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AI AND RACIAL DISCRIMINATION IN U.S. BORDER ENFORCEMENT

Impacts on Black Migrants and Migrants of Color



Report for the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance: AI Uses and Implications for Racial Discrimination Against Black Migrants and Other Migrants of Color in U.S. Border and Immigration Enforcement

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discrimination, xenophobia and related intolerance:**

**AI Uses and Implications for Racial Discrimination Against Black Migrants and Other
Migrants of Color in U.S. Border and Immigration Enforcement**

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I. EXECUTIVE SUMMARY

In recent years, the U.S. government has increasingly relied on Artificial Intelligence (“AI”) systems to carry out its border enforcement and migration control efforts. As a result, migrants increasingly interact with various AI systems throughout their migration journey to the U.S., sometimes even unaware that they are doing so. AI systems surveil migrants attempting to flee life-threatening conditions along the border, determine who will be allowed to enter the country, inform immigration officials’ exercise of discretion in detention and deportation decisions, and increasingly determine who will be granted immigration relief. In short, the Department of Homeland Security’s (“DHS’s”) use of AI systems profoundly impacts migrants.¹

While DHS and many other proponents of these AI systems make claims about their neutrality and efficiency, such narratives overlook the discriminatory impact these technologies have on migrants of color, particularly Black migrants. Their failure to recognize the ways that AI reflects racial biases of both its developers and deployers, as well as the biases in the data on which AI relies, exposes a critical gap in their discourse about AI.

This report undertakes a broad examination of the AI currently utilized by DHS, using illustrative examples from each stage of a migrant’s journey, and identifies key ways in which AI use reproduces and exacerbates inequality in the existing immigration system and fails to adhere to domestic and international standards regarding nondiscrimination. While this report discusses what technology is being used at this time, further research is needed to keep current on newly emerging technologies. Additionally, publicly available information on DHS’s development, deployment, and implementation of AI technologies and systems is minimal. Our analysis is necessarily limited to the available information.

The 2002 Durban Declaration and Programme of Action confirmed that colonization is a root cause of racial discrimination and its reproduction.² Thus, we discuss the racially discriminatory impact of AI through a decolonial lens, alongside an analysis of the International Convention on the Elimination of All Forms of Racial Discrimination. A decolonial lens calls for the incorporation of diverse perspectives, especially those of the subaltern.

Ultimately, we conclude that the U.S. government should halt the deployment of all AI systems by DHS that fail to meet relevant nondiscrimination standards under international and domestic law. Concrete steps must be taken to promote greater transparency in the development and implementation of AI and to enable and empower civil society to convey its opinions. The U.S. government must implement effective risk mitigation measures with strong oversight. And finally, the people affected by DHS’s AI use should have access to effective remedies. Otherwise, the goal of decolonizing AI will remain unrealized.

¹ JUST FUTURES LAW & THE ADVOCATES FOR HUMAN RIGHTS, [CANCEL DHS USE OF AI TECHNOLOGIES FOR IMMIGRATION ENFORCEMENT AND ADJUDICATION BY DECEMBER 1, 2024](#) (Sept. 4, 2024).

² United Nations General Assembly, [Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance](#) ¶ 12 U.N. Doc. A/CONF.189/12 (Sept. 8, 2001) [hereinafter A/CONF.189/12].

II. INTRODUCTION

A. Background

Between 31 October and 14 November 2023, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance conducted a country visit to the United States. On 6 November 2023, during the Special Rapporteur’s meeting with the Black Alliance for Just Immigration (“BAJI”) and other groups in Los Angeles, CA regarding the impacts of racism on immigration law in the U.S., we discussed the U.S. government’s increasing use of artificial intelligence (“AI”) systems in U.S. border management and immigration enforcement and its impact on Black migrants. The Special Rapporteur expressed interest in learning more about this topic from BAJI.

Black migrants: in this report, we use the term Black migrants to refer to any person born outside the United States, Puerto Rico, or other U.S. territories from Black-majority countries such as Jamaica, Haiti, Cape Verde, Cameroon, Guinea, Bahamas, Sierra Leone, Nigeria, Dominican Republic, Kenya, Somalia, Ghana, Burkina Faso, Liberia, Togo, Trinidad and Tobago, Sudan, Democratic Republic of the Congo, and Côte d’Ivoire, as well as those with African ancestry from non-Black-majority countries, such as Honduras, Colombia, and Brazil. Where DHS data is available, the definition of Black migrants is defined and calculated based on region and/or nationality, so all data on Black migrants from DHS sources are calculated based on migrants from African and Caribbean countries.

In response to your request, BAJI, in partnership with the Immigrant Rights Clinic and International Justice Clinic at the University of California, Irvine School of Law, respectfully submit this report. The submission is aimed at providing the Special Rapporteur with information about the U.S. government’s ongoing use of AI systems in border management and immigration enforcement as well as the discriminatory impacts of AI systems on Black migrants and other migrants of color. Guided by a decolonial framework, as detailed below, this report also identifies some key actions the U.S. government can take to mitigate those discriminatory impacts, as required under international law, including the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).

BAJI is the first U.S. national immigrant rights organization for people of African descent, representing the nearly five million Black immigrants nationwide. BAJI fights for the rights of Black migrants and African Americans through legal advocacy, research, policy, organizing, and narrative building to improve the conditions of Black communities by advancing racial justice and migrant rights. BAJI’s legal team works to combat the criminalization and deportation of Black immigrant communities through a powerful three-pronged approach, which includes direct legal representation, impact litigation, and legal training in communities facing removal. BAJI’s approach to practicing, changing, and teaching the law has provided critical

assistance to Black immigrants and achieved long-lasting impacts on immigration systems. BAJI was founded in Oakland, CA in 2006 by veteran civil rights activists and clergy who were concerned about a wave of unjust immigration enforcement laws under consideration by the U.S. Congress. Currently, BAJI has offices, staff, and organizers in New York, NY; Los Angeles, CA; Oakland, CA; Atlanta, GA; Miami, FL; Washington, DC; Minneapolis, MN; and Houston, TX.

The Immigrant Rights Clinic (“IRC”) launched in 2011 as part of UCI Law’s experiential learning program. Clinic students, under the supervision of faculty, provide direct representation to immigrants on matters ranging from detention and deportation defense to protection of civil and constitutional rights of immigrants. The Clinic also engages in advocacy work through partnerships with grassroots and community organizations on critical immigration issues. The Clinic has worked with organizations, such as Just Futures Law, to obtain records about the government’s use of surveillance tools in immigration enforcement.

The International Justice Clinic (“IJC”) produces research and conducts advocacy promoting compliance with international human rights law and, *inter alia*, United Nations human rights mechanisms. Since its founding in 2012, under the direction of Professor David Kaye, a former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Clinic has continuously researched and advocated for freedom of expression and privacy as well as the eradication of racial discrimination, particularly at the intersection of technology and human rights. For example, in 2023, IJC submitted an NGO report to the Human Rights Committee on ICE’s dragnet surveillance, in collaboration with the Center on Privacy and Technology at Georgetown Law.

B. AI in Border Management and Immigration Enforcement

In just a few years’ time, AI has become ubiquitous in border management and the enforcement of immigration laws by the U.S. government. Authorities are experimenting with numerous AI systems to make decisions about immigration enforcement. AI can be utilized to determine who to investigate at the border, who is eligible for release from detention, and who is allowed to receive asylum and other forms of immigration relief. These technologies have been combined with ever-expanding forms of surveillance to constitute a new “smart border,” creating significant concerns for the human rights of migrants.

Artificial intelligence: in this report, we use AI in accordance with the European Union’s definition of AI as “a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical

or virtual environments.”³ This definition is somewhat broader than DHS’s definition of AI as “[a]utomated, machine-based technologies with at least some capacity for self-governance that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments.”⁴

Recently promulgated regulatory and policy frameworks at the U.S. domestic level governing federal agencies’ use of AI systems seemingly recognize the potential dangers of AI systems. However, questions remain around transparency and accountability regarding the deployment of AI systems by the Department of Homeland Security (“DHS”). While DHS recently released the AI inventory⁵ on 14 August 2024, pursuant to Executive Order 13960, the agency failed to comply with federal guidelines regarding notification, redress, and failed to both provide an opt-out process for those impacted by AI systems and consult affected groups on the rollout of AI.⁶ These gaps in compliance with federal guidance also raise questions about U.S. compliance with international human rights law.

Department of Homeland Security (DHS): DHS’s mission is to secure the U.S. from threats, such as through border security. In this report, we discuss various components of DHS that migrants face in their journeys including Customs and Border Protection (“CBP”), Immigration and Customs Enforcement (“ICE”), and U.S. Citizenship and Immigration Services (“USCIS”).⁷

The remainder of this report is structured into four parts. In [Section III](#), we lay the foundation for the analytical framework we are using in the report, including a discussion of a decolonial lens for understanding AI systems, relevant international law, and applicable domestic policies that govern the use of AI systems in the U.S. border and immigration enforcement regime. In [Section IV](#), we examine specific examples of AI systems migrants, including Black migrants, encounter along their migration journey and discuss how those technologies often fail to adhere to international human rights laws on nondiscrimination. In [Section V](#) we offer baseline recommendations for the U.S. to comply with both international and domestic laws in its development, deployment, and implementation of AI technologies in immigration. We end with a short conclusion.

³ [Regulation 2024/1689](#), art. 3, 2024 O.J. (L 12.7.2024) 1, 46 (EU).

⁴ In 2024, the African Union likewise took a broad approach to defining AI as: “computer systems that can simulate the processes of natural intelligence exhibited by humans where machines use technologies that enable them to learn and adapt, sense and interact, predict and recommend reason and plan, optimize procedures and parameters, operate autonomously, be creative and extract knowledge from large amounts of data to make decisions and recommendations for the purpose of achieving a set of objectives identified by humans.” AFR. UNION, [CONTINENTAL ARTIFICIAL INTELLIGENCE STRATEGY](#) 14 (2024).

⁵ U.S. DEPT. OF HOMELAND SEC., [DHS INVENTORY OF AI USE CASES](#) (Aug. 14, 2024).

⁶ JUST FUTURES LAW & THE ADVOCATES FOR HUMAN RIGHTS, [CANCEL DHS USE OF AI TECHNOLOGIES FOR IMMIGRATION ENFORCEMENT AND ADJUDICATION BY DECEMBER 1, 2024](#) (Sept. 4, 2024).

⁷ U.S. DEPT. OF HOMELAND SECURITY, [About DHS](#).

III. FRAMEWORK FOR ANALYSIS

A. The Urgent Need to “Decolonize” Artificial Intelligence in Immigration

In the 2002 Durban Declaration and Programme of Action, United Nations member states, including the U.S., stated that colonialism remains “among the root causes of racism, racial discrimination, xenophobia and related intolerance against Africans and people of African descent, people of Asian descent and indigenous peoples.”⁸ As the previous Special Rapporteur, Professor. E. Tendayi Achiume emphasized, member states of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) should not only address individual wrongful acts through legal means following international human rights law, but also, “transform contemporary structures of racial injustice, inequality, discrimination, and subordination ... built through ... colonialism.”⁹

As Professor Achiume framed it, immigration policy, especially in the U.S., is one of the areas where the stark influence of colonial legacies exists, perpetuating racial discrimination and associated violence.¹⁰ States that have benefited from colonialism tend to be receiving countries, and the U.S.—as a nation with a legacy of both settler colonialism¹¹ and chattel slavery—is likewise a country that receives many immigrants. A substantial number of immigrants are forced to migrate from nations such as Haiti, Ghana, Nigeria, Somalia, and Kenya, nations directly impacted by U.S. wars or devastated by U.S. economic policies.¹² Once in the U.S., migrants from the global South experience discrimination in the form of racial profiling, violence, and disproportionate rates of detention and deportation.¹³ For example, Black migrants

⁸ United Nations General Assembly, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, ¶ 4 U.N. Doc. A/74/321 (Aug. 21, 2019) [hereinafter A/74/321].

⁹ *Id.*

¹⁰ Human Rights Council, *Visit to the United States of America: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶ 5 U.N. Doc. A/HRC/56/68/Add.1 (May 16, 2024) [hereinafter A/HRC/56/68/Add.1].

¹¹ Settler colonialism plays an important part in the creation and history of the U.S., creating a system of power and control upheld through governmental and social orders, “operat[ing] through internal/external colonial modes simultaneously because there is no spatial separation between metropole and colony.” Eve Tuck & K. Wayne Yang, *Decolonization is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & Soc’y. 1, 5 (2012). Colonialism “consolidated ‘race and racial identity’ as ‘instruments of basic social classification,’” making race the marker for accessing power and privilege within society. *Id.* at 7. These power dynamics have been replicated through other social constructs such as gender, class, and immigration status and reinforced through legal means, by both the state and international law. *Id.* Subsequently, states in themselves serve as “technologies of colonialism,” where those holding marginalized identities are subjugated to violence and oppression. *Id.* at 4.

¹² *Id.* at 7.

¹³ TIMANTHA GOFF ET AL., UNCOVERING THE TRUTH: VIOLENCE AND ABUSE AGAINST BLACK MIGRANTS IN IMMIGRATION DETENTION 11–12 (2022).

experience the highest rates of detention and deportation¹⁴ due to racial discrimination, over-policing of Black communities, and invisibility within the public consciousness.¹⁵

Professor Achiume emphasized the importance of decolonization in approaches for the realization of human rights.¹⁶ Some scholars have defined decolonization as the literal process of transferring territorial power from colonial hands to local governments.¹⁷ Others have emphasized the importance of structural decolonization which seeks to “undo colonial mechanisms of power, economics, language, culture, and thinking,” and critique dominant norms and knowledge.¹⁸ Moreover, decolonizing knowledge involves engaging in critical conversations about who gets to be included and who is excluded from colonial spaces and works to both decenter those in power and re-center those who are most affected by legacies of violence.¹⁹

Decolonization: In this report, we use the term decolonization to refer to the process of transforming contemporary structures of racial injustice, inequality, and discrimination that were built through colonialism. While there are many ways in which decolonization can be achieved, this report focuses on recentering the narrative of AI development and deployment around the people and communities it ultimately affects. This includes framing our work around acknowledging new pathways to allow for those who have been historically marginalized an opportunity to shape and build their own futures in this new frontier of AI.

Contrary to the myth that advanced technologies, such as AI systems, are “neutral,” a decolonizing framework recognizes that such technology carries a significant risk of intensifying the already stark impact of colonial legacies on systems of governance.²⁰ A nearly inevitable consequence of technologies is the reproduction of colonial dynamics through human value judgments, which are then mirrored and replicated in the physical world.²¹ Indeed, the theory of “technocolonialism” posits that technological advances, data, surveillance, and the use of AI, extend, rather than mitigate, colonial power over migrants.²² Given bias in, for example, AI

¹⁴ *Id.*

¹⁵ JULIANA MORGAN-TROSTLE & KEXIN ZHENG, *THE STATE OF BLACK IMMIGRANTS PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM* 25–26 (2020).

¹⁶ A/74/321, *supra* note 8, at 4–5.

¹⁷ JAN JANSEN & JÜRGEN OSTERHAMMEL, *DECOLONIZATION: A SHORT STORY 2* (Princeton Univ. Press, 2017).

¹⁸ Shakir Mohamed, Marie-Therese Png & William Isaac, *Decolonial AI: Decolonial Theory as Sociotechnical Foresight in Artificial Intelligence*, 33 *PHIL. AND TECH.* 659, 664 (2020).

¹⁹ Decolonial epistemology is essential in this work alongside pragmatic approaches as “theories have been some of the greatest instruments of colonization.” José Cossa, *Cosmo-uBuntu: Toward a New Theorizing for Justice in Education and Beyond*, *CRITICAL THEORIZATIONS OF EDUC.*, 39 (Leiden, The Netherlands: Brill, 2020).

²⁰ See Aarathi Krishnan et al., *AI DECOLONIAL MANYFESTO*.

²¹ The new technologies create new borders both horizontally and vertically, adding hurdles for refugees to navigate their journeys. Mark Latonero & Paula Kift, *On Digital Passages and Borders: Refugees and the New Infrastructure for Movement and Control*, 4 *SOC. MEDIA + Soc’y* 1, 5 (2018). See A/HRC/56/68/Add.1, *supra* note 10, 13.

²² Mirca Madianou, *Technocolonialism: Digital Innovation and Data Practices in the Humanitarian Response to Refugee Crises*, 5 *SOC. MEDIA + Soc’y* 1, 1 (2019).

training data²³ as well as the reach of Western-centric companies and researchers in the development and regulation of AI,²⁴ colonial influence is proliferated at every stage.²⁵ As the Special Rapporteur detailed in the report on her recent visit to the U.S., AI systems have “significant potential for algorithmic bias and the deepening of racial inequalities.”²⁶

A growing number of scholars and civil society organizations are thus calling for the decolonization of AI systems, including in immigration enforcement.²⁷ Decolonizing AI can be achieved, in part, through “acknowledg[ing] the expertise that comes from lived experience[s], and creat[ing] new pathways to make it possible for those who have historically been marginalized to have the opportunity to decide and build their own dignified socio-technical futures.”²⁸ One example of decolonial AI praxis is the application of the “Cosmo uBuntu” concept to AI, which involves the voluntary embracing of African-derived epistemology uBuntu (personhood) as “a foundational value system in our participation in planetary conviviality, without forcing universality.”²⁹ In contrast to the Western-centric, individualistic views on humanity expressed in “*Cogito Ergo Sum*” (“I think, therefore I am”), uBuntu posits that “a person is a person through/unto/because of persons” and applies personhood “to all humans and precludes individuation, classifications, and hierarchies,” such as race, ethnic, and geopolitical origins.³⁰ Applying Cosmo uBuntu to AI fosters the inclusion of critical perspectives and

²³ “Training data means data used for training an AI system through fitting its learnable parameters.” [Regulation 2024/1689](#), art. 3, 2024 O.J. (L 12.7.2024) 1, 48 (EU). Training data is a “dataset used to train machine learning (ML) models to process information and accurately predict outcomes.” Vangie Beal, , [TECHOPEDIA](#) (updated on Aug. 19, 2024). *What is Training Data?*, [TECHOPEDIA](#) (updated on Aug. 19, 2024).

²⁴ Fourteen out of the fifteen largest AI developers are based in the U.S. Team Stash. *15 Largest AI companies in 2024*, [STASH](#) (Aug. 8, 2024).

²⁵ Madianou, *supra* note 22, at 11.

²⁶ A/HRC/56/68/Add.1, *supra* note 10, at 13.

²⁷ For example, in *Decolonial AI: Decolonial Theory as Sociotechnical Foresight in Artificial Intelligence*, the authors: (i) highlight the benefits of using a decolonial lens as a foresight tool to address bias in AI; (ii) identify situations where colonial characteristics are either generated or intensified by the use of AI in the present day (referred to as 'algorithmic coloniality'); and (iii) propose decolonial approaches to be applied in the development and deployment of AI. Mohamed et al., *supra* note 18; *see also* International Telecommunication Union (ITU), *AI FOR GOOD LIVE: Cosmo-Ubuntu, Machine Translation and Cognitive Code Switching*, [YOUTUBE](#) (July 15, 2020).

²⁸ Krishnan et al., *supra* note 20; *see also* Sareeta Amrute et al., *A Primer on AI in/from the Majority World*, [DATA AND Soc'y](#) (Sept. 14, 2022) (compiling scholarship and other articles that highlight the perspectives of Global Majority on AI development and use).

²⁹ [AI FOR GOOD LIVE](#), *supra* note 27.

³⁰ For “Cosmo-uBuntu,” *see* Susan Wiksten, ed., *Centering Global Citizenship Education in the Public Sphere: International Enactments of GCED for Social Justice and Common Good*, 22 (ROUTLEDGE, TAYLOR & FRANCIS GRP. 2021); Cossa, *supra* note 19, at 33–34; [AI FOR GOOD LIVE](#), *supra* note 27.

experiences that can work towards balance in AI.³¹ This, in turn, contributes to the decolonization of AI.³²

At a practical level, decolonizing AI will require action from AI developers and deployers like DHS as well as civil society, including impacted communities and their supporters. First, AI deployers must “adopt a self-reflexive approach . . . that recognizes power imbalances and its implicit value systems.”³³ This requires examining, restructuring, and transforming how AI is developed, tested, and regulated to ensure marginalized communities are included. Second, civil society must be empowered to “create new forms of affective community, elevate intercultural dialogue, and demonstrate the forms of solidarity and alternative community that are already possible.”³⁴ This requires, at a minimum, capacity building among civil society and robust public disclosure about AI. Transparency allows the public to identify, assess, and act against algorithmic harms that disproportionately harm people of color and immigrants.³⁵ Finally, decolonizing AI “will require reparations for present and past material and epistemic injustice and dispossession.”³⁶

B. Legal Framework Governing AI Use and Non-Discrimination

1. State duties under international human rights law

The International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD” or the “Convention”) imposes the following set of key duties on states in the context of AI use in border management and immigration enforcement.³⁷ The U.S. ratified ICERD in

³¹ “The potential impact of such a placement of Africa in negotiating the conceptualization and the unfolding of AI is to leverage power dynamics in negotiation of concepts, theorizing, policy, and practice. Africa cannot afford to only focus on the practical and continue to sacrifice African theorizing and praxis, thus rely on non-African thought processes, values, and realities.” José Cossa, *Cosmo-uBuntu and AI*.

³² “In this context, data science, AI, and overall technology must align with Cosmo-uBuntu in order to enhance efficiency without disturbing the natural-balance/ecosystem.” Cossa, *supra* note 19, at 41.

³³ Mohamed et al., *supra* note 18, at 14; “In engaging the so-called Artificial Intelligence (AI), we must first understand that machines have no intelligence, but humans do; such human intelligence facilitates the process and efficiency of machine learning which empowers machines with AI.” Cossa, *supra* note 31.

³⁴ Mohamed et al., *supra* note 18, at 18.

³⁵ Emanuel Moss et al., *Assembling Accountability: Algorithmic Impact Assessment for the Public Interest*, DATA AND Soc’y (June 29, 2021).

³⁶ Krishnan et al., *supra* note 20.

³⁷ The U.S. is also obligated under the International Covenant on Civil and Political Rights (ICCPR) and other international instruments to follow principles of non-discrimination. Specifically, Article 26 of the ICCPR obligates states to “prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination.” *International Covenant on Civil and Political Rights* art. 26, Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171. However, many of these duties overlap with the provisions under ICERD, so for the purposes of this report, we will focus on ICERD as our main international legal instrument.

1994, making those duties obligatory for the U.S. government.³⁸ The states' duties below are applicable vis-à-vis all migrants, regardless of their citizenship or visa status.³⁹

The duty not to engage in and to prevent acts of racial discrimination (art. 2(1)(a)). **States must refrain from using AI in ways that result in racial discrimination.** To ensure compliance with this norm, **states must put in place effective mechanisms to prevent discrimination by AI** such as robust testing or human checks in decision-making.⁴⁰ States must exercise due diligence both prior to and during the deployment of AI systems, ensuring that the intended application of AI will not lead to discrimination or bias, and checking that the use of AI does not in fact cause discrimination.⁴¹ **There should also be independent oversight and robust public disclosure to ensure due diligence is robustly implemented.** DHS should procure AI only from vendors that agree to such disclosure.

The duty to amend policies, laws, and regulations that perpetuate existing racial discrimination (art 2(1)(c)). **States should take measures to decolonize AI,** and actively take steps to (i) avoid reinforcing or exacerbating systems of inequality and bias, which exist as remnants of colonialism;⁴² and (ii) **ensure more diverse voices and perspectives are consulted at every decision point in AI development and use,** especially those who may be adversely affected. **To enable and empower the participation of diverse populations, robust and accessible public disclosure is needed** so that the public understands the implications of DHS's use of AI on their lives. This obligation is "absolute," and states must take effective and immediate action to fulfill it.⁴³

The duty to ensure equal treatment before the law (art. 5). **States must guarantee the AI used by states in decision-making in individual immigration cases does not have any discriminatory impact.** AI systems used in the context of border and immigration enforcement and adjudication that result in disparate treatment before the law and prevent equal access to

³⁸ *Status of Treaties*, U.N. TREATY COLLECTION (last visited Nov. 29, 2024).

³⁹ As laid out in art. 1(2) of ICERD, which states "[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens," every individual has a right to non-discrimination, regardless of their citizenship status. [International Convention on the Elimination of All Forms of Racial Discrimination](#), Dec. 21, 1965, S. Treaty Doc. 95-18, 660 U.N.T.S. 195.

⁴⁰ United Nations International Committee on the Elimination of Racism, [General Recommendation No. 37: Racial Discrimination in the Enjoyment of the Right to Health](#), ¶ 5 U.N. Doc. CERD/C/GC/37 (Aug. 23, 2024).

⁴¹ Latonero & Kift, *supra* note 21, at 8 ("There is no easy answer to the question of whether or not the digital passage ultimately benefits or harms vulnerable populations. However, we would urge academics, policymakers, and the tech community alike to grapple with this question before experimenting with new technologies in the context of refugees and migration flows.").

⁴² See Committee on the Elimination of Racial Discrimination, [General Recommendation No. 36 \(2020\) on Preventing and Combating Racial Profiling by Law Enforcement Officials](#), ¶ 23, U.N. Doc. CERD/C/GC/36 (Dec. 17, 2020) [hereinafter CERD/C/GC/36].

⁴³ Human Rights Council, [Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance](#), ¶ 60, U.N. Doc. A/HRC/56/68 (Jun. 3, 2024) [hereinafter A/HRC/56/68].

immigration relief violate the guaranteed principle of equality before the law.⁴⁴ States should actively monitor outcomes, such as who is arrested, flagged, detained, and granted and denied relief, to identify possible discriminatory impact.

The duty to ensure the right to effective remedy (art. 6). **States should provide the public with access to effective remedies against any act of racial discrimination through the use of AI systems.**⁴⁵ States must: (i) ensure their domestic law contains proper mechanisms through which to assert claims of discrimination caused by the use of AI systems used in U.S. border management and immigration enforcement, and (ii) ensure that the use of AI is auditable and intelligible so that victims of harm can secure evidence and prove that the AI use caused discriminatory impact. As a remedy, individuals should be granted the option to opt out of automated decision-making.⁴⁶

The duty to ensure private sector compliance (art. 2(1)(d)). **States must take appropriate measures to prevent, thoroughly investigate, punish, or redress private AI vendors' facilitation of racially discriminatory outcomes.**⁴⁷ Moreover, states must ensure private actors “provide for or cooperate in their remediation” for racial discrimination attributable to or facilitated by private companies, in line with the provisions under article 6 of ICERD.⁴⁸ This duty is becoming increasingly important due to the growing collaboration between the public and private sectors in the development and use of AI, including in border and immigration enforcement.⁴⁹

2. Current domestic regulation in place in the United States in relation to international human rights law

Given the gridlock in the U.S. Congress that has left the legislative framework for immigration largely unchanged for nearly thirty years, executive actions have an outsized impact on U.S. immigration enforcement. While Congress has not enacted any federal legislation when it comes to the use of AI systems,⁵⁰ the executive branch has begun regulating AI system use,

⁴⁴ CERD/C/GC/36, *supra* note 42. A/HRC/56/68, *supra* note 43, at ¶ 62.

⁴⁵ Human Rights Council, *The Right to Privacy in the Digital Age*, ¶ 38, U.N. Doc. A/HRC/48/31 (Sept. 13, 2021) [hereinafter A/HRC/48/31]; Human Rights Council, *Racial Discrimination and Emerging Digital Technologies: A Human Rights Analysis*, ¶¶ 64–68, U.N. Doc. A/HRC/44/57 (Jun. 18, 2020) [hereinafter A/HRC/44/57]. *See also* CERD/C/GC/36, *supra* note 42, at ¶ 24.

⁴⁶ G.A. Res. 78/265, ¶ 6(k), U.N. Doc. A/RES/78/265 (Apr. 1, 2024).

⁴⁷ This is in accordance with the Guiding Principles of Business and Human Rights, which outline the relevant obligations of governments and the relevant human rights responsibilities of both governments and businesses. The Guiding Principles establish that states must protect against human rights abuses committed by third parties within their territory and/or jurisdiction, including business enterprises. U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/4 (2011).

⁴⁸ A/HRC/44/57, *supra* note 45, at ¶ 59; United Nations Guiding Principle of Human Rights

⁴⁹ A/HRC/48/31, *supra* note 45, at ¶¶ 51–54.

⁵⁰ *See Artificial Intelligence Legislation Tracker*, BRENNAN CENTER FOR JUSTICE (November 1, 2024).

including in border management and immigration. Individual states in the U.S. have also been active in regulating AI, however, state law has generally been less directly applicable to the use of AI in immigration enforcement.⁵¹

AI regulation in the U.S. is largely constituted by three interrelated executive actions: first, Executive Order (“EO”) 13960 “Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government,” was signed in 2020⁵²; second, EO 14110 “the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,” was signed in 2023⁵³; and third, a series of binding rules adopted by the Office of Management and Budget (“OMB”), as authorized under EO 14110, creates mandatory obligations for federal agencies, including DHS.⁵⁴ Two OMB memoranda, i.e., Memorandum 24-10⁵⁵ and Memorandum 24-18, are most pertinent to border management and immigration enforcement.⁵⁶

While these Executive Orders and OMB rules do not explicitly mention ICERD, the current U.S. administration rightfully acknowledges that AI systems have “reproduced and intensified existing inequities, caused new types of harmful discrimination, and exacerbated online and physical harms.”⁵⁷ Based on this understanding, the rules set, at minimum, the commonsense principles described below as a starting point for compliance with ICERD. Yet, also as discussed below, there are concerns with the robustness and specificity of rules and practicality of implementation.

Discrimination prevention measures. EO 14110 requires testing prior to use, evaluation, and post-deployment performance monitoring to ensure compliance with nondiscrimination

⁵¹ Thirty-one states have enacted AI laws. *Artificial Intelligence 2024 Legislation*, NCLS (Sept. 9, 2024). Additionally, many state Bar Associations have enacted ethics rules regarding AI use binding on American lawyers practicing law. See CAL. STATE BAR STANDING COMM. ON PRO. RESP. AND CONDUCT, *PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW 2–3* (2024) (“AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI The duty of competence requires more than the mere detection and elimination of false AI-generated results.”); See *Kruse v. Karlen*, 692 S.W.3d 43, 51 (Mo. Ct. App. 2024) (finding filing brief containing fictitious case citations by AI rose to level of abuse of judicial system and violation of duty of candor).

⁵² Exec. Order No. 13960, 3 C.F.R. 13960 (2021).

⁵³ Exec. Order No. 14110, 3 C.F.R. 14110 (2024). Promulgated in response to serious concerns about the rapid implementation of AI in government and private industry. See Nihal Krishan, *Tech Groups Push Back on Biden AI Executive Order, Raising Concerns That It Could Crush Innovation*, FEDSCOOP (Nov. 9, 2023).

⁵⁴ 3 C.F.R. 13960. EO 14110 was informed by the White House Blueprint for an AI Bill of Rights signed in 2022 and requires broad action to be taken by both government agencies and private companies.

⁵⁵ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMORANDUM. M-24-10, *ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE* (2024) [hereinafter OMB 24-10].

⁵⁶ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMORANDUM. M-24-18, *ADVANCING THE RESPONSIBLE ACQUISITION OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT* (2024) [hereinafter OMB 24-18].

⁵⁷ 3 C.F.R. 14110, §§ 2(d), 1 (“Artificial intelligence (AI) holds extraordinary potential for both promise and peril.”).

principles.⁵⁸ Furthermore, for certain high-risk AI uses (“rights or safety-impacting AI,” including AI used in biometric identification, risk assessments and forecasting related to immigration, asylum or detention status), OMB Rule 24-10 explicitly requires agencies to stop AI use by 1 December 2024 unless agencies can effectively mitigate risks.

Nevertheless, there are some gaps in these rules that raise questions about compliance with international law. A key to risk assessment is having effective and specific criteria to use for testing, evaluation, and discrimination auditing; however, such criteria have not yet been developed for DHS’s use of AI. EO 14110 itself is silent on such criteria, instead directing⁵⁹“NIST”) to create benchmarks. NIST, for its part, has yet to adopt such standards. According to NIST’s latest AI standards, “[m]ore foundation work is needed to establish how organizations can best determine and apply their risk tolerances,” and “[f]urther work may be needed before it is possible to standardize some testing and evaluation protocols” relating to testing practices for “bias and fairness risks” in realistic settings.⁶⁰

National Institute of Standards and Technology (“NIST”): NIST is a part of the U.S. Department of Commerce and works to “creat[e] critical measurement solutions and promot[e] equitable standards.”⁶¹ Their goals are to “stimulate innovation, foster individual competitiveness, and improve the quality of life,” through setting standards on technology use.⁶²

Additionally, the OMB rules fail to detail any risk mitigation practices required, leaving it up to each agency’s discretion to determine how they will undertake such risk mitigation.⁶³ Moreover, the rules fail to request independent oversight or state how agencies should gauge the efficacy of risk mitigation measures.

Regarding AI systems that use individuals’ faces, irises, fingerprints, and other information for identification purposes, OMB Rule 24-18 provides special guidance on risk mitigation.⁶⁴ For example, that rule requires NIST to test such biometric AI systems and conduct independent assessments.⁶⁵ DHS is required to keep detailed logs of its biometric AI use and must meet minimum quality criteria.⁶⁶ DHS Directive 026-11 “requires that all uses of face recognition and face capture technologies are thoroughly tested to ensure there is no intended bias or disparate impact.”⁶⁷ However, questions remain about the practicality of DHS

⁵⁸ 3 C.F.R 14110, § 2(a).

⁵⁹ 3 C.F.R 14110, § 4.1(c)

⁶⁰ NAT’L INST. OF STANDARDS AND TECH. [A PLAN FOR GLOBAL ENGAGEMENT ON AI STANDARDS](#) 10–12 (July 2024)

⁶¹ NAT’L INST. OF STANDARDS AND TECH., [About NIST](#) (updated Jan. 11, 2022).

⁶² *Id.*

⁶³ OMB 24-10, *supra* note 55, at 14.

⁶⁴ OMB 24-18, *supra* note 56, at § 4(b)(ii).

⁶⁵ *Id.* at § 4(b)(ii)(C).

⁶⁶ *Id.* at § 4(b)(ii)(D)(4).

⁶⁷ [Ensuring AI Is Used Responsibly](#), DHS (Nov. 23, 2024).

components implementing this rule. NIST itself admits that it remains impossible to complete such a “thorough” testing.⁶⁸

Finally, Rule OMB 24-10 contains a blanket carve-out, allowing DHS to waive risk mitigation measures required for “rights or safety impacting AI” when such measures “would create an unacceptable impediment to critical agency operations.”⁶⁹ Neither OMB nor DHS have defined what “an unacceptable impediment to critical operations” would be. This waiver provision allows DHS a workaround to avoid complying with minimum legal requirements.

Public disclosure. EO 13960 requires DHS and other agencies, consistent with laws concerning the protection of privacy and sensitive law enforcement, national security, and other protected information, to “make their [AI] inventories available public[ly] . . .”⁷⁰ In addition, OMB Rule 24-10 adds mandatory disclosures for agencies, including DHS, such as “determin[ing] whether a particular use of AI is meeting the agency’s equity goals”⁷¹

While these public disclosure requirements are a positive step, they are insufficiently robust in substance and implementation. The scope of the mandatory disclosure provisions is too limited to enable meaningful public oversight and participation. While OMB requires evaluations, testing, and red teaming, the results are shared only internally and not disclosed publicly. To ensure the public understands how AI use will impact their lives, at a minimum, the following information should be disclosed: DHS’s risk assessment of racial discrimination, including details on how and what type of data is collected and used for AI development, how algorithms function, and why DHS believes that the discrimination prevention measures they are taking are sufficient to mitigate these risks.⁷² Moreover, the Government Accountability Office (“GAO”), a non-partisan agency that conducts congressional audits,⁷³ has found inaccuracies in DHS’s current AI inventory, suggesting that DHS has not taken steps to verify whether the disclosed use cases involves AI.⁷⁴

Consultation with diverse populations. Among the measures that the OMB requires for “rights-impacting AI” is “consult[ion] [with] affected communities. . . [to] solicit public feedback . . . and use such feedback to inform agency decision-making regarding the AI.”⁷⁵ DHS

⁶⁸ NAT’L INST. OF STANDARDS AND TECH, *supra* note 60.

⁶⁹ OMB 24-10, *supra* note 55, at § 5(c)(iii).

⁷⁰ 3 C.F.R 13960 § 5(e).

⁷¹ OMB 24-10, *supra* note 55, at § 4(a)(iii).

⁷² IBM Data and AI Team, *Shedding Light on AI Bias with Real World Examples*, IBM (Oct. 16, 2023); *See generally* FREDERIK ZUIDERVEEN BORGESIU, *DISCRIMINATION, ARTIFICIAL INTELLIGENCE, AND ALGORITHMIC DECISION-MAKING* (2018).

⁷³ *See generally*, *Role as an Audit Institution*, GAO (2024).

⁷⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO-24-106246, *FULLY IMPLEMENTING KEY PRACTICES COULD HELP DHS ENSURE RESPONSIBLE USE FOR CYBERSECURITY* (2024) at 14 n.35.

⁷⁵ OMB 24-10, *supra* note 55, at § 5(c)(v)(B).

is obligated to release “the plan to encourage diverse perspectives”⁷⁶ These requirements are good starting point for agencies to decolonize AI by giving various communities an opportunity to share their perspectives and shape the technology. However, the requirement is still vague and lacks specific methodology for consultations, leaving its effectiveness dependent on each agency’s motivation, expertise, and capacity to implement the rule.

Access to effective remedies. OMB Rule 24-10 requires agencies to set minimum standards to grant individuals opportunities to appeal and contest the negative impact caused by AI system use⁷⁷ and, notably, to provide an option to opt out from AI for people who favor human alternatives.⁷⁸ However, it is unclear whether DHS is complying with this rule in many cases. Moreover, individuals’ ability to exercise their right to an effective remedy depends on whether they are aware of those rights and the potential and actual impact of AI on them. The rules do not require agencies to provide robust disclosure or to notify people when they may be negatively impacted by AI. DHS should not be able to avoid liability for racial discrimination by “hiding” behind closely held, secret algorithms that discriminate on DHS’s behalf.⁷⁹

Due to the anticipated Presidential transition in January 2025, the landscape of domestic regulation of AI is likely to change dramatically. President-elect, Donald Trump, is widely expected to rescind even the minimum standards set by the EOs and OMB under the theory that they “hinder[] AI Innovation and impose[] Radical Leftwing ideas on the development of this [AI] technology.”⁸⁰ If Trump repeals EO 14110, then OMB authority of rulemaking will be likely withdrawn as well. With respect to the AI use against immigrants, Trump’s dehumanizing and raced-based rhetoric around immigration combined with his tough-on-immigration policy stances suggests AI use will continue to proliferate in ways that violate human rights, enable or justify more aggressive deportations of migrants, and block access to legal pathways for immigration, including for asylum seekers. For example, Trump has repeatedly called immigrants “snakes that bite,” who “are killing Americans en masse,”⁸¹ and even “animals” who are “not human.”⁸² Since Trump’s election victory, the private sector has already begun preparations “to detain and deport migrants residing in the United States on a large scale.”⁸³

⁷⁶ *Id.* at § 4(a)(iii).

⁷⁷ OMB 24-10, *supra* note 55, at § 5(c)(v)(E).

⁷⁸ *Id.* at § 5(c)(v)(F).

⁷⁹ See *Mobley v. Workday, Inc.*, No. 23-cv-00770-RFL, 2024 WL 3409146 at 5–7 (N.D. Cal. July 12, 2024).

⁸⁰ Gerhard Peters & John T. Woolley, *Republican Party Platforms: 2024 Republican Party Platform*, The American Presidency Project (July 8, 2024) at ch. 3 § 5; See also Bruce D. Sokler, Alexander Hecht & Christian Tamotsu Fjeld, *AI Under a Second Trump Administration—AI: The Washington Report*, NAT’L L. REV. (Nov. 15, 2024) (commenting that Trump seems likely to repeal “most if not all of Biden’s EO [EO 14110]”).

⁸¹ *Fact-checking Over 12,000 of Donald Trump’s Statements About Immigration*, THE MARSHALL PROJECT (Oct. 21, 2024, 6:00 AM).

⁸² *Trump on Immigration: Tearing Apart Immigrant Families, Communities, and the Fabric of Our Nation*, ACLU (Jun. 6, 2024).

⁸³ Priscilla Alvarez & Alayna Treene, *Trump Allies, Private Sector Quietly Prepare for Mass Detention of Immigrants*, CNN (Nov. 7, 2024, 3:10 PM). Asylum will be a key lever used by Trump to show that he is being tough on immigration. See *A Timeline of the Trump Administration’s Efforts to End Asylum*, NAT’L IMMIGRANT JUST. CTR. (Nov. 2020).

IV. ANALYSIS OF SPECIFIC AI APPLICATIONS AND IMPLICATIONS FOR RACIAL DISCRIMINATION

With the expansion of the use of AI in U.S. border management and immigration enforcement, migrants are increasingly impacted by AI systems use across all stages of their immigration journey.

This section will highlight and analyze a few representative AI uses in border management and immigration enforcement, derived in large part from the DHS AI inventory, which DHS is required to disclose under EO 13960.⁸⁴ The representative AI systems are roughly grouped by the different stages of a migrant’s journey: (1) before arrival, (2) at ports of entry, (3) detention and interior enforcement, and (4) immigration relief. For each stage, we will first present a summary, then provide the background, a description of the examples of the AI systems involved, and a discussion of the harms related to racial discrimination.

An in-depth analysis of these AI systems shows that the technologies either create or perpetuate racial discrimination and fail to comply with international human rights standards and existing domestic regulations. Among the common issues consistently seen in DHS’s use of various AI systems are the lack of transparency behind both the development and deployment of the AI systems, the failure to adequately account for structural bias, and the lack of effective access to remedies for those negatively impacted by DHS’s use of AI. Each of these issues raises serious concerns about compliance with ICERD and domestic law.

A. Before Arrival

Key Findings

- The use of AI-powered surveillance tools by Customs and Border Patrol (“CBP,” the DHS component in charge of enforcement at or near borders and ports of entry), designed to detect migrants taking irregular land routes to the U.S., forces those migrants, who are mostly from the Global South, to take more dangerous paths. Representative examples of these tools include small Unmanned Aerial Systems (“sUAS”) and surveillance towers (e.g., those called “Anduril towers”).
- The deployment of CBP’s AI-powered border surveillance technologies at the U.S.-Mexico border focused on monitoring and interdicting migrants, especially migrants of color, reinforces the narrative that those migrants are “threats” to national security.

⁸⁴ U.S. DEPT. OF HOMELAND SEC., [DHS INVENTORY OF AI USE CASES](#) (Aug. 14, 2024).

- DHS can store the data collected by these surveillance systems in its databases, to be used for various purposes later in a migrant’s journey, which can lead to further disproportionate impacts.

In the last decade, migrants seeking entry to the U.S. through the U.S.-Mexico border have faced more challenges than ever before. The composition of these migrants has also changed. There has been a decrease in migrants from Mexico and a growth in migrants from Central America, the Caribbean, Africa, and parts of Asia.⁸⁵ With more diverse origin countries, migrants are traveling longer distances and more dangerous routes to reach and cross the border.⁸⁶ At the same time, the U.S. government has expanded its efforts to externalize the border, and to fortify the border with digital technologies, including automated surveillance towers and small Unmanned Ariel Systems (“sUAS”).⁸⁷ The border is no longer just a physical border but, has become a “smart border” through AI systems, data collection, and surveillance.⁸⁸

The increased hardship faced by migrants can be understood as part of the legacy of colonialism. Just as the border militarization before it, the rise of the “smart border” disproportionately impacts migrants of color. Black migrants are among the most heavily affected, as the number of African migrants grew exponentially in the past few years.⁸⁹ Lacking access to formal pathways to immigration, they are then left to undertake dangerous journeys in search of refuge from persecution and conditions in their countries of origin.⁹⁰

1. AI-Powered Surveillance Systems

a. Autonomous Surveillance Towers

The autonomous surveillance towers developed by Anduril Industries, an American private defense company, use AI to automatically identify and classify “objects of interest,” such

⁸⁵ Veronica Montes, *Changes in the Demographic Makeup of Immigrants Arriving at the U.S. Southern Border*, PRRI (Jan. 30, 2024).

⁸⁶ Deborah Bonello, *From Africa to Mexico: How Far Would You Go for the American Dream?*, THE TELEGRAPH (last visited Nov. 29, 2024).

⁸⁷ Border externalization is a term used by migration scholars, policy makers, civil society and the media to describe “the extension of border and migration controls beyond the so-called ‘migrant receiving nations’ in the Global North and into neighboring countries or sending states in the Global South. Inka Stock, Aysen Ustubici & Susanne U. Schultz, *Externalization at Work: Responses to Migration Policies from the Global South*, 7 COMPAR. MIGRATION STUD. 1, 1 (Dec. 2019).

⁸⁸ Latonero & Kift, *supra* note 21, at 5 (“Several scholars have also turned their attention to how the introduction of new technologies, particularly in the digital realm, has led to a proliferation of borders both horizontally...and vertically...”).

⁸⁹ The number of African migrants apprehended at the southern border jumped to 58,462 in FY 2023 from 13,406 in FY 2022. Miriam Jordan, *African Migration to the U.S. Soars as Europe Cracks Down*, N.Y. TIMES (Jan. 5, 2024).

⁹⁰ Latonero & Kift, *supra* note 21, at 16.

as humans or vehicles.⁹¹ These are solar-powered, relocatable towers that are equipped with cameras, radar, and thermal imaging sensors that operate autonomously and scan their surroundings to detect movement.⁹² When the cameras detect motion, AI algorithms analyze the imagery and notify CBP agents of any suspected human activity. The AI is designed to help CBP handle the volume of data from its growing array of surveillance technologies reaching its command centers. The theory is that this should save Border Patrol agents time because they no longer need to monitor live images or videos.⁹³

Initially, five Anduril towers were piloted in San Diego in 2019.⁹⁴ Then, in 2020, Anduril was awarded a five-year contract with CBP to deploy additional towers.⁹⁵ There are currently 300 Anduril towers deployed by CBP, covering around 30% of the U.S.-Mexico border.⁹⁶

b. Small Unmanned Aerial Systems (“sUAS”)

sUAS, commonly referred to as drones, are remotely operated aircraft which collect images and video and detect human movement with cameras, sensors, or communication systems that transmit data.⁹⁷ CBP operates sUAS for border surveillance and other law enforcement purposes.⁹⁸ sUAS allow CBP to swiftly cover vast areas as well as surveil remote and challenging terrain along the border. Although the deployment of sUAS along the U.S.-Mexico border is not new, integration with AI algorithms make sUAS faster and easier to operate.⁹⁹

2. Specific Concerns/Harms

The rapidly expanding use of surveillance towers and sUAS at the U.S.-Mexico border raises grave concerns about racial equity. To begin with, those under surveillance include large numbers of people fleeing violence, persecution, and even torture, who are entitled to seek protection in the U.S. under domestic and international law. However, due to their more limited access to formal immigration procedures, migrants of color are forced to risk their lives to cross the border. Second, the use of Anduril Towers, sUAS, and other forms of AI-powered surveillance systems at the U.S.-Mexico border perpetuates discrimination by marking those

⁹¹ Hilary Beaumont, *‘Never Sleeps, Never Even Blinks’: The Hi-tech Anduril Towers Spreading Along the US Border*, THE GUARDIAN (Sept. 16, 2022, 2:00 PM).

⁹² MIJENTE, JUST FUTURES LAW & NO BORDER WALL COALITION, *THE DEADLY DIGITAL BORDER WALL* 12 (2021).

⁹³ Nick Miroff, *Powered by Artificial Intelligence, ‘Autonomous’ Border Towers Test Democrats’ Support for Surveillance Technology*, WASH. POST (Mar. 11, 2022, 6:15 PM).

⁹⁴ Anduril Industries, *Anduril Deploys 300th Autonomous Surveillance Tower (AST), Advancing Capability for Border Security* (Sept. 26, 2024).

⁹⁵ MIJENTE, JUST FUTURES LAW & NO BORDER WALL COALITION, *supra* note 92, at 12.

⁹⁶ Anduril Industries, *supra* note 94.

⁹⁷ MIJENTE, JUST FUTURES LAW & NO BORDER WALL COALITION, *supra* note 92, at 13; DHS OIG, OIG-21-21, *CBP HAS IMPROVED BORDER TECHNOLOGY, BUT SIGNIFICANT CHALLENGES REMAIN* (February 23, 2021).

⁹⁸ DHS, DHS/CBP/PIA-018(B), *PRIVACY IMPACT ASSESSMENT UPDATE FOR THE AIRCRAFT SYSTEMS* (May 8, 2024).

⁹⁹ JOUAV, *Border Patrol Drone: How Are Drones Used for Border Security?* (Nov. 14, 2024).

migrants as lawbreakers and threats to national security rather than people seeking safety and security.¹⁰⁰

The disproportionate surveillance on migrants of color translates to a disproportionately high death rate for those same groups as they get pushed into more dangerous terrain.¹⁰¹ CBP claims new AI-powered systems are more humane than physical border walls. According to CBP, the smart border can help deter irregular crossings and increase migrant safety by having the capability to detect, capture, and safely deport migrants who find themselves lost in the desert or mountains. Yet, the data has shown the opposite is true—increased implementation of “smart border” technology has led to historically high rates of migrant deaths.¹⁰²

Another impact of these AI technologies is that the data collected from these surveillance systems get stored in databases that can be used at a later stage of a migrant’s journey.¹⁰³ Later in the report, in the sections on interior enforcement and immigration relief, we will see how data collected at this initially stage can harm migrants. Discrimination starts with the very collection of data through these invasive surveillance systems.¹⁰⁴

As demonstrated by the deployment of Anduril towers and sUAS, the border is quickly becoming a testing ground for smart border AI systems. New surveillance technologies are being tested without public scrutiny, accountability, or even knowledge.¹⁰⁵

To mitigate these grave concerns, and as is required under ICERD, DHS must take adequate mitigation measures prior to AI use, disclose the effectiveness of such measures, meaningfully consult with the communities affected, and ensure access to effective remedies for those impacted by the surveillance. Further, as seen by the partnership with Anduril, CBP is increasingly relying on private contractors to supply these AI surveillance systems at the border. It is more important than ever that the U.S. government take appropriate measures to ensure not only its own compliance with nondiscrimination law but also private actors’ compliance with ICERD as required in article 2(1)(d).

¹⁰⁰ Ozgun E. Topak, *Drones: Robot Eyes on Racialized Migrant Bodies*, 61 INT’L MIGRATION 313, 313–314 (Oct. 2023).

¹⁰¹ Over the last 30 years, civil society organizations have estimated up to 80,000 migrant deaths, mostly indigenous, brown, and Black migrants, with many more folks disappeared. See [US: Border Deterrence Leads to Deaths, Disappearances](#), HUMAN RIGHTS WATCH (June 26, 2024, 9:00 AM).

¹⁰² J. Weston Phippen, *‘A \$10-Million Scarecrow’: The Quest for the Perfect ‘Smart Wall’*, POLITICO (Dec. 10, 2021, 4:30 AM).

¹⁰³ Latonero & Kift, *supra* note 21, at 7.

¹⁰⁴ EPIC, *Traveler Screening and Border Surveillance* (last visited Nov. 29, 2024).

¹⁰⁵ Francesca D’Annunzio, *‘Tech Doesn’t Just Stay at the Border’: Petra Molnar on Surveillance’s Long Reach*, TEX. OBSERVER (Jul. 11, 2024, 8:00 AM).

B. At Ports of Entry

Key Findings

- AI systems used by DHS at ports of entry are flawed and replete with errors that disproportionately impact migrants of color. In combination with discriminatory laws and policies, the use of AI makes access to formal routes of entry even harder for migrants, which forces them to choose other more dangerous ways of crossing the border (see Section VI.A above).
- Many asylum seekers at the border are now required to download and use CBP One to start the process for requesting asylum. CBP One’s AI-based application has demonstrated difficulty recognizing and correctly matching the faces of migrants with darker skin, thus preventing Black and brown migrants from being able to present themselves to U.S. authorities at the U.S.-Mexico border to seek asylum.
- Predictive AI models, such as the Automated Targeting System (ATS), used by CBP at ports of entry, are highly likely to replicate the biases of those who create these systems and rely on biased data, thus perpetuating discrimination through the veneer of “neutrality.”

For those migrants who are able to make it to the U.S. border, AI systems may further prevent them from accessing forms of lawful entry to which they are entitled. Over the past decade, DHS has utilized various methods, from “metering” to illegal turnbacks,¹⁰⁶ to attempt to limit the number of people who seek asylum at the border. These methods have resulted in extremely long wait times and dangerous conditions in migrant encampments at or near ports of entry.¹⁰⁷ Rules like the Circumvention of Lawful Pathways and Securing the Border (the “Asylum Bans”), which require use of the CBP One application, are just the latest attempt to limit access to asylum.

For those who seek entry at ports of entry for reasons other than asylum, AI-based risk assessment technologies subject certain border crossers to stricter scrutiny by CBP officers. These predictive risk assessment technologies replicate existing racial biases based on a migrant’s perceived threat profile.

1. *CBP One*

¹⁰⁶ HUMAN RIGHTS WATCH, *“We Couldn’t Wait” Digital Metering at the US-Mexico Border*, 13–17, 29 (May 2024).

¹⁰⁷ Some examples of the policies include, metering, Title 42, EO 9645, and the Asylum Ban.

CBP One is a mobile application that requires migrants, upon arrival at the U.S.-Mexico border, to submit their personal and biometric information to CBP to have an opportunity to present themselves to immigration officials and start the process for requesting asylum.¹⁰⁸ Over the past decade, the number of asylum seekers at the U.S.-Mexico border has grown exponentially, reaching an all-time high in 2023.¹⁰⁹ Although migrants have the lawful right to request asylum under both international and domestic law,¹¹⁰ the U.S. applied different measures over the years to block or limit asylum. Through the Asylum Ban, the U.S. made the CBP One app the nearly exclusive way to access asylum at the border.¹¹¹ CBP One has also become the only way that Cubans, Haitians, Nicaraguans, and Venezuelans can obtain humanitarian parole to enter the U.S.¹¹²

a. Specific Concerns/Harms

When implementing CBP One, officials claimed the app would streamline in-person processing and reduce the time individuals are detained for questioning during processing. However, many asylum seekers have reported significant problems and accessibility issues in using the app, including technical glitches, language and literacy limitations, and lack of sufficient appointments.¹¹³ When asylum seekers are unable to properly present their asylum claim because they are unable to schedule an appointment in CBP One, their lives are put at risk. They must either remain in migrant camps where conditions are deplorable, attempt to access protection by crossing the border irregularly, or return to the very places where they are fleeing persecution.

One of the main issues with the CBP One app is the discriminatory impact of CBP One's facial recognition technology. CBP One requires individuals seeking appointments at ports of entry to submit a "selfie" to ensure the submission is being made by a "live person."¹¹⁴ Yet, in many instances, CBP One's AI-based facial recognition technology was unable to recognize photos of migrants with darker skin tones.¹¹⁵ Facial recognition technology has been found to inaccurately identify Black faces at a rate 10 to 100 times more than white faces.¹¹⁶ This goes against the guidance laid out in OMB Rule 24-18 (4)(b)(ii) and (iii) requiring agencies to ensure AI-based biometrics protect the public's right, safety, and privacy and avoid unlawful discrimination.

¹⁰⁸ Biometric identifiers include faces, irises, fingerprints, or gait according to OMB 24-18 (4)(b)(ii).

¹⁰⁹ CBP, *Southwest Land Border Encounters* (last visited Nov. 29, 2024).

¹¹⁰ AM, IMMIGR. COUNCIL, *ASYLUM IN THE UNITED STATES* (Jan. 15, 2024).

¹¹¹ Brenda Macias, *Think Immigration: The CBP One App is Not Enough*, AILA (Jul. 24, 2024).

¹¹² AM, IMMIGR. COUNCIL, *CBP ONE: AN OVERVIEW* (Jun. 2, 2023).

¹¹³ Macias, *supra* note 111.

¹¹⁴ AM, IMMIGR. COUNCIL, *supra* note 112.

¹¹⁵ Priya Morely, *AI at the Border: Racialized Impacts and Implications*, JUST SEC. (Jun. 28, 2024).

¹¹⁶ *Id.*

Additionally, “selfies” submitted by applicants on CBP One may be incorrectly matched to photos in the CBP database in a way that disproportionately impacts racial minorities. For those who secure an appointment, CBP officers must match a new photo taken during the inspection appointment with the appropriate “selfies” in CBP One. There are reports of high numbers of false positives when matching photos of West and East Africans with similar AI image technology.¹¹⁷ This creates another barrier to asylum.

The issues above, along with the lack of stable internet, charging ports, and smart phones that support the app, keep thousands of migrants from accessing humanitarian protection. Black migrants and migrants of color are disproportionately impacted. Discriminatory access to asylum means unequal treatment before the law, violating article 5 of ICERD.

The mandatory use of CBP One as the only way to access a port of entry to present an asylum claim also violates the requirement to provide adequate redress of issues under article 6 of ICERD. There must be ways to remedy errors and provide an alternative path for those adversely affected to gain access to an appointment. Previous regulations allowed migrants arriving at ports of entry without an appointment to maintain asylum eligibility if users could show they could not access the appointment process due to language barriers, illiteracy, significant technical failure, or other ongoing serious obstacles.¹¹⁸ New regulations under the “Securing the Border” final rule, however, eliminated even that narrow exception. The final rule extinguishes any mechanism for redress.¹¹⁹

2. Automated Targeting System (ATS)

The Automated Targeting System (ATS) is a security and tracking program used by CBP to assign all travelers who cross U.S. borders at a port of entry with a “risk assessment” score. With the help of AI, ATS analyzes information pulled from multiple government databases and other sources, including a DHS database for sharing airline records, searches of electronic devices at the border, and criminal records from the Federal Bureau of Investigation (FBI), along with social media data and other information compiled and sold by commercial data collectors.¹²⁰ If an individual’s score is above a certain threshold, they are subjected to increased scrutiny. Analysts will conduct additional vetting of travelers against databases and/or agents will inspect travelers and their belongings at the port of entry.¹²¹ CBP also uses ATS to predict

¹¹⁷ AM, IMMIGR. COUNCIL, *supra* note 112.

¹¹⁸ *Id.*

¹¹⁹ AILA, POLICY BRIEF: ANALYSIS OF FINAL RULE ON “SECURING THE BORDER,” 3 (Oct. 3, 2024).

¹²⁰ RACHEL LEVINSON-WALDMAN & JOSE GUILLERMO GUTIERREZ, BRENNAN CTR. FOR JUST., OVERDUE SCRUTINY FOR WATCH LISTING AND RISK PREDICTION, 5 (Oct. 19, 2023).

¹²¹ *Id.* at 2.

who might violate U.S. immigration laws. ATS data is used to generate an “Overstay Hotlist,” which is a list of individuals marked as high risk for overstaying.¹²²

b. Specific Concerns/Harms

Risk assessments are not new in the immigration system, but in recent years, algorithmic programs such as ATS have become an integral part of border management because of the commonly held misconception that these technologies are less biased than direct human analysis. The reality is that the algorithms are created by people, who themselves have bias. The meaning assigned to specific data points and decisions about what data to flag as high risk is determined by the creators. For example, Nigeria was added to the list of countries facing heightened travel restrictions in January 2020.¹²³ A decision that was made due to a heightened risk environment in Nigeria and the number of Nigerian visa overstays.¹²⁴ This determination meant that others with similar profiles would be flagged into higher-risk by AI.¹²⁵

The underlying data utilized by ATS is also itself biased, thus further tainting the process. For instance, one of ATS’s key data sources is the federal government’s terrorist watch lists. These watch lists have low standards for inclusion and a record of drawing in individuals who pose no evident terrorist threat.¹²⁶ This will likely lead to more Black and brown individuals being flagged as high risk and being subject to highly intrusive inspections or even denials of entry.¹²⁷ An automated prediction is only as accurate as the information on which it is based.¹²⁸

CBP has a duty to not engage in acts of racial discrimination under article 2(1)(a) of ICERD. Civil society groups have continuously advocated against such predictive risk assessments like ATS, yet DHS has failed to heed the warning. While the agency has published reports and privacy impact assessments (“PIA”) on ATS, it has yet to offer any meaningful information about how ATS carries out its predictive functions. There is also almost nothing available that explains how the predictive threat modeling process works, what the resulting models look like, or how the capability is operationalized. Since states are required to exercise due diligence before and during the deployment of their AI technology, CBP needs to be more transparent about ATS and adhere to the testing requirements laid out in EO 14110. Transparency will allow for adequate remedies when racial discrimination occurs and will allow

¹²² U.S. DEPT. OF HOMELAND SEC., 2018 DATA MINING REPORT TO CONGRESS, 11–12 (Nov. 2019).

¹²³ Carlyn Greenfield, *As Governments Build Advanced Surveillance Systems to Push Borders Out, Will Travel and Migration Become Unequal for Some Groups?*, MIGRATION POL’Y INST. (Mar. 11, 2020).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Rachel Levinson-Waldman & Jose Guillermo Guitierrez, Opinion, *DHS Must Overhaul Its Flawed Automated Systems*, BRENNAN CTR. FOR JUST. (Oct. 24, 2023).

¹²⁷ *Id.*

¹²⁸ Lindsey Barrett, *Reasonably Suspicious Algorithms: Predictive Policing at the United States Border*, 41 N.Y.U. REV. L. & SOC. CHANGE 327, 339 (2017).

for the inclusion of the voices of those who are adversely affected in decisions about the future of ATS and related tools.

Predictive tools like ATS are not being closely scrutinized by the U.S. government because they are deemed as performing national security functions, but there is little doubt that CBP and DHS are failing to comply with OMB 24-10 and article 2(1)(c) of ICERD. There must be more inspection of ATS and quality control of the existing data systems ATS is utilizing.

C. Detention and Interior Enforcement

Key Findings

- Migrants who make it into the U.S. are likely to experience further discrimination by the use of AI systems that are used to determine who will be detained and who may be released pending adjudication of their immigration cases.
- For migrants who are released and placed in Alternatives to Detention (“ATD”) Program, Immigration and Customs Enforcement (“ICE”)’s use of predictive algorithms such as the “Hurricane Score” tool may place migrants under heightened surveillance based on racially discriminatory factors, which can lead to the risk of re-detention. These tools also leave migrants unable to redress negative determination due to the lack of transparency in the determination process.
- Regarding interior enforcement, ICE’s RAVEn platform uses AI to analyze trends and patterns across multiple data sources, both domestic and international, and carries a risk of replicating racial bias, leading migrants to be targeted for enforcement actions on a discriminatory basis.

The U.S. immigration detention and deportation system has been widely criticized as a broken, unfair, and violent system that can be seen as an extension of the legacy of colonialism, with disproportionate impacts on Black migrants and other migrants of color.¹²⁹ Another DHS component, Immigration and Customs Enforcement (“ICE”) oversees such detention and deportation. The 2022 Shadow Report to the Committee on the Elimination of Racial Discrimination that BAIJ submitted highlights some examples: “racial profiling in immigration enforcement actions; excessive force, medical neglect, and other discriminatory treatment by U.S. personnel in immigration detention; prolonged and arbitrary detention, including the

¹²⁹ TIMANTHA GOFF ET AL., UNCOVERING THE TRUTH: VIOLENCE AND ABUSE AGAINST BLACK MIGRANTS IN IMMIGRATION DETENTION 19 (2022).

imposition of higher bonds on Black migrants; inadequate access to legal information, legal counsel or proper interpretation in detention; low rates of successful asylum screenings and approval rates for individuals from Black-majority countries from which many refugees are seeking international protection; and racially disparate rates of deportation.”¹³⁰

While DHS claims not to collect data regarding race,¹³¹ making it difficult to fully assess how race and ethnicity impact the treatment of migrants,¹³² from the data that is available, we know Black migrants experience detention for longer periods than non-Black migrants and are less likely to be released from detention on either bond or parole.¹³³ Since 2022, “ICE detained asylum seekers from Black-majority countries, on average, 27% longer than asylum seekers from non-Black countries.”¹³⁴ An African asylum seeker detained at Adelanto ICE Processing Center in California reported that “ICE imposed discriminatory requirements for release on Black asylum seekers, demanding extensive documentation that non-Black asylum seekers were not asked to produce.”¹³⁵ Additionally, “Black immigrants are six times more likely to be sent to solitary confinement than other detained populations.”¹³⁶

The criminalization of Black people in the U.S. contributes to the racial discrimination that Black migrants face even after they are released from detention. While many do not have a criminal record when they arrive in the U.S., Black migrants face high rates of racial profiling and are subjected to stops, searches, arrests, and other violent acts by the police due to systemic racism.¹³⁷ These experiences with the police, in turn, make migrants more vulnerable to immigration enforcement and affect migrants in their immigration proceedings. It is therefore no surprise that Black immigrants are disproportionately represented among those migrants who are targeted for deportation following contact with the criminal legal system. “An estimated 76% of Black immigrants who were deported were deported because of prior contact with the U.S. criminal enforcement system” in 2013 while in comparison, “only half of non-Black immigrants are deported because of such prior contact.”¹³⁸

Rather than mitigate systemic discrimination, the introduction of AI systems in detention and interior enforcement has contributed to the disparate treatment of Black migrants and other migrants of color. This section will specifically highlight the use of three AI-powered

¹³⁰ BLACK ALLIANCE FOR JUST IMMIGRATION ET AL., *ANTI-BLACK DISCRIMINATION AGAINST NON-CITIZENS AND ONGOING VIOLATIONS OF INTERNATIONAL PROTECTIONS FOR MIGRANTS, REFUGEES, AND ASYLUM SEEKERS OF AFRICAN DESCENT*, 1 (2022).

¹³¹ GOFF, *supra* note 129, at 16.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ BLACK ALLIANCE FOR JUST IMMIGRATION ET AL., *supra* note 130, at 14.

¹³⁶ *Id.* at 16; Black migrants are also almost twice as likely to experience abuse inside detention. GOFF, *supra* note 129, at 19.

¹³⁷ BLACK ALLIANCE FOR JUST IMMIGRATION ET AL., *supra* note 130, at 13.

¹³⁸ *Id.*

technologies, the Risk Classification Assessment (RCA), the “Hurricane” Score Tool used in ICE’s Alternatives to Detention Program, and RAVEn.

1. Risk Classification Assessment (“RCA”)

RCA is an AI system used by ICE that makes recommendations to officials about whether a migrant should be detained in ICE custody or released.¹³⁹ RCA uses a combination of database records (including criminal history) and interview information to provide a score of either “low,” “medium,” or “high” for whether a migrant is a risk to public safety or a flight risk.¹⁴⁰ RCA provides one of four recommendations that inform ICE officials’ final determinations of detention or release: (1) detain with no bond; (2) detain with a certain bound amount; (3) determination by supervisor; and (4) release.¹⁴¹

The use of RCA is widespread.¹⁴² Asylum seekers are among those subject to RCA determinations, and many such migrants receive “high” flight-risk assessments¹⁴³ leading to a decision not to release.¹⁴⁴ Many migrants who are detained, including asylum seekers, are unable to seek review of ICE’s decision to detain them by an immigration judge, and even when they are, RCA determinations are not shared with the migrant or the immigration judge.¹⁴⁵

a. Specific-Concerns/Harms

RCA is an example of how a seemingly “neutral” tool can manifest bias and lead to the detention of more people. RCA was designed to supposedly provide recommendations about detention decisions without bias. However, one of the inputs to RCA is criminal history and even criminal history classified as “low severity crimes,” such as driving under the influence (“DUI”), traffic offenses, or possessing a fraudulent document, can be a contributing factor to a migrant’s encounter with ICE and subsequently, a detention decision.¹⁴⁶ These types of low severity crimes disproportionately affect Black migrants who are hyper criminalized and more likely to be stopped by the police.¹⁴⁷

¹³⁹ Robert Koulisch & Kate Evans, *Punishing With Impunity: The Legacy of Risk Classification Assessment in Immigration Detention*, 36 GEO. IMMIGR. L. J. (2021) at 1, 4.

¹⁴⁰ Koulisch & Evans, *supra* note 139, at 4. Migrants are asked 178 questions pertaining to the RCA with four modules forming the detention determination: special vulnerabilities, mandatory detention, public safety risk, and flight risk. *Id.* at 13; *See also* OFF. OF INSPECTOR GEN., OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S ALTERNATIVES TO DETENTION (REVISED) (2015) at 22.

¹⁴¹ Koulisch & Evans, *supra* note 139, at 4.

¹⁴² *Id.* at 14.

¹⁴³ *Id.* at 5.

¹⁴⁴ Robert Koulisch, *Immigration Detention in the Risk Classification Assessment Era*, 16.1 CONN. PUB. INT. L. J. (2018) at 3, 11.

¹⁴⁵ Anu Chugh, *Risk Assessment Tools: An Algorithmic Solution to the Due Process Problem in Immigration* 6 COLUM. HUM. RTS. L. REV. (2022) at 272, 306.

¹⁴⁶ Koulisch & Evans, *supra* note 139, at 38–39.

¹⁴⁷ BLACK ALLIANCE FOR JUST IMMIGRATION ET AL., *supra* note 130, at 13.

As ICE began using RCA, officers apparently overrode decisions to release migrants. ICE modified the algorithm to reduce officer overrides, but in doing so, made the algorithm harsher, resulting in more migrants being detained.¹⁴⁸ “Risk levels became tighter at the low end and broader at the high end,” resulting in more migrants being classified for detention without bond.¹⁴⁹ Criminal offenses that were previously categorized as “low” risk were recategorized to “medium” and “high” risk.¹⁵⁰

In the creation of RCA, the developers “measured the tool’s accuracy backwards through the rate of field officers’ dissent,” leading to, “the RCA ha[ving] no neutral arbiter and no objective, external standard by which to measure fairness.”¹⁵¹ This led Black and brown migrants to be disproportionately affected, since “nearly any criminal history generate[s] a ‘medium’ or ‘high’ risk level.”¹⁵²

The use of RCA, its algorithmic bias, lack of transparency, and the lack of remedy for many detention determinations has contributed to the rising rates of detention for migrants of color. This violates article 2(1)(a) of ICERD because the U.S. government is clearly not exercising due diligence and not ensuring the prevention of discrimination. The use of RCA also violates article 5 of ICERD because migrants are being punished twice for the same offense in both the criminal justice system, which produces racially disparate results, and the immigration system, which exacerbates those racial disparities. The state is failing to ensure the equal treatment of migrants before the law.

In addition to the duty to prevent racial discrimination, under article 2(1)(c) of ICERD, the state has a responsibility to make changes to the use of AI when it perpetuates racial discrimination. Instead of making changes to reduce discrimination, here, the government made the algorithm worse by responding to decision overrides by ICE officers. An AI system that trains based on officers’ perceptions is bound to perpetuate the same biases that it was intended to prevent. Under the OMB rules, since RCA cannot mitigate this discrimination risk, there is a responsibility on the part of DHS to stop using RCA.

Finally, the RCA is also in violation of article 6 of ICERD as there is no remedy to challenge risk determinations resulting in continued custody. There is no mechanism, for example, for review of a risk determination by an immigration judge. Any remedy is also impeded by a lack of transparency about the decision-making mechanism for the migrants affected.

¹⁴⁸ Koulish & Evans, *supra* note 139, at 42.

¹⁴⁹ *Id.* at 52.

¹⁵⁰ *Id.* at 53.

¹⁵¹ *Id.* at 63.

¹⁵² *Id.* at 63, 66–68.

2. *The “Hurricane” Score Tool in ICE Alternatives to Detention*

The Intensive Appearance Supervision Program (“ISAP”) is a part of ICE’s Alternatives to Detention (“ATD”) Program. ATDs are supposed to reduce the number of individuals in ICE detention by offering additional options to ensure migrants’ compliance with release conditions, such as a promise to attend court.¹⁵³ However, it is unclear if ATDs actually reduce the footprint of detention or if they simply place individuals who otherwise would be free under alternative forms of control enabled by a variety of electronic monitoring tools.¹⁵⁴ ISAP participants are subject to the most intensive surveillance by ICE.¹⁵⁵ ISAP participants are often required to wear an electronic ankle monitor and use the SmartLink application,¹⁵⁶ tracking and logging an individual’s movements. ISAP has nearly 200,000 participants subject to electronic monitoring.¹⁵⁷

In a 2022 report, “Tracked & Trapped: Experiences from ICE Digital Prisons,” Black migrants from Honduras, Guinea, and South Africa shared their experiences of being surveilled under the ISAP program.¹⁵⁸ They described faulty technology,¹⁵⁹ the psychological toll,¹⁶⁰ and the lack of transparency in how long they would be subject to electronic monitoring.¹⁶¹

¹⁵³ U.S. DEPT. OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE ALTERNATIVES TO DETENTION (ATD) PROGRAM, No. DHS/ICE/PIA-062 (2023) at 3.

¹⁵⁴ Only ISAP participants are tracked using electronic monitoring technology such as ankle monitors while YACMP participants are not tracked using these methods. *Id.* at 4.

¹⁵⁵ ISAP participants are typically noncitizens age 18 years or older who are released from detention, “pursuant to an Order of Release on Recognizance, Order of Supervision, grant of parole, or bond (unless the custody determination does not allow for participation in ATD).” Participation is not voluntary and is a condition of release. *Id.* at 3. Several factors are taken into consideration for enrollment such as: (1) criminal, immigration and supervision history; (2) family and/or community ties; (3) status as a caregiver or provider; and (4) humanitarian or medical considerations. *Alternatives to Detention*, ICE (June 24, 2024).

¹⁵⁶ The surveillance under the SmartLink application also has tough restrictions and expectations such as uploading a selfie within the hour window given and, “[i]f you fail to do this, you go through constant harassment and you’re required to go to ICE offices the next day to fulfill this requirement.” Aly Panjwani & Hannah Lucal, *Tracked and Trapped: Experiences from ICE Digital Prisons* (May 2022) at 25.

¹⁵⁷ Julie Mao et al., *Automating Deportation: The Artificial Intelligence Behind the Department of Homeland Security’s Immigration Enforcement Regime* (June 2024) at 28.

¹⁵⁸ *Tracked & Trapped Experiences from ICE Digital Prisons*, African Bureau for Immigration and Social Affairs et al. (2022)

¹⁵⁹ Michael Bongani Langa, a migrant from South Africa, shared how the devices themselves are faulty and the burden is placed on the participant to report despite there not being adequate avenues to report. Langa states, “[w]hen there is an issue with a device: ICE Officers call and threaten to detain you, claiming you violated the terms of your release. You don’t get a chance to report it when the device is not working properly, cause ICE Officers will be on your back. What is shocking is that ICE Officers do not answer their phones if you want to report something BUT if they call you, they expect you to answer immediately.” *Id.* at 24.

¹⁶⁰ Hassane, a migrant from Guinea, described the experience as, “another form of incarceration because with that, your mind is never really at peace. You live with constant fear in your belly, you are embarrassed.” *Id.* at 19.

¹⁶¹ Hassane shared the difficulty in removing GPS monitoring and that ultimately it was ICE’s decision. *Id.* Samuel, a migrant from a Garifuna community in Honduras, shares how initially he was to have a GPS ankle monitor for one month but the conditions of his supervision kept changing. *Id.* at 15.

Additionally, there is the heightened stigma of having an ankle monitor. One migrant explained that with an ankle monitor, “[p]eople will look at you as if you’re someone who’s very dangerous.”¹⁶² This limits migrants’ ability to be financially independent and further reinforces the perception of Black and brown people as threats and lawbreakers.

ICE uses a predictive algorithm called the “Hurricane Score” to make determinations about a person’s terms of monitoring under ISAP.¹⁶³ The algorithm is provided by the B.I. Incorporated (“B.I.”), an American company connected to the private prison industry as a subsidiary of GEO Group,¹⁶⁴ and run on a weekly basis to “predict” the flight-risk or likelihood of non-compliance of a participant.¹⁶⁵ The system notifies ICE through automated alerts if an individual’s score changes.¹⁶⁶ Presumably, a higher score is used to justify additional restrictions, but there is little information on this tool, or what “risk factors” it evaluates,¹⁶⁷ and there is no mention of its use in the DHS AI Inventory or the Privacy Impact Assessment about ATD Program.¹⁶⁸

b. Specific Concerns/Harms

There is a severe lack of transparency about the Hurricane Score tool. There is not even a PIA or apparently any disclosure to the people who are impacted that the Hurricane Score is being used in their cases. This lack of transparency raises grave concerns under ICERD articles 2(1)(a) and 2(1)(c) and domestic regulations such as EOs and OMB guidelines because the lack of disclosure suggests the likely scenario that ICE has not been taking adequate preventative measures to address the way in which the Hurricane Score tool perpetuates existing discrimination.

¹⁶² *Id.* at 19.

¹⁶³ Mao et al., *supra* note 157, at 28–29.

¹⁶⁴ See Aly Panjwani, *ICE Digital Prisons: The Expansion of Mass Surveillance as ICE’s Alternative to Detention* (May 2021) at 3. B.I. originally sold technology to track cattle, a haunting history given how the technology is now used to further the dehumanization of migrants. Panjwani & Lucal, *supra* note 156, at 4. “BI proposed to ICE that the agency could use the incarceration data program in the future to track the ‘criminal activity’ of ‘persons of interest,’ either part of the ATD program or outside of it.” Just Futures Law, Mijente, & Community Justice Exchange, *Fact Sheet on ICE FOIA Lawsuit: ICE Documents Reveal Alarming Scale of Surveillance in ISAP Program* (2023) at 8 [Hereinafter *Fact Sheet on ICE FOIA Lawsuit*].

¹⁶⁵ Mao et al., *supra* note 157, at 29.

¹⁶⁶ *Id.*

¹⁶⁷ Using the SmartLink app and ankle monitors, B.I. collects and stores a wide range of information on ISAP participants including: biometric information, location and common routes taken, addresses, employment, education, finances, religious affiliation, race and gender. This data could potentially be used to discriminate against Black migrants as it is fed into the risk factor analysis. Johana Bhuiyan, *Revealed: US Collects More Data on Migrants than Previously Known*, THE GUARDIAN (Sept. 6, 2023). See also, *Fact Sheet on ICE FOIA Lawsuit*, *supra* note 164, at 3.

¹⁶⁸ Mao et al., *supra* note 157, at 30.

There is also a potential for the Hurricane Score tool to violate ICERD article 5's requirement of equal treatment before the law. If migrants are treated differently based on the scores they receive and the scores themselves are based on discriminatory criteria, then the heightened monitoring or scrutiny will no doubt impact migrants' ability to fight their immigration cases. If it lands migrants back in detention, then they will be automatically less likely to win immigration relief.¹⁶⁹

Finally, the lack of information about the Hurricane Score tool impacts the access to an effective remedy for those who are wronged by the use of the tool under ICERD article 6. There does not seem to be any avenues for participants to redress an erroneous "high risk" Hurricane Score. There is indeed no notification to participants of their score or of any changes to the score. Under ICERD article 2(1)(d), the state also has a responsibility to ensure nondiscrimination by private companies involved, i.e., B.I., but there is no indication that the U.S. has taken any steps to do so.

3. *RAVE*n

The Repository for Analytics in a Virtualized Environment ("RAVE"n) platform¹⁷⁰ is used by ICE's Homeland Security Investigations ("HIS") to investigate and take enforcement action against those suspected of violating of U.S. civil, administrative, and criminal law.¹⁷¹ RAVE"n uses machine learning to analyze trends and isolate patterns in large datasets pulled from numerous sources, including "law enforcement, immigration, border inspection, criminal, visa, and publicly available information from U.S. government and commercial databases."¹⁷² RAVE"n is unique in that it is an AI system that connects information across datasets, which allows users to "perform analytics . . . using a suite of search, analytical, and reporting tools" making it easier to flag migrants for violations and reinstate them into the immigration carceral system.¹⁷³

c. Specific Concerns/Harms

Because RAVE"n allows users to access and analyze so many different sources of information, DHS claims there is a "decrease[d] . . . risk of introducing error or bias into RAVE"n

¹⁶⁹ According to the American Immigration Council, unrepresented detained migrants had a 2% chance of being granted relief in removal cases in comparison to their non-detained counterparts being granted relief at a rate of 17%. Additionally, unrepresented detained migrants that applied for relief were successful in their cases at a rate of 23% in comparison to the rate of 49% for detained migrants with legal representation. INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT, 19–21 (2016).

¹⁷⁰ Developed by contractor Booz Allen Hamilton. Mao et al., *supra* note 157, at 26.

¹⁷¹ U.S. DEPT. OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE REPOSITORY FOR ANALYTICS IN A VIRTUALIZED ENVIRONMENT (RAVE"n), DHS/ICE/PIA-055, (2020) [Hereinafter RAVE"n PIA].

¹⁷² *Id.* at 2, 9.

¹⁷³ *Id.* at 3.

machine learning models.”¹⁷⁴ But the quality of RAVEn’s outputs is only as good as the data on which it relies. The datasets from which RAVEn pulls from are often riddled with errors, and further, it is unclear what factors the AI uses to determine patterns and identify migrants to target when their social media, biographic data, and biometric data are analyzed.¹⁷⁵ There is a risk that the AI might identify someone as a threat based on inaccurate assumptions or faulty associations, leading individuals to be targeted for ICE raids or other enforcement actions on a discriminatory basis.¹⁷⁶

As Black migrants experience disproportionate levels of contact with law enforcement, the data that is collected during these encounters, not only domestically in the U.S. but internationally as well, can be used to flag and further criminalize them through programs like RAVEn. Race can also intersect with other factors such as poverty, housing instability, mental health, and disability that render migrants more vulnerable to being flagged by RAVEn. Among the sources that RAVEn pulls from are DHS’s own databases, which record encounters earlier in a migrant’s journey, such as with CBP.¹⁷⁷ Thus, the increased surveillance and scrutiny that Black migrants and other migrants of color face before arrival or at ports of entry can continue to haunt them and the communities they join in the U.S. as part of their attempt to rebuild their lives.

This harm is exacerbated when taking into account the international aspect of RAVEn’s reach. ICE has an international component composed of 93 HSI offices located across 56 countries.¹⁷⁸ These offices extend ICE’s reach as they work with international law enforcement communities to “investigate immigration and customs violations.”¹⁷⁹ Additionally, the U.S. has entered into Criminal History Information Sharing (“CHIS”) agreements¹⁸⁰ with foreign countries such as Mexico¹⁸¹, El Salvador, Guatemala, Honduras, Mexico, the Dominican Republic, Jamaica and the Bahamas.¹⁸² This information is then input into different databases¹⁸³

¹⁷⁴ *Id.* at 9.

¹⁷⁵ Mao et al., *supra* note 157, at 34–35.

¹⁷⁶ *Id.* at 35.

¹⁷⁷ RAVEn PIA, *supra* note 171, at 26.

¹⁷⁸ *International Operations*, U.S. IMMIGR. AND CUSTOMS ENF’T (last updated Sept. 24, 2024).

¹⁷⁹ *Id.*

¹⁸⁰ These are data sharing agreements which also collect biometric information. MIZUE AIZEKI & PAROMITA SHAH, HART ATTACK: HOW DHS’S MASSIVE BIOMETRICS DATABASE WILL SUPERCHARGE SURVEILLANCE AND THREATEN RIGHTS 27 (2022).

¹⁸¹ Additionally, the U.S. has provided \$112 million in technological assistance to Mexico. Bill Frelick et al., *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION AND HUM. SEC’Y, 190, 194 (2016).

¹⁸² MIJENTE ET AL., *WHO’S BEHIND ICE? THE TECH COMPANIES FUELING DEPORTATIONS* 39 (2018).

¹⁸³ Those databases include the Enforcement Integrated Database (EID), Office of Biometric Identity Management (OBIM) Automated Biometric System (IDENT), and Homeland Advanced Recognition Technology (HART). *Id.* at 38–42.

that foreign governments have access to,¹⁸⁴ and which RAVEn uses as sources.¹⁸⁵ Additionally, data collected by foreign governments can be erroneous or racially motivated and, when entered into databases, could lead to migrants being subjected to wrongful deportations.¹⁸⁶ Due to a lack of transparency, these data sharing agreements make it difficult to gather the full scope of information sharing with foreign agencies and the oversight mechanisms implemented to assure that racial discrimination is not taking place and being reproduced with RAVEn.¹⁸⁷

ICE's use of RAVEn is non-compliant with international and domestic law. First, DHS plainly admits that with its RAVEn systems "there is no opportunity for individuals to consent, decline, or opt out of providing information to the system,"¹⁸⁸ especially since there are many domestic and foreign agencies contributing to the information collection. Additionally, publicly available information on RAVEn is limited and ICE has yet to disclose the algorithms, training data used, or plans for future deployment of AI. The lack of transparency means that RAVEn's algorithms may perpetuate racial discrimination in violation of ICERD article 2(1)(a) and 2(1)(c). The U.S. has yet to show how the use of RAVEn does not lead to discrimination or bias, especially when the data used by RAVEn is coming from sources which can themselves be biased. There is also the risk that use of RAVEn violates ICERD article 5 in that information from RAVEn may be used in immigration cases and affect decisions on applications for immigration relief. Finally, it is nearly impossible for those affected to seek a remedy if they are harmed.¹⁸⁹ This is in contravention to ICERD article 6.

D. Immigration Relief

Key Findings

- Gaining immigration relief, such as asylum or other pathway to Lawful Permanent Resident status, can be quite complex. Relief often requires immigrants to submit high volumes of evidence to U.S. Citizenship and Immigration Services ("USCIS"). USCIS's use of AI systems to carry out critical functions, such as evidence sorting and fraud detection, raises questions of fairness and reliability.
- Due to possible limitations in the training model, Asylum Text Analytics ("ATA"), a system responsible for identifying fraud by reading asylum application text, can prejudice non-English speaking applicants or those with

¹⁸⁴ *Id.*

¹⁸⁵ RAVEn PIA, *supra* note 171, at 21, 26–27.

¹⁸⁶ AIZEKI & SHAH, *supra* note 180, at 34.

¹⁸⁷ UCI Law International Justice Clinic, *Submission to the United Nations Human Rights Committee During its Periodic Review of United States of America* (Sept. 12, 2023) at 13.

¹⁸⁸ RAVEn PIA, *supra* note 171, at 16.

¹⁸⁹ UCI Law International Justice Clinic, *supra* note 187, at 12.

bona fide claims whose applications contains similar phrases or narratives as other applications. Many of those applicants are Black migrants.

- USCIS’s AI-powered Evidence Classifier, which “reviews” millions of pages of evidence ranging from birth certificates to medical records and photos for USCIS adjudicators, is likely to negatively impact those who have atypical documentation.

U.S. immigration laws are notoriously complex and the process of applying for immigration relief is fraught with difficulty.¹⁹⁰ Despite the “self-contradictory,” “ambiguous,” and “complex statutory scheme,”¹⁹¹ immigrants appearing before U.S. Citizenship and Immigration Services (“USCIS”), another component of DHS in charge of granting many applications for immigration relief as well as citizenship, are often unrepresented by counsel and struggle to navigate immigration laws that even experienced attorneys find difficult to master.

Migrants seeking asylum in the U.S. can either apply “affirmatively” or “defensively.”¹⁹² Many recently arriving migrants will be given a credible fear screening and, if they pass, placed in removal proceedings to apply for asylum defensively to an immigration judge. But some, including minors and others who are already living in the U.S., will be able to make an “affirmative application” and will generally have that application decided by USCIS.¹⁹³

Accessing asylum and other forms of immigration relief has become incredibly difficult for Black migrants. From negative determinations in credible fear screenings to the lack of adequate translation services, the barriers to relief abound. For example, in 2020, “asylum seekers from Sub-Saharan Africa were deemed not credible in 8.5% of credible fear interviews, over 37% more often than on average for all nationalities.”¹⁹⁴ And between 2001-2021, Haitian asylum seekers had the “second highest asylum denial rate of any nationality at 82%.”¹⁹⁵ Additionally, third-country transit asylum bans during the Trump Administration also, “disproportionately impacted Black asylum seekers from the Caribbean and Africa, who had passed through several third-countries en route to the United States.”¹⁹⁶ This is of particular concern for Black migrants as the Trump Administration retakes office in 2025.

Currently, USCIS is using a variety of AI systems in the adjudication of immigration applications it has jurisdiction over. USCIS is using these AI tools as shortcuts in the process to

¹⁹⁰ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 Penn. L. Rev. 1, 8 (2015).

¹⁹¹ *See Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 75 (2014).

¹⁹² Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1) (1964).

¹⁹³ *Id.*

¹⁹⁴ BLACK ALLIANCE FOR JUST IMMIGRATION ET AL., *supra* note 130, at 10.

¹⁹⁵ *Id.* at 12.

¹⁹⁶ *Id.*

partially automate immigration relief decision-making. DHS relies on AI for many common forms of immigration relief.¹⁹⁷ To illustrate how AI is being used, in this section, we will focus on two tools, Asylum Text Analytics (“ATA”) and the Evidence Classifier.¹⁹⁸

1. Asylum Text Analytics (“ATA”)

ATA is used by USCIS for the detection of fraud in requests for asylum, and works by scanning text and looking for duplicate language repeated across applications.¹⁹⁹ According to the DHS’s AI Inventory, “[m]achine learning and data graphing techniques [are used] to ID plagiarism-based fraud . . . by scanning the digitized narrative sections of the associated forms and looking for common language patterns.”²⁰⁰

As difficult as the immigration relief application process is for English speakers, it is even more challenging for non-native English speakers.²⁰¹ In asylum applications, applicants are expected to explain the circumstances leading to the applicant’s need for protection. The best asylum applications explain facts in a way that helps the USCIS officer see how their claim meets the numerous elements of asylum—if an element of asylum is not met, relief is denied. A finding of fraud can not only defeat a claim of asylum but can render a migrant permanently inadmissible from the U.S.²⁰²

a. Specific Concerns/Harms

Black migrants, especially those from non-Anglophone countries, frequently rely on translators and legal assistance organizations to file their asylum applications. Black migrants rely on these entities for their stories to be deemed credible. Translators and legal assistance organizations may, in turn, use similar wording to describe different migrants’ experiences. Those narratives can then be coded as fraudulent by ATA even if they are perfectly truthful. Even Black migrants from Anglophone countries are likely prejudiced as ATA almost certainly lacks sufficient training data to understand the nation-specific variations in English language use.

¹⁹⁷ Many forms of immigration relief are currently highly dependent on AI: for asylum seekers, USCIS relies on Asylum Text Analytics; for students and travelers, USCIS relies on I-538 Approval Prediction; for those adjusting status based on U.S. family members, USCIS relies on I-485 Family Matching. Meanwhile, on an unknown amount of immigration relief applications, the DHS is relying on tools like Evidence Classifier and FDNS-DS NextGen to replace human work in deciding what is, and is not, relevant in deciding to grant relief in the critical and complex stories of humans. U.S. DEPT. OF HOMELAND SEC., [DHS INVENTORY OF AI USE CASES](#) (Aug. 14, 2024).

¹⁹⁸ *Asylum Text Analytics*, ACT-IAC (2024); see U.S. DEPT. OF HOMELAND SEC., [DHS INVENTORY OF AI USE CASES](#) (Aug. 14, 2024).

¹⁹⁹ U.S. DEPT. OF HOMELAND SEC., [DHS INVENTORY OF AI USE CASES](#), (Aug. 14, 2024).

²⁰⁰ *Id.*

²⁰¹ See DHS USCIS, FORM I-589, [INSTRUCTIONS FOR APPLICATION FOR ASYLUM AND FOR THE WITHHOLDING OF REMOVAL](#) (2023) at Part V (“Your answers must be completed in English”).

²⁰² 8 U.S.C. § 1158(a)(6)(C)(i) (“[a]ny alien who by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation or admission into the United States or other benefit provided under this chapter is inadmissible”).

Migrants from the same geographic region may also experience similar kinds of persecution that are a part of a pattern of violence that targets particular groups. The appearance of similar phrases or similar narratives in multiple asylum applications in this case is not an indication of fraud but of bona fide claims for relief. Unfortunately, there is also no indication that ATA can distinguish between legitimate stories that are similar from fraudulent ones. It is highly likely that Black migrants and other migrants of color are experiencing discriminatory outcomes in cases where ATA is used.

Compounding this problem is the severe lack of disclosure by the DHS about how ATA works.²⁰³ There is no indication that DHS is auditing the results of ATA for false positives. Without disclosure of algorithm information and testing procedures, it is impossible for the public, including asylum seekers, to know whether discrimination is occurring, inhibiting corrective measures and an effective remedy.²⁰⁴

2. Evidence Classifier

USCIS’s Evidence Classifier works by “sift[ing] through dozens, if not hundreds, of unlabeled pages to find one specific artifact”—be that a passport, birth certificate, marriage license, medical record, photo, letter, legal document, or anything else submitted in support of one’s story and basis for relief.²⁰⁵ The AI systematically tags individual pages and is used to aid in adjudication of a variety of different kinds of immigration relief.²⁰⁶ USCIS claims that the Evidence Classifier saves USCIS time, having eliminated “around 24 million page scrolls.”²⁰⁷

USCIS does not explain what happens when the Evidence Classifier encounters less common forms of evidence among the many types of evidence that may be submitted with an immigration application, such as documents from diverse legal systems, medical records, photos, letters, newspaper clippings, news articles, and the like, and whether the lack of sufficient training data may render less common forms of evidence undetectable.²⁰⁸ USCIS has failed to explain what happens if the Evidence Classifier is unable to locate a particular piece or type of evidence in a file, and whether this renders the application more likely to be denied.

²⁰³ The DHS Case Inventory Webpage provides, “For more information, please contact: [hyperlinked] DHS Artificial Intelligence Team.” U.S. DEPT. OF HOMELAND SEC., [DHS INVENTORY OF AI USE CASES](#), (Aug. 14, 2024). However, our email inquiries to the DHS Artificial Intelligence Team regarding AI functionality, testing, and general requests for information went unanswered—this appearance of transparency appears to be illusory.

²⁰⁴ See 3 C.F.R. 13960 (creating duty for states to provide remedy for racial discrimination).

²⁰⁵ U.S. DEPT. OF HOMELAND SEC., [DHS INVENTORY OF AI USE CASES](#) (Aug. 14, 2024).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *id.*

b. Specific Concerns/Harms

USCIS's justification for using the Evidence Classifier is one of efficiency. However, one way to reduce the amount of time it takes to adjudicate applications is to simplify the application process and limit how much evidence that must be submitted to evaluate eligibility for relief. This would also make the immigration process more accessible and less burdensome to migrants.

Rather than simplifying the application process, USCIS has opted to use AI. If the public could be assured that AI is being used only to expedite the approval of applications where eligibility is clear, perhaps there would be less of a concern. Unfortunately, the U.S. has yet to provide that assurance, leading to the possibility that the Evidence Classifier can be used to determine that a person is *not* eligible for relief based on possible mis-tagging or the failure to tag relevant evidence.

By leaving the sifting of evidence to AI, USCIS adjudicators may also fail to consider that evidence may speak to more than one element of an application, or they may miss critical connections between disparate pieces of evidence. These are the types of things that applicants rely on a human adjudicator to catch, but that AI may not, depending on the training data and instructions provided to the AI. Since publicly available information does not identify what human review is available, and under what circumstances, it is quite possible that certain applicants are being unfairly prejudiced by the AI. Given the greater likelihood that Black migrants and other migrants of color may have fewer common forms of evidence, or evidence in a variety of languages, it is likely that those migrants are disproportionately impacted.

To prevent acts of racial discrimination as required under article 2(1)(a) of ICERD, risk mitigation measures—such as thorough testing and independent oversight of ATA—must be put in place. Greater public disclosure is necessary for diverse communities to convey their perspectives, which are critical for DHS to perform the obligation to prevent perpetuate racial bias, as required under article 2(c). Such disclosure alongside with the notifications to impacted individuals are critical to ensure impacted persons are able to seek an effective remedy through applicable administrative appeal processes, as required under article 6.

V. RECOMMENDATIONS

BAJI imagines a future where the legacies of colonialism are fully acknowledged and the associated structural violence and discrimination against Black migrants and migrants of color is eradicated. BAJI fights for the abolition of systems of oppression, and as such, believes that further use of AI in U.S. border management and immigration enforcement should be halted.

Instead, the U.S. government should focus on technological advancements that promote human thriving, including investments in health, education, housing, and the effective delivery of services to marginalized communities.

While we strive to meet these long-term goals, we also see the need to take short- and medium-term steps to reduce the harm that is inflicted by AI system use in border management and immigration enforcement. We thus respectfully suggest the Special Rapporteur make the following recommendations to the U.S. government, with the recognition that AI is here to stay, at least for now.

1. DHS should:

- acknowledge the harms AI systems inflict on Black migrants and other migrants of color, in particular those that:
 - intensify racial discrimination and violence at the border and throughout migration process; and
 - brazenly violate international human rights law prohibitions on racial discrimination;
- place a moratorium on the use of AI until DHS:
 - adopts (i) effective anti-discrimination measures and (ii) independent oversight to ensure its use of AI does not lead to racially discriminatory outcomes;²⁰⁹
 - (iii) provides sufficient information regarding AI use, including algorithmic models and training methods, to ensure the public's understanding of its implications and enables and empowers individuals to convey their perspectives to DHS;²¹⁰
 - (iv) engages diverse stakeholders, including those from Global South and those most likely to be adversely affected by the development and use of AI in border management and immigration enforcement, are consulted at each material decision point in AI development and use, as is required by OMB 24-10; and
 - (v) guarantees access to effective remedies, including, at a minimum,
 - ensures that individuals who may be negatively impacted by the use of AI are promptly notified about such decisions, and
 - provides individuals an option to opt out of AI systems where appropriate.

²⁰⁹ 3 C.F.R 14110, § 2(a).

²¹⁰ DHS should contract with only AI vendors that agree to such disclosures and not to claim the defense of protecting trade secrets.

2. Congress should:²¹¹

- enact federal laws governing DHS’s use of AI that:
 - prohibit and prevent any AI use that would result in racially discriminatory results or exacerbates structural racial discrimination; and
 - mandate (i) the effective discrimination-prevention measures, (ii) independent oversight on implementation,²¹² (iii) robust public disclosures, (iv) stakeholder consultation with diverse populations, and (v) access to effective remedies by those who are negatively impacted by DHS’s use of AI; and
- exercise budgetary oversight and hold congressional hearings to thoroughly investigate claims of alleged discrimination by DHS’s use of AI and AI use that fails to comply with the applicable rules and standards.

3. The executive branch more generally should:

- affirm the existing Executive Orders and OMB rules applicable to agencies’ AI use;
- eliminate or at least appropriately delineate the ability of DHS to be carved out of obligations under existing Executive Orders and OMB rules; and
- implement more robust rules requiring DHS to: (i) implement the effective discrimination-prevention measures, (ii) introduce independent oversight on implementation, (iii) make robust public disclosures, (iv) conduct stakeholder consultation with diverse populations, and (v) make available effective remedies for those who are negatively impacted by DHS’s use of AI.

4. State and local governments should:²¹³

- stop any actions that facilitate DHS’s discriminatory AI use;
- adopt and revise “sanctuary”²¹⁴ policies to include an explicit pledge not to share information with DHS if it is expected to be used for AI development or deployment by DHS or its vendors.²¹⁵

²¹¹ See generally TODD GARVEY & SEAN M. STIFF, CONG. RSCH. SERV., R45442, [CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES](#) (2023).

²¹² OMB should transfer “independent evaluation” of DHS AI use away from the DHS Chief AI Officer and to a non-interested, independent evaluation process. This could be done by NIST which is already tasked with testing AI use by agencies by order of EO 14110. 3 C.F.R 14110, § 4.1.

²¹³ MARY MCLEOD, [THE ROLE OF STATE, TERRITORIAL, AND LOCAL GOVERNMENT IN PROMOTING, RESPECTING, AND DEFENDING HUMAN RIGHTS](#) (2015); see generally HUMAN RIGHTS INSTITUTE, [BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY](#) (2012).

²¹⁴ Sanctuary policies aim to not only create a safe place for immigrants to “live, work, drive, and thrive” (as in Washington state), but also in many cases pledging not to cooperate with ICE. In general, sanctuary policies prohibit local law enforcement agencies from helping ICE with immigration enforcement. Which in turn allows migrants to integrate into the community by reducing both encounters with ICE and discrimination based on status. See the Immigrant Legal Resource Center, [Searching for Sanctuary and The Rise of Sanctuary](#) (December 2019) and [National Map of Local Entanglement with ICE](#) (13 November 2019).

²¹⁵ See generally Krissy Eliot, [State AG Bans Employer-ICE Cooperation. Can He Do That?](#), CAL ALUMNI ASS’N (Feb. 8, 2018).

- help DHS meet the requirements of international and domestic laws and regulations, for example, by:²¹⁶
 - promoting consultation with more diverse populations, incentivizing migrants with diverse backgrounds to work for AI developers; educating diverse communities in science and technology; and by creating state grants for the inclusive development of AI systems as well as the empowerment of local, grassroots organizations in the domain of AI policy); and
 - with respect to access to effective remedies, create additional state-level mechanisms whereby those harmed by DHS’s AI use can seek redress.

VI. CONCLUSION

Recognizing the humanity owed to us *all*, uBuntu, should be a underlying motivation of AI development and use.²¹⁷ “African cosmology embraces the humanity of all humans,” and ICERD and decolonizing AI requires “Global Africa [to] play a significant role in the process of conceptualizing, inventing, innovating, [and] operating” AI systems.²¹⁸ In contrast, the AI systems currently used by DHS fail to incorporate decolonial perspectives, perpetuating and exacerbating racial biases rooted in colonialism, extraction, suffering, and death.

Given the significant discriminatory impact of AI on the rights of Black migrants and the increasingly adversarial political climate against immigrants in the U.S., the Special Rapporteur’s intervention on this issue has never been more critical. In solidarity with civil society both within the U.S. and globally, particularly countries of the Global South, we hope this submission will assist the Special Rapporteur, alongside submissions from the other civil society organizations, in deepening the understanding of the widespread use of AI in the U.S. border and immigration enforcement. We urge the Special Rapporteur to join the chorus of voices calling for the immediate end of use of AI systems by DHS until they can be free of discrimination and until diverse perspectives are meaningfully included in the development and use of AI systems. AI use and development should center around *all* people and communities, including those most profoundly impacted by its use.

²¹⁶ Not being complicit in the federal government’s violations of ICERD—states do not need to enforce the federal government’s law and may leave that to the federal government.

²¹⁷ International Telecommunication Union (ITU), *AI FOR GOOD LIVE: Cosmo-Ubuntu, Machine Translation and Cognitive Code Switching*, YOUTUBE (July 15, 2020); Mohamed, Png & Isaac, *supra* note 18, at 664.

²¹⁸ *Id.*