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the United States**

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Towards the Abolition of the Immigration Detention of Children in the
United States

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Towards the Abolition of the Immigration Detention of Children in the United States

By Lauren E. Bartlett¹

Abstract

For over a decade, international human rights mechanisms have been calling for the prohibition of the detention of children based solely on immigration status. Human rights experts agree that the detention of children for immigration purposes is never in the best interests of the child, it leads to long-term harm, and it is a clear human rights violation. Until recently, the United States has detained hundreds of thousands of migrant children in cages each year and we have still not outlawed the inhumane practice. This article argues that engaging with international human rights mechanisms on this topic, including during the upcoming review of the United States by the U.N. Human Rights Committee in October 2023, is a small and relatively low stakes step to help forge a path towards the abolition of the immigration detention of children in the United States.

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I. Introduction

Detaining children even for short periods of time is traumatic and has negative long-lasting impacts on child health and well-being.² Human Rights courts, treaty bodies, and experts agree that the detention of children based solely on migration status is never in the best interests of the child and is a clear human rights violation.³ For over a decade, international human rights mechanisms⁴ have been calling for a complete prohibition on the detention of children, with or without their families, based solely on migration status.⁵

While some countries around the globe have outlawed the detention of children based solely on migration status,⁶ U.S. law allows officials to put children in cages at the border for up to twenty

² See e.g., Jody Heymann et al., *Preventing immigration detention of children: a comparative study of laws in 150 countries*, I.J.H.R. (2021), <https://doi.org/10.1080/13642987.2021.1947808>.

³ U.N. COMM. ON THE RTS. OF THE CHILD, REP. OF THE 2012 DAY OF GENERAL DISCUSSION: THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF INTERNATIONAL MIGRATION, ¶ 78 (Nov. 2012), <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>; INTER-AM. CT. H. R., RIGHTS AND GUARANTEES OF CHILDREN IN THE CONTEXT OF MIGRATION AND/OR IN NEED OF INTERNATIONAL PROTECTION, Advisory Opinion OC-21/14 of Aug. 19, 2014; JUAN E. MENDEZ (SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT), REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, U.N. Doc. A/HRC/28/68 ¶ 80 (Mar. 5, 2015); Office of the High Commissioner for Human Rights, Press Release, Children and Families Should Never be in Immigration Detention (Dec. 14, 2016), <https://www.ohchr.org/en/press-releases/2016/12/children-and-families-should-never-be-immigration-detention-un-experts>; 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; Kanagaratnam and Others v. Belgium, 2011-12 Eur. Ct. H.R. 15297 (holding that the detention of children is a measure of last resort and limited to very exceptional circumstances where it would be justified by the best interest of the child).

⁴ International human rights mechanisms consist of treaty bodies, such as the Committee on the Elimination of Racial Discrimination, and charter-based bodies, such as the Inter-American Commission on Human Rights, U.N. Human Rights Council, or Special Rapporteurs. See U.N. Office of the High Commissioner for Human Rights, Instruments and Mechanisms, <https://shorturl.at/dop14>; Organization of American States, Inter-American Commission on Human Rights, What is the IACHR, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp>.

⁵ See *supra* note 3.

⁶ See e.g., INTERNATIONAL ORGANIZATION FOR MIGRATION, U.N. HIGH COMMISSIONER ON REFUGEES, AND U.N. CHILDREN'S FUND, SAFETY AND DIGNITY FOR REFUGEE AND MIGRANT CHILDREN: RECOMMENDATIONS FOR ALTERNATIVES TO DETENTION AND APPROPRIATE CARE ARRANGEMENTS IN EUROPE (May 2022), <https://www.unhcr.org/en-us/publications/brochures/62c3f1464/safety-dignity-refugee-migrant-children-recommendations-alternatives-detention.html>; COUNCIL OF EUROPE, A STUDY OF IMMIGRATION DETENTION PRACTICES AND THE USE OF ALTERNATIVES TO IMMIGRATION DETENTION OF CHILDREN (2017), <https://edoc.coe.int/en/migration/7533-a-study-of-immigration-detention-practices-and-the-use-of-alternatives-to-immigration-detention-of-children.html>.

days,⁷ and that time limit is rarely enforced.⁸ Both the Obama and Trump administrations put hundreds of thousands of migrant children in cages each year, often for months on end and without adequate medical care, education, and other necessary supports.⁹ The Biden administration officially halted the practice in late 2021, instead releasing migrant children and their families into the United States with ankle bracelets or traceable cellphones to keep track of them.¹⁰ However, it is unclear how long President Biden will be able to keep his campaign promise to avoid the detention of migrant children all costs.¹¹

Even before the Biden administration officially ended the practice of caging migrant children, the U.S. government conceded that the detention of children for immigration purposes is traumatic and causes long-term harm.¹² Yet, many people in the United States still cannot imagine an immigration system that would not require detention of at least some migrant children at the border, for some period of time, let alone putting an end to the practice altogether.¹³ Moreover,

⁷ See *Flores v. Sessions*, 862 F.3d 863, 866-67 (9th Cir. 2017); 8 U.S.C. § 1232(c)(2); 84 FR 44392. The twenty-day limit applies to migrant children accompanied by immediate family members. Border Patrol is by law only allowed to detain unaccompanied minors in cages for up to seventy-two hours. See *id.*

⁸ See e.g., Eileen Sullivan and Zolan Kanno-Youngs, *U.S. Is Said to Consider Reinstating Detention of Migrant Families*, N.Y. TIMES (Mar. 6, 2023), <https://www.nytimes.com/2023/03/06/us/politics/biden-immigration-family-detention.html>; Peter Margulies, *What Ending the Flores Agreement on Detention of Immigrant Children Really Means*, LAWFARE (Aug. 29, 2019), <https://www.lawfareblog.com/what-ending-flores-agreement-detention-immigrant-children-really-means>.

⁹ See e.g., Edwidge Danticat, *We Must Not Forget Detained Migrant Children*, NEW YORKER (Jun. 26, 2018), <https://www.newyorker.com/news/news-desk/we-must-not-forget-detained-migrant-children>; Michelle Mark, *The children who have been detained in appalling conditions at the border could bear scars from the experience for life, experts say*, INSIDER (Jul. 11, 2019), <https://www.insider.com/migrant-children-health-effects-from-border-facilities-trauma-2019-7>.

¹⁰ See e.g., Sullivan and Kanno-Youngs, *supra* note 8.

¹¹ Bo Erickson and Camilo Montoya-Galvez, *Biden tells lawmakers he would end detention of migrant children*, CBS NEWS (Jul. 19, 2019), <https://www.cbsnews.com/news/biden-tells-lawmakers-he-would-end-detention-of-migrant-children/>.

¹² The U.S. Department of Homeland Security has conceded that while precise studies of the extent and duration of harm are difficult to implement, the weight of clinical opinion suggests that detention of children causes harm. See 84 FR 44392, Final Rule pp. 444503-04.

¹³ In presenting on this topic to my Human Rights at Home Advocacy Class and an Immigration Law Class at St. Louis University, I had my students try to brainstorm what an immigration system would look like without the detention of migrant children. They were unable to come up with any ideas that did not involve detention. It was a very difficult task. See also, Brian Tashman, *Two-Thirds of Voters Want to top the Expansion of For-Profit Immigration Detention*, ACLU (Jan. 12, 2022), <https://shorturl.at/jnrvc>.

recent reports indicate that the U.S. government's goal of deterring future immigration may at any time once again override its concerns regarding the long-harms to migrant children.¹⁴

If the Biden administration is serious about forging a path towards the abolition of immigration detention of children, it should at the very least engage on the topic with international human rights mechanisms, including during the upcoming review of the United States by the U.N. Human Rights Committee in October 2023.¹⁵ This is a small and relatively easy step that the U.S. government can take towards abolition. Compliance with recommendations made by international human rights mechanisms is voluntary and relatively little domestic attention is given to U.S. engagement with these mechanisms.¹⁶ Moreover, the expertise and guidance that international human rights mechanisms can provide on this subject is unparalleled.¹⁷

In Part II, this article begins with a description of U.S. practices of detaining migrant children. Part III details the growing consensus among human rights law experts around a complete prohibition on the immigration detention of children. Part IV discusses recent U.S. engagement with international human rights mechanisms on the topic of immigration detention of children. Lastly, Part V offers recommendations for U.S. engagement with international human rights mechanisms to forge a path towards abolition of the immigration detention of children.

¹⁴ See Hamed Aleaziz, *Biden administration considers forcing migrant families to remain in Texas*, LATIMES (Sept. 7, 2023); Colleen Long and Elliot Spagat, *In reversal, Biden weighs detaining migrant families*, AP NEWS (Mar. 7, 2023), <https://apnews.com/article/immigration-migrant-families-detention-border-biden-0909546c3984ae439b376d02c40ac7ff>.

¹⁵ See Office of the High Commissioner for Human Rights, 54th session of the Human Rights Council (11 September to 13 October 2023), Draft programme of work, <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session54/regular-session>.

¹⁶ See Lauren E. Bartlett, *"One of the greatest human tragedies of our time": The U.N., Biden, and a Missed Opportunity to Abolish Immigration Prisons*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 37 (2022).

¹⁷ See *id.*

II. Migrant Children in Cages in the United States

Until just a year and a half ago, the United States detained hundreds of thousands migrant children in cages each year.¹⁸ Out of nearly 2 million people detained in detention facilities by U.S. Customs and Border Protection (“Border Patrol”) from February 2017 through June 2021, more than 650,000 were children.¹⁹ Migrant children who arrive with their families were detained by the Border Patrol for up to twenty days.²⁰ Unaccompanied minors were only supposed to be held by the Border Patrol up to 72 hours.²¹ After that time, the unaccompanied minors were supposed to be sent to a “shelter” operated by the U.S. government.²² However, those time limits were rarely enforced and migrant children often spent weeks and months in Border Patrol facilities.²³

Children detained at the border were held in cages that were built decades ago, at a time when most detained migrants were adult men who were held briefly and rapidly deported.²⁴ Migrant children were detained in wire cages or tents and then were later moved to larger cinder block cells.²⁵ The children detained at the border reported that the food provided was spoiled and made

¹⁸ See e.g., Sullivan and Kanno-Youngs, *supra* note 8.

¹⁹ Anna Flag and Julia Preston, ‘No Place for a Child’: 1 in 3 Migrants Held in Border Patrol Facilities Is a Minor, POLITICO (Jun. 16, 2022), <https://www.politico.com/news/magazine/2022/06/16/border-patrol-migrant-children-detention-00039291>; The Marshall Project, ‘No Place for a Child’ (2022), <https://www.themarshallproject.org/2022/06/16/no-place-for-a-child>; HUMAN RIGHTS WATCH, WRITTEN TESTIMONY: “KIDS IN CAGES: INHUMANE TREATMENT AT THE BORDER” (2019), <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border>.

²⁰ See *Flores v. Sessions*, 862 F.3d 863, 866-67 (9th Cir. 2017); 8 U.S.C. § 1232(c)(2); 84 FR 44392.

²¹ See Margulies, *supra* note 8; 8 U.S.C. § 1232(c)(2); 84 FR 44392.

²² See *id.* Newer rules require unaccompanied migrant children be held by customs and Border Patrol for up to 72 hours and then must be placed in a residential care shelter operated by the Department of Health and Human Services Office of Refugee Resettlement. See *id.* Either way, migrant children are not allowed to leave either facility voluntarily or with a family member until the U.S. government gives them permission to do so. See *id.* Thus, that the children are detained and deprived of liberty is not in question no matter which type of facility it is. See *id.*

²³ See e.g., Sullivan and Kanno-Youngs, *supra* note 8; Peter Margulies, *What Ending the Flores Agreement on Detention of Immigrant Children Really Means*, LAWFARE (Aug. 29, 2019), <https://www.lawfareblog.com/what-ending-flores-agreement-detention-immigrant-children-really-means>.

²⁴ Flag and Preston, *supra* note 19.

²⁵ See *id.*

them sick.²⁶ Kids with injuries, fevers, coughs or stomachaches could not get basic medical care while held by the Border Patrol, and this was true even during the height of the COVID-19 pandemic.²⁷ Children were held for weeks in the same wet and filthy clothes after journeying thousands of miles and crossing the Rio Grande river.²⁸ Toilets and showers lacked privacy, so children were mortified to use them.²⁹ Children also reported bone-chilling cold from the air-conditioned cinder block cells, which are known across the border as *hieleras*, meaning iceboxes in Spanish.³⁰

The United States government has used many excuses for putting migrant children in cages. These excuses include security and terrorism,³¹ deterrence,³² risk of absconding,³³ health,³⁴ and ensuring the child's well-being. However, detention is never in a child's best interest³⁵ and the ill-treatment endured by child migrants means these excuses fall short of justifying these practices.

²⁶ See Danticat, *supra* note 9; Mark, *supra* note 9.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See e.g., U.N. OFFICE ON DRUGS AND CRIME, HANDBOOK ON CHILDREN RECRUITED AND EXPLOITED BY TERRORIST AND VIOLENT EXTREMIST GROUPS (2017), https://www.unodc.org/documents/justice-and-prison-reform/Child-Victims/Handbook_on_Children_Recruited_and_Exploited_by_Terrorist_and_Violent_Extremist_Groups_the_Role_of_the_Justice_System.E.pdf.

³² See Aaron Korthuis, *Detention and Deterrence: Insights from the Early Years of Immigration Detention at the Border*, 129 YALE L.J. F. 238, 239-40 (2019); Ingrid Eagly, Steven Shafer, & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 826-7 (2018).

³³ See e.g., Council of Europe, *supra* note 6.

³⁴ Sullivan and Kanno-Youngs, *supra* note 8.

³⁵ U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 4 (2017); U.N. Committee on the Rights of the Child, general comment No. 23 (2017), CMW/C/GC/4-CRC/C/GC/23 (2017), www.refworld.org/docid/5a12942a2b.html; European Court of Human Rights, Factsheet: Unaccompanied migrant minors in detention (2020), www.echr.coe.int/Documents/FS_Unaccompanied_migrant_minors_detention_ENG.pdf; INTER-AGENCY WORKING GROUP (IAWG), ENDING CHILD IMMIGRATION DETENTION (2016), https://endchilddetention.org/wp-content/uploads/2016/09/IAWG_Advocacy-Brochure_Aug-2016_FINAL-web.pdf. See also 84 FR 44392, Final Rule pp. 444503-04.

Moreover, many of the detained migrant children, up to forty-six percent or more, had valid asylum claims and require protection as refugees under international law.³⁶

At least for the time being, the U.S. government no longer puts migrant children in cages. Today, migrant children with their families at the border must wait in camps and cities for their turn to use the mobile app called CBP One.³⁷ The U.S. Department of Homeland Security is allowing roughly 40,000 migrants per month to make appointments through the CPB one app, with more than 100,000 migrants waiting to use the app at any given time.³⁸ If a family receives an appointment and their asylum claims are processed by the Border Patrol, they are supposed to be briefly processed by the Border Patrol and then released into the United States with their movements tracked through a GPS monitoring device, such as ankle bracelets or traceable cellphone.³⁹

Unaccompanied children at the border now detained by Border Patrol are supposed to be immediately transferred to the U.S. Department of Health and Human Services' Office of Refugee Resettlement ("ORR"). The ORR places unaccompanied children in shelters and then with sponsors, usually family members, as they await immigration proceedings.⁴⁰ Though the ORR has used large temporary facilities to detain unaccompanied children at the border in the past, which

³⁶ The U.N. High Commissioner on Refugees found that 58 percent of unaccompanied children interviewed in Border Patrol custody were forcibly displaced because they suffered or faced harms that indicated a potential or actual need for international protection. The top two types of harm faced by the children indicating a need for international protection were violence by organized armed criminal actors and violence in the home. U.N.H.C.R., CHILDREN ON THE RUN 6-7 (2016), <https://www.unhcr.org/en-us/children-on-the-run.html>.

³⁷ See Joel Rose, *Illegal border crossings are down. One big reason why is now part of a court fight.*, NPR (Jul. 19, 2023), <https://www.npr.org/2023/07/19/1188438846/illegal-border-crossings-are-down-one-big-reason-why-is-now-part-of-a-court-figh>.

³⁸ *Id.*

³⁹ See e.g., Sullivan and Kanno-Youngs, *supra* note 8.

⁴⁰ Congressional Research Service, *Increasing Numbers of Unaccompanied Children at the Southwest Border* (Jun. 28, 2023), <https://crsreports.congress.gov/product/pdf/IN/IN11638>.

resemble the Border Patrol cages and hieleras, no migrant children have been held in such a temporary facility since 2022 according to the ORR's website.⁴¹

While current practices regarding migrant children at the border do not officially involve cages, there are ongoing worries about conditions in the CBP and ORR facilities.⁴² In addition, there is a strong argument that GPS monitoring is just another form of oppressive and racialized violence perpetuated against migrants.⁴³ The bottom line is that no inhumane, cruel or tortuous practices should be perpetuated by the U.S. government against migrant children.

III. Human Rights Law Prohibits the Detention of Migrant Children in Cages

There is a growing consensus in international human rights law that any deprivation of liberty of migrant children based solely on migration status, no matter how brief, is a violation of human rights law and may amount to ill-treatment.⁴⁴ In 2012, the U.N. Committee on the Rights of the Child stated that the detention of children based on their migration status or their parents' migration status is a clear human rights violation.⁴⁵ In 2015, Juan Mendez, the former U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that "States should, expeditiously and completely, cease the detention of children, with or without their

⁴¹ See *id.*; U.S. Department of Health and Human Services, Programs, Social Services, Unaccompanied Children Information, Latest UC Data – FY 2023, <https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data-fy2023/index.html>.

⁴² See e.g., Kerri Evans, *Policy and Legal Implications for Working with Unaccompanied Immigrant Children in Foster Care in the United States*, LAWS 12:31 (Mar. 20, 2023), <https://doi.org/10.3390/laws12020031>.

⁴³ Sarah R. Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages* (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192032 (arguing for the abolition of "digital cages" consisting of GPS-outfitted ankle shackles and invasive phone and location tracking as another kind of oppressive and racialized violence which is perpetuated as an alternative to immigration prisons).

⁴⁴ See Bartlett, *supra* note 16; Jeffrey R. Baker and Allyson McKinney Timm, *Zero-Tolerance: The Trump Administration's Human Rights Violations Against Migrants on the Southern Border*, 13 Drexel L. Rev. 581, 636 (2021); Carrie F. Cordero, Heidi Li Feldman, & Chimène I. Keitner, *The Law Against Family Separation*, 51 Colum. Human Rights L. Rev. 432, 491 (2020).

⁴⁵ U.N. COMM. ON THE RTS. OF THE CHILD, *supra* note 3.

parents, on the basis of their immigration status.”⁴⁶ Both Juan Mendez and his successor, Nils Melzer, 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 and proportionality and, even in case of short-term detention, may amount to ill-treatment.”⁴⁷ The Inter-American Court of Human Rights has noted that the best interests of the child must be determined on an individual basis in assessing the possibility to admit, return, expel, deport, repatriate, reject at the border.⁴⁸

The U.N. Special Rapporteur on the human rights of migrants dedicated his 2020 thematic report to ending the immigration detention of children.⁴⁹ In that report he stated that the “human rights of children have neither nationality nor borders.”⁵⁰ The child’s right to non-discrimination includes the protection of children against all forms of discrimination and punishment, “including specifically on the basis of the status of the child and his or her parents or family members.”⁵¹ Moreover, respect for family unity and the right to family life requires States to take measures to maintain family unit and reunite separated family members.⁵² The Special Rapporteur on migrants also stated that the “imperative requirement not to deprive the child of liberty extends to the child’s parents and requires the authorities to provide alternative measures to detention for the entire family.”⁵³ The Special Rapporteur also pointed out that the rights to physical and mental integrity,

⁴⁶ Juan E. Mendez, *supra* note 2; Nils Melzer (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Human Rights Council, U.N. Doc. A/HRC/37/50 ¶ 64, (Feb. 26, 2018).

⁴⁷ Nils Melzer, *supra* note 24 at ¶ 27.

⁴⁸ Inter-Am. Ct. H. R., *supra* note 3.

⁴⁹ Felipe González Morales (Special Rapporteur on the human rights of migrants), *Rep. of the Special Rapporteur on the human rights of migrants, Ending immigration detention of children and providing adequate care and reception for them*, Human Rights Council, U.N. Doc. A/75/183 (Jul. 20, 2020), <https://www.ohchr.org/en/calls-for-input/report-ending-immigration-detention-children-and-seeking-adequate-reception-and>.

⁵⁰ *Id.* at ¶ 22.

⁵¹ *Id.*

⁵² *Id.* at ¶23 (“Article 9 of the Convention on the Rights of the Child protects the child’s right to family and makes clear that children should never be separated from their parents or guardians unless it is considered in the child’s best interests, such as in cases of parental abuse.”).

⁵³ *Id.*

health care, education and freedom torture or ill-treatment are implicated in the immigration detention of children.⁵⁴

In those exceptional circumstances where children are deprived of their liberty, the detention conditions must align with the Nelson Mandela Rules,⁵⁵ 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.⁵⁶ Under international human rights law, it is also now clear that the deprivation of liberty of either children or adults based solely on migration status may also amount to torture or ill-treatment.

Clearly depriving children of their liberty, without access to adequate food, healthcare, or education, separated from their family members, for prolonged periods of time, solely based on their migration status, is a violation of international human rights law.

IV. Recent U.S. Engagement with International Human Rights Mechanisms on the Detention of Children Based Solely on Immigration Status

The United States has engaged with international human rights mechanisms on the issue of immigration detention of children in recent years, but only when asked by the mechanisms to do so and the U.S. responses have largely been confined to making excuses for its practices.

During the Universal Periodic Review⁵⁷ of the United States by the U.N. Human Rights Council in 2015, Councilmembers recommended that the U.S. halt the immigrant detention of children and consider alternatives to detention.⁵⁸ In its response, the United States stated that it

⁵⁴ *Id.* at ¶¶25, 27.

⁵⁵ G.A. Res. 70/175 (Jan. 8, 2016), <https://undocs.org/A/RES/70/175>.

⁵⁶ Nils Melzer, *supra* note 24 at ¶ 64.

⁵⁷ See 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>.

⁵⁸ U.N. HUM. RTS. COUNCIL, REP. OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW, UNITED STATES OF AMERICA, ¶¶ 176.252-54, 176.338, U.N. Doc. A/HRC/30/12 (July 20, 2015).

⁵⁸ *Id.* ¶ 176.252.

supported the recommendation to consider alternatives to the detention of migrants.⁵⁹ However, in response to the recommendation to halt the detention of children, the United States stated it supported that recommendation in part, noting that “[w]e support this recommendation insofar as it recommends compliance with our international human rights obligations.”⁶⁰

In 2020, during the third Universal Periodic Review of the United States, the Councilmembers made many recommendations regarding migrant children in cages in the United States. For example, China recommended that the United States “[s]top incarcerating migrants, including migrant children.”⁶¹ Iran stated that the United States should “[s]top separating young children from their migrant parents and putting them in cages.”⁶² Other recommendations focused on conditions of immigration prisons, alternatives to detention, and the use of detention as a punitive measure to deter migration.⁶³

In its response to the Council’s 2020 recommendations, the United States stated that the “U.S. is committed to safe, humane, and lawful immigration enforcement, including access to asylum and family unity”⁶⁴ In addition, the United States made excuses including 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”⁶⁵ and “[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.” Putting children in cages is never the least restrictive setting and is not safe or dignified.

⁵⁹ *See Id.*

⁶⁰ *Id.* ¶ 12.

⁶¹ *Id.* ¶ 26. 338.

⁶² *Id.* ¶¶ 26.336, 26.344.

⁶³ Bartlett, *supra* note 16.

⁶⁴ U.N. HUM. RTS. COUNCIL, REP. OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW, UNITED STATES OF AMERICA, ADDENDUM, VIEWS ON CONCLUSIONS AND/OR RECOMMENDATIONS, U.N. DOC. A/HRC/46/15/Add.1 ¶ 18 (Mar. 21, 2021).

⁶⁵ *See id.* The administration may be referring to U.S. law requiring adult migrants detained on federal criminal charges to be 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.

Once the Trump administration took over, the United States' interactions with international human rights mechanisms on this topic departed even further from abolition. In January 2021, the Trump administration submitted the United States' fifth periodic report to the U.N. Human Rights Committee on its compliance with the International Covenant on Civil and Political Rights.⁶⁶ In that report, instead of discussing a prohibition on the immigration detention of children, the United States declared that it has "expanded its bed capacity...to care for the extraordinary numbers of unaccompanied alien children arriving at its facilities" and detailed the additional \$2.88 billion in appropriations for assistance for children housed in its custody made in 2019.⁶⁷

If President Biden hopes to stick to his commitment of avoiding the detention of migrant children at all costs, he will need help. Instead of making excuses, the U.S. government should take advantage of the expert guidance that can be provided by international human rights mechanisms, including by the U.N. Human Rights Committee during its review of the United States in October 2023.

V. Conclusion & Recommendations

The decision to forge a path towards the abolition of the detention of children based solely on immigration status in the United States is far from impossible. The United States is closer than many may think; the Biden Administration has ceased the practice since 2021,⁶⁸ the U.S. government has recognized that the harms perpetrated on children are severe and long-lasting,⁶⁹

⁶⁶ U.N. HUM. RTS. COMM. FIFTH PERIODIC REPORT SUBMITTED BY THE UNITED STATES OF AMERICA, U.N. Doc. CCPR/C/USA/5 (Nov. 11, 2021). Despite calls by human rights advocates for the Biden administration to update that report and repudiate some of the statements made in that report, in October 2023, the U.N. Human Rights Committee will base its review of the United States on the Trump administration's report. See American Civil Liberties Union, Coalition Letter to the White House and State Department on the US Periodic Report to the UN Human Rights Committee Under the ICCPR (Apr. 19, 2023), <https://www.aclu.org/documents/coalition-letter-white-house-and-state-department-us-periodic-report-un-human-rights>.

⁶⁷ See *id.* at ¶86-7.

⁶⁸ See *e.g.*, Sullivan and Kanno-Youngs, *supra* note 8.

⁶⁹ 84 FR 44392.

and though the United States has not outlawed the practice, U.S. law already provides for limits on immigration detention of children and minimum standards of detention conditions.⁷⁰ Moreover, and despite American exceptionalism,⁷¹ the United States does regularly avail itself to the expertise and guidance of some human rights mechanisms. For example, the United States rejoined the U.N. Human Rights Council,⁷² the United States attends and participates in treaty body reviews,⁷³ the Universal Periodic Review,⁷⁴ Inter-American Commission hearings,⁷⁵ and official visits from human rights experts.⁷⁶

To forge a clear path towards the abolition of immigration detention of children, the United States should take seriously the expertise and guidance of international human rights mechanisms. The United States has already received recommendations from treaty bodies and the United States should invite additional guidance by including this issue in its periodic reports to treaty bodies and other official communications with the mechanisms. The United States should also consider bringing up this topic at the U.N. Human Rights Committee's review of the United States in October 2023. This would be a low stakes approach to exploring the abolition of immigration detention of children.

⁷⁰ See Flores, *supra* note 5.

⁷¹ James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121 ("American exceptionalism—a belief that the United States has a unique mission to lead the world, but ought logically to be exempt from the rules it promotes").

⁷² See U.S. Department of State, Anthony Blinken, Secretary of State, Press Statement, *49th Session of the UN Human Rights Council* (Feb. 28, 2022), <https://www.state.gov/49th-session-of-the-un-human-rights-council/>.

⁷³ See e.g., U.S. Mission to International Organizations in Geneva, *The United States at the Committee on the Elimination of Racial Discrimination*, <https://geneva.usmission.gov/uscerd2022/>.

⁷⁴ See e.g., U.S. Mission to International Organizations in Geneva, *U.S. Delegation to the Universal Periodic Review*, https://geneva.usmission.gov/2010/11/02/u-s-delegation-to-the-universal-periodic-review/?_ga=2.49727142.1404981079.1694189931-1941740826.1694189931.

⁷⁵ See Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 282 (2013); Margaret E. McGuinness, *Human Rights Reporting as Human Rights Governance*, 59 COLUM. J. TRANSNAT'L L. 364, 395 (2021).

⁷⁶ See e.g., Maya Yang, *UN human rights experts begin US tour focusing on racial justice and policing*, THE GUARDIAN (Apr. 24, 2023), <https://www.theguardian.com/world/2023/apr/24/un-human-rights-experts-racial-justice-policing>.

The United States should also invite the U.N. Special Rapporteur on the Human Rights of Migrants on an official country visit to the United States, whereby the Special Rapporteur could lend his expertise on the abolition of immigration detention of children, including suggestions for outlawing the practice. Eventually the United States should also consider ratifying additional relevant international conventions, including the Convention on the Rights of the Child and the Convention on the Rights of All Migrant Workers and Members Their Families, among others.

Abolition of immigration detention of children is the right thing to do and in line with international human rights law; the United States can start dismantling its racist, oppressive, and violent immigration system and prevent future long-term harm to the hundreds of thousands of migrant children each year. Hopefully this article can provide law and policymakers with motivation and practical guidance on forging a path forward.