

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS
**Independent Expert on protection against violence and discrimination based on sexual
orientation and gender identity**

**RESPONSE OF THE REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND
LEGAL SERVICES TO THE REQUEST FOR SUBMISSIONS FOR THE THEMATIC
REPORT ON THE IMPACT OF COVID-19 ON THE HUMAN RIGHTS OF LGBT
PERSONS, COMMUNITIES AND/OR POPULATIONS**

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RAICES

The Refugee and Immigrant Center for Education (“RAICES”) envisions a compassionate society where all people have the right to migrate and human rights are guaranteed; it defends the rights of immigrants and refugees, empowers individuals, families and communities, and advocates for liberty and justice. As a 501(c)(3) legal services agency based in San Antonio, Texas, in the United States of America, RAICES serves tens of thousands of noncitizens¹ per year in direct immigration legal services, social services, advocacy, community engagement, and refugee resettlement. In 2019 RAICES closed over 28,000 immigration cases free of charge. With ten offices throughout Texas, more than 200 staff members and thousands of active volunteers, RAICES is one of the largest legal service providers for low-income immigrants, asylum seekers, and refugees in the United States.

For many years, RAICES has provided legal services to adults and children detained by U.S. Immigration and Customs Enforcement (“ICE”) in Texas. In response to concerns about lack of access to legal counsel, and community interest in providing pro bono legal services to detained families, the Karnes Pro Bono and CARA Projects were developed in 2014 to service Karnes and Dilley, respectively. The Karnes Pro Bono Project, now run primarily by RAICES, provides legal services to individuals and families held in Karnes in ICE custody. RAICES also provides pro and low bono services to detained and non-detained noncitizens seeking release and immigration relief.

U.S. International Legal Obligations

The United States is a party to several international human rights treaties and is bound by customary international law, particularly the law applying to the member states of the Organization of American States. These sources of international law provide due process of fair trial for every person under the jurisdiction of the United States. The obligation extends to both rights under international law as well as rights provided in domestic law.

Though immigration proceedings are civil proceedings and “not subject to the full range of constitutional protections, [they] must conform to the Fifth Amendment’s requirement of due process.”² Indeed, “an alien who faces deportation is entitled to a full and fair hearing of his

¹ Although the Immigration and Nationality Act (“INA”) uses the term “alien” to describe an individual who is neither a U.S. citizen nor a U.S. national, we prefer to refer to this vulnerable class as simply “noncitizens.” All references to “noncitizen” in this comment submission refer to “any person who is not a citizen or national of the United States.” See 8 U.S.C. §1101(a)(3). See also *Pereira v. Sessions*, 138 S. Ct. 2105, 2110, 201 L. Ed. 2d 433 n.1 (2018).

² *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended).

claims and a reasonable opportunity to present evidence on his behalf.”³ The rights to due process and fair trial are also found in International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) (“ICCPR”). This treaty has been ratified by the United States. The ICCPR provides in article 14 that in the determination of one’s rights, “. . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁴ This right requires access to a body that is not beholden to one of the parties before it and to a proceeding in which there is equality of harms between the parties. The right enumerated in article 14 also requires that a petitioner be allowed an opportunity to determine the fairness of his or her procedure.

The fundamental aspects of both the right to due process and the right to a fair trial are well-established in customary international law that is applicable to the United States. These rights are included in numerous human rights instruments that have been ratified by virtually every country in the world.⁵ In total, these treaties enjoy more than 300 ratifications.

The most important expressions of the customary international law rights to due process and fair trial are found in the Inter-American context, in which the United States is an important actor. As a Member State of the Organization of American States (“O.A.S.”), the United States has recognized and accepted its obligation to respect the Inter-American rules of customary international law. It has done this by joining the consensus of States that have adopted the regional Inter-American instruments that expressly endorse the rights to due process and fair trial. These instruments are interpreted by the Inter-American Commission on Human Rights (“IACHR”), a body whose “principal function [is] to promote the observance and protection of human rights.”⁶ The United States is party to the Charter of the Organization of American States, 119 U.N.T.S. 3 (1951), the instrument that created the Commission, and is subject to the jurisdiction of the IACHR.⁷

³ *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000).

⁴ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1976) at art. 14.

⁵ *See, e.g.*, ICCPR, arts. 6, 7, 14 (ratified by 173 of 206 sovereign States in the international community); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 2, 3, 6, 213 U.N.T.S. 221 (*entered into force* Sept. 3, 1953) (ratified by 47 European States); American Convention on Human Rights, Nov. 22, 1969, arts. 4, 5, 8, 114 U.N.T.S. 213 (*entered into force* Jul. 18, 1978) (ratified by 25 American States); African Charter of Human and Peoples’ Rights, Jun. 27, 1981, arts. 4, 5, 7, 1520 U.N.T.S. 217 (*entered into force* Oct. 21, 1986) (ratified by 54 African States).

⁶ Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, art. 112, O.A.S.T.S. 1-A (*entered into force* Mar. 12, 1970) (ratified by the United States on April 23, 1968).

⁷ *See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human, Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. ¶ 45 (Jul. 14, 1989).

The IACHR has held that the provisions of the American Declaration of the Rights and Duties of Man (“American Declaration”), which enumerates the rights to due process and fair trial and was adopted by the 1948 inter-governmental Ninth International Conference of American States, in which the United States participated, are incorporated into the text of the Charter because they reflect customary international law.⁸ The IACHR reaffirmed the customary international nature of the American Declaration in its opinions in *White and Potter (Baby Boy) v. United States*⁹ and *Roach and Pinkerton v. United States*.¹⁰ In the latter case, the IACHR held unequivocally that the provisions of the Declaration are part of international law applicable to the United States.¹¹

Article XVIII of the American Declaration provides that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”¹² Article XXVI of the American Declaration states that “[e]very person accused of an offense has the right to be given an impartial and public hearing . . .”¹³ The IACHR, as the body authorized to interpret the obligations of O.A.S. Member States, has made clear that it understands these fair trial provisions to apply to immigration proceedings.¹⁴ The Commission stated that to deny an alleged victim these protections “simply by virtue of the nature of immigration proceedings would contradict the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the persons under the State’s jurisdiction are established.”¹⁵

Both the Inter-American Court and IACHR have reiterated this understanding. In its “Report on Immigration in the United States: Detention and Due Process,” the IACHR noted that “[w]hile many of these guarantees are articulated in a language that is more germane to criminal proceedings, they must be strictly enforced in immigration proceedings as well, given the circumstances of such proceedings and their consequences.”¹⁶

⁸ O.A.S. Res. XXX, Apr. 1948, O.A.S. Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

⁹ Judgment, Inter-Am. Comm’n H.R. 25, OEA/ser.L/V/II.54, doc. 9, rev. 1 (Mar. 6, 1981).

¹⁰ Judgment, Inter-Am. Comm’n H.R. 147, OEA/ser.IJVII.71, doc. 9 rev. 1 (Sept. 22, 1987).

¹¹ *Roach and Pinkerton v. United States*, IAComm.HR Res. N° 3/87, Case 9647 (September 22, 1987) at ¶¶ 45–48.

¹² American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

¹³ *Id.*

¹⁴ *See Andrea Mortlock v. United States*, Admissibility and Merits, Judgment, Inter-Am. Comm’n H.R., Report No. 63/08, Case No. 12.534, ¶ 83 (2008).

¹⁵ *Id.*

¹⁶ IACHR, “Report on Immigration in the United States: Detention and Due Process,” O.A.S. Doc. OEA/Ser.L/V/II.Doc. 78/10 (Dec. 30, 2010); *see also* IACHR, “Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Annual Report 2000,” para. 90 (Apr. 16, 2001); *Wayne Smith v. United States*, Admissibility, Judgment, Inter-Am. Comm’n H.R., Report No. 56/06, Case

Standards for Immigration Detention

Upon its formation in 2003, ICE adopted the pre-existing 2000 National Detention Standards to govern the standards of detention for noncitizens, including individuals detained in facilities operated or managed by private contractors.¹⁷ Working with various stakeholders, ICE created and promulgated the Performance-Based National Detention Standards (“PBNDS 2008”) in 2008.¹⁸ However, the standards were not enforced by an independent third party or governmental investigative authority.¹⁹ In 2011 the framework was revised with the intent of improving overall detention conditions. Specifically, the 2011 PBNDS updated medical and mental health. complaint processes and responses, prevention of and protection from sexual assault and abuse, and improvement of communication with detainees who speak languages other than English.²⁰ The 2011 standards were revised again in 2016 to “ensure consistency with federal legal and regulatory requirements as well as prior ICE policies and policy statements;”²¹ and in 2015 ICE issued a memorandum, Further Guidance Regarding the Care of Transgender Detainees.²² Through these policies, ICE has made efforts to prevent sexual assault and/or abuse of LGBT individuals. However, the agency has not publicly shared guidance or policies that address other particular vulnerabilities of detained LGBT noncitizens.

It is important to note that ICE’s detention standards are merely suggestions and do not exist as binding or regulatory instruments. Alarming, a 2019 report from DHS’s Office of the Inspector General found that “ICE does not adequately hold detention facility contractors accountable for not meeting performance standards.”²³

Concerns about Conditions

Doctors, lawyers, politicians, and activists have urged ICE to use its discretionary power to release noncitizens from detention “from ICE detention to avoid a potentially deadly coronavirus

No. 12.562, ¶ 51 (Jul. 20, 2006); *Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Randolph Izal Elorz v. Mexico*, Merits, Judgment, Inter-Am. Comm’n H.R., Report No. 49/99, Case No. 11.610, ¶ 46 (Apr. 13, 1999).

¹⁷ U.S. Immigration and Customs Enforcement, *2000 Detention Operations Manual*, Department of Homeland Security, 2019, <https://www.ice.gov/detention-standards/2000>

¹⁸ U.S. Immigration and Customs Enforcement, *2008 Operations Manual ICE Performance-Based National Detention Standards*, Department of Homeland Security, 2019, <https://www.ice.gov/detention-standards/2008>

¹⁹ LOCKING UP FAMILY VALUES, AGAIN: A REPORT ON THE RENEWED PRACTICE OF FAMILY IMMIGRATION DETENTION, *supra* note 4.

²⁰ U.S. Immigration and Customs Enforcement, *2011 Operations Manual ICE Performance-Based National Detention Standards*, Department of Homeland Security, 2019, <https://www.ice.gov/detention-standards/2011>

²¹ *Id.*

²² U.S. Dep’t. of Homeland Security, Further Guidance Regarding the Care of Transgender Detainees, 2 (June 19, 2015) <https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf>

²³ U.S. Immigration and Customs Enforcement, *2011 Operations Manual ICE Performance-Based National Detention Standards*, Department of Homeland Security, 2019, <https://www.ice.gov/detention-standards/2011>

outbreak in scores of facilities across the country.”²⁴ ICE’s inadequate medical treatment, lack of protections for LGBT detainees, and failure to adhere to CDC guidelines, significantly interfere with LGBT noncitizen detainees’ right to health under Article XI of the American Declaration, right to life under Article VI of the ICCPR, and right to seek asylum under Article XXVII of the American Declaration.

On its website ICE states that the agency is following the guidance of the U.S. Centers for Disease Control (“CDC”) to protect detainees from COVID-19. These guidelines include:

- Provision of hygiene, cleaning, and medical supplies, including alcohol-based sanitizer, at no cost to detainees;
- Implementation of social distancing strategies; and
- Posting information about COVID-19 and maintaining good hygiene.²⁵

However, in a case currently pending in the U.S. District Court for the District of Columbia, *O.M.G. v. Wolf*, plaintiffs allege that ICE fails to follow “CDC guidelines to prevent the spread of COVID-19” in three family residential centers.²⁶ In another case, *Fraihat v. ICE*, U.S. District Judge Central District of California Jesus G. Bernal ordered ICE to “identify and track all ICE detainees with Risk Factors” and consider releasing those individuals.²⁷ Judge Bernal states in his opinion that ICE has “likely exhibited callous indifference to the safety and wellbeing of [detained noncitizens].”²⁸

In a letter to Acting ICE Director Matthew Albence and Acting Secretary of Homeland Security Chad Wolf, eight immigrant rights organizations reported numerous examples of ICE’s failure to meet its own “minimal standards to ensure the health and safety of LGBTQI/HIV+ individuals in immigration detention.”²⁹ The letter then outlines “the ongoing detention and civil rights violations of a group of LGBTQI/HIV+ immigrants who are being detained at the Winn Correctional Center (‘Winn’) in Winnfield, LA. Many of these individuals are transgender women.”³⁰ The violations generally fall into four categories: abuse and mistreatment, inadequate medical and mental health care, “discrimination and verbal abuse by facility staff,” and “failure

²⁴ Camilo Montoya-Galvez, “Powder kegs”: Calls grow for ICE to release immigrants to avoid coronavirus outbreak, CBS News, updated Mar. 19, 2020,

<https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/>

²⁵ Centers for Disease Control, *Guidance for Correctional & Detention Facilities*, 2019,

<https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>

²⁶Emergency Verified Petition for a Writ of Mandamus and Complaint for Declaratory and Injunctive Relief, at 9, *O.M.G. v. Wolf*, No. 1:20-cv-00786, ECF No. 1.

²⁷ *Fraihat v. U.S. Immigration & Customs Enft*, No. EDCV191546JGBSHKX, 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020)

²⁸ *Id.*

²⁹ Letter from Santa Fe Dreamers Project, et al., to Matthew Albence Acting ICE Director, and Chad Wolf, Acting Secretary of Homeland Security (Mar. 26, 2020) (available at

<https://www.washingtonblade.com/content/files/2020/03/March262020WinnConditionsLetter.pdf>)

³⁰ *Id.*

to timely adjudicate parole requests or consider transfer requests.”³¹ The organizations also report that “social distancing at Winn is virtually impossible.”³²

U.S. Congressman Mike Quigley penned a letter to Acting Secretary Wolf urging ICE to release “all LGBT asylum seekers immediately.”³³ In his letter he states,

As COVID-19 continues to spread across the United States, claiming thousands of lives, ICE has proven itself incapable of protecting the people in its custody, routinely ignoring CDC guidelines and ICE’s own Pandemic Response Requirements. LGBTQ asylum seekers were at particular risk in detention even before COVID-19. They frequently face discrimination and harassment based on their sexual orientation or gender identity, as well as lack of appropriate HIV and other medical care.... The COVID-19 outbreak makes the situation in ICE detention even more dangerous for individuals in the agency’s custody, including LGBTQ individuals. It is widely reported that ICE does not provide sufficient protective gear or hygiene products, fails to provide timely information on how to prevent infection, and is either unable or unwilling to implement social distancing measures.³⁴

Conclusion

ICE’s continued mistreatment of LGBT detainees, failure to meet minimum guidelines to prevent the spread of COVID-19, and inadequate protection of the rights of LGBT detainees put this already vulnerable group at significant risk during the current global pandemic. With no way to adequately protect these individuals, the U.S. government must immediately release noncitizen detainees in ICE custody, giving priority to individuals who identify as LGBT.

Respectfully submitted,

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³¹ *Id.*

³² *Id.*

³³ Letter from Mike Quigley, U.S. Representative, to Chad Wolf, Acting Secretary of Homeland Security (Jun. 9, 2020) (available at <https://quigley.house.gov/sites/quigley.house.gov/files/Final%20Rep.%20Quigley%20letter%206.9.20..pdf>)

³⁴ *Id.*