or private accountability for the creation and maintenance of these inequities. Internally displaced voters have no voice back home, and reconstruction workers are either non-residents or non-citizens. As a result, contractors have free reign to exploit workers, and the Government has felt little pressure to ensure that migrant workers are protected and able to access what is needed to meet basic human needs.

94. As noted above, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families establish workers' rights to (a) a safe and healthful workplace, (b) compensation for workplace injuries and illnesses, (c) freedom of association and the right to form trade unions and bargain collectively, and (d) equality of conditions and rights for immigrant workers.

95. Immigrant workers, including those who migrated to work in the regions affected by Katrina, often experience violations of these rights. Lack of familiarity with United States law and language difficulties often prevent them from being aware of their rights as well as specific hazards in their work. Immigrant workers who are undocumented, as many are, risk deportation if they seek to organize to improve conditions. Fear of drawing attention to their immigration status also prevents them from seeking protection from Government authorities for their rights as workers. In 2002, the Supreme Court stripped undocumented workers of any remedies if they are illegally fired for union organizing activity. Under international law, however, undocumented workers are entitled to the same labour rights, including wages owed, protection from discrimination, protection for health and safety on the job and back pay, as are citizens and those working lawfully in a country.

96. Furthermore, pre- and post-Katrina policies and practices of local, state and federal government agencies have had a grossly disproportionate impact on migrants of colour, in violation of the United States Government's obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and other human rights norms that the United States has ratified.

B. Institutional responsibility

97. Personal stories recounted to the Special Rapporteur illuminate the commonality of the struggles faced by migrant workers but also the institutional responsibility, and how both policies and practices perpetuate structural and institutional racism and xenophobia. Across the city of New Orleans, workers - both returning internally displaced persons and new migrant workers - list calamities that have become routine: homelessness, wage theft, toxic working conditions, joblessness, police brutality, and layers of bureaucracy. These shared experiences with structural racism unite low-wage workers across racial, ethnic, and industry lines. Thousands of workers now live in the same conditions: they sleep in the homes they are gutting or in abandoned cars that survivors were forced to leave behind; they are packed in motels, sometimes 10 to a room; and they live on the streets. Most migrant workers were promised housing by their employers but quickly found upon arrival that no housing accommodation had been made available. Instead, they were left homeless.

98. By all accounts, state and local governments have turned a blind eye to this dismal housing situation. Although the city depends on migrant workers to act as a flexible, temporary workforce, it also made no arrangements to provide them with temporary housing. As a result, the workers who are rebuilding New Orleans often have nowhere to sleep.

99. The federal Government has sent mixed messages. On the one hand, it relaxed the immigration law requirements relating to hiring practices, thereby sending a message to contractors that hiring undocumented workers was permissible if not condoned. On the other hand, federal authorities failed to assure these workers and their family members that they would not be turned over to immigration authorities.

100. New migrant workers on the Gulf Coast have experienced a range of problems relating to wage theft which include:

- Non-payment of wages for work performed, including overtime
- Payment of wages with cheques that bounce due to insufficient funds
- Inability to identify the employer or contractor in order to pursue claims for unpaid wages
- Subcontractors - often migrants themselves - who want to but cannot pay wages because they have not been paid by the primary contractor (often a more financially stable white contractor)

101. These conditions are particularly salient for migrant workers, especially if they are undocumented as they are more easily exploitable. They may be hired for their hard manual

labour and then robbed of their legally owed wages. The situation is exacerbated by the complexity of local employment structures. Because there are multiple tiers of subcontractors, often flowing from a handful of primary contractors with federal Government contracts, workers often do not know the identities of their employers. This is typical of the growing contingent of low-wage workers throughout the country. In New Orleans, workers explained that without knowing the identity of their employer, they cannot pursue wage claims against them.

102. Numerous workers have witnessed immigration raids by ICE and local law enforcement across the city of New Orleans, at large hotels downtown, the bus station, hiring sites across the city, the Superdome, on work sites, in the parking lots of home improvement stores, and even inside homes that workers are gutting or rebuilding. Workers report frequent immigration raids; retaliatory calls to immigration authorities, or threats of such calls, by employers; and collaboration between local law enforcement agents and ICE to the benefit of employers.

103. The lack of labour and human rights enforcement in the Gulf Coast stands in stark contrast to the aggressive tactics employed by local police and ICE, who readily respond to tips from unscrupulous employers who report workers that voice employment-related grievances. As a result, ICE raids on day labourer and other work sites have increased substantially in the wake of Hurricane Katrina. Both ICE and the Department of Labor have expressed their commitment to developing a process whereby ICE will determine, before deporting any worker detained on the Gulf Coast, whether the worker has any unpaid wage claims. Although ICE and the Department are reportedly engaged in ongoing consultations on this subject, no agreement appears to be in place. Workers live in fear of these tactics every day and most cannot or will not complain for fear of more severe repercussions.

IV. CONCLUSIONS

104. Contrary to popular belief, United States immigration policy did not become more severe after the terrorist attacks on September 11. Drastic changes made in 1996 have been at work for more than a decade, affecting communities across the nation and recent policy changes simply exacerbate what was put in motion then. Also, contrary to popular belief, these policies do not target only undocumented migrants - they apply to citizens born in the United States of undocumented parents and long-term lawful permanent residents (or green card holders) as well.

105. Not only have immigration laws become more punitive - increasing the types of crimes that can permanently sever a migrant's ties to the United States - but there are fewer ways for migrants to appeal for leniency. Hearings that used to happen in which a judge would consider a migrant's ties to the United States, particularly their family relationships, were stopped in 1996. There are no exceptions available, no matter how long an individual has lived in the United States and no matter how much his spouse and children depend on him for their livelihood and emotional support.

106. Throughout the history of the United States, many different kinds of non-citizens have been made subject to mandatory detention. People with lawful permanent resident status (or green card holders), including those who have lived lawfully in the United States for decades, are subject to deportation. So are other legal immigrants - refugees, students, business people, and those who have permission to remain because their country of nationality is in the midst of war

or a humanitarian disaster. Undocumented non-citizens are also subject to mandatory detention and deportation regardless of whether they have committed a crime.

107. A primary principle of United States immigration law is that United States citizens can never be denied entry into the country; neither can they ever be forcibly deported from the United States. By contrast, non-citizens, even those who have lived in the country legally for decades, are always vulnerable to mandatory detention and deportation.

108. In the wake of Hurricane Katrina, migrant workers from across the United States travelled to New Orleans. Ultimately, the voices of workers in post-Katrina New Orleans demonstrate that the actions and inactions of federal, state, and local governments and the actions of the private reconstruction industry have created deplorable working and living conditions for people striving to rebuild and return to the city. Because these workers are migrant, undocumented, and displaced they have little chance to hold officials and private industry accountable (e.g., many cannot vote, and displaced workers in New Orleans continue to experience barriers to voting) except through organized, collective action.

V. RECOMMENDATIONS

109. The Special Rapporteur would like to make the following recommendations to the Government.

On general detention matters

110. Mandatory detention should be eliminated; the Department of Homeland Security should be required to make individualized determinations of whether or not a non-citizen presents a danger to society or a flight risk sufficient to justify their detention.

111. The Department of Homeland Security must comply with the Supreme Court's decision in *Zadvydas v. Davis* and *Clark v. Martinez*. Individuals who cannot be returned to their home countries within the foreseeable future should be released as soon as that determination is made, and certainly no longer than six months after the issuance of a final order. Upon release, such individuals should be released with employment authorization, so that they can immediately obtain employment.

112. The overuse of immigration detention in the United States violates the spirit of international laws and conventions and, in many cases, also violates the actual letter of those instruments. The availability of effective alternatives renders the increasing reliance on detention as an immigration enforcement mechanism unnecessary. Through these alternative programmes, there are many less restrictive forms of detention and many alternatives to detention that would serve the country's protection and enforcement needs more economically, while still complying with international human rights law and ensuring just and humane treatment of migrants.

Create detention standards and guidelines

113. At the eighty-seventh session of the Human Rights Committee in July 2006, the United States Government cited the issuance of the National Detention Standards in 2000

as evidence of compliance with international principles on the treatment of immigration detainees.¹³ While this is indeed a positive step, it is not sufficient. The United States Government should create legally binding human rights standards governing the treatment of immigration detainees in all facilities, regardless of whether they are operated by the federal Government, private companies, or county agencies.

114. Immigration detainees in the custody of the Department of Homeland Security and placed in removal proceedings, should have the right to appointed counsel. The right to counsel is a due process right that is fundamental to ensuring fairness and justice in proceedings. To ensure compliance with domestic and international law, court-appointed counsel should be available to detained immigrants.

115. Given that the difficulties in representing detained non-citizens are exacerbated when these individuals are held in remote and/or rural locations, U.S. Immigration and Customs Enforcement (ICE) should ensure that the facilities where non-citizens in removal proceedings are held, are located within easy reach of the detainees' counsel or near urban areas where the detainee will have access to legal service providers and pro bono counsel.

Deportation issues impacting due process and important human rights

116. United States immigration laws should be amended to ensure that all non-citizens have access to a hearing before an impartial adjudicator, who will weigh the non-citizen's interest in remaining in the United States (including their rights to found a family and to a private life) against the Government's interest in deporting him or her.

Detention/deportation issues impacting unaccompanied children

117. The Government should urge lawmakers to pass the Unaccompanied Alien Child Protection Act of 2007 reintroduced in March 2007.

118. Children should be removed from jail-like detention centres and placed in home-like facilities. Due care should be given to rights delineated for children in custody in the American Bar Association "Standards for the Custody, Placement, and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States".¹⁴

119. Temporary Protected Status (TPS) should be amended for unaccompanied children whose parents have TPS, so they can derive status through their parents.

Situation of migrant women detained in the United States

120. In collaboration with legal service providers and non-governmental organizations that work with detained migrant women, ICE should develop gender-specific detention

¹³ CCPR/C/USA/3, paras. 190-192.

¹⁴ Available at https://www.abanet.org/publicserv/immigration/Immigrant_Childrens_Standards.pdf.

standards that address the medical and mental health concerns of migrant women who have survived mental, physical, emotional or sexual violence.

121. Whenever possible, migrant women who are suffering the effects of persecution or abuse, or who are pregnant or nursing infants, should not be detained. If these vulnerable women cannot be released from ICE custody, the Department of Homeland Security should develop alternative programmes such as intense supervision or electronic monitoring, typically via ankle bracelets. These alternatives have proven effective during pilot programmes. They are not only more humane for migrants who are particularly vulnerable in the detention setting or who have family members who require their presence, but they also cost, on average, less than half the price of detention.

Judicial review

122. The United States should ensure that the decision to detain a non-citizen is promptly assessed by an independent court.

123. The Department of Homeland Security and the Department of Justice should work together to ensure that immigration detainees are given the chance to have their custody reviewed in a hearing before an immigration judge. Both departments should revise regulations to make clear that asylum-seekers can request these custody determinations from immigration judges.

124. Congress should enact legislation to ensure that immigration judges are independent of the Department of Justice, and instead part of a truly independent court system.

125. Families with children should not be held in prison-like facilities. All efforts should be made to release families with children from detention and place them in alternative accommodation suitable for families with children.

On migrant workers

126. The Government should ensure that state and federal labour policies are monitored, and their impact on migrant workers analysed. Policymakers and the public should be continually educated on the human needs and human rights of workers, including migrant workers. In this context, the Special Rapporteur strongly recommends that the United States consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

127. A human services infrastructure should be built in disaster-affected communities to comprehensively meet the needs of workers facing substandard housing and homelessness, wage theft, unsafe working conditions and health issues.

128. Effective oversight of the enforcement of applicable labour laws by state and federal agencies should be ensured.

129. Existing health and safety laws should be assiduously enforced in order to curb exploitative hiring and employment practices by contractors.

130. Improved health and safety conditions should be ensured in places that are known to employ migrant workers, compensation for workers and health care for injured migrant workers should be provided, and the significant incidences of wage theft combated.

131. Local law enforcement and federal immigration authorities must cease harassing and racially profiling migrant workers. Law enforcement should instead focus on helping to promote the rights of workers, including the rights of migrant workers.
