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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

*Lauren E. Bartlett**

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I. INTRODUCTION

[W]idespread 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 punishment¹

Children in cages.² Children separated from their parents and ‘lost’ in the system.³ Endless solitary confinement.⁴ Women

¹ 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*, ¶ 64, Human Rights Council, U.N. Doc. A/HRC/37/50 (Feb. 26, 2018) [hereinafter A/HRC/37/50].

² 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> [<https://perma.cc/SGQ5-HXF2>] (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).

³ See, e.g., 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> [<https://perma.cc/57TM-J94L>]; 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/> [<https://perma.cc/SLW8-Y76W>] (discussing how the Biden administration is still separating migrant children at the border).

⁴ See, e.g., *Cruelty and Corruption: Contracting to Lock up Immigrant Women For Profit at the Hutto Detention Center*, TEX. L. IMMIGR. CLINIC & GRASSROOTS LEADERSHIP, 6-12 (Mar. 2021), https://grassrootsleadership.org/sites/default/files/reports/utlaw_hutto_rpt_2.pdf [<https://perma.cc/7W8W-KXA8>].

forced to undergo unneeded hysterectomies.⁵ Racism and other discriminatory policies.⁶ Systematic sexual abuse.⁷ Denial of access to life-saving medication, let alone other forms of medical treatment,⁸ including COVID-19 precautions, testing, or vaccines.⁹ No heat in the winter, heatstroke in the summer.¹⁰ Deaths.¹¹ No access, let alone right, to an attorney.¹² Each of these human rights

⁵ See, e.g., Victoria Bekiempis, *More Immigrant Women Say They Were Abused by Ice Gynecologist*, GUARDIAN (Dec. 22, 2020), <https://www.theguardian.com/us-news/2020/dec/22/ice-gynecologist-hysterectomies-georgia> [<https://perma.cc/J89Z-VLSD>] (discussing the abuse of more than 40 women while in U.S. Immigration and Customs Enforcement (ICE) custody, including unnecessary hysterectomies).

⁶ See, e.g., *Cruelty and Corruption*, *supra* note 4, at 13; Juliana Morgan-Trostle, Kexin Zhang & Carl Lipscombe, *The State of Black Immigrants Part II: Black Immigrants in the Mass Criminalization System*, NYU L. IMMIGR. RTS. CLINIC & BLACK ALL. FOR JUST IMMIGR., 19 (Jan. 22, 2021), <http://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf> [<https://perma.cc/EL4R-8U5F>] (noting Black immigrants make up only 5.4% of the undocumented population in the United States but make up 20.3% of immigrants facing removal based upon a criminal conviction).

⁷ See, e.g., *Cruelty and Corruption*, *supra* note 4, at 13; Lomi Kriel, *ICE Guards “Systematically” Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, TEXAS TRIBUNE & PROPUBLICA (Aug. 14, 2020), <https://www.texastribune.org/2020/08/14/texas-immigrant-detention-ice-el-paso-sexual-abuse/> [<https://perma.cc/JP4M-DWM9>].

⁸ See, e.g., Inter-American Commission on Human Rights Res. 41/2020, ¶ 6 (Jul. 27, 2020) [hereinafter Human Rights Res. 41/2020].

⁹ See, e.g., *id.* ¶¶ 8-15; Katherine Peeler et al., *Praying for Hand Soap and Masks: Health and Human Rights Violations in U.S. Immigration Detention during the COVID-19 Pandemic*, PHYSICIANS FOR HUM. RTS. (Jan. 12, 2021), <https://phr.org/our-work/resources/praying-for-hand-soap-and-masks/> [<https://perma.cc/NA95-NQ4H>].

¹⁰ 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/> [<https://perma.cc/2V7S-WNDU>]; Alleen Brown, *“Dying of Cold”: ICE Detainees Freezing in Southern Prisons*, INTERCEPT (Feb. 19, 2021), <https://theintercept.com/2021/02/19/ice-detention-cold-freezing-texas-louisiana/> [<https://perma.cc/37AX-537N>].

¹¹ See, e.g., Human Rights Res. 41/2020, *supra* note 8.

¹² See, e.g., *Cruelty and Corruption*, *supra* note 4, at 6; *Detained Immigrants Ask Court to Stop ICE Interference to Phone Access in Immigration*

violations was perpetrated *this year* by U.S. officials in immigration prisons.¹³

At the southern border, migrants are held in tents.¹⁴ In Missouri, where I practice and teach, migrants are held in local jails.¹⁵ Many migrants are also held in Federal Bureau of Prisons Criminal Alien Requirement (“CAR”) prisons. 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

Detention Centers, AM. IMMIGR. COUNCIL (Aug. 26, 2020), <https://www.americanimmigrationcouncil.org/news/detained-immigrants-ask-court-stop-ice-interference-phone-access-immigration-detention-centers> [<https://perma.cc/HG6H-UDTV>]. *But see*, White House Briefing Room, *President Biden to Sign Presidential Memorandum to Expand Access to Legal Representation and the Courts* (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/> [<https://perma.cc/EPN2-ZWRH>].

¹³ 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 under civil legal powers, such as those assigned to ICE, and those imprisoned 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, note 8 (2017).

¹⁴ *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> [<https://perma.cc/TJ32-3VLC>]; 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> [<https://perma.cc/9R73-F2RR>].

¹⁵ *See, e.g.*, *Detention Facilities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (updated Mar. 11, 2021), <https://www.ice.gov/detention-facilities> [<https://perma.cc/MNH8-GNCQ>].

of Prisons itself.¹⁶ Other migrants are held in state and federal prisons.¹⁷

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 2019.¹⁸ In April 2021 alone, U.S. Immigration and Customs Enforcement (“ICE”) took more than 178,000 migrants into custody.¹⁹ Comparatively, 60,000 people were detained in all of 2020 for non-immigration federal criminal charges.²⁰

Given the scope of the ongoing terrible things in immigration prisons, many, including the United Nations, are

¹⁶ See 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> [<https://perma.cc/8CV2-443F>]; *Shadow Prisons*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/shadow-prisons> [<https://perma.cc/EXQ6-3C9W>].

¹⁷ See, e.g., Kyle Stucker, *Some New England County Jails Stopped ICE Holds. Here's Why the Remaining Won't Join Them*, USA TODAY (Jul. 16, 2021), <https://www.providencjournal.com/story/news/2021/07/16/new-england-jails-receive-ice-immigration-detainees-new-jersey-new-york-block-contracts/7977471002/> [<https://perma.cc/JUU5-GAF5>]; Ariel Goodman, “*Spaces of Detention*” Takes You Inside the Facilities That Criminalize Undocumented Immigrants, MARSHALL PROJECT (Jul. 14, 2021, 06:00 a.m.), <https://www.themarshallproject.org/2021/07/14/spaces-of-detention-takes-you-inside-the-facilities-that-criminalize-undocumented-immigrants> [<https://perma.cc/8R8S-QRF7>].

¹⁸ See ICE DET. DATA, FY19 (2020), <https://www.ice.gov/doclib/detention/FY19-detentionstats.xlsx> [<https://perma.cc/WTR7-34RQ>] (ICE initial book-ins, Fiscal Year 2019 – total 510,854); CBP ENF’T STAT. FISCAL YEAR 2021, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> [<https://perma.cc/E8LD-J43S>] (in 2019, the Border Patrol detained 859,501 migrants).

¹⁹ 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://perma.cc/ZQ6R-R7AX>].

²⁰ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (March 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/NDD2-HDHG>].

pushing the United States to abolish immigration prisons altogether.²¹ However, based on its response²² to the U.N. Human Rights Council’s recommendations from the Universal Periodic Review of the United States in March 2021,²³ the Biden administration has made clear that it not interested in abolition, not even on the world stage.²⁴ Instead of pushing for a path toward abolishing immigration prisons, the new administration responded with a mix of false hopes and outright lies.²⁵

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 summarizes international human rights law’s prohibition of all immigration prisons. Lastly, the essay explores the recommendations on immigration prisons from all three Universal

²¹ See Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review, United States of America, ¶¶ 334, 335, 337, 340, 344, U.N. Doc. A/HRC/46/15 (Dec. 15, 2020) [hereinafter A/HRC/46/15].

²² See Hum. Rts. 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, ¶¶ 18-19, U.N. Doc. A/HRC/46/15/Add.1 (March 4, 2021) [hereinafter A/HRC/46/15/Add.1].

²³ 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. Off. of the High Comm’r on Hum. Rts., 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> [<https://perma.cc/B2TJ-KFZD>]. A working group of the U.N. Human Rights Council reviews each member state’s implementation of the human rights commitments set out in the U.N. Charter, the Universal Declaration of Human Rights, all ratified human rights treaties, as well as voluntary pledges made by the state. See *id.* at 3. No other universal human rights mechanism of this kind exists. See *id.* The process aims to improve the human rights situation “in all countries.” *Id.*

²⁴ See A/HRC/46/15/Add.1, *supra* note 22. For more on abolition generally, see Brendan Roediger, *Abolish Municipal Courts: A Response To Professor Natapoff*, 134 HARV. L. REV. F. 213, 215 (Feb. 20, 2021).

²⁵ See A/HRC/46/15/Add.1, *supra* note 22. 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.* ¶ 18.

Periodic Reviews of the United States. This final Part also explores U.S. responses to those recommendations, arguing that the Biden administration missed an important opportunity to step up as global leader and promote the human rights of migrants by forging 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 Part discusses the four main arms of the U.S. immigration prison system in turn: (1) U.S. Customs and Border Protection; (2) ICE; (3) U.S. Marshals and the Federal Bureau of Prisons; and (4) state prisons and local jails. This Part specifically focuses on the rationale and authority of each arm to detain immigrants, as well as each arm's conditions of detention. This part concludes by debunking common myths regarding the need for immigration prisons and argues the system is irreparably broken.

A. *U.S. Customs and Border Protection*

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.²⁶ The Border Patrol operates at or near any of the U.S. borders, including at ports and airports.²⁷ By U.S. law, migrant detention should not be without justification, nor should it be punitive.²⁸ However, reality indicates otherwise.

²⁶ See CBP ENF'T STAT. FISCAL YEAR 2021, *supra* note 18.

²⁷ See U.S. Department of Homeland Security, U.S. Customs and Border Protection, <https://www.cbp.gov/> [<https://perma.cc/9SZZ-YPCW>] (last visited Sept. 19, 2021).

²⁸ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (noting 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).

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.²⁹ The second type of Border Patrol prison is called the “dog pound” because of the chain-link fencing.³⁰ At times, the Border Patrol has also detained families and children outside under bridges and in makeshift open-air tents.³¹ The Border Patrol’s official policy is that it will generally not detain people for more than seventy-two hours, and that it will hold people for “the least amount of time required for their processing, transfer, release,

²⁹ AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY, 2 (Jan. 2, 2020), <https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency> [<https://perma.cc/PQ9Q-MBYA>]; see also Opheli G. Lawler, *The Iceboxes at the Border*, THE CUT: N.Y. (Dec. 26, 2018), <https://www.thecut.com/2018/12/what-are-las-hieleras-iceboxes-used-by-cbp-at-the-border.html> [<https://perma.cc/AU9W-2MWN>]; Ed Pilkington, *'It Was Cold, Very Cold': Migrant Children Endure Border Patrol 'Ice Boxes'*, THE GUARDIAN (last modified July 14, 2017, 5:31 PM), <https://www.theguardian.com/us-news/2015/jan/26/migrant-children-border-patrol-ice-boxes> [<https://perma.cc/TT5S-Z3EK>].

³⁰ See AM. IMMIGR. COUNCIL, *supra* note 29, at 2; see also Dahlia Lithwick, *There Are Two Types of Detention Facilities at the Border, “Iceboxes” and “Dog Pounds”*, SLATE (July 11, 2019, 5:50 AM), <https://slate.com/news-and-politics/2019/07/border-crisis-conditions-migrants.html> [<https://perma.cc/HJ4B-P5K9>]; Reade Levinson & Kristina Cooke, *Migrants in U.S. Custody Describe Life in 'Ice Boxes' and 'Dog Pounds'*, REUTERS (last updated July 18, 2018, 5:05 PM), <https://www.reuters.com/article/us-usa-immigration-conditions-idUSKBN1K82X1> [<https://perma.cc/A23Y-TQRU>].

³¹ See AM. IMMIGR. COUNCIL, *supra* note 29, at 2; see also Molly Hennessy-Fiske, *Border Patrol Holds Migrant Families for Days Under a South Texas Bridge*, L.A. TIMES (March 24, 2021, 6:43 PM), <https://www.latimes.com/world-nation/story/2021-03-24/texas-migrants-border-bridge>; Michelle Hackman, *In a Texas Border Town, Migrant Families Sleep Under a Bridge as Local Resources Are Strained*, WALL STREET J. (last updated March 28, 2021, 7:35 PM), <https://www.wsj.com/articles/in-a-texas-border-town-migrant-families-sleep-under-a-bridge-as-local-resources-are-strained-11616837401> [<https://perma.cc/7XUP-WDZ8>].

or repatriation.”³² But the Border Patrol holds many people for longer periods of time, often for months.³³

B. ICE

The U.S. Immigration and Customs Enforcement, otherwise known as “ICE,” maintain the second arm of the U.S. immigration prison system.³⁴ 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.³⁵

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.³⁶ 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.³⁷ Many migrants detained by ICE win the right to remain in the United States or otherwise have their immigration cases terminated or

³² U.S. CUSTOMS AND BORDER PROT., NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH 14 (2015).

³³ See AM. IMMIGR. COUNCIL, *supra* note 29, at 2; Rebecca Plevin, *He Got Deportation Relief. Why Was This Man Still Detained By ICE In California For 77 Days*, THE FRESNO BEE (July 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 (last updated March 9, 2021, 4:35 PM), <https://www.cbsnews.com/news/migrant-children-border-patrol-custody-past-legal-limit/> [<https://perma.cc/2CED-LZ6V>].

³⁴ Of the four arms of the U.S. immigration prison system, ICE detains the second largest number of migrants. See *supra* note 18.

³⁵ See, e.g., *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).

³⁶ See, e.g., A/HRC/37/50, *supra* note 1, at ¶ 15. See also CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS*, 7 (2021) (“[i]mmigration law treats asylum seekers worthy of confinement”) [hereinafter *MIGRATING TO PRISON*].

³⁷ *Id.*

closed.³⁸ ICE uses a variety of facilities to detain migrants. These include state and federal prisons, private detention centers, hotels, and even hospitals.³⁹ In 2019, individuals were held in ICE custody for an average of fifty-five days.⁴⁰

C. U.S. Marshals Service

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.⁴¹ Although Congress first criminalized migrant entry without inspection and reentry after deportation in 1929,⁴² these crimes were not heavily prosecuted until the 1990s and 2000s.⁴³

³⁸ See, e.g., *MIGRATING TO PRISON*, *supra* note 36, at 7.

³⁹ See, e.g., AM. IMMIGR. COUNCIL, *supra* note 29, at 3.

⁴⁰ AM. IMMIGR. COUNCIL, *supra* note 29, at 4. See also MALIK NDAULA WITH DEBBIE SATYAL, *Rafiu's Story: An American Immigrant Nightmare*, in *KEEPING OUT THE OTHER: A CRITICAL INTRO. TO IMMIGR. ENF'T 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.”).

⁴¹ AM. IMMIGR. COUNCIL, *supra* note 29 at 10. See also 8 U.S.C. §§ 1325, 1326.

⁴² Act of Mar. 4, 1929, Pub. L. No. 70–1018, 45 Stat. 1551.

⁴³ 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 Libr. of Cong., *CRIMINALIZATION OF ILLEGAL ENTRY AROUND THE WORLD 1* (2019), <https://www.loc.gov/item/2019685473/> [<https://perma.cc/8UBD-3AVT>]. 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) (Can.) (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> [<https://perma.cc/L4FK-RVTF>]; Immigration and Refugee Protection Regulations (Immigration and Refugee Protection Act), SOR/2002-227, § 27(1)-(2) (Can.), <https://laws-lois.justice.gc.ca/eng/regulations/sor-2002->

Today, fifty-two percent of all federal criminal prosecutions are for immigration-related crimes.⁴⁴

After conviction—and practically “everyone charged with a federal immigration crime is eventually convicted” in the United States—these migrants are transferred to CAR prisons.⁴⁵ The average length of time spent by migrants in CAR prisons is six years and over twenty-five percent of migrants in CAR prisons are serving sentences of ten years or more,⁴⁶ regardless of federal law which limits sentencing for improper entry to not more than six months imprisonment for first time offenders.⁴⁷

The treatment of migrants in CAR prisons is “shocking.”⁴⁸ Migrants suffer regular human rights violations, including inadequate food, poor medical care, and mistreatment by guards.⁴⁹ Also of note is that the migrants detained in CAR prisons are nearly all Latinos, and discrimination is rampant.⁵⁰

D. State Prisons and Jails

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,⁵¹ or on state criminal charges. A large percentage of migrants detained by ICE

[227/FullText.html](#) [<https://perma.cc/53EJ-EJN7>]. On the other hand, Brazil and several other countries, do not criminalize illegal entry and instead proscribe the penalty of deportation. See Libr. of Cong., *supra* at 5.

⁴⁴ *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, TRAC REPORTS (2016), <https://trac.syr.edu/tracreports/crim/446/> [<https://perma.cc/LU8D-C9JL>]. In 1970, only 575 people were charged with a federal immigration crime. MIGRATING TO PRISON, *supra* note 36, at 10.

⁴⁵ García Hernández, *supra* note 13, at 250; *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, AMERICAN CIVIL LIBERTIES UNION, 2-3 (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf> [<https://perma.cc/943E-S24B>].

⁴⁶ Blitzer, *supra* note 16.

⁴⁷ See 8 U.S.C.S. § 1325 (LexisNexis 2021).

⁴⁸ See, e.g., *Warehoused and Forgotten*, *supra* note 45, at 3-5.

⁴⁹ *Id.* at 4-5.

⁵⁰ See, e.g., Blitzer, *supra* note 16; *Warehoused and Forgotten*, *supra* note 45, at 3.

⁵¹ See AM. IMMIGR. COUNCIL, *supra* note 29, at 3.

and the U.S. Marshals Service are actually held in state and local prisons and jails.⁵² 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.⁵³ 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.⁵⁴

This vast immigration prison system is incredibly expensive, and “financial incentives push toward ever-growing incarceration” of migrants.⁵⁵ In 2020, ICE alone spent \$3 billion on detention,⁵⁶ and sixty-five percent of ICE detainees are held in private prisons.⁵⁷ Beyond private financial interests and deeply rooted and widespread discrimination against brown and black migrants,⁵⁸ 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.⁵⁹

⁵² See *id.* at 3, 10. The federal government pays state prisons and local jails to house these migrants. MIGRATING TO PRISON, *supra* note 36, at 126. Cities, counties, and states pay almost nothing. *Id.* Therefore, these contracts are a huge financial boon. *Id.* at 126-27.

⁵³ See García Hernández, *supra* note 13, at 247.

⁵⁴ *Id.*

⁵⁵ MIGRATING TO PRISON, *supra* note 36, at 15, 126-133.

⁵⁶ DEP'T OF HOMELAND SECURITY & U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, BUDGET OVERVIEW, FISCAL YEAR 2020, 10 (2020), https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf [<https://perma.cc/D6SQ-TF8A>].

⁵⁷ MIGRATING TO PRISON, *supra* note 36, at 15.

⁵⁸ See MORGAN-TROSTLE ET AL, *supra* note 6, at 39; MIGRATING TO PRISON, *supra* note 36, at 12-14; García Hernández, *supra* note 13, at 249.

⁵⁹ 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> [<https://perma.cc/54GS-MBM7>]; WALTER A. EWING ET AL, *The Criminalization of Immigration in the United States*, AMERICAN IMMIGRATION COUNCIL 6 (2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states> [<https://perma.cc/P5CR-HENC>].

Immigration prisons do not deter immigration to the United States; hundreds of thousands of migrants continue to attempt to cross into the U.S. each month.⁶⁰ In fact, many migrants crossing the border consider their journey an effort to return home, rather than an attempt to leave their homeland.⁶¹ While strong family ties often decrease recidivism in the criminal justice system once migrants are in the United States,⁶² family ties can be a “motivator” for recidivism for migrants apprehended while attempting to cross the border,⁶³ Moreover, immigration prisons are not needed to enforce immigration law. Studies have shown that when migrants have access to counsel or case management support, they appear at immigration court hearings over ninety percent of the time.⁶⁴

Alternatives to immigration prisons have proven effective at ensuring appearances at immigration court at a significantly lower cost to the taxpayer than detention.⁶⁵ Many migrants have relatives

⁶⁰ See, e.g., Emily Ryo, *The Unintended Consequences of US Immigration Enforcement Policies*, 118 PROC. OF THE NAT’L ACAD. OF SCI. 1 (2021), <https://www.pnas.org/content/118/21/e2103000118> [<https://perma.cc/8RJ3-R9TN>] (“survey results provide no evidence that a heightened awareness of these US immigration enforcement policies affects individuals’ intentions to migrate to the United States”).

⁶¹ Ali Noorani, Brittney Nystrom, & Maurice Belanger, *Immigration Reform: Will New Political Calculations and New Actors Overcome Enforcement Inertia?* THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES 124–25 (2015).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ AM. IMMIGR. COUNCIL, IMMIGRANTS AND FAMILIES APPEAR IN COURT: SETTING THE RECORD STRAIGHT (July 30, 2019), <https://www.americanimmigrationcouncil.org/research/immigrants-and-families-appear-court> [<https://perma.cc/CW2F-4ASZ>]; VERA INSTITUTE OF JUSTICE, EVIDENCE SHOWS THAT MOST IMMIGRANTS APPEAR FOR IMMIGRATION COURT HEARINGS (Oct. 2020), <https://www.vera.org/publications/immigrant-court-appearance-fact-sheet> [<https://perma.cc/8JQD-2GUB>]; 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://perma.cc/Z5X2-89XA>].

⁶⁵ See, e.g., NAT’L IMMIGR. JUST. CTR., A BETTER WAY: COMMUNITY BASED PROGRAMING AS AN ALTERNATIVE TO IMMIGRATION DETENTION, 4, 6,

in the United States ready to provide them with stable housing and other assistance, meaning that migrants have strong incentives to appear for their hearings to seek the right to remain in the United States.⁶⁶

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.⁶⁷ Each year, Congress passes a budget providing for more spending on immigration enforcement agencies than for all of its other principal criminal federal law enforcement agencies combined.⁶⁸ As Professor César Cuauhtémoc García Hernández has stated, “[c]learly there remains a vast gulf between current reality and a future without immigration prisons.”⁶⁹ It may seem as if there is no way out of this hell we have created and perpetuate for migrants. However, as explained below,

11 (April 2019), <https://immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration> [<https://perma.cc/LFZ4-2Y26>].

⁶⁶ See AMERICAN BAR ASSOCIATION, *ACHIEVING AMERICA’S IMMIGRATION PROMISE* 19 (2021), <https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving-americas-immigration-promise.pdf>.

⁶⁷ See KELLY LYTLE HERNANDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES* (2017) (discussing the development of U.S. law on immigration detention from the 1890s through the 1960s); see also *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation. Detention is a usual feature in every case of arrest on a criminal charge, even when an innocent person a wrongfully accused, but it is not imprisonment in a legal sense.”).

⁶⁸ DORIS MEISSNER, ET AL., *MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 15 (Jan. 2013), <https://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf> [<https://perma.cc/CL63-VMAT>].

⁶⁹ García Hernández, *supra* note 13, at 251.

international human rights law provides hope and a path towards abolition of immigration prisons for the United States.

III. INTERNATIONAL HUMAN RIGHTS LAW PROHIBITS IMMIGRATION PRISONS

Unlike U.S. law, international human rights law provides for the complete prohibition of immigration prisons.⁷⁰ 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 because “holding asylum seekers and persons charged with civil immigration violations in a prison environment is incompatible with basic human rights guarantees.”⁷¹ In 2014, the U.N. Human Rights Committee, 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.*”⁷² In his thematic report on the torture of migrants in 2018, 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, repeated this rule prohibiting immigration prisons.⁷³

⁷⁰ 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> [<https://perma.cc/7VDA-QVY3>] (discussing 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).

⁷¹ Inter-Am. Comm’n on Human Rights Res. 03/08, at 2 (2008), <http://www.cidh.org/Resoluciones/Resolution.03.08.ENG.pdf> [<https://perma.cc/9LM9-L5YC>].

⁷² U.N. Hum. Rts. Comm., *General Comment No. 35*, U.N. Doc. CCPR/C/GC/35, art. 9, ¶ 18 (Oct. 23, 2014), (emphasis added), <https://undocs.org/CCPR/C/GC/35> [<https://perma.cc/RZ9B-ES5Y>].

⁷³ A/HRC/37/50, *supra* note 1, at ¶ 18.

Today, international human rights law allows for the deprivation of liberty⁷⁴ of adult migrants based solely on immigration status *only in exceptional cases*.⁷⁵ 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.⁷⁶ Asylum seekers in particular may be detained for only a brief initial period to document their entry, record their claims, and determine their identity if it is in doubt.⁷⁷ Detaining asylum seekers after that initial period 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, violates international human rights law.⁷⁸

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,⁷⁹ taking into account any personal vulnerability due to

⁷⁴ 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.*; *see also* CCPR/C/GC/35, *supra* note 73, at ¶ 18.

⁷⁵ A/HRC/37/50, *supra* note 1, at ¶ 65(c); U.N. Comm. Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, *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> [<https://perma.cc/P2D7-LUC3>].

⁷⁶ A/HRC/37/50, *supra* note 1, at ¶ 65(c); CCPR/C/GC/35, *supra* note 72, at ¶ 18.

⁷⁷ A/HRC/37/50 *supra* note 1, at ¶ 22; CCPR/C/GC/35, *supra* note 72, at ¶ 18.

⁷⁸ A/HRC/37/50 *supra* note 1, at ¶ 22; CCPR/C/GC/35, *supra* note 72, at ¶ 18.

⁷⁹ G.A. Res. 70/175 (Jan. 8, 2016), <https://undocs.org/A/RES/70/175> [<https://perma.cc/U6C6-7HAB>] (In 2015, the U.N. General Assembly adopted revised Standard Minimum Rules for the Treatment of Prisoners, which constitute the universally acknowledged minimum standards for the management of prison facilities and the treatment of prisoners. The revised rules are known as “the Nelson Mandela Rules” to honor the legacy of the late President of South Africa, Nelson Rolihlahla Mandela, who spent 27 years in prison).

factors such as migration status, age, gender, disability, medical condition, previous trauma, or membership in a minority group.⁸⁰ In addition, the inability of the government to carry out the deportation of a migrant never justifies indefinite detention under international human rights law.⁸¹

Moreover, international law prohibits any deprivation of liberty of migrant children, no matter how brief, based solely on migration status. The U.N. Committee on the Rights of the Child has stated that the detention of children based on their migration status or their parents' migration status is a clear human rights violation.⁸² In 2015, Juan Mendez, U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment wrote "States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status."⁸³ 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."⁸⁴ Additionally, The Inter-American Court of Human Rights has noted that, when assessing the possibility to return, expel, deport, repatriate, reject at the border,

⁸⁰ A/HRC/37/50, *supra* note 1, at ¶ 65(c).

⁸¹ *See, e.g.,* A/HRC/37/50, *supra* note 1, at ¶ 22; CCPR/C/GC/35, *supra* note 72, at ¶ 18.

⁸² 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> [<https://perma.cc/JL9D-HRCE>].

⁸³ *See* 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*, ¶ 80, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015). 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.

⁸⁴ A/HRC/37/50, *supra* note 1, at ¶ 27.

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.⁸⁵

Under international human rights law, it is also now clear that the deprivation of liberty⁸⁶ of either children or adults based solely on migration status may also amount to torture.⁸⁷ The current U.N. Special Rapporteur on torture has identified several situations 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.⁸⁸

While the United States generally likes to eschew its international human rights obligations, it has signed and ratified the

⁸⁵ See *Rights and Guarantees of Children in the Context of Migration and / or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-Am. Ct. H. R., Vol. 56, ¶¶ 222, 231-233 (Aug. 19, 2014).

⁸⁶ Under international law, regardless of the name given to the place where a migrant is detained or 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 1, at ¶ 17.

⁸⁷ See A/HRC/37/50, *supra* note 1, at ¶ 28. See also *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 (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.”).

⁸⁸ A/HRC/37/50, *supra* note 1, at ¶ 28.

International Covenant on Civil and Political Rights⁸⁹ and the Convention Against Torture.⁹⁰ Therefore, the aforementioned international human rights law should apply fully in the United States.⁹¹ In addition, as a member of the United Nations, the United States has chosen to take part in the Universal Periodic Review process, as described more fully below.⁹²

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.⁹³ The first cycle of the UPR for the United States was in 2010, the second cycle in 2015, and the third in 2020.⁹⁴ This section begins with a brief overview of the UPR process and moves on to analyze the UPR recommendations

⁸⁹ See *Status of Ratification Interactive Dashboard*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <https://indicators.ohchr.org/> [<https://perma.cc/M325-JQ3T>] [hereinafter *Status of Ratification*] (last visited Jan. 12, 2022).

⁹⁰ See *id.*

⁹¹ See *Human Rights in the United States: A Handbook for Legal Aid Attorneys* (AM. UNIV. WASH. COLL. OF LAW, CTR. FOR HUMAN RIGHTS & HUMANITARIAN LAW), July 21, 2014, 18-19, <https://www.wcl.american.edu/index.cfm?LinkServID=B1E62E62-A5A0-D585-2D87C971D50AAE18> [<https://perma.cc/M325-JQ3T>].

⁹² While participation in the Universal Periodic Review is voluntary, the nation under review has a big incentive to participate and to try to control the narrative of the review. See, e.g., Luis Gallagos Chiriboga (Vice-President and Rapporteur), *Rep. of the Human Rights Council on Its Seventh Meeting*, U.N. Doc. A/HRC/OM/7/1 (Apr. 4, 2013), https://www.un.org/ga/search/viewm_doc.asp?symbol=A/HRC/OM/7/1 [<https://perma.cc/3U8F-K54H>] (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).

⁹³ See U.N. HUMAN RIGHTS COUNCIL, *Universal Periodic Review – United States of America*, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/USindex.aspx> [<https://perma.cc/YL69-9WJ7>] [hereinafter *Human Rights Council Universal Periodic Review*].

⁹⁴ *Id.*

regarding U.S. immigration prisons, and the U.S. response to those recommendations, from each of the three UPR cycles.

The U.N. General Assembly established the UPR in 2006.⁹⁵ The human rights record of each U.N. member nation state is reviewed every four and a half years through the UPR.⁹⁶ The UPR is an interactive process led by the U.N. Human Rights Council and provides 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 overcome challenges to the enjoyment of human rights.”⁹⁷ The Council assesses “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 treaties ratified by the State; (4) voluntary human rights pledges and commitments made by the State . . . ; and (5) international humanitarian law.”⁹⁸ The UPR also gives U.N. Members the chance to receive advice from human rights experts and civil society organizations.

To begin the UPR process, the U.N. Human Rights Council forms a working group for each nation being reviewed.⁹⁹ The working group then collects information provided by the nation under review, which takes the form of a “national report.”¹⁰⁰ The working group also collects relevant information from the reports of U.N. Human Rights Mechanisms and other U.N. entities as well

⁹⁵ See U.N. G.A. Res. 60/251, U.N. Doc A/RES/60/251 (Apr. 3, 2006), https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf [<https://perma.cc/A2A8-G6WA>].

⁹⁶ *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> [<https://perma.cc/6886-BVML>] [hereinafter *Basic Facts UPR*]. 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> [<https://perma.cc/9Y9U-FH49>].

⁹⁷ *Basic Facts UPR*, *supra* note 96.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* For examples of U.S. national reports submitted for the Universal Periodic Review, see U.S. DEP’T OF STATE, UNIVERSAL PERIODIC REVIEW, <https://www.state.gov/universal-periodic-review/> [<https://perma.cc/A35M-5L7C>] [hereinafter *Universal Periodic Review*].

as information provided by other stakeholders including non-government organizations and civil society.¹⁰¹ The nation under review is then scheduled for an interactive, live discussion in Geneva.¹⁰² 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.¹⁰³ The working group then issues a report, which includes recommendations—ways to improve the human rights record—for the nation under review.¹⁰⁴ Lastly, the nation under review has a chance to respond to those recommendations.¹⁰⁵ When President Biden took office, the U.S. human rights record had just been reviewed by the U.N. through the UPR process for the third time.¹⁰⁶

During the first cycle of the UPR of the United States in 2010, there was little attention paid to immigration prisons.¹⁰⁷ In fact, only two recommendations mentioned immigration detention.¹⁰⁸ 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”.¹⁰⁹ 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

¹⁰¹ Basic Facts UPR, *supra* note 96.

¹⁰² *Id.*; U.N. OFF. OF THE HIGH COMM’R ON HUM. RTS, UNIVERSAL PERIODIC REVIEW (UPR) THE 3RD CYCLE 2017-2021 (2022) 15, https://www.ohchr.org/Documents/HRBodies/UPR/PPP_UPR_3rd_cycle_EN.pdf [<https://perma.cc/V6L6-TVDD>].

¹⁰³ Basic Facts UPR, *supra* note 96.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Universal Periodic Review, *supra* note 100.

¹⁰⁷ 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*.

¹⁰⁸ U.N. Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review, United States of America, ¶¶ 72, 73 U.N. Doc. A/HRC/16/11/ (Jan. 4, 2011). “Harsh” immigration detention conditions in the United States were also noted by Switzerland. *See supra*, at ¶ 26.

¹⁰⁹ *Id.*

‘exceptional circumstances.’”¹¹⁰ The United States chose to support Brazil’s recommendation in full.¹¹¹

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.¹¹² 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.”¹¹³ Brazil repeated its 2010 recommendation to “[c]onsider alternatives to the detention of migrants.”¹¹⁴ Thailand recommended that the United States “[t]reat migrant children in detention with due respect to human rights.”¹¹⁵ In addition, Paraguay recommended that the right to family reunification of migrants held in detention be guaranteed.¹¹⁶

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 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.”¹¹⁷ 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

¹¹⁰ 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, voluntary commitments and replies presented by the State under review, ¶ 18, U.N. Doc. A/HRC/16/11/Add.1 (Mar. 8, 2011).

¹¹¹ *Id.* at ¶ 16.

¹¹² 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).

¹¹³ *Id.* ¶ 176.252.

¹¹⁴ *Id.* ¶ 176.253.

¹¹⁵ *Id.* ¶ 176.254.

¹¹⁶ *Id.* ¶ 176.338.

¹¹⁷ U.N. Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review, United States of America, ¶ 18, U.N. Doc. A/HRC/30/12/Add.1 (September 14, 2015).

recommendation insofar as it recommends compliance with our international human rights obligations.”¹¹⁸

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.¹¹⁹ China recommended that the United States “[s]top incarcerating migrants, including migrant children.”¹²⁰ Iran stated that the United States should “[s]top separating young children from their migrant parents and putting them in cages.”¹²¹ Other recommendations focused on the conditions of immigration prisons,¹²² alternatives to detention,¹²³ and the use of detention as a punitive measure to deter migration.¹²⁴

After President Biden was inaugurated, his administration had the chance to draft the U.S. response to those UPR recommendations.¹²⁵ This was very exciting news for human rights advocates. Biden had promised to build a “fair and humane immigration system” on the campaign trail,¹²⁶ and there was hope that the new administration’s response to the UPR would reflect those goals. However, 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”¹²⁷ What is happening in immigration prisons is not safe or humane, however.¹²⁸ Children are still being

¹¹⁸ *Id.* ¶ 12.

¹¹⁹ A/HRC/46/15, *supra* note 21, at ¶¶ 26.334-38, 26.340, 26.342-44, 26.346-7.

¹²⁰ *Id.* ¶ 26.338.

¹²¹ *Id.* ¶¶ 26.336, 26.344.

¹²² *See id.* ¶¶ 26.333, 26.337, 26.342, 26.343, 26.346.

¹²³ *See id.* ¶¶ 26.335, 26.337, 26.340.

¹²⁴ *See id.* ¶ 26.334.

¹²⁵ *See* A/HRC/46/15/Add.1, *supra* note 22.

¹²⁶ *See The Biden Plan for Securing our Values as a Nation of Immigrants*, JOE BIDEN, <https://joebiden.com/immigration/> [<https://perma.cc/CCH9-7CNQ>].

¹²⁷ A/HRC/46/15/Add.1, *supra* note 22, at ¶ 18.

¹²⁸ *See* Section I, *supra*.

caged and separated from their families.¹²⁹ In addition, the United States made excuses regarding the separation of children from their parents in detention, 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.”¹³⁰ Under international human rights law, caging children is never “humane” and may amount to torture.¹³¹

The Biden administration also claimed to support, at least in part, the recommendations to stop incarcerating migrant children.¹³² 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.”¹³³ In April 2021, a month after the U.S. response to the U.N., the Biden Administration put more unaccompanied migrant children in cages at the border.¹³⁴

In its response to the U.N., the Biden administration also pointed out that the Executive branch is bound by laws made by Congress regarding the detention of migrant children.¹³⁵ 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 impossible and idealistic goals concerning other human rights issues. For example, in its response

¹²⁹ See, e.g., Jervis, *supra* note 3.

¹³⁰ See A/HRC/46/15/Add.1, *supra* note 22, at ¶ 19. 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.

¹³¹ See Section III, *supra*.

¹³² A/HRC/46/15/Add.1, *supra* note 22, at ¶ 19.

¹³³ *Id.* ¶ 18.

¹³⁴ See, e.g., *Number of Migrant Children Detained at Border Has Tripled in Two Weeks*, *supra* note 2.

¹³⁵ A/HRC/46/15/Add.1, *supra* note 22, at ¶ 19.

to China’s recommendation “to eliminate rich-poor polarization and social inequality,”¹³⁶ the United States stated “[w]e support the part of this recommendation asking us to work towards the ideal of equality”¹³⁷ 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 and Sri Lanka’s recommendations that the United States explore mandatory paid minimum maternity leave,¹³⁸ the United States stated, “[w]e support exploring possible legislation expanding the availability of paid parental leave for parents who seek it.”¹³⁹

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.¹⁴⁰ 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,¹⁴¹ and it sees the United States as a leader in promoting democracy, human rights, and equality around the world as well as at home.¹⁴²

¹³⁶ A/HRC/46/15, *supra* note 21, at ¶ 26.283.

¹³⁷ A/HRC/46/15/Add.1, *supra* note 22, at ¶ 13.283.

¹³⁸ A/HRC/46/15, *supra* note 21, at ¶ 26.315-16.

¹³⁹ A/HRC/46/15/Add.1, *supra* note 22, at ¶ 12.315-16.

¹⁴⁰ 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.”).

¹⁴¹ Yuliya Talmazan, *U.S. to seek election to United Nations Human Rights Council*, NBC NEWS (Feb. 24, 2021, 5:03 AM), <https://www.nbcnews.com/news/world/u-s-seek-election-united-nations-human-rights-council-n1258704> [<https://perma.cc/68ZU-WKGL>].

¹⁴² See, e.g., Press Statement, U.S. Dep’t of State, *U.S. Decision To Reengage with the UN Human Rights Council* (Feb. 8, 2021), <https://www.state.gov/u-s-decision-to-reengage-with-the-un-human-rights-council/> [<https://perma.cc/ZYK9-F3ZY>]; 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->

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.¹⁴³ U.S. leadership has helped to dramatically shape international human rights law and influenced law and policy around the globe. A commitment by the Biden administration to explore the idea of abolishing immigration prisons would have 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 realization¹⁴⁴ 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

[starts-at-home/618505/](https://www.washingtonpost.com/news/energy-environment/wp/2021/02/26/biden-announces-renewable-energy-targets/) [<https://perma.cc/3BJA-YHXU>] (quoting Anthony Blinken, “Our domestic renewal and our strength in the world are completely entwined . . .”).

¹⁴³ See PHIL CREHAN ET AL., CENTER FOR AMERICAN PROGRESS, TRANSFORMING U.S. FOREIGN POLICY TO ENSURE DIGNITY AND RIGHTS FOR LGBTI PEOPLE, (Nov. 16, 2020, 9:01 AM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/11/16/492936/transforming-u-s-foreign-policy-ensure-dignity-rights-lgbti-people/> [<https://perma.cc/R28D-E2MP>] (“[T]he 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, 6:52 AM), <https://www.nbcnews.com/feature/nbc-out/biden-signs-foreign-policy-memo-putting-u-s-forefront-global-n1256848> [<https://perma.cc/7BG6-8SDG>] (“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.’”).

¹⁴⁴ 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> [<https://perma.cc/F26V-QTAN>] (stating that progressive realization of human rights is the “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.”).

path towards the abolition of immigration prisons in the United States and beyond.¹⁴⁵ 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 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. 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.

¹⁴⁵ Admittedly, the Biden administration has enacted policy to end detention for some migrants. 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> [<https://perma.cc/7RZL-D3XS>] (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). This makes it all the more frustrating that the U.S. response to the UPR was so disappointing.