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## **“One of the greatest human tragedies of our time”: The U.N., Biden, and a Missed Opportunity to Abolish Immigration Prisons**

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“One of the greatest human tragedies of our time”: The U.N., Biden,  
and a Missed Opportunity to Abolish Immigration Prisons

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– DRAFT –

**“One of the greatest human tragedies of our time”: The U.N., Biden, and a Missed Opportunity to Abolish Immigration Prisons**

**By Lauren E. Bartlett<sup>1</sup>**

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**Abstract**

*Children in cages, rampant sexual abuse, lack of access to life-saving medical treatment, and more. These human rights violations continue to occur in immigration prisons in the United States today, and given the scope, many, including the United Nations, are pushing the United States to abolish immigration prisons altogether. However, the Biden administration has demonstrated that is not interested in supporting the abolition of immigration prisons, not even in the international human rights arena.*

*After providing a brief overview of international human rights law prohibiting immigration prisons, this essay explores U.N. recommendations on immigration prisons from each of the Universal Periodic Reviews of the United States over the past ten years, as well as the U.S. responses to those recommendations. Through that exploration, it is made clear that while the Biden administration has showed an eagerness for reform in other areas, the administration missed an important opportunity this year to step up as a global leader and demonstrate commitment to the progressive realization of the full spectrum of human rights of migrants and set the United States on a path towards the abolition of immigration prisons.*

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## I. Introduction

...widespread and increasingly systematic human rights violations committed against migrants by State officials, criminals and private citizens have not only grown into a major global governance challenge, but have become one of the greatest human tragedies of our time.

- Nils Melzer, Special Rapporteur on torture, cruel, inhuman or degrading treatment or punishment<sup>2</sup>

Children in cages.<sup>3</sup> Children separated from their parents and 'lost' in the system.<sup>4</sup>

Endless solitary confinement.<sup>5</sup> Women forced to undergo unneeded hysterectomies.<sup>6</sup> Racism

<sup>2</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Migration-Related Torture and Ill-Treatment, U.N. Doc. A/HRC/37/50, ¶ 63 (Feb. 26, 2018) (by Nils Melzer), [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A\\_HRC\\_37\\_50\\_EN.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_50_EN.docx).

<sup>3</sup> See e.g., *Number of Migrant Children Detained at Border Has Tripled in Two Weeks*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/live/2021/03/08/us/joe-biden-news> (discussing how the Biden administration reopened an emergency immigration detention facility used during the Trump administration to put more unaccompanied migrant children in cages at the border); Nicole Narea, *Biden Border Crisis Children: America's Asylum System is Broken*, VOX (May 28, 2021), <https://www.vox.com/policy-and-politics/22442165/biden-border-asylum-crisis-children> (discussing criticism of the Trump and Biden administrations for keeping kids in cages).

<sup>4</sup> See e.g., James Lemon, *Biden Says Admin Still Can't Find Hundreds of Migrant Kids Separated From Parents by Trump*, NEWSWEEK (Apr. 30, 2021), <https://www.newsweek.com/biden-says-admin-still-cant-find-hundreds-migrant-kids-separated-parents-trump-1587805/> (discussing Biden administration's failed attempts to find migrant children separated from their parents by the Trump Administration); Priscilla Alvarez, *Parents of 445 migrant children separated at the border under Trump still have not been found, court filing says*, CNN (updated Apr. 7, 2021), <https://www.cnn.com/2021/04/07/politics/family-separation-court-filing/index.html>; Rick Jervis, *Migrant Children at Border Are Still Being Separated From Relatives For Weeks Under Biden Administration*, USA TODAY (Mar. 7, 2021), <https://www.usatoday.com/story/news/nation/2021/03/06/migrant-children-facility-used-house-minors-separated-family/4587455001/> (discussing how the Biden administration is still separating migrant children at the border).

<sup>5</sup> See e.g., *Cruelty and Corruption: Contracting to Lock up Immigrant Women For Profit at the Hutto Detention Center*, TEXAS LAW IMMIGRATION CLINIC AND GRASSROOTS LEADERSHIP, at 6-12 (Mar. 2021) (on file with the author); Carmen Molina Acosta, *Psychological Torture: ICE Responds to COVID-19 with Solitary Confinement*, THE INTERCEPT (Aug. 24, 2020), <https://theintercept.com/2020/08/24/ice-detention-coronavirus-solitary-confinement/>. See also Kayla James & Elena Vanko, *The Impacts of Solitary Confinement*, VERA INSTITUTE OF JUSTICE (Apr. 2021), <https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf/> (examining the use and impacts of solitary confinement in U.S. prisons, jails, and immigration detention centers).

<sup>6</sup> See e.g., Azadeh Shahshahani & Priyanka Bhatt, *ICE Shut Down One Gruesome Detention Center—Then Transferred Immigrants to Another*, THE PROGRESSIVE MAG. (June 18, 2021), <https://progressive.org/latest/ice-gruesome-detention-center-bhatt-shahshahani-210618/> (discussing human rights abuses at Georgia's Irwin Detention Center, including forced sterilization and sexual abuse); Jose Olivares & John Washington, *ICE Detention Center Shuttered Following Repeated Allegations of Medical Misconduct*, THE INTERCEPT (May 20, 2021), <https://theintercept.com/2021/05/20/ice-irwin-hysterectomies-medical/> (discussing a pattern of medical procedures being performed without consent on immigrant women in

and other discriminatory policies.<sup>7</sup> Systematic sexual abuse.<sup>8</sup> Denial of access to life-saving medication, let alone other forms of medical treatment,<sup>9</sup> including COVID-19 precautions, testing, or vaccines during the pandemic.<sup>10</sup> No heat in the winter, heat stroke in the summer.<sup>11</sup>

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ICE detention, including hysterectomies); *ICE Transfers Women Out Of Detention Center That Became Infamous Over Allegations Of Forced Sterilization*, INSIDER (May 3, 2021), <https://www.businessinsider.com/ices-irwin-county-detention-center-transfers-remaining-women-lawyer-says-2021-4/>; Victoria Bekiempis, *More immigrant women say they were abused by ICE gynecologist*, THE GUARDIAN (Dec. 22, 2020), <https://www.theguardian.com/us-news/2020/dec/22/ice-gynecologist-hysterectomies-georgia> (discussing the abuse of more than 40 women while in ICE custody, including unnecessary hysterectomies).

<sup>7</sup> See e.g., *Cruelty and Corruption*, supra note 5, at 13; Juliana Morgan-Trostle, Kexin Zhang, & Carl Lipscombe, *The State of Black Immigrants Part II: Black Immigrants in the Mass Criminalization System*, Black Alliance for Just Immigration, NYU LAW IMMIGRANT RIGHTS CLINIC & BLACK ALLIANCE FOR JUST IMMIGRATION (Jan. 22, 2021), <http://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf> (“Black immigrants make up only 5.4% of the undocumented population in the United States, but make up 20.3% of immigrants facing removal on the basis of a criminal conviction”).

<sup>8</sup> See e.g., *Cruelty and Corruption*, supra note 5, at 13; Lomi Kriel, *ICE guards “systematically” sexually assault detainees in an El Paso detention center, lawyers say*, THE TEXAS TRIBUNE & PROPUBLICA (Aug. 14, 2020), <https://www.texastribune.org/2020/08/14/texas-immigrant-detention-ice-el-paso-sexual-abuse/>.

<sup>9</sup> See e.g., Hilary Andersson, *‘Heartbreaking’ Conditions in US Migrant Child Camp*, BBC NEWS (June 23, 2021), <https://www.bbc.com/news/world-us-canada-57561760/> (discussing the horrible conditions at a Texas immigrant detention center, including reports of staff sexually abusing children); Shahshahani & Bhatt, supra note 6; *Cruelty and Corruption*, supra note 5, at 6; Claire Osborn, *Texas Advocates Hope Biden Closes Immigration Center Marred by Sex Abuse Allegations*, AUSTIN AMERICAN-STATESMAN (Mar. 26, 2021), <https://www.statesman.com/story/news/2021/03/26/texas-advocates-hope-biden-closes-immigration-center-detainees-abused/6989802002/> (examining why a local group of Texas advocates hope Biden will close immigration center marred by sex abuse allegations, inadequate food and medical care, and forced labor); Nick Miroff, *Immigrant detainees get poor medical care, face retaliation for speaking out, according to Democrat-led report*, WASH. POST (Sept. 20, 2020),

[https://www.washingtonpost.com/immigration/ice-detainees-health-care-report/2020/09/21/270a64f4-fc1e-11ea-830c-a160b331ca62\\_story.html](https://www.washingtonpost.com/immigration/ice-detainees-health-care-report/2020/09/21/270a64f4-fc1e-11ea-830c-a160b331ca62_story.html); *Northwest Detention Center regarding the United States of America*, Res. 41/2020, Precautionary measure No. 265-20, INTER-AM. COMM’N ON H.R. (July 27, 2020), <https://www.oas.org/en/iachr/decisions/pdf/2020/41-20MC265-20-US.pdf>.

<sup>10</sup> See e.g., Felipe De La Hoz, *ICE Locks Down Facility as Women Protest Handling of Possible Tuberculosis Case*, THE INTERCEPT (June 12, 2021), <https://theintercept.com/2021/06/12/ice-louisiana-tuberculosis/> (discussing how migrant women were put on a communication lockdown after they protested in response to a tuberculosis outbreak and lack of prompt medical treatment in ICE custody); Sam Levin, *US Immigration: A Trans Woman Detained by ICE for Two Years is Fighting for Freedom: ‘I’ve been forgotten’*, THE GUARDIAN (June 9, 2021), <https://www.theguardian.com/us-news/2021/jun/09/a-trans-woman-detained-by-ice-for-two-years-is-fighting-for-freedom-ive-been-forgotten/> (discussing transgender migrants denied medical treatment in ICE detention, including medical treatment for HIV); *Praying for Handsoap and Masks: Health and Human Rights Violations in U.S. Immigration Detention during the COVID-19 Pandemic*, PHYSICIANS FOR HUMAN RIGHTS (Jan. 12, 2021), <https://phr.org/our-work/resources/praying-for-hand-soap-and-masks/>; *Northwest Detention Center*, supra note 9, at 3-4.

<sup>11</sup> See e.g., Jessie Gomez, *Immigration Attorneys Demand Release of Detainees at Bergen Jail Amid Reports of Broken AC*, NORTHJERSEY (July 27, 2020), <https://www.northjersey.com/story/news/2020/07/27/bergen-county-jail-attorneys-want-release-inmates-over-broken-ac/5521766002/>

Deaths.<sup>12</sup> No access, let alone right, to an attorney.<sup>13</sup> Each of these human rights violations were perpetrated *this year* by U.S. officials in immigration prisons.<sup>14</sup>

At the Southern Border, migrants are held in tents.<sup>15</sup> In Missouri, where I practice and teach, migrants are held in local jails.<sup>16</sup> Many migrants are also held in in Federal Bureau of

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(discussing immigration attorneys' demands for release of immigrant clients amid reports of broken air conditioning); Aileen Brown, "Dying of Cold": ICE Detainees Freezing in Southern Prisons, THE INTERCEPT (Feb. 19, 2021), <https://theintercept.com/2021/02/19/ice-detention-cold-freezing-texas-louisiana/>; Noah Lanard, *Detainees Describe Dire Conditions After the Hurricane Left ICE Jails Without Water or Power*, MOTHER JONES (Sept. 1, 2020), <https://www.motherjones.com/politics/2020/09/detainees-describe-dire-conditions-after-hurricane-leaves-ice-jails-without-water-or-power/> (discussing dire conditions after a hurricane left ICE jails without water or power).

<sup>12</sup> See e.g., *Northwest Detention Center*, *supra* note 9.

<sup>13</sup> See e.g., *Cruelty and Corruption*, *supra* note 5, at 6; Nicole Narea, *New York Gave Every Detained Immigrant A Lawyer: It Could Serve As A National Model*, VOX (June 9, 2021), <https://www.vox.com/policy-and-politics/22463009/biden-new-york-immigrant-access-lawyer-court/> (discussing how New York was able to give every detained immigrant a lawyer despite issues that arise from the fact that the Sixth Amendment does not apply in immigration cases); *Detained Immigrants Ask Court to Stop ICE Interference to Phone Access in Immigration Detention Centers*, AMERICAN IMMIGRATION COUNCIL (Aug. 26, 2020), <https://www.americanimmigrationcouncil.org/news/detained-immigrants-ask-court-stop-ice-interference-phone-access-immigration-detention-centers>. In May 2021, President Biden signed a presidential memo declaring the expansion of access to legal representation and courts. See *Fact Sheet: President Biden to Sign Presidential Memorandum to Expand Access to Legal Representation and the Courts*, WHITE HOUSE, BRIEFING ROOM (May 18, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/18/fact-sheet-president-biden-to-sign-presidential-memorandum-to-expand-access-to-legal-representation-and-the-courts/>.

<sup>14</sup> I follow Professor César Cuauhtémoc García Hernández's lead in using the term "immigration prisons" to refer to secure facilities in which migrants are confined due to a suspected or confirmed violation of U.S. immigration law. This term does not differentiate between migrants imprisoned for criminal or civil purposes, and includes migrants confined under civil legal powers, such as those assigned to ICE, under criminal legal powers, such as those assigned to the U.S. Bureau of Prisons, state prisons, local jails, or otherwise. See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 248 (2017).

<sup>15</sup> See e.g., Miriam Jordan, 'No Place for a Child': Inside the Tent Camp Housing Thousands of Migrant Children, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/us/texas-border-facility-migrants.html>; Nomaan Merchant, *U.S. Reopens Texas Tent Facility to Hold Immigrant Teenagers*, PBS NEWS HOUR (Feb. 22, 2021), <https://www.pbs.org/newshour/nation/u-s-reopens-texas-tent-facility-to-hold-immigrant-teenagers>.

<sup>16</sup> See *Detention Facilities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (updated Mar. 11, 2021), <https://www.ice.gov/detention-facilities>; *Detention FY 2021 YTD*, ICE DETENTION MANAGEMENT, <https://www.ice.gov/detain/detention-management>.

Prisons Criminal Alien Requirement (“CAR”) prisons.<sup>17</sup> Other migrants are held in state and federal prisons.<sup>18</sup>

The number of migrants subject to human rights violations in the United States is staggering. The United States caged over 1.3 million migrant women, children, and men in 2019.<sup>19</sup> In just one month—April 2021— U.S. Immigration and Customs Enforcement (“ICE”) took more than 178,000 migrants into custody.<sup>20</sup> Comparatively, 60,000 people were detained in all twelve months of 2020 for non-immigration federal criminal charges.<sup>21</sup>

Given the scope of the ongoing terrible things happening today in immigration prisons, many, including the United Nations, are pushing the United States to abolish immigration prisons altogether.<sup>22</sup> However, it is now clear that the Biden administration is not interested in

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<sup>17</sup> Jonathan Blitzer, *A New Study Uncovers Troubling Information About Immigrant-Only Prisons*, NEW YORKER (Mar. 13, 2019), <https://www.newyorker.com/news/daily-comment/a-new-study-uncovers-troubling-information-about-immigrant-only-prisons>; García Hernández, *supra* note 14, at 251; *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, AMERICAN CIVIL LIBERTIES UNION (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>; *Shadow Prisons*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/shadow-prisons>. See also *Contract Facilities*, FEDERAL BUREAU OF PRISONS, [https://www.bop.gov/about/facilities/contract\\_facilities.jsp](https://www.bop.gov/about/facilities/contract_facilities.jsp). The CAR prisons hold only non-citizens convicted of federal immigration offenses and are operated by for-profit companies instead of being run by the Bureau of Prisons itself. See *id.*

<sup>18</sup> See e.g., Kyle Stucker, *Some New England County Jails Stopped ICE Holds. Here's Why the Remaining Won't Join Them*, USA TODAY (July 16, 2021), <https://www.providencejournal.com/story/news/2021/07/16/new-england-jails-receive-ice-immigration-detainees-new-jersey-new-york-block-contracts/7977471002/>; Ariel Goodman, “*Spaces of Detention*” Takes You Inside the Facilities That Criminalize Undocumented Immigrants, THE MARSHALL PROJECT (July 14, 2021), <https://www.themarshallproject.org/2021/07/14/spaces-of-detention-takes-you-inside-the-facilities-that-criminalize-undocumented-immigrants>.

<sup>19</sup> See *Detention Management, FY 2019 Detention Statistics*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/doclib/detention/FY19-detentionstats.xlsx> (ICE Initial Book-Ins, FY 2019 - total 510,854); *CBP Enforcement Statistics Fiscal Year 2021*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> (in 2019, the Border Patrol detained 859,501 migrants); Jacob Kang-Brown, Chase Montagnet, & Jasmine Heiss, *People in Jail and Prison in 2020*, VERA INSTITUTE (Jan. 2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf>.

<sup>20</sup> Nick Miroff, *Biden administration leaves Homeland Security budget flat despite border surge*, WASH. POST (May 26, 2021), [https://www.washingtonpost.com/national/dhs-budget-flat-despite-border-surge/2021/05/26/1109c1ee-be57-11eb-9bae-5a86187646fe\\_story.html](https://www.washingtonpost.com/national/dhs-budget-flat-despite-border-surge/2021/05/26/1109c1ee-be57-11eb-9bae-5a86187646fe_story.html).

<sup>21</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

<sup>22</sup> *Achieving American's Immigration Promise: ABA Recommendations to Advance Justice, Fairness and Efficiency*, AMERICAN BAR ASSOCIATION (2021), <https://www.americanbar.org/content/dam/aba/>

abolition,<sup>23</sup> not even on the world stage.<sup>24</sup> The Biden administration's disinterest in abolition was made clear in its written response<sup>25</sup> to the U.N. Human Rights Council's recommendations

[administrative/immigration/achieving\\_america's\\_immigration\\_promise.pdf](#); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2021); *Groups Urge President Biden to Include Immigration in Pardon Process: Immigration is a Racial Justice Issue*, HUMAN RIGHTS WATCH (June 2, 2021), <https://www.hrw.org/news/2021/06/02/groups-urge-president-biden-include-immigration-pardon-process>; *Policy Brief | 5 Reasons to End Immigrant Detention*, NATIONAL IMMIGRANT JUSTICE CENTER (Sept. 14, 2020), <https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention>; KELLY LYTLE HERNANDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES* (2017); García Hernández, *supra* note 14, at 250 (“I propose a vision of migration and migrants whereby deprivations of liberty are not simply unusual, but intolerable. By contextualizing immigration imprisonment—whether civil or criminal—within its racist origins and exploitative contemporary embodiments, I propose that imprisoning migrants should become taboo”). See also Human Rights Council, Rep. of the Working Group on the Universal Periodic Review, United States of America, U.N. Doc A/HRC/46/15 ¶¶ 334, 335, 337, 340, 344 (Dec. 15, 2020), <https://undocs.org/en/A/HRC/46/15>.

<sup>23</sup> I follow my colleague Brendan Roediger's brilliant lead in his explanation of abolition in practice:

- *Demystifying: Explaining what a legal system or apparatus actually does (as opposed to what it says it does).*
- *Delegitimizing: Explaining why it does what it does (as opposed to why it says it does what it does).*
- *Disempowering/Dismantling: Collectively implementing interventions that move us closer to the elimination of the system or apparatus — interventions that ideally diminish suffering while weakening the system or apparatus.*
- *Dreaming: Imagining (not reimagining) ways of collective existence.*

Brendan Roediger, *Abolish Municipal Courts: A Response To Professor Natapoff*, 134 HARV. L. REV. F. 213, 215 (Feb. 20, 2021). Professor Roediger suggests that a “whole world of scholarship across and against disciplines undermines carceral and police logic.” *Id.* As a starting point he suggests *Prison Abolition Syllabus 2.0*, AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSP. (Sept. 8, 2018), <https://www.aaihs.org/prison-abolition-syllabus-2-0/>. *Id.*

<sup>24</sup> See Human Rights Council, Rep. of the Working Group on the Universal Periodic Review, United States of America, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, U.N. Doc. A/HRC/46/15/Add.1, at ¶¶ 18-19 (Mar. 4, 2021), <https://undocs.org/en/A/HRC/46/15/Add.1>. On the campaign trail, Biden promised to build a “fair and humane immigration system.” See *The Biden Plan for Securing our Values as a Nation of Immigrants*, JOE BIDEN, <https://joebiden.com/immigration/>; Annie Reneau, *Biden's 'fair and humane' immigration plans are a breath of fresh air*, UPWORTHY (Nov. 14, 2020), <https://www.upworthy.com/bidens-fair-and-human-plan-is-a-breath-of-fresh-air>. Yet, the Biden administration's budget for fiscal year 2022 continues to fund the incarceration of tens of thousands of immigrants at a time. See Miroff, *supra* note 20. In addition, Congress is also not pushing for abolition of immigration prisons in any manner whatsoever, although that is not the focus of this essay. In December 2020, Congress approved funding for an average daily population of 34,000 people in ICE detention in fiscal year 2021. Kang-Brown, Montagnet, & Heiss, *supra* note 19. See also Miroff, *supra* note 20. But see Eileen Sullivan, *Biden Will End Detention for Most Pregnant and Postpartum Undocumented Immigrants*, N.Y. TIMES (July 9, 2021), <https://www.nytimes.com/2021/07/09/us/politics/pregnant-postpartum-immigration-biden.html> (discussing Biden's new executive order ending detention of most pregnant and postpartum immigrants in ICE custody and stating the order does not apply to immigrants in the custody of other agencies).

<sup>25</sup> *Id.*

from the Universal Periodic Review of the United States in March 2021.<sup>26</sup> The new administration's response,<sup>27</sup> instead of pushing for a path towards abolition of immigration prisons, was a disappointing mix of false hopes and outright lies.<sup>28</sup>

This essay begins with an overview of the U.S. immigration prison system, arguing that the system is irreparably broken, horrifyingly expensive to maintain, and serves no purpose other than to perpetuate abuse and discrimination against migrants. The essay then provides a summary of the international human rights law, which clearly prohibits all immigration prisons. Lastly, the essay explores the U.N. Human Rights Council's recommendations on immigration prisons from all three Universal Periodic Reviews of the United States as well as the U.S. responses to those recommendations, arguing that the Biden administration missed an important opportunity to step up as global leader to promote the human rights of migrants and forge a path towards abolition of immigration prisons.

## II. The Irreparably Broken U.S. Immigration Prison System

The U.S. immigration prison system is vast, expensive, and serves no valid purpose. This section discusses each of the four main arms U.S. immigration prison system in turn: 1) U.S. Customs and Border Protection ("Border Patrol"); 2) ICE; 3) U.S. Marshals and the Federal Bureau of Prisons; and 4) state prisons and local jails, focusing on the rationale and authority of

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<sup>26</sup> The Universal Periodic Review is a unique process whereby the human rights record of each U.N. member state is reviewed every four and a half years by fellow U.N. member states. *See* U.N. Office of the High Commissioner on Human Rights, Maximizing the use of the Universal Periodic Review at country level: Practice Guidance (Aug. 18, 2020), <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>. A working group of the U.N. Human Rights Council reviews each member states' implementation of the human rights commitments and obligations set out in the U.N. Charter, the Universal Declaration of Human Rights, and all human rights treaties ratified, as well as voluntary pledges and commitments made by the state. *See id.* at 3. There is no other universal human rights mechanism of this kind in existence. *See id.* The goal of the Universal Periodic Review process is to improve the human rights situation "in all countries and address human rights violations wherever they occur." *Id.*

<sup>27</sup> *See* A/HRC/46/15/Add.1, *supra* note 20.

<sup>28</sup> *See* A/HRC/46/15/Add.1, *supra* note 20. An example of an outright lie: "When non-citizen children are placed in government custody, we ensure they are placed in the least restrictive setting and treated in a safe, dignified, and secure manner". *Id.* at ¶ 18.

each of these arms to detain immigrants, as well as the conditions of detention. This section concludes by debunking common myths regarding the need for immigration prisons and argues the system is irreparably broken.

The first arm of the U.S. immigration prison system is the U.S. Customs and Border Protection, otherwise known as the “Border Patrol”. The border patrol is the largest arm of the immigration prison system, detaining hundreds of thousands of migrants each year.<sup>29</sup> The Border Patrol detains men, women, and children at or near any of the U.S. borders, including at ports and airports.<sup>30</sup> By U.S. law, detention at the border should not be without justification or punitive.<sup>31</sup> However, reality indicates otherwise.

On the Southern border of the United States, there are two main types of Border Patrol prisons. The first are cement cells described as “iceboxes” because of the frigid temperatures experienced by those detained.<sup>32</sup> The second type of Border Patrol prison is called the “dog pound” because of the chain-link fencing.<sup>33</sup> At times, the Border Patrol has also detained families and children outside under bridges and in makeshift open-air tents.<sup>34</sup> While the Border

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<sup>29</sup> See *supra* note 19.

<sup>30</sup> See U.S. Department of Homeland Security, U.S. Customs and Border Protection, <https://www.cbp.gov/>.

<sup>31</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (holding that non-criminal detention is only allowed in special circumstances where the government has shown a justification that outweighs the individual's private interest in freedom from restraint); *R.I.L.R. v. Johnson*, 80 F. SUPP. 3D 164 (D.D.C. 2015) (granting preliminary injunction against ICE's blanket "No-Release Policy" of asylum-seeking central American families at the border).

<sup>32</sup> American Immigration Council, Immigration Detention in the United States by Agency (Jan. 2, 2020), <https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency>; Opheli G. Lawler, *What are Las Hieleras (Iceboxes) used by CBP at the Border*, THE CUT: NEW YORK (Dec. 26, 2018), <https://www.thecut.com/2018/12/what-are-las-hieleras-iceboxes-used-by-cbp-at-the-border.html>; Ed Pilkington, *'It Was Cold, Very Cold': Migrant Children Endure Border Patrol 'Ice Boxes'*, THE GUARDIAN (Jan. 26, 2015), <https://www.theguardian.com/us-news/2015/jan/26/migrant-children-border-patrol-ice-boxes>.

<sup>33</sup> See *id.*; Dahlia Lithwick, *There Are Two Types of Detention Facilities at the Border, "Iceboxes" and "Dog Pounds"*, SLATE (Jul. 11, 2019), <https://slate.com/news-and-politics/2019/07/border-crisis-conditions-migrants.html>; Reade Levinson & Kristina Cooke, *Migrants in U.S. custody describe life in 'ice boxes' and 'dog pounds'*, THOMSON REUTERS (Jul. 18, 2018), <https://www.reuters.com/article/us-usa-immigration-conditions-idUSKBN1K82X1>.

<sup>34</sup> See *id.* at 2; Molly Hennessy-Fiske, *Border Patrol Holds Migrant Families for Days Under a South Texas Bridge*, LOS ANGELES TIMES (Mar. 24, 2021), <https://www.latimes.com/world-nation/story/2021->

Patrol is required by law to hold people for the “least amount of time required for their processing, transfer, release, or repatriation,” not longer than seventy-two hours,<sup>35</sup> most people are held by the Border Patrol for greater periods of time, often for months.<sup>36</sup>

The second arm of the U.S. immigration prison system is maintained by the U.S. Immigration and Customs Enforcement, otherwise known as “ICE.”<sup>37</sup> ICE has the authority to detain migrants who are suspected or confirmed to have violated U.S. civil immigration law. ICE also often keeps migrants in detention while their court case regarding their rights to remain in the United States moves through the immigration court system.<sup>38</sup>

The group of migrants detained by ICE also includes many asylum seekers, who have a right under international law not to be detained for coming to the U.S. to seek asylum.<sup>39</sup> In fact, most of the migrants detained by ICE do not have a deportation order and may never have one, meaning many of the migrants detained by ICE should never have been detained under international law.<sup>40</sup> Many migrants win the right to remain in the United States or otherwise have their immigration cases terminated or closed.<sup>41</sup> ICE uses a variety of facilities to detain

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[03-24/texas-migrants-border-bridge](https://www.wsj.com/articles/in-a-texas-border-town-migrant-families-sleep-under-a-bridge-as-local-resources-are-strained-11616837401); Michelle Hackman, *In a Texas Border Town, Migrant Families Sleep Under a Bridge as Local Resources Are Strained*, WALL STREET JOURNAL (Mar. 28, 2021), <https://www.wsj.com/articles/in-a-texas-border-town-migrant-families-sleep-under-a-bridge-as-local-resources-are-strained-11616837401>.

<sup>35</sup> U.S. Customs and Border Protection, National Standards on Transport, Escort, Detention, and Search §4.1 (Oct. 2015), <https://www.cbp.gov/document/directives/cbp-national-standards-transport-escort-detention-and-search>.

<sup>36</sup> See IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY, *supra* note 34 at 2; Rebecca Plevin, *He Got Deportation Relief. Why Was This Man Still Detained By ICE In California For 77 Days*, THE FRESNO BEE (Jul. 19, 2021), <https://www.fresnobee.com/news/local/article252821858.html>; Camilo Montoya-Galvez & Adam Verdugo, *Record 3,200 Migrant Children Stuck In Border Patrol Custody, With Nearly Half Held Past Legal Limit*, CBS NEWS (Mar. 9, 2021), <https://www.cbsnews.com/news/migrant-children-border-patrol-custody-past-legal-limit/>.

<sup>37</sup> Of the four arms of the U.S. immigration prison system, ICE detains the second largest number of migrants. See *supra* note 19.

<sup>38</sup> See *e.g.*, *R.I.L.R. v. Johnson*, *supra* note 31.

<sup>39</sup> See *e.g.*, A/HRC/37/50 ¶15. See also *MIGRATING TO PRISON*, *supra* note 18 at 7 (“[i]mmigration law treats asylum seekers worthy of confinement”).

<sup>40</sup> See García Hernández, *supra* note 14 at 250; A/HRC/37/50 ¶15.

<sup>41</sup> *Id.*

migrants. These include state and federal prisons, private detention centers, hotels, and even hospitals.<sup>42</sup> In 2019, individuals were held in ICE custody for an average of fifty-five days.<sup>43</sup>

The third arm of the U.S. immigration detention system is centered around the U.S. Marshals Service, which detains migrants facing prosecution for federal immigration crimes, the most common immigration crimes being crossing the border into the United States without inspection and reentry after a previous deportation.<sup>44</sup> Although Congress first criminalized migrant entry without inspection and reentry after deportation in 1929,<sup>45</sup> these crimes were not heavily prosecuted until the 1990s and 2000s.<sup>46</sup> Today, fifty-two percent of all federal criminal prosecutions are for immigration-related crimes.<sup>47</sup>

After conviction—and practically everyone charged with a federal immigration crime is eventually convicted in the United States—these migrants are transferred to private CAR

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<sup>42</sup> See e.g., IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY, *supra* note 34 at 3.

<sup>43</sup> IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY, *supra* note 34 at 4. See also Malik Ndaula with Debbie Satyal, *Rafiu's Story: An American Immigrant Nightmare*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 241, 250 (David C. Brotherton & Philip Kretsedemas eds., 2008) (“They call immigration detention civil confinement, but prison is prison no matter what label you use, and prison breaks people’s souls, hearts, and even minds.”).

<sup>44</sup> Immigration Detention in the United States by Agency, *supra* note 34 at 10. See also 8 U.S.C. § 1325; 1326.

<sup>45</sup> Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551.

<sup>46</sup> Alina Das, *Immigration Law & Resistance: Ensuring a Nation of Immigrants: Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 190-93 (2018). Notably, the criminalization of immigration is not a phenomenon limited to the United States. Other than the United States, 124 countries around the world treat illegal entry as a crime. See Library of Congress, *Criminalization of Illegal Entry Around the World* 3 (Aug. 2019), <https://www.loc.gov/item/2019685473/>. For example, Canada criminalizes illegal entry and has legislation providing for penalties including fine and imprisonment for 6 months or two years. See Immigration and Refugee Protection Act (IRPA), S.C. 2001, c. 27, §§ 18(1) (statutory requirement to appear for examination), 20(1) (statutory obligation to establish permanent/temporary residence), 124(1)(a) (general offense), <https://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html>; Immigration and Refugee Protection Regulations, SOR/2002-227, § 27(1)-(2), <https://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/FullText.html>. On the other hand, Brazil and several other countries, do not criminalize illegal entry and instead proscribe the penalty of deportation. See Library of Congress, *supra* at 6.

<sup>47</sup> TRAC REPORTS, IMMIGRATION NOW 52 PERCENT OF ALL FEDERAL CRIMINAL PROSECUTIONS (Nov. 28, 2016), <https://trac.syr.edu/tracreports/crim/446/>. In 1970, only 575 people were charged with a federal immigration crime. *MIGRATING TO PRISON*, *supra* note 18 at 10.

prisons.<sup>48</sup> The average length of time spent by migrants in private CAR prisons is six years,<sup>49</sup> but over twenty-five percent of migrants in CAR prisons are serving sentences of ten years or more.<sup>50</sup> The treatment of migrants in CAR prisons is shocking.<sup>51</sup> Migrants suffer regular human rights violations in CAR prisons, including inadequate food, poor medical care, and mistreatment by guards.<sup>52</sup> Also of note is that the migrants detained in CAR prisons are nearly all Latinos, and discrimination is rampant.<sup>53</sup>

The fourth arm of the U.S. immigration detention system is state prisons and local jails, where migrants are held through either a contract with ICE or the U.S. Marshals Service,<sup>54</sup> or on state criminal charges.<sup>55</sup> A large percentage of migrants detained by ICE and the U.S. Marshals service are actually held in state and local prisons and jails.<sup>56</sup> In terms of migrants held on state criminal charges, the majority of those charges are linked to the act of migration or a person's status as a migrant.<sup>57</sup> A number of U.S. states rely on state criminal law to prosecute migrants, including identity theft prosecutions when a migrant uses a social security number to obtain employment and trafficking laws that target the person trafficked on equal grounds as the person doing the trafficking.<sup>58</sup>

This vast immigration prison system is incredibly expensive, and “financial incentives push toward ever-growing incarceration” of migrants.<sup>59</sup> In 2020, ICE alone spent \$3 billion on

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<sup>48</sup> García Hernández, *supra* note 14 at 250; *Warehoused and Forgotten*, *supra* note 29.

<sup>49</sup> Yet, the Federal law criminalizing improper entry by an “alien” provides that the criminal sentence will be a fine or imprisonment of not more than 6 months, or both, and for “subsequent commission of any such offense, be fined ...or imprisoned not more than 2 years, or both.” 8 USCS. § 1325.

<sup>50</sup> Blitzer, *supra* note 17.

<sup>51</sup> *See e.g.*, *Warehoused and Forgotten*, *supra* note 17, at 3-5.

<sup>52</sup> *Id.*

<sup>53</sup> *See e.g.*, Blitzer, *supra* note 17; *Warehoused and Forgotten*, *supra* note 17, at 3.

<sup>54</sup> *See Immigration Detention in the United States by Agency*, *supra* note 32, at 3.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.* at 3, 10. The federal government pays state prisons and local jails to house these migrants. GARCÍA HERNÁNDEZ, *supra* note 22, at 126. Cities, counties, and states pay almost nothing. *Id.* Therefore, these contracts are a huge financial boon. *Id.* at 126-27.

<sup>57</sup> *See* García Hernández, *supra* note 14, at 247.

<sup>58</sup> *Id.*

<sup>59</sup> GARCÍA HERNÁNDEZ, *supra* note 22, at 15, 126-233.

detention,<sup>60</sup> and sixty-five percent of ICE detainees are held in private prisons.<sup>61</sup> Beyond private financial interests and deeply rooted and widespread discrimination against brown and black migrants,<sup>62</sup> it is unclear why the United States is spending billions of dollars on immigration prisons. Immigration prisons do not ensure greater public safety; the fallacy of the ‘dangerous immigrant’ has been debunked by data demonstrating that when the number of immigrants increases in a community, violent crime rates decline precipitously.<sup>63</sup> Immigration prisons do not deter immigration to the United States; hundreds of thousands of migrants continue attempt to cross into the U.S. each month.<sup>64</sup> Immigration prisons are not needed to enforce immigration law; studies have shown that when these migrants have access to counsel or case management support, they appear at immigration court hearings above ninety percent of the time.<sup>65</sup>

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<sup>60</sup> *Budget Overview*, DEP’T OF HOMELAND SECURITY & U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (2020), [https://www.dhs.gov/sites/default/files/publications/19\\_0318\\_MGMT\\_CBJ-Immigration-Customs-Enforcement\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf).

<sup>61</sup> GARCÍA HERNÁNDEZ, *supra* note 22, at 15.

<sup>62</sup> See Morgan-Trostle, Zhang, & Lipscombe, *supra* note 7; GARCÍA HERNÁNDEZ, *supra* note 22, at 12-14; García Hernández, *supra* note 14, at 249.

<sup>63</sup> See Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html>; *The Criminalization of Immigration in the United States*, AMERICAN IMMIGRATION COUNCIL (July 2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states>.

<sup>64</sup> See e.g., Emily Ryo, *The unintended consequences of US immigration enforcement policies*, 118 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 1 (May 17, 2021), <https://www.pnas.org/content/118/21/e2103000118> (“survey results provide no evidence that a heightened awareness of these US immigration enforcement policies affects individuals’ intentions to migrate to the United States”); Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE (Mar. 2019), <https://www.stanfordlawreview.org/online/detention-as-deterrence/> (discussing hurdles to deterrence in the immigration law context); Ali Noorani, Brittney Nystrom, & Maurice Belanger, *Immigration Reform*, in THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES 124-25 (2015) (discussing how many migrants “consider their attempt to cross illegally as an effort to return home, rather than to leave their homeland. While strong family ties normally decrease the probably of recidivism in the criminal justice system, for persons who are apprehended while attempting to cross the border illegally, family ties are a motivator for recidivism.”).

<sup>65</sup> TRAC Immigration shows that in fiscal year 2020, around 10% of individuals with closed cases were granted relief, around 8.6% had their cases terminated and around 5% had their cases administratively closed. See *Immigration Court Processing Time by Outcome*, TRAC IMMIGRATION (2020), [https://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php); *Immigrants and Families Appear in Court: Setting the Record Straight*, AMERICAN IMMIGRATION COUNCIL (July 2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_and\\_families\\_appear\\_in\\_court\\_setting\\_the\\_record\\_straight.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf); *Evidence Shows that*

Alternatives to immigration prisons have proven effective at ensuring appearances at immigration court at a significantly lower cost to the taxpayer than detention.<sup>66</sup> Many migrants have relatives in the United States ready to provide them with stable housing and other assistance, and migrants have strong incentives to appear for their hearings to seek the right to remain in the United States.<sup>67</sup>

There is no question that the lack of any valid purpose for caging hundreds of thousands of migrants per year, tortuous conditions, and obvious underlying racism mean that the U.S. immigration prison system is irreparably broken. Yet the United States continues to enact laws and policies wholeheartedly supporting immigration prisons.<sup>68</sup> Each year, Congress passes a budget providing for more spending on immigration enforcement agencies than on all of its other principal criminal federal law enforcement agencies combined.<sup>69</sup> As Professor César Cuauhtémoc García Hernández has put it, “[c]learly there remains a vast gulf between current reality and a future without immigration prisons.”<sup>70</sup> At times it seems there is no way out of this hell we have created and perpetuated for migrants. However, as explained below, international human rights law provides hope and a path towards abolition of immigration prisons for the United States.

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*Most Immigrants Appear for Immigration Court Hearings*, VERA INSTITUTE OF JUSTICE (Oct. 2020), <https://www.vera.org/publications/immigrant-court-appearance-fact-sheet>.

<sup>66</sup> García Hernández, *supra* note 14.

<sup>67</sup> *Id.*

<sup>68</sup> See KELLY LYTLE HERNANDEZ, *supra* note 22 (discussing the development of U.S. law on immigration detention from 1890s through the 1960s); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

<sup>69</sup> Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, & Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POLICY INSTITUTE (Jan. 2013), <https://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf>.

<sup>70</sup> García Hernández, *supra* note 14, at 251.

### III. International Human Rights Law Prohibits Immigration Prisons

Unlike U.S. law, international human rights law provides for a complete prohibition on immigration prisons.<sup>71</sup> This section provides an overview of international human rights law relevant to immigration prisons.

In 2008, the Inter-American Commission on Human Rights (“IACHR”) held that migrants must not be detained in prisons.<sup>72</sup> Then, in 2014, the U.N. Human Rights Committee,<sup>73</sup> the treaty body that monitors implementation and publishes interpretation of the International Covenant on Civil and Political Rights, stated that “[a]ny necessary detention [of migrants] should take place in appropriate, sanitary, non-punitive facilities and *should not take place in prisons.*”<sup>74</sup> The U.N. Special Rapporteur on torture, an independent expert appointed by the U.N. Human Rights Council to examine issues relevant to the international prohibition on torture, other cruel, inhuman and degrading treatment or punishment,<sup>75</sup> repeated this rule prohibiting immigration prisons in his thematic report on torture and of migrants in 2018.<sup>76</sup>

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<sup>71</sup> See e.g., Michael Flynn, *The Hidden Costs of Human Rights: The Case of Immigration Detention, Global Detention Project Working Paper No. 7* (Sept. 2013), <https://www.refworld.org/docid/545b41570.html> (discussing the former UN Special Rapporteur on torture Manfred Nowak’s 2009 arguments that migrants in detention were one of the most critical human rights challenges and putting those arguments into historic perspective).

<sup>72</sup> *Human Rights of Migrants, International Standards and Return Directive of the EU*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Res. 03/08, at 2 (2008), <http://www.cidh.org/Resoluciones/Resolution.03.08.ENG.pdf> (“As international law requires, migrants may not be held in prison facilities. The holding of asylum seekers and persons charged with civil immigration violations in a prison environment is incompatible with basic human rights guarantees.”). See also Dora B. Schiro, *A Civil System of Civil Detention*, in *THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES* 62-64 (2015).

<sup>73</sup> See Human Rights Bodies, Human Rights Committee, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>.

<sup>74</sup> Human Rights Comm., General Comment No. 35, Article 9 (Liberty and security of person), U.N. Doc. CCPR/C/GC/35, ¶ 18 (Oct. 23, 2014), <https://undocs.org/CCPR/C/GC/35> (emphasis added).

<sup>75</sup> See Your Human Rights, Torture, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. HUMAN OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <https://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx>.

<sup>76</sup> A/HRC/37/50, *supra* note 2, at ¶ 18.

Today, international human rights law allows for the deprivation of liberty<sup>77</sup> of adult migrants solely on the basis of immigration status *only in exceptional cases*.<sup>78</sup> Any detention of adult migrants “should be subject to the same criteria as are applicable to nationals,” including the requirements of legality, necessity, proportionality, and periodic review.<sup>79</sup> Asylum seekers in particular may be detained just for a brief initial period to document their entry, record their claims, and determine their identity if it is in doubt.<sup>80</sup> Detaining asylum seekers after that initial period violates international human rights law in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others, or a risk of acts against national security.<sup>81</sup>

In those exceptional circumstances where migrants are legally deprived of their liberty under international human rights law, the detention conditions must align with the Nelson Mandela Rules,<sup>82</sup> taking into account any personal vulnerability due to factors such as migration status, age, gender, disability, medical condition, previous trauma, or membership in a minority group.<sup>83</sup> In addition, the inability of the government to carry out the deportation of a migrant never justifies indefinite detention under international human rights law.<sup>84</sup>

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<sup>77</sup> Under international law, regardless of the name given to the place where a migrant is detained and its categorization under national law, “the decisive question for its qualification as ‘deprivation of liberty’ is whether or not migrants are free to leave.” *See id.*; CCPR/C/GC/35, *supra* note 74, at ¶ 18. Notice that under international law, there is no distinction between civil and criminal detention and no need to examine *why* a migrant is detained. Rather, any deprivation of liberty based solely on immigration status is allowed only in exceptional circumstances.

<sup>78</sup> A/HRC/37/50, *supra* note 2, at ¶ 65(c); Comm. Against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, U.N. Doc. CAT/C/GC/4, Art. 3, § 12 (Sept. 4, 2018), <https://undocs.org/en/CAT/C/GC/4>.

<sup>79</sup> A/HRC/37/50, *supra* note 2, at ¶ 65(c); CCPR/C/GC/35, *supra* note 74, at ¶ 18.

<sup>80</sup> A/HRC/37/50 *supra* note 2, at ¶ 22; CCPR/C/GC/35, *supra* note 74, at ¶ 18.

<sup>81</sup> *Id.*

<sup>82</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), G.A. Res. 70/175, U.N. Doc A/RES/70/175, ¶¶ 39, 42, 45, 109 (Jan. 8, 2016), <https://undocs.org/A/RES/70/175>.

<sup>83</sup> A/HRC/37/50, *supra* note 2, at ¶ 65(c).

<sup>84</sup> A/HRC/37/50, *supra* note 2, at ¶ 22; CCPR/C/GC/35, *supra* note 74, at ¶ 18.

Moreover, no matter how brief, any deprivation of liberty of migrant children based solely on migration status is prohibited under international human rights law. In 2015, then U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, stated that “States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status.”<sup>85</sup> This was the first time a U.N. official had called for the complete prohibition on depriving children of their liberty on the basis of their immigration status for any period of time.

Under international human rights law, it is also now clear that the deprivation of liberty<sup>86</sup> of both children or adults based solely on migration status may also amount to torture.<sup>87</sup> The current U.N. Special Rapporteur on torture has identified several situations

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<sup>85</sup> The current Special Rapporteur on torture, Nils Melzer, as well as his predecessor, Juan E. Méndez, both agree that the detention of migrant children based solely on migration status is *never* in the best interests of the child, as it “exceeds the requirement of necessity, is grossly disproportionate, and, even in case of short-term detention, may amount to cruel, inhuman or degrading treatment. *See* A/HRC/37/50, *supra* note 2, at ¶ 28; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, *Torture and ill-treatment of children deprived of their liberty*, U.N. Doc. A/HRC/28/68, § 80 (Mar. 5, 2015), <https://undocs.org/ch/A/HRC/28/68>. According to the European Court of Human Rights, even short-term detention of migrant children is a violation of the prohibition on torture and other ill-treatment, holding a child’s vulnerability and best interests outweigh the Government’s interest in halting illegal immigration. *See S.F. v. Bulgaria*, 2017-16 Eur. Ct. H.R. 8138; *Popov v. France*, 2012-07 Eur. Ct. H.R. 39472; *Rahimi v. Greece*, 2011-08 Eur. Ct. H.R. 8687; *Mayeka v. Belgium*, 2006-03 Eur. Ct. H.R. 13178. The Inter-American Court of Human Rights has also noted that, when assessing the possibility to return, expel, deport, repatriate, reject at the border, or not to admit or in any way transfer or remove a child to a State, the best interests of the child must be determined, which also incorporate the component of adequate development and survival of the child. *See Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14, 56 I.L.M. 839, ¶¶ 222, 231-233 (Aug. 19, 2014).

<sup>86</sup> Under international law, regardless of the name given to the place where a migrant is detained and its categorization under national law, “the decisive question for its qualification as ‘deprivation of liberty’ is whether or not migrants are free to leave.” *See* A/HRC/37/50, *supra* note 2, at ¶ 18; CCPR/C/GC/35, *supra* note 74, at ¶ 18.

<sup>87</sup> *See* A/HRC/37/50, *supra* note 2, at ¶ 14. *See also* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/39/46 Art. 1, ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (hereinafter “CAT”) (“the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).

where the detention of migrants is likely to amount to torture, including when migrants are detained for the purposes of: 1) deterring, intimidating, or punishing migrants or their families; 2) coercing migrants to withdraw their requests for asylum or other immigration status; 3) coercing migrants to agree to voluntary repatriation; 4) coercing migrants to provide information or fingerprints; 5) extorting money or sexual acts from migrants; and 6) reasons based on discrimination of any kind, including discrimination based on immigration status.<sup>88</sup>

While the United States generally likes to eschew its international human rights obligations,<sup>89</sup> it has signed and ratified the International Covenant on Civil and Political Rights<sup>90</sup> and the Convention Against Torture.<sup>91</sup> Therefore, the aforementioned international human rights law should apply fully in the United States. In addition, as a member of the United Nations, the United States is obligated to and has chosen to take part in the Universal Periodic Review process, as described more fully below.<sup>92</sup>

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<sup>88</sup> A/HRC/37/50, *supra* note 2, at ¶¶ 20, 28, 29. *See also* U.N. Committee Against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2 (Jan. 1, 2008), <https://undocs.org/CAT/C/GC/2>; CAT/C/GC/4, *supra* note 78; CAT, *supra* note 87, Art. 1; International Covenant on Civil and Political Rights, U.N. Doc. A/GA/2200A (XXI) Arts. 2(1), 7, and 26, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (“ICCPR”).

<sup>89</sup> The United States ratifies human rights treaties, it enters reservations, understandings and declarations, which it then uses as an excuse to avoid implementing international human rights protections to the fullest extent necessary. For example, the United States entered a declaration when it ratified the ICCPR stating that “[t]he United States considers itself bound by Article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.” *See* Senate Consideration of Treaty Document 95-20 (Apr. 4, 1992), <https://www.congress.gov/treaty-document/95th-congress/20/resolution-text>. For more on reservations, understandings, and declarations, *see e.g.*, AM. UNIV. WASH. COLL. OF LAW, CTR. FOR HUMAN RIGHTS & HUMANITARIAN LAW, HUMAN RIGHTS IN THE U.S.: A HANDBOOK FOR LEGAL AID ATTORNEYS 18-19 (2014), <https://www.wcl.american.edu/index.cfm?LinkServID=B1E62E62-A5A0-D585-2D87C971D50AAE18>.

<sup>90</sup> ICCPR, *supra* note 88. *See Status of Ratification of 18 Human Rights Treaties*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <https://indicators.ohchr.org/> (hereinafter “*Status of Ratification*”).

<sup>91</sup> CAT, *supra* note 87. *See Status of Ratification*, *supra* note 90. The United States has also ratified the Charter of the Organization of American States, which requires its compliance and cooperation with the Inter-American Commission on Human Rights. *See Charter of the Organization of American States, Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-41\\_charter\\_OAS\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp).

<sup>92</sup> The United States ratified the United Nations Charter shortly after it was finalized in 1945. *See* U.N. CHARTER (June 26, 1945), <https://www.un.org/en/about-us/un-charter>; *Status of Treaties, Charter of the*

#### IV. The Universal Periodic Review and U.N. Recommendations Regarding U.S. Immigration Prisons

The U.S. human rights record has been reviewed by the United Nations through the Universal Periodic Review (“UPR”) process three times so far.<sup>93</sup> The first cycle of the UPR for the United States was in 2010, the second cycle in 2015, and the third in 2020.<sup>94</sup> This section begins with a brief overview of the UPR process and moves on to analyze the UPR recommendations regarding U.S. immigration prisons, and the U.S. response to those recommendations, from each of the three UPR cycles.

The UPR was established by the U.N. General Assembly in 2006.<sup>95</sup> The human rights record of each U.N. member nation state is reviewed every four and a half years through the UPR.<sup>96</sup> The UPR is an interactive process led by the U.N. Human Rights Council and provides

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*United Nations and International Court of Justice*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-1&chapter=1](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1). The United States was then admitted into the United Nations as a member in accordance with Article 4 of the Charter. *Id.* While U.N. General Assembly resolutions are not binding, they do reflect the will of the members of the United Nations. *See* U.N. CHARTER art. 25 (discussing U.N. Security Council resolutions, which are binding). The Universal Periodic Review process was established by a UN General Assembly resolution. *See* G.A. Res. 60/251, U.N. Doc A/RES/60/251 (Apr. 3, 2006), <https://daccess-ods.un.org/TMP/9378099.44152832.html>. While participation in the Universal Periodic Review is voluntary, the nation under review has a big incentive to participate and try to control the narrative of the review. *See e.g.*, U.N. Human Rights Council, Report of the Human Rights Council on its seventh organizational meeting, U.N. Doc. A/HRC/OM/7/1 (Apr. 4, 2013), [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/OM/7/1](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/OM/7/1) (discussing Israel’s non-cooperation with the Universal Periodic Review and decision by the U.N. Human Rights Council to attempt to get Israel to cooperate and to reschedule, and the decision to apply those tactics to future non-cooperating nation states).

<sup>93</sup> *See Universal Periodic Review – United States of America*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/USindex.aspx> (hereinafter “Human Rights Council, Universal Periodic Review”).

<sup>94</sup> *Id.*

<sup>95</sup> *See* A/RES/60/251, *supra* note 92.

<sup>96</sup> The UPR will assess the extent to which States respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights instruments to which the State is party (human rights treaties ratified by the State concerned); (4) voluntary pledges and commitments made by the State (e.g. national human rights policies and/or programmes implemented); and (5) applicable international humanitarian law. *Basic Facts about the UPR*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, HUMAN RIGHTS BODIES, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>. *See Cycles of the Universal Periodic Review*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, HUMAN RIGHTS BODIES, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx>.

each U.N. member with the opportunity “to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations.”<sup>97</sup>

To begin the UPR process, the U.N. Human Rights Council forms a working group for each nation being reviewed.<sup>98</sup> The working group then collects information provided by the nation under review, which takes the form of a “national report.”<sup>99</sup> The working group also collects relevant information from the reports of U.N. Human Rights Mechanisms and other U.N. entities as well as information provided by other stakeholders including non-government organizations and civil society.<sup>100</sup> The nation under review is then scheduled for an interactive, live discussion in Geneva.<sup>101</sup> During that interactive discussion, the working group members, as well as also any other U.N. member who wishes, pose questions, make comments, or give recommendations to the nation under review.<sup>102</sup> The working group then issues a report, which includes recommendations—ways to improve the human rights record—for the nation under review.<sup>103</sup> Lastly, the nation under review has a chance to respond to those recommendations.<sup>104</sup> When President Biden took office, the U.S. human rights record had just been reviewed by the U.N. through the Universal Periodic Review process for the third time.<sup>105</sup>

During the first cycle of the UPR of the United States in 2010, there was little attention paid to immigration prisons.<sup>106</sup> In fact, only two recommendations mentioned immigration

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* For examples of U.S. national reports submitted for the Universal Periodic Review, see *Universal Periodic Review*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/universal-periodic-review/> (hereinafter “Universal Periodic Review”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> [Human Rights Council, Universal Periodic Review](#), *supra* note 93.

<sup>106</sup> This lack of attention to immigration prisons tracks with the slow development of human rights law prohibiting immigration prisons, as discussed in Section III, *supra*.

detention.<sup>107</sup> Switzerland recommended that the United States “[i]ncarcerate immigrants only exceptionally” and Brazil recommended that the United States “[r]econsider alternatives to the detention of migrants”.<sup>108</sup> In response to Switzerland’s recommendation, the United States unhelpfully stated “we endeavor not to detain irregular immigrants unnecessarily, but our statutes, policies, and practices result in detention other than in ‘exceptional circumstances.’”<sup>109</sup> The United States chose to support Brazil’s recommendation in full.<sup>110</sup>

By 2015, a bit more attention was being paid by the international community to immigration prisons in the United States, particularly with regard to the separation of migrant children from their parents.<sup>111</sup> During the second UPR of the United States in 2015, Sweden recommended that the United States “[h]alt the detention of immigrant families and children, seek alternatives to detention and end use of detention for reason of deterrence.”<sup>112</sup> Brazil repeated its 2010 recommendation to “[c]onsider alternatives to the detention of migrants.”<sup>113</sup> Thailand recommended that the United States “[t]reat migrant children in detention with due respect to human rights...”<sup>114</sup> In addition, Paraguay recommended that the right to family reunification of migrants held in detention be guaranteed.<sup>115</sup>

In response to the 2015 recommendations, the United States supported in full the recommendation to reconsider alternatives to the detention of migrants, this time explaining

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<sup>107</sup> U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States of America, U.N. Doc. A/HRC/16/11 ¶¶ 92.182, 92.212 (Jan. 4, 2011). “Harsh” immigration detention conditions in the United States were also noted by Switzerland. *See supra* at ¶ 26.

<sup>108</sup> *Id.*

<sup>109</sup> U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States of America, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, U.N. Doc. A/HRC/16/11/Add.1 ¶ 18 (Mar. 8, 2011), [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/16/11/Add.1](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/16/11/Add.1).

<sup>110</sup> *Id.* at ¶ 16.

<sup>111</sup> U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States of America, U.N. Doc. A/HRC/30/12 ¶¶ 176.252, 253, 254, 338 (July 20, 2015), <https://undocs.org/A/HRC/30/12>.

<sup>112</sup> *Id.* at ¶ 176.252.

<sup>113</sup> *Id.* at ¶ 176.253.

<sup>114</sup> *Id.* at ¶ 176.254.

<sup>115</sup> *Id.* at ¶ 176.338.

that “[w]e actively utilize alternatives to detention where appropriate, and are working to shorten detention families may face while their immigration proceedings are resolved.”<sup>116</sup> The United States also fully supported Thailand’s recommendation. In response to both Sweden and Paraguay, the United States confusingly stated it supported those recommendations in part, noting that “[w]e support this recommendation insofar as it recommends compliance with our international human rights obligations.”<sup>117</sup>

Finally, during the third UPR of the United States in 2020, the international community brought a great deal of attention to immigration prisons. The vast majority of the recommendations focusing on migrants focused on the detention of migrants.<sup>118</sup> China recommended that the United States “[s]top incarcerating migrants, including migrant children.”<sup>119</sup> Iran stated that the United States should “[s]top separating young children from their migrant parents and putting them in cages.”<sup>120</sup> Other recommendations focused on the conditions of immigration prisons,<sup>121</sup> alternatives to detention,<sup>122</sup> and the use of detention as a punitive measure to deter migration.<sup>123</sup>

After President Biden was inaugurated, his administration had the chance to draft the U.S. response to those UPR recommendations.<sup>124</sup> The new administration’s response, dated March 4, 2021, was a disappointing mix of false hopes and outright lies. The U.S. response stated that the “U.S. is committed to safe, humane, and lawful immigration enforcement, including access to asylum and family unity...”<sup>125</sup> However, what is happening in immigration

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<sup>116</sup> A/HRC/16/11/Add.1, *supra* note 109, at ¶¶ 17-18.

<sup>117</sup> *Id.* at ¶ 12.

<sup>118</sup> A/HRC/46/15, *supra* note 22, at ¶¶ 334-38, 340, 342-44, 346.

<sup>119</sup> *Id.* at ¶ 338.

<sup>120</sup> *Id.* at ¶¶ 336, 344.

<sup>121</sup> *See id.* at ¶¶ 333, 337, 342, 343, 346.

<sup>122</sup> *See id.* at ¶¶ 335, 337, 340.

<sup>123</sup> *See id.* at ¶ 334.

<sup>124</sup> *See* A/HRC/46/15/Add.1, *supra* note 24.

<sup>125</sup> *Id.* at ¶ 18.

prisons is not safe or humane.<sup>126</sup> Children are still being caged and separated from their families.<sup>127</sup> In addition, under international human rights law it is never “humane”, and may amount to torture, when a person is deprived of their liberty based solely on their immigration status.<sup>128</sup>

The Biden administration also claimed to support, at least in part, the recommendations to stop incarcerating migrant children.<sup>129</sup> At the same time, however, the Biden administration plainly lied in stating that “[w]hen non-citizen children are placed in government custody, we ensure they are placed in the least restrictive setting and treated in a safe, dignified, and secure manner.”<sup>130</sup> The Biden administration also pointed out that the Executive branch is bound by laws made by Congress regarding the detention of migrant children.<sup>131</sup> Yet, obviously, putting children in cages is not the least restrictive of custody settings, and under no circumstances can putting children in cages be considered safe for their mental health or dignified. In addition, nowhere in its response did the Biden administration specifically indicate any support for ending the incarceration of adult migrants.

The new administration’s responses on immigration prisons were even more disappointing given that the administration was willing to commit to big, seemingly impossibly idealistic goals in regard to other human rights issues. For example, in its response to China’s

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<sup>126</sup> See Section I, *supra*.

<sup>127</sup> See *e.g.*, Jervis, *supra* note 4. The U.S. made excuses regarding the separation of children from their parents in detention as well, including stating that “there are certain rare circumstances under U.S. law where a separation is necessary, such as for the safety and well-being of the child.” A/HRC/46/15/Add.1, *supra* note 24, at ¶ 19. In fact, under U.S. law, when a migrant is detained on federal criminal charges, they are separated from any children traveling with them because the children cannot be detained in federal prisons. See Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 42 U.S.C. § 5601 et seq., § 233(13).

<sup>128</sup> See Section III, *supra*.

<sup>129</sup> A/HRC/46/15/Add.1, *supra* note 24, at ¶ 19.

<sup>130</sup> *Id.* at ¶ 18. In April 2021, a month after the U.S. response to the UPR recommendations was submitted to the U.N., the Biden Administration immigration detention facility used during the Trump administration in Carrizo Spring, Texas, to put more unaccompanied migrant children in cages at the border. See *e.g.*, *Number of Migrant Children Detained at Border Has Tripled in Two Weeks*, *supra* note 3.

<sup>131</sup> A/HRC/46/15/Add.1, *supra* note 24, at ¶ 19.

recommendation “to eliminate rich poor polarization and social inequality,” the United States stated “we support the part of this recommendation asking us to work towards the ideal of equality...”<sup>132</sup> In addition, it is not like the Biden administration considers itself bound to U.S. law as it stands on all human rights issues. In response to Romania’s recommendation that the United States explore mandatory paid minimum maternity leave, the U.S. stated “[w]e support exploring possible legislation...”<sup>133</sup>

There was little to lose for the Biden administration if it had chosen to set big goals and bring the U.S. treatment of migrants in line with human rights law; there is no enforcement of commitments made and very little domestic attention given to what the United States does during the UPR process.<sup>134</sup> Moreover, there was a lot to gain in taking a stand on such an important human rights issue as the abolition of immigration prisons. The Biden administration has stated that it wants to reengage fully with the U.N. Human Rights Council,<sup>135</sup> and it sees the United States as a leader in promoting democracy, human rights, and equality around the world as well as at home.<sup>136</sup>

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<sup>132</sup> A/HRC/406/15/Add.1, *supra* note 24, at ¶ 13.

<sup>133</sup> *Id.* at ¶¶ 1, 13 (“Some recommendations ask us to achieve an ideal, e.g., end discrimination or police brutality, and others request action not entirely within the power of our Federal Executive Branch, e.g., adopt legislation, ratify treaties, or act at the state level. We support or support in part these recommendations when we share their ideals, are making serious efforts to achieve their goals, and intend to continue doing so. Nonetheless, we recognize, realistically, that the United States may never completely accomplish what is described in these recommendations’ literal terms.”).

<sup>134</sup> See Sara Alvarez, *The Universal Periodic Review as a Form of Alternative Dispute Mechanism: Strengths & Shortcomings*, 21 CARDOZO J. CONFLICT RESOL. 149, 168-69 (2019) (“Due to the political nature of the Universal Periodic Review, neither of its constituent instruments set out mechanisms for enforcement.”). The U.S. UPR process is important and is closely followed by human rights at home advocates. See e.g., *The Bringing Human Rights Home Lawyers’ Network*, COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, <https://web.law.columbia.edu/human-rights-institute/bhrh-lawyers-network> (The Bringing Human Rights Home Lawyers’ Network consists of over 800 members working in 37 states across the U.S. and helps members share strategies across issue areas and develop joint responses to common challenges and needs); *International Mechanism Taskforces*, U.S. HUMAN RIGHTS NETWORK, <https://ushrnetwork.org/membership/taskforces>.

<sup>135</sup> Yuliya Talmazan, *U.S. to seek election to United Nations Human Rights Council*, NBC NEWS (Feb. 24, 2021), <https://www.nbcnews.com/news/world/u-s-seek-election-united-nations-human-rights-council-n1258704>.

<sup>136</sup> See e.g., Antony Blinken, Secretary of State, *U.S. Decision To Reengage with the UN Human Rights Council*, U.S. DEPARTMENT OF STATE, PRESS RELEASES (Feb. 8, 2021), <https://www.state.gov/u-s-decision->

The United States also has a history of successfully taking the lead in human rights standard-setting on other issues, such as Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex rights<sup>137</sup> U.S. leadership has helped to dramatically shape international human rights law and influenced law and policy around the globe. If the Biden administration had been willing to commit to exploring the idea of abolishing immigration prisons, that would have likely gone far in promoting similar human rights commitments to be made by other countries around the globe. Yet, in the context of the UPR, the Biden administration was even unwilling to recognize that U.S. law and practice regarding immigration detention violates human rights law, let alone commit to the progressive realization<sup>138</sup> of a full spectrum of human rights for migrants.

The Biden administration missed an important opportunity in its response to the U.N. Human Rights Council's recommendations. The Biden administration could have forged a path towards the abolition of immigration prisons in the United States and beyond. The administration could have also made itself out to be a world leader regarding migrant's rights and the prohibition against torture; the administration could have simultaneously signaled that

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[to-reengage-with-the-un-human-rights-council/](#). See also Peter Nicholas, *Biden's Foreign Policy Starts at Home*, THE ATLANTIC (Apr. 13, 2021), <https://www.theatlantic.com/politics/archive/2021/04/bidens-foreign-policy-starts-at-home/618505/> (quoting Anthony Blinken, "Our domestic renewal and our strength in the world are completely entwined...").

<sup>137</sup> See Phil Crehan et al, *Transforming U.S. Foreign Policy To Ensure Dignity and Rights for LGBTI People*, CENTER FOR AMERICAN PROGRESS (Nov. 16, 2020), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/11/16/492936/transforming-u-s-foreign-policy-ensure-dignity-rights-lgbti-people/> ("The United States can once again assume the mantle of global leadership"); Dan Avery, *Biden signs foreign policy memo putting U.S. at 'forefront' of global LGBTQ rights*, NBC NEWS (Feb. 5, 2021), <https://www.nbcnews.com/feature/nbc-out/biden-signs-foreign-policy-memo-putting-u-s-forefront-global-n1256848> ("Barack Obama issued the first presidential memorandum directing U.S. agencies abroad to promote LGBTQ rights globally in 2011. Biden indicated his order "builds upon that historic legacy.").

<sup>138</sup> See *Fact Sheet 33: Frequently Asked Questions on Economic, Social and Cultural Rights*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <https://www.ohchr.org/documents/publications/factsheet33en.pdf> ("...an immediate obligation to take appropriate steps towards the full realization of economic, social and cultural rights. A lack of resources cannot justify inaction or indefinite postponement of measures to implement these rights. States must demonstrate that they are making every effort to improve the enjoyment of economic, social and cultural rights, even when resources are scarce.").

its expectations were changing regarding U.S. diplomacy and immigration policy abroad as well as a desire to shift domestic immigration policy in the United States. And the low-stakes context of the UPR was the perfect place to take that first step towards abolition of U.S. immigration prisons.

## **V. Conclusion**

The ongoing terrible things happening in U.S. immigration prisons today make it clear that the system is irretrievably broken. There is no reforming the tortuous system, no amount of training that will prevent further harm or deaths, and no way to undo the generations of harm that has already been wrought. No human being should ever suffer the human rights violations being perpetrated every day in immigration prisons in the United States.

The Biden administration has a duty under international human rights law, as well as a moral obligation to the U.S. public, to recognize the human rights violations occurring under its watch in immigration prisons. Furthermore, the United States has a duty to ensure the progressive realization of the full spectrum of human rights of migrants, including the prohibition of immigration prisons. In future interactions with international human rights fora, the Biden administration should agree to explore immigration prison abolition policy and legislation, with the eventual goal of implementing a complete prohibition on all immigration prisons.