Arbitrary & Cruel: How US Immigration Detention Violates the Convention against Torture and Other International Obligations – A Legal Analysis

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Introduction

Throughout the last decade, international human rights experts and monitoring bodies have expressed deep concern over States' increased use of immigration detention. A primary reason for this concern is that States regularly impose immigration detention arbitrarily, and in so doing, render detained persons more vulnerable to violations of the prohibition on torture and other cruel, inhuman, or degrading treatment or punishment. As U.N. Special Rapporteur on Torture Nils Melzer explained in his 2018 report to the U.N. Security Council on migration-related torture and ill-treatment: "While not every case of arbitrary detention will automatically amount to torture or ill-treatment, there is an undeniable link between both prohibitions … experience shows that any form of arbitrary detention exposes migrants to increased risks of torture and ill-treatment."

While considerable analysis of components of the immigration detention system in the U.S. under international law, particularly the prohibition on torture and other ill treatment, have been completed, there have been few attempts to bring all these different analyses together to look at the correlation between arbitrary detention and violations of the prohibition on torture and other ill-treatment within the U.S. immigration detention system. This report attempts to fill that gap.

This report analyzes the U.N. Convention against Torture and Cruel, Inhuman and Degrading Treatment and Punishment and other international and regional legal authorities. It draws on CVT's decades-long clinical experience providing care to survivors of torture,

including formerly detained asylum seekers, and highlights reports of wide-ranging abuses at immigration detention centers such as Stewart and Irwin County Detention Centers, located in Georgia where CVT has operated a survivor of torture program for the past five years.

This report ultimately concludes both that the U.S. immigration detention system is arbitrary and that it systematically exposes detained migrants to violations of the prohibition on torture and other cruel, inhuman, or degrading treatment or punishment. Indeed, it finds that the current system's defects are structural and pervasive to a degree that the system must be phased out entirely to bring the U.S. into compliance with its international legal obligations.

About CVT

Founded in 1985 as an independent non-governmental organization, the Center for Victims of Torture is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest in the world. Through programs operating in the U.S., the Middle East, and Africa – involving psychologists, social workers, physical therapists, physicians, psychiatrists, and nurses – CVT annually rebuilds the lives of more than 25,000 primary and secondary survivors, including children. The majority of CVT's clients in the United States are asylum seekers. Indeed, research has shown that an astonishing percentage of refugees and asylum seekers – as many as 44% across certain populations – are torture survivors.

Since 2016, CVT has operated a torture survivor treatment program in the State of Georgia, home to several immigration detention centers, including Stewart, Irwin, Folkston and Deyton. During that time, CVT Georgia clinicians have provided healing care to survivors of torture from around the world, including those who have been detained in Georgia's immigration detention centers while seeking asylum.

Through its extensive experience providing mental health services to asylum seekers and refugees who have been subjected to detention, both inside and outside the United States, CVT is uniquely positioned to speak to the adverse mental and physical health effects of prolonged detention in harsh, prison-like conditions, especially – though not only – for individuals who have come to the United States seeking refuge from persecution in their homelands.

Section 1: Arbitrary Detention

I. The United States Has an International Legal Obligation to Uphold the Prohibition of Arbitrary Detention Under Treaty Law and Customary International Law.

Arbitrary detention is absolutely prohibited under international law.[1] This prohibition is found in both treaty law as well as customary international law ("CIL").[2] The United States of America ("U.S.") has legal obligations to uphold this prohibition under both treaty law and CIL.[3]

[1] U.N. Working Grp. on Arbitrary Det., *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants*, ¶ 8, U.N. Doc. A/HRC/39/45 (Jul. 2018) [hereinafter WGAD *Revised Deliberation No. 5*]; Int'l Comm. of the Red Cross, *Rule 99. Deprivation of Liberty*, CUSTOMARY IHL DATABASE (last visited Jan. 19, 2021), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule99 [hereinafter ICRC Rule 99].

[2] U.N. Working Grp. on Arbitrary Det., *Deliberation No. 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty under Customary Int'l Law*, ¶ 51, U.N. Doc. A/HRC/22/44 (Dec. 2012) [hereinafter WGAD *Deliberation No. 9*]; ICRC Rule 99, *supra* note 1; Kelly Mannion, *Int'l Law, Federal Courts, and Exec. Discretion: The Interplay in Immigr. Det.*, 44 GEO. J. INT'L L. 1217, 1235-36 (2013).

[3] Mannion, *supra* note 2, at 1235-36; Int'l Covenant on Civil and Political Rights art. 9, Mar. 23, 1976, 999 U.N.T.S. 171. [hereinafter ICCPR]; 138 Cong. Rec. 8070-71 (1992); U.N. Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; The Am. Declaration of the Rights and Duties of Man art. XXV, O.A.S. Res. XXX (1948) [hereinafter American Declaration]; Am. Convention on Human Rights art. 7, Org. of Am. States, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

A. All Major International and Regional Human Rights Treaties Prohibit Arbitrary Detention.

The prohibition of arbitrary detention is contained within the highly ratified International Covenant on Civil and Political Rights ("ICCPR").[4] Article 9 of the ICCPR provides, "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[5] Similar language is found in all other major international and regional instruments relating to the protection and promotion of human rights,[6] including the African Charter of Human and Peoples' Rights ("No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.")[7], the American Convention on Human Rights ("No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. No one shall be subjected to arbitrary arrest or imprisonment.")[8], the Arab Charter on Human Rights ("No one shall be imprisoned on the ground of his proven inability to meet a debt or fulfil any civil obligation.")[9], and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.").[10] On its

[4] ICCPR, *supra* note 3, at art. 9; As of January 2021, there are 173 parties to the ICCPR, including the United States. Int'l Convention on Civil and Political Rights, U.N. Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.
[5] ICCPR, *supra* note 3, at art. 9(1).
[6] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 42.
[7] African Charter of Human and Peoples' Rights art. 6, League of Arab States, *entered into force* Oct. 21, 1986, 1520 U.N.T.S. 217. [hereinafter African Charter]
[8] American Convention, *supra* note 3, at art. 7.
[9] Arab Charter on Human Rights art. 14, *entered into force* Mar. 15, 2008, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005) [hereinafter Arab Charter].
[10] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5 ¶ 1, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention].

own, this extensive treaty law binds state parties to the prohibition of arbitrary detention, creating legal obligations under public international law. Additionally, the creation of this treaty law has contributed to the prohibition of arbitrary detention achieving status as CIL.[11]

B. Customary International Law Prohibits Arbitrary Detention as the Prohibition is Reflected Consistently in State Practice and States Adhere to It Out of a Sense of Legal Obligation.

CIL is a principal source of international public law recognized in the Statute of the International Court of Justice, second in significance only to treaty law.[12] Unfortunately, no "single, definitive, readily-identifiable source" of CIL exists.[13] Instead, whether an international norm rises to the level of CIL depends on a determination of whether that norm is reflected in consistent state practice and adhered to out of a sense of legal obligation (*opinio juris*).[14] Neatly put, CIL refers to "those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[15] Determining whether an international norm constitutes CIL then requires looking extensively at diverse sources both domestic and international.[16]

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[11] *See North Sea Continental Shelf Cases (Fed. Republic of Ger. v. Den. & Neth.)*, Judgment, 1969 I.C.J. Rep. 3, ¶¶ 28-29, 37-43 (Feb. 20) (recognizing that international agreements constitute the practice of states and as such can contribute to the growth of customary international law).

[12] Statute of the Int'l Ct. of Just. art. 38, as annexed to the Charter of the U.N., *entered into force* Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153; *see e.g.* A.A. D'Amato, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 1-10 (1971); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GEORGIA FJ. INT'L & COMP. L. 1, 10-21 (1995/96); *Aziz v. Alcolac, Inc*., 658 F.3d 388, 398-99 (4th Cir. 2011) (recognizing CIL as one of the sources of international law).

[13] *Flores v. S. Peru Copper Corp*., 414 F.3d 233, 248 (2d Cir. 2003).

[14] *See e.g.* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INT'L LAW: BEYOND THE NUREMBERG LEGACY 18 (2d ed. 2001); Jordan J. Paust, *The Significance and Determination of Customary Int'l Human Rights Law: The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA.J. Int'l & Comp. L. 147, 148 (1996) (noting that "nearly all agree that customary human rights laws has two primary components … (1) patterns of practice or behavior, and (2) patterns of legal expectation."); Restatement (Third) of the Foreign Relations Laws of the United States § 102(2) (Am. Law Inst. 1987); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co*., 517 F.3d 104, 116 (2d Cir. 2008); *M.C. v. Bianchi*, 782 F. Supp. 2d 127, 130 (E.D. Pa. 2011).

[15] *Flores v. S. Peru Copper Corp*., 414 F.3d at 248.

[16] *Id*. at 247.

The ICCPR's predecessor, the Universal Declaration of Human Rights ("UDHR"), declared in 1948 that "No one shall be subjected to arbitrary arrest, detention, or exile."[17] Following this declaration, widespread ratification of international treaty law on the prohibition of arbitrary detention occurred as did the prohibition's translation into national laws.[18] Even states not party to the ICCPR, such as China and Saudi Arabia, subscribed to the prohibition of arbitrary detention by codifying it into domestic legislation.[19] Today, the prohibition is reflected in at least 119 national constitutions.[20] This international and domestic codification has led to "a near universal State practice" of prohibiting arbitrary detention, with the prohibition reaching a level of uniformity, consistency, and regularity which has in turn generated in states a sense of legal obligation, *opinio juris*, to it.[21] This *opinio juris* is reflected in the numerous United Nations ("UN") resolutions, recommendations, and reports that address arbitrary detention for all states without distinction according to treaty obligations as well as in the International Court of Justice's ("ICJ") reliance on the norm in finding violations of international law.[22] Taken together, this consistent state practice and *opinio juris* fulfills the requirements for an

[17] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 9 (Dec. 10, 1948) [hereinafter UDHR]. The UDHR itself is not binding on states. However, many of its provisions are considered CIL.
[18] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 42-43.
[19] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 46; David Weissbrodt and Brittany Mitchell, *The U.N. Working Group on Arbitrary Det. Procedures and Summary of Juris.*, HUMAN RIGHTS Q. 655, 662 (2016).
[20] M. Cherif Bassiouni, *Human Rights in the Context of Crim. Just.: Identifying Int'l Procedural Protections and Equivalent Protections in Nat'l Const.*, 3 DUKE J. COMP. & INT'L L. 235, 261 (1993).
[21] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 43.
[22] *See e.g.*, S.C. Res. 417 (Nov. 4, 1977); S.C. Res. 473 (Jun. 13, 1980); G.A. Res. 62/159 (Mar. 11, 2008); G.A. Res. 43/173, *Body of Principles for the Protection of All Persons under Any Form of Det. or Imprisonment* (Dec. 9, 1988); G.A. Res. 45/113, *U.N. Rules for the Protection of Juveniles Deprived of Their Liberty* (Dec. 14, 1990); G.A. Res. 40/33, *U.N. Standard Minimum Rules for the Administration of Juvenile Just.* (Nov. 29, 1985); U.N. High Comm'r for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Det. of Asylum Seekers and Alternatives to Det.* (2012) [hereinafter UNHCR Detention Guidelines]; *U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. Rep. 3, ¶ 91 (May 24).

international norm to crystalize into CIL. Resultingly, the prohibition of arbitrary detention is considered universally binding on all states as a CIL norm.[23]

1. The Prohibition of Arbitrary Detention is a Non-Derogable Norm of International Law as it Enjoys a *Jus Cogens* Status.

The prohibition of arbitrary detention enjoys the highest status as a *jus cogens*, or peremptory, norm of international law.[24] Once an international norm is incorporated into CIL, it may then rise to the level of a *jus cogens* norm if the international community, as a whole, recognizes it as "absolutely essential to coexistence in the international community" such that derogation from the norm is not permitted.[25] *Jus cogens* norms are considered "hierarchically superior to other rules of international law and are universally applicable."[26] The Vienna Convention on the Law of Treaties defines a *jus cogens* norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[27]

The UN Working Group on Arbitrary Detention ("WGAD") has concluded that the prohibition of arbitrary detention is a *jus cogens* norm due to its non-derogable nature under both

[23] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 43; Restatement (Third) of the Foreign Relations Laws of the United States, *supra* note 14, at § 102(2); ICRC Rule 99, *supra* note 1; Mannion, *supra* note 2, at 1235.
[24] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 51; Restatement (Third) of the Foreign Relations Laws of the United States, *supra* note 14, at § 702(n); Lucien J. Dhooge, *Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT'L & COMP. L. REV. 393, 469 (2006); *see Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (finding that because *jus cogens* norms do not depend solely on the consent of states for their binding force, they enjoy the highest status within international law).
[25] U.N. Conference on the Law of Treaties, 1st and 2nd Sess. Vienna Mar. 26 – May 24, 1968, Statement of Mr. Suarez (Mexico) at 294, U.N. Doc. A/CONF./39/11/Add.2 (1971); *see Comm. Of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *Al Shimari v. CACI Premier Tech., Inc*., 368 F. Supp. 3d 935 (E.D. Va. 2019).
[26] Int'l Law Comm'n, Peremptory Norms of General Int'l Law: Text of the Draft Conclusions and Draft Annex Provisionally Adopted by the Drafting Comm. on First Reading, Draft Conclusion 3[3(2)], U.N. Doc. A/CN.4/L.936 (May 29, 2019).
[27] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 33.

treaty law and CIL.[28] The United States appears to be in agreement with this conclusion.[29] The prohibition is non-derogable since the determination of whether a deprivation of liberty is arbitrary in any given circumstance already factors in necessity and proportionality, the elements required for any derogation from an international human rights obligation.[30] Moreover, the Human Rights Committee has opined that reservations to Article 9 of the ICCPR allowing a State party to engage in arbitrary detention would be "incompatible with the object and purpose of the Covenant."[31] As a result of being a *jus cogens* norm, "arbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers."[32] Accordingly, the prohibition of arbitrary detention is at all times a non-derogable legal obligation on all states.

C. The United States is Bound by Treaty Law and Customary International Law to Uphold the International Norm on the Prohibition of Arbitrary Detention.

The U.S. has an international legal obligation to uphold the prohibition of arbitrary detention under treaty law.[33] Most significantly, the U.S. has signed and ratified the ICCPR, with no reservations, understandings, or declarations ("RUDs") relevant to Article 9.[34] Since the U.S.

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[28] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 47-51*; see e.g.* U.N. Human Rights Comm., *General Comment No. 29: Article 4: Derogations During a State of Emergency*, ¶ 11, U.N. Doc. CCPR/C/Rev.1/Add.11 (Aug. 31, 2011) [hereinafter HRC *General Comment No. 29*]; Arab Charter, *supra* note 9, at art. 14 ¶ 2; American Convention, *supra* note 3, at art. 27 ¶ 2.

[29] Restatement (Third) of the Foreign Relations Laws of the United States, *supra* note 2, at § 702(n).

[30] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 48; *see* OEA/Ser.L/V/II.19 Doc 32, Inter-American Yearbook on Human Rights, pp. 59-61 (1968). An essential condition for valid derogation from an international obligation in a human rights treaty is that such derogation must be (1) necessary for the state to safeguard an essential interest against a grave and imminent peril and (2) proportionate. WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 50; *see also* Human Rights Comm., *General Comment No. 35: Article 9 Liberty and Security of Person*, ¶ 66, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter HRC *General Comment No. 35*]

[31] HRC *General Comment No. 35*, *supra* note 30, at ¶ 68.

[32] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 8.

[33] ICCPR, *supra* note 3, at art. 9; Refugee Convention, *supra* note 3, *as extended by* the Protocol Relating to the Status of Refugees, Dec. 16, 1966, 606 U.N.T.S. 267, art. 31; American Convention, *supra* note 3, at art. 7(3); American Declaration, *supra* note 3, art. XXV.

[34] International Covenant on Civil and Political Rights, United States of America: Declarations and Reservations, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

is bound by the international treaties to which it is a party, by ratifying the ICCPR, the U.S. legally bound itself to the Article 9 prohibition of arbitrary detention.[35] Executive order has clarified that it is the U.S.' "policy and practice . . . fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR."[36]

In addition to ICCPR obligations, the American Declaration of the Rights and Duties of Man ("American Declaration") provides in Article XXV that "[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law" and that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay."[37] Although the American Declaration is not a binding treaty, it is considered a source of legal obligation for members of the Organization of American States (OAS) as the authoritative interpretation of the human rights commitments of the Charter of the OAS.[38] Thomas Buergenthal, one of the world's leading international human rights experts, said of the American Declaration,

> Although the American Declaration, not unlike the Universal Declaration, was not deemed to be legally binding at the time it was proclaimed in 1948, it has now been accepted as a normative instrument of the Inter-American System that contains the authoritative catalogue of the Human Rights which all State Parties to the OAS Charter are required to promote.[39]

Since the U.S. is a member of the OAS, it follows then that it does have legal obligations stemming out of the American Declaration, including Article XXV. However, the U.S. maintains

[35] Restatement (Third) of Foreign Relations Law of the United States, *supra* note 2, at § 102.
[36] Implementation of Human Rights Treaties, Executive Order No. 13107, 63 Fed. Reg. 68,991 (Dec. 10,1998).
[37] American Declaration, *supra* note 3, at art. XXV.
[38] *See* James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, Inter-Am. Comm'n H.R. (1987) (finding the United States legally bound to the rights enumerated in the American Declaration); *see* Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (July 14, 1989); *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).
[39] Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 16 (1988).

an official and judicial position that it is not bound by the American Declaration as it is "merely an aspirational document" and not a treaty.[40]

The U.S. is also legally bound to protect refugees specifically from arbitrary detention under the 1951 Refugee Convention, which binds the U.S. through its Optional Protocol.[41] Article 31 of the Refugee Convention has been interpreted to protect refugees from arbitrary detention.[42] It reads:

> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.[43]

Finally, the U.S. is obligated to uphold the prohibition of arbitrary detention under CIL. To enjoy customary status in the U.S., an international norm must be "specific, universal, and obligatory."[44] Typically, the violation of a *jus cogens* norm is enough to satisfy this standard.[45] In determining what norms constitute CIL, the US Supreme Court advised in 1900:

> "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their

[40] *Igartua v. United States*, 626 F.3d 592, 603 (1st Cir. 2010); *see also Flores-Nova v. Attorney General of U.S.*, 652 F.3d 488, 494 (3rd Cir. 2011).
[41] Refugee Convention, *supra* note 3. The United States adheres to Articles 2 through 34 of the Refugee Convention by virtue of the Protocol relating to the Status of Refugees. Protocol relating to the Status of Refugees, *supra* note 33.
[42] *See* Cambridge University Press, *Global Consultations on International Protection - Summary Conclusions: Article 31 of the 1951 Convention*, ¶ 11(b) (Nov. 2001); *see generally* U.N. High Comm'r for Refugees, *Conclusions Adopted by the Executive Comm. on the International Protection of Refugees*, Conclusion No. 44 (Dec. 2009).
[43] Refugee Convention, *supra* note 3, at art. 31.
[44] *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"); *see Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2nd Cir. 1980).
[45] *Alvarez-Machain v. U.S.*, 331 F.3d 604, 613 (9th Cir. 2003); *see In re Estate of Ferdinand Marcos*, 25 F.3d at 1475.

> authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[46]

The U.S. appears to have recognized arbitrary detention as enjoying such customary status under international law. The Restatement (Third) of Foreign Relations Law § 702 includes "prolonged arbitrary detention" on its non-exhaustive list of CIL norms which have *jus cogens* status.[47] Restatements of the Law are persuasive secondary sources of law, and while they do not replace legal precedents or controlling statutes, they do synthesize and restate existing case law and statutes to articulate general principles and rules of law.[48] Despite the relatively clear Restatements though, it should be noted that US courts have dealt with CIL inconsistently, leading to dysfunctional jurisprudence which fails to clarify when and how CIL is applied in the U.S.[49] Additionally, there are some arguments that the U.S. does not recognize arbitrary detention as a norm of CIL, pointing to the landmark Supreme Court case *Sosa v. Alvarez-Machian* as proof. The Court held in *Sosa* that "a single detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[50] Importantly however, the Court did not outright reject arbitrary detention as a CIL norm here.[51] Rather, it rejected the facts of the case as amounting to arbitrary detention. Thus, *Sosa* left intact the U.S.' recognition of the prohibition of arbitrary detention as CIL.

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[46] *The Paquete Habana*, 175 U.S. 677, 700 (1900).
[47] The Restatement (Third) of Foreign Relations Laws of the United States, *supra* note 2, at § 702(n).
[48] *Restatement of the Law*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/restatement_of_the_law#:~:text=Primary%20tabs,ALI)%20to%20clarify%20the%20law.
[49] *See* Gary Born, *Customary Int'l Law in U.S. Courts*, 92 WASH. L. REV.1641, 1645-46 (2017). (discussing how courts are torn between the modernist position, which posits that all rules of CIL are rules of US federal law and are directly applicable in US courts, and the revisionist position which holds that CIL does not constitute federal common law and thus, absent treaty or statutory authorization, federal judges cannot find or make rules of international law).
[50] *See Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2769 (2004).
[51] *Id.* at 2765.

Bound by both treaty law and CIL, the U.S. has international legal obligations as it relates to the prohibition of arbitrary detention. Since the prohibition is a *jus cogens* norm, the U.S. has obligations *erga omnes*[52] owed to the international community as a whole.[53] This includes obligations to both prevent and punish violations.[54] Accordingly, the U.S. may not arbitrarily detain any person and must provide safeguards against arbitrary detention.

II. Despite International Treaties Not Defining Arbitrary Detention, International Bodies Have Created the Hard and Soft Law Norms Required to Make the Determination of When Detention Becomes Arbitrary.

Although the prohibition of arbitrary detention is contained in all major international human rights treaties, none of these treaties go so far as to explicitly define what constitutes "arbitrary detention" or an "arbitrary deprivation of liberty." Given that detention alone is not a violation of human rights, "international law has progressively endeavored to define the limits beyond which a detention, whether administrative or judicial, would become arbitrary."[55]

A. The Prohibition of Arbitrary Detention Applies to Administrative Detention.

Early legal development around the prohibition of arbitrary detention quickly established that the prohibition is applicable not just to deprivations of liberty in criminal cases but also in

[52] *Erga omnes* is Latin for "duties toward all." Obligations *erga omnes* under international law refer to a country's duties that concern issues affecting the international community at large, not just the country's neighboring states. *Obligations erga omnes*, Black's Law Dictionary (11th ed. 2019).
[53] Dr. Thomas Weatherall, *Lessons from the Alien Tort Statute: Jus Cogens as the Law of Nations*, 103 GEO. L.J. 1359, 1364 (2015); *see, e.g.*, Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5); Questions Relating to Obligation to Prosecute or Extradite (Belg. V. Sen.), 2012 I.C.J. 422, ¶69 (Jul. 20); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 47, ¶¶ 147, 162 (Feb. 26); Armed Activities on Territory of Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 6, ¶¶ 64, 125 (Feb. 3); Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶¶ 88, 155-57 (Jul. 9).
[54] Weatherall, *supra* note 53, at 1365; Application of Convention on Prevention and Punishment of Crime of Genocide, *supra* note 53, at ¶ 31.
[55] The Working Grp. on Arbitrary Det., *Revised Fact Sheet No. 26*, p. 3 (Feb. 8, 2019).

cases of administrative detention, including for immigration-related purposes.[56] In 1982, the Human Rights Committee, the treaty body for the ICCPR, stated in its General Comment No. 8 that Article 9 of the ICCPR applies to *all* deprivations of liberty.[57] (emphasis added). International courts have affirmed this conclusion. In the *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the ICJ held the following:

> The provisions of Article 9, paragraphs 1 and 2, of the [ICCPR], and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued. The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure. . .[58]

The Inter-American Commission has come to a similar conclusion regarding Article XXV of the American Declaration.[59] Support for this is also found in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides protections against arbitrary detention for all those under any form of detention.[60]

B. Detention is Arbitrary When It Is Without Legal Justification, Based Upon the Exercise of Universal Human Rights, Without Fair Trial Protections, Administrative in Nature and Prolonged, and/or in Violation of International Anti-Discrimination Standards.

In 1991, the former Commission on Human Rights established the WGAD with a mandate including the formulation of deliberations on general issues of arbitrary detention in

[56] Human Rights Comm., *General Comment No. 8: Article 9 Right to Liberty and Security of Persons*, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (Jun. 30, 1982) [hereinafter HRC *General Comment No. 8*]; HRC *General Comment No. 35*, *supra* note 30; The European Convention on Human Rights (ECHR) is the only international instrument explicitly referring to the admissibility of the detention of migrants to prevent them to entry the country without being authorized or with the view to his or her deportation or extradition. European Convention, *supra* note 10, at art. 5(1)(f).
[57] HRC *General Comment No.* 8, *supra* note 56, at ¶ 1.
[58] Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 77 (Nov. 30).
[59] Rafael Ferrer-Mazorra et al. v. U.S., Case 9903, Inter-Am. Comm'n H.R., Rep. No. 51/01, OEA/Ser.L.V/II.111 doc. 20 ¶ 181, (2001).
[60] *See Body of Principles for the Protection of All Persons under Any Form of Det. or Imprisonment*, *supra* note 22.

order to assist states in preventing and guarding against arbitrary deprivation of liberty.[61] When defining the mandate of the WGAD, the Commission on Human Rights considered as arbitrary "those deprivations of liberty which for one reason or another are contrary to relevant international provisions laid down in the Universal Declaration of Human Rights or in the relevant international instruments ratified by States."[62] After its establishment, the WGAD adopted its own criteria for when detention is arbitrary. According to the WGAD, deprivation of liberty is arbitrary if a case falls into one of the following categories: (1) deprivation of liberty without legal justification; (2) deprivation of liberty resulting from the exercise of universal human rights; (3) grave violations of the right to fair trial; (4) *prolonged administrative custody*; (5) deprivation of liberty as a violation of international anti-discrimination standards.[63] (emphasis added). Although the WGAD does not have the power to provide authoritative interpretations of any human rights treaty or to legally bind states through its opinions, its body of work has contributed heavily to the development of international law around the issue of arbitrary detention, helping guide state conduct through soft law rules, standards, and principles.[64] The WGAD's definitions and interpretations are understood to be highly persuasive given their root in international instruments, opinions by authoritative treaty bodies, and decisions by international courts.[65]

[61] U.N. Comm'n on Human Rights Res. 1991/42, U.N. Doc. E/CN.4/RES/1991/42 (Mar. 5, 1991); U.N. Comm'n on Human Rights Res. 1997/50, U.N. Doc. E/CN.4/1997/50 (Apr. 15, 1997); Human Rights Council Res. 15/18, U.N. Doc. A/HRC/15/L.24 (Sep. 27, 2010); Human Rights Council Res. 24/7, U.N. Doc. A/HRC/24/L.8 (Sep. 20, 2013).
[62] Revised Fact Sheet No. 26, *supra* note 55, at p. 5.
[63] *Ibid*. at p. 5-7; David Weissbrodt and Brittany Mitchell, *The U.N. Working Group on Arbitrary Det. Procedures and Summary of Juris.*, HUMAN RIGHTS Q. 655, 666 (2016).
[64] Jared M. Genser & Margaret K. Winterkorn-Meikle, *The Intersection of Politics and In'l Law: The U.N. Working Grp. on Arbitrary Det. in Theory and in Practice*, 39 COLUM. HUM. RTS. L. REV. 687, 688 (2008); Weissbrodt & Mitchell, *supra* note 63.
[65] *See* Genser & Winterkorn-Meikle, *supra* note 64.

International bodies together have fleshed out the contours of the prohibition of arbitrary detention, largely reflecting and affirming the WGAD criteria for arbitrary detention. As a starting point, all deprivations of liberty must have a legal basis in domestic law,[66] and they should not extend "beyond the period for which the state party can provide appropriate justification."[67] However, even a detention prescribed by law may be arbitrary.[68] The Human Rights Committee in its General Comment No. 35 on Article 9 of the ICCPR stated,

> An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[69]

Thus, detention authorized by law may still be considered arbitrary if "premised upon an arbitrary piece of legislation or is inherently unjust."[70] It follows then that decisions to detain must be based upon individual assessments which evaluate the necessity of detention to achieve a legitimate and lawful purpose.[71]

Consistent with the requirement for due process of law, for a detention to not be arbitrary, the person deprived of their liberty must be able to bring proceedings before a court to challenge

[66] ICCPR, *supra* note 3, at art. 9(2); *see* HRC *General Comment No. 35*, *supra* note 30, at ¶¶ 14, 23; *see* Working Grp. on Arbitrary Det., *Individual Complaints and Urgent Appeals*, https://www.ohchr.org/en/issues/detention/pages/complaints.aspx; UNHCR Detention Guidelines, *supra* note 22, at ¶ 15; *Body of Principles for the Protection of All Persons under Any Form of Det. or Imprisonment*, *supra* note 22, at Principle 2.
[67] *Madani v. Algeria*, Commc'n No. 1172/2003, Human Rights Comm., ¶ 8.4 (Mar. 28, 2007); *C v. Australia*, Commc'n No. 900/1999, Human Rights Comm., ¶ 8.2 (Oct. 28, 2002); *Baban v. Australia*, Commc'n No. 1014/2001, Human Rights Comm., ¶ 7.2 (Aug. 6, 2003).
[68] *See* HRC *General Comment No. 35*, *supra* note 30, at ¶ 12; WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 63.
[69] HRC *General Comment No. 35*, *supra* note 30, at ¶ 12.
[70] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 63.
[71] UNHCR Detention Guidelines, *supra* note 22, at ¶¶ 19, 21.

the legality of their detention.[72] This right is non-derogable.[73] Moreover, the decision to detain a person must be periodically reviewed.[74] Additionally, the adhesion to or violation of fair trial protections, contained within Article 14 of the ICCPR and elsewhere, are relevant to determining whether a detention is arbitrary.[75] Although Article 14 refers to criminal cases, its protections also apply to administrative cases where sanctions imposed "because of their purpose, character, or severity, must be regarded as penal."[76] Such fair trial protections include the detainee's right to (1) know the reason for detention, (2) be promptly brought before a judge, (3) have access to a lawyer, (4) have their family know where they are, and (5) be able to see their family.[77] Importantly, a fair trial also includes the right to be tried without "undue delay."[78] When a person is detained, a state carries a heightened burden to expedite proceedings, ensuring the detention "does not last longer than necessary in the circumstances of the specific case."[79]

Even when detention is justified and fair trial protections provided, improper conditions of detention may make the detention arbitrary.[80] The Human Rights Committee has stated that "certain conditions of detention . . . may result in procedural violations of [Article 9]."[81] All

[72] ICCPR, *supra* note 3, at art. 9(4); HRC *General Comment No. 35*, *supra* note 30, at ¶ 39; *Revised Fact Sheet No. 26*, *supra* note 55, at ¶ 47; *see Maksim Gavrilin v. Belarus*, Commc'n No. 1342/2005, Human Rights Comm., U.N. Doc. CCPR/C/89/D/1342/2005, ¶ 7.4 (Mar. 4, 2007); *Body of Principles for the Protection of All Persons under Any Form of Det. or Imprisonment*, *supra* note 22, at Principle 11, 32.
[73] *Revised Fact Sheet No. 26*, *supra* note 55, at ¶ 48-49; HRC *General Comment No. 35*, *supra* note 30, at ¶ 67; *see* HRC *General Comment No. 29*, *supra* note 28, at ¶¶ 11,16; Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 42-44 (1987); Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 41(1) (1987); Neira Alegria et al v. Peru, Judgment, Inter-Am. Ct. H.R., ¶¶ 82-84, 91(2) (Jan. 19, 1995).
[74] HRC *General Comment No. 35*, *supra* note 30, at ¶ 12; *Body of Principles for the Protection of All Persons under Any Form of Det. or Imprisonment*, *supra* note 22, at Principle 39.
[75] HRC *General Comment No. 35*, *supra* note 30, at ¶ 61.
[76] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 68.
[77] ICCPR, *supra* note 3, at art. 9(2-3).
[78] *Ibid.* at art. 9(3)(c).
[79] Human Rights Comm., *General Comment No. 32: Article 14 Right to Equality Before Courts and Tribunals and to Fair Trial*, ¶ 35, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).
[80] HRC *General Comment No. 35*, *supra* note 30, at ¶ 59.
[81] *Ibid.*

conditions of detention must be both humane and dignified.[82] Detainees should have access to appropriate medical care, contact with relatives and friends, regular physical exercise, and food of nutritional value.[83] Additionally, they should have access to suitable basic necessities such as beds, bedding, shower facilities, basic toiletries, and clean clothing.[84] Moreover, access to reading materials and educational training is part of creating humane conditions of detention.[85]

III. The United States is Violating its International Legal Obligations by Arbitrarily Detaining Asylees, Refugees, and Immigrants.

A. International Law Protects Migrants from Arbitrary Immigration Detention.

In 1997, the Commission on Human Rights requested that the WGAD "devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy."[86] In 1999, the WGAD developed soft law criteria "for determining whether the deprivation of liberty of asylum seekers and immigrants might be arbitrary," leading to the adoption of Deliberation No. 5 on Deprivation of Liberty of Migrants.[87] In 2017, in light of the rising use of immigration detention globally, the WGAD released a Revised Deliberation No. 5, consolidating its own jurisprudence and taking into account new developments in international law.[88] Critically, Revised Deliberation No. 5 proclaims the

[82] UNHCR Detention Guidelines, *supra* note 22, at Guideline 8; *see* ICCPR, *supra* note 3, at art. 7, art. 10, and art. 17; *Body of Principles for the Protection of All Persons under Any Form of Det. or Imprisonment*, *supra* note 22, at Principle 1; *see U.N. Rules for the Protection of Juveniles Deprived of Their Liberty*, *supra* note 22.
[83] UNHCR Detention Guidelines, *supra* note 22, at ¶ 48(vi-viii), (xi); *Body of Principles for the Protection of All Persons under Any Form of Det. or Imprisonment*, *supra* note 22, at Principles 15, 19, 24.
[84] UNHCR Detention Guidelines, *supra* note 22, at ¶ 48(x).
[85] *Ibid*. at ¶ 48(xii-xiii); *Body of Principles for the Protection of All Persons under Any Form of Det. or Imprisonment, supra* note 22, at Principle 28.
[86] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 1.
[87] *Ibid*. at ¶ 2.
[88] *Ibid*. at ¶ 3.

following: "Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period…"[89] The Inter-American Commission has expounded on this, advising that "member states must enact immigration laws and establish immigration policies that are premised on a presumption of liberty – the right of the immigrant to remain at liberty while his or her immigration proceedings are pending – and not a presumption of detention."[90] This position has been incorporated by and reiterated across United Nations and other international bodies.[91] As a result, states must seek alternatives to detention, allowing state objectives to be achieved in manners less restrictive on liberty.[92] Put succinctly, "States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, as long as they are compatible with the norms of human rights protection."[93]

B. Immigration Detention That Does Not Abide by the Principles of Reasonableness, Necessity, and Proportionality is Arbitrary.

Immigration detention "must be prescribed by law, justified as reasonable, necessary, and proportionate in the light of the circumstances and reassessed as it extends with time."[94] In

[89] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 12; *see* UNHCR Detention Guidelines, *supra* note 22, at Guideline 4.1.
[90] *Velez Loor v. Panama*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 39 (Nov. 23, 2010).
[91] UNHCR Detention Guidelines, *supra* note 22, at Guideline 4.1; Nils Melzer (Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, ¶ 65(c), U.N. Doc. A/HRC/37/50 (Nov. 28, 2018) [hereinafter *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*]; Francois Crepeau, (Special Rapporteur on the Human Rights of Migrants), *Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council Twentieth Session*, ¶ 69, U.N. Doc. A/HRC/20/24 (Ap. 2, 2012) [hereinafter *Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council Twentieth Session*]; U.N. High Comm'r for Refugees, *Beyond Det.: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees*, p. 5 (2004); U.N. High Comm'r for Refugees, *Compilation of Int'l Human Rights Law and Standards on Immigr. Det.*, Guideline 4.3 (Feb. 2018); *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle III(2), Inter-Am. Comm'n H.R. (2008).
[92] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 16; UNHCR Detention Guidelines, *supra* note 22, at Guideline 4.3; *see C v. Australia*, *supra* note 67, at ¶ 8.2.
[93] *Velez Loor v. Panama*, *supra* note 90, at ¶ 97.
[94] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 20; ; HRC *General Comment No. 35*, *supra* note 30, at ¶18; *see Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council Twentieth*

assessing the use of immigration detention and its interaction with Article 9 of the ICCPR, the Human Rights Committee has said the following:

> Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be ***justified as reasonable, necessary and proportionate*** in the light of the circumstances and reassessed as it extends with time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identify if it is in doubt. To detain them further while their claims are resolved would be arbitrary 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. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[95] (emphasis added).

1. The United States' Immigration Detention System Fails the Proportionality Requirement because Migrants are Mandatorily Detained without an Individual Assessment.

The principle of proportionality is a critical tool in international human rights law most often used to "balance individual rights against public interests."[96] The principle of proportionality is largely considered uncontestable and its vitality is established both in the U.S. and abroad.[97] For immigration detention to be proportional, it must not be automatic and/or mandatory.[98] Under international law, the principle of proportionality requires that alternatives to

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Session, *supra* note 91, at ¶ 9; *Compilation of Int'l Human Rights Law and Standards on Immigr. Det.*, *supra* note 91, at Guideline 4.2.; *see A v. Australia*, Commc'n No. 560/1993, Human Rights Comm., ¶ 9.3-9.4 (Apr. 30, 1997); *see Jalloh v. Netherlands*, Commc'n No. 794/1998, Human Rights Comm., ¶ 8.2 (Apr. 125, 2002); *see Nystrom v. Australia*, Commc'n No. 1557/2007, Human Rights Comm., ¶ 7.2-7.3 (Sep. 1, 2011); Gilman, *supra* note 38, at 267.

[95] HRC *General Comment No. 35*, *supra* note 30, at ¶ 18.

[96] Michael Flynn, *Who Must be Detained? Proportionality as a Tool for Critiquing Immigr. Det. Policy*, REFUGEE SURVEY Q. 40, 41 (2012). The European Court of Human Rights, for example, has regularly and consistently incorporated the proportionality principle in its deliberations on whether "the reasons given by authorities for the restrictive measure are relevant and sufficient." *See* GALINA CORNELISSE, IMMIGRATION DETENTION AND HUMAN RIGHTS: RETHINKING TERRITORIAL SOVEREIGNTY 302 (2010).

[97] Michael J. Wishnie, *Immigr. Law and the Proportionality Requirement*, 2 UC IRVINE L. REV. 415, 416 (2012).

[98] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 19; *see* AMNESTY INTERNATIONAL, THE IMPACT OF INDEFINITE DETENTION: THE CASE TO CHANGE AUSTRALIA'S MANDATORY DET. POLICY (Jun. 29, 2005); Several U.N. treaty bodies, including CAT, CCPR, CERD, and CRC, have dealt extensively with mandatory immigration detention and its failure to satisfy the necessity and proportionality requirements. For an extensive list of relevant cases out of these bodies, *see* Mariette Grange and Izabella Majcher, *When is Immigr. Det. Lawful? The Monitoring Practices of UN Human Rights Mechanisms*, GLOBAL DET. PROJECT (Feb. 2017).

detention be considered in every circumstance.[99] This is consistent with the fundamental principle of the U.S.' legal system that people, including those in immigration proceedings, cannot be deprived of their liberty without due process of law.[100]

In 2014, the Human Rights Committee in its Concluding Observations on the Fourth Periodic Report of the United States expressed concern with the U.S.' use of mandatory detention for immigrants without individual assessment.[101] This led to a recommendation that the "State party review its policies of mandatory detention and deportation of certain categories of immigrants in order to allow for individualized decisions."[102] Then, in 2016, the WGAD visited the U.S. at its invitation.[103] Like the Human Rights Committee just a few years prior, WGAD expressed concern with the U.S.' practice of mandatory detention for immigration purposes.[104]

In 2018, the Department of Homeland Security ("DHS") released a report stating that U.S. Immigration and Customs Enforcement ("ICE") was responsible for "the detention of removable aliens who present a flight risk, a threat to public safety, or fall within ***mandatory detention requirements***."[105] (emphasis added). Under the Illegal Immigration Reform and

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[99] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 24; Report of the Working Grp. on Arbitrary Det., *U.N. Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, ¶ 108, U.N. Doc. A/HRC/30/37 (Jul. 6, 2015); Grange and Majcher, *supra* note 98, at 5; *C v. Australia*, *supra* note 67 at ¶ 8.2; *Baban v. Australia*, *supra* note 67, at ¶ 7.2.; *Kwok v. Australia*, Commc'n No. 1442/2005, Human Rights Comm., ¶ 9.3 (Nov. 23, 2009).

[100] Wishnie, *supra* note 97, at 417; *Zadvydas v. Davis*, 121 S.Ct. 2491 (2001) (holding that the Due Process Clause guarantees fundamental fairness in removal proceedings); *Landon v. Plasencia*, 103 S.Ct. 321 (1982) (holding that due process protections apply in deportation proceedings); American Civil Liberties Union, *Analysis of Immigr. Det. Policies: Support Fair Detention Policies*, https://www.aclu.org/other/analysis-immigration-detention-policies. For a legal analysis of mandatory detention and due process rights for asylum seekers in the United States *see* Hillel R. Smith, IS MANDATORY DETENTION OF UNLAWFUL ENTRANTS SEEKING ASYLUM CONSTITUTIONAL, CONGRESSIONAL RESEARCH SERVICE (Jan. 27, 2021).

[101] Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the U.S., ¶ 15, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) [hereinafter Fourth Periodic Report of the USA].

[102] Fourth Periodic Report of the USA, *supra* note 101, at ¶ 15.

[103] Working Grp. on Arbitrary Det., *Report of the Working Grp. on Arbitrary Det. on its Visit to the U.S.*, ¶ 1, U.N. Doc. A/HRC/36/37/Add.2 (Jul. 17, 2017) [hereinafter WGAD *Report on Visit to USA*].

[104] *Ibid.* at ¶¶ 24-28.

[105] IMMIGR. AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FED. PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DET. SERVICES, DEPT. OF HOMELAND SECURITY (Feb. 2018),

Immigrant Responsibility Act ("IIRIRA"), passed in 1996, mandatory detention of non-United States citizens has grown exponentially alongside the use of summary removals.[106] Under the IIRIRA, non-United States citizens can be mandatorily detained if they have been convicted of certain criminal offenses, regardless of the seriousness of the offense, or are deemed to be a national security risk.[107] The mandatory detention scheme found in the IIRIR has been interpreted as "stripping DHS and Immigration Judges of their discretion to release an individual who falls into one of the [mandatory detention] categories" contained in the statute.[108] Furthermore, because of expedited removal, asylum seekers are subject to mandatory detention if their "inadmissibility is being considered" or if they have a prior removal order.[109]

The US Supreme Court in 2003 upheld the use of such mandatory detention in *Demore v. Kim*, finding that mandatory detention for the limited period of a deportable immigrant's removal proceedings does not violate due process.[110] *Demore* affirmed previous Supreme Court decisions

https://www.oig.dhs.gov/reports/2018/immigration-and-customs-enforcement-did-not-follow-federal-procurement-guidelines-when.

[106] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. §§ 1101-1178 (1996). Since the passage of the IIRIRA, DHS has implemented three types of summary removals: "expedited removal" for noncitizens who encounter immigration authorities at or near a US border with insufficient or fraudulent documents; "reinstatement of removal" for noncitizens who unlawfully reenter after a prior removal order; and "administrative removal" for noncitizens without lawful permanent resident status but with a prior criminal conviction which is considered an "aggravated felony" under US immigration laws. IMMIGR. DET.: BEHIND THE RECORD NUMBERS, CENTER FOR IMMIGR. STUDIES.

[107] 8 U.S.C. § 1126(c); *Facts About Mandatory Detention*, DETENTION WATCH NETWORK; IIRIRA also broadened the list of crimes to be considered aggravated felonies under immigration law, despite not being considered neither aggravated nor felonies in the criminal context. *Analysis of Immigr. Det. Policies: Support Fair Det. Policies, supra* note 100; Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigr. Det.*, 45 HARV. C.R.-C.L. L. REV. 601, 611 (2010); *Demore v. Kim*, 123 S.Ct. 1708,1716 (2003).

[108] Philip L. Torrey, *Rethinking Immigr.'s Mandatory Det. Regime: Politics, Profit, and the Meaning of "Custody*," 48 U. MICH. J. L. REFORM 879, 880 (2015).

[109] WGAD *Report on Visit to USA*, *supra* note 103, at ¶ 24; 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.; 8 C.F.R. § 235.3(b)(2)(iii) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal"), (4)(ii) ("Pending the credible fear determination by an asylum officer and any review of that determination by an [immigration judge], the alien shall be detained."), (5)(i) (providing that an alien whose claim of being a U.S. citizen, LPR, asylee, or refugee cannot be verified "shall be detained pending review of the expedited removal order under this section").

[110] *Demore v. Kim*, 123 S.Ct. at 1722.

finding detention during removal proceedings to be constitutionally permissible.[111] In doing so, the Supreme Court relied upon the "very limited time of . . . detention at stake," noting that "in the majority of cases [§ 1226(c) detention] lasts less than the 90 days … considered presumptively valid."[112] While true that most migrant detainees remain in detention for only a brief period of time, many others undergo lengthy proceedings that last well beyond 90 days.[113] Although the Fifth Amendment requires immigration proceedings be "fundamentally fair," the reality is that specific due process protections for immigration related proceedings are primarily based on statutes and regulations.[114]

These mandatory detentions are no small percentage of overall immigration detention. Through a series of FOIA requests, the Immigration Legal Resource Center determined that around 71% of people detained by ICE in January 2018 were subject to mandatory detention.[115] Moreover, around 60% of migrants detained are being held while a decision on their case is pending.[116] In the U.S., detention has become the "presumptive norm in immigration cases."[117] This mandatory detention is imposed without an individual assessment determining that the detention is both legitimate and necessary.[118] In practice, the U.S.' immigration detention system

[111] *Demore v. Kim*, 123 S.Ct. at 1722; *see Wong v. U.S*, 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"); *Carlson v. Landon*, 342 U.S. 524 (1952); *Reno v. Flores*, 507 U.S. 292 (1993).
[112] *Rodriguez v. Barr*, W.D.N.Y. WL 5651603 (2020) (*citing Demore v. Kim*, 123 S.Ct. at 1720-21).
[113] Gilman, *supra* note 38, at 254-256
[114] Philip L. Torrey, *supra* note 108, at 881.
[115] Tara Tidwell Cullen, *ICE Released its Most Comprehensive Immigration Detention Data Yet. It's Alarming*, NATIONAL IMMIGRANT JUSTICE CENTER (Mar. 13, 2018); *see also Mandatory Detention*, DETENTION WATCH NETWORK.
[116] Gilman, *supra* note 38, at 252; Donald Kerwin and Serena Yi-Ying Lin, Migration Policy Inst., *Immigrant Det.: Can ICE Meet its Legal Imperatives and Case Management Responsibilities?* 16-17 (2009) (providing data supporting the conclusion that sixty-three percent of immigration detainees had pending cases, where pending cases are calculated as a percentage of the total number of cases for which information was available regarding pending or post-final order status).
[117] Gilman, *supra* note 38, at 246.
[118] WGAD *Report on Visit to USA*, *supra* note 103, at ¶ 29; *see Facts About Mandatory Detention*, DETENTION WATCH NETWORK.

"prioritizes abstract legal categories over case-specific facts."[119] Because this detention is imposed mandatorily and without consideration of other less restrictive alternatives, it does not meet the proportionality requirement for immigration detention. Accordingly, the current use of mandatory detention on non-United States citizens is arbitrary and thus in violation of the U.S.' international legal obligations.

2. The United States' Immigration Detention System Fails the Reasonableness Requirement because the United States' Aims in Detaining Migrants are Regularly Illegitimate.

For immigration detention to be considered reasonable, it must be used in pursuance of a legitimate aim of the state.[120] As a starting point, any legitimate purpose must be prescribed by domestic legislation, clearly and exhaustively providing the aims which justify the detention.[121] In addition to facilitating imminent expulsion, legitimate purposes for immigration detention include a risk of the migrant absconding from future legal proceedings or administrative processes, presenting a danger to themselves or others, or posing a risk to national security.[122]

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[119] Heeren, *supra* note 107, at 604.

[120] Inter-Amer. Comm'n on Human Rights, Report on Immigr. in the U.S.: Det. and Due Process ¶ 83 (2010); *A v. Australia*, *supra* note 94, at ¶ 9.2 (establishing that detention is arbitrary if not "necessary" to meet government goals); *Shams v. Australia*, Commc'n No. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, Human Rights Comm., ¶ 7.2 (2007) (holding that the state must provide adequate justification for detention).

[121] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 22.

[122] UNHCR Detention Guidelines, *supra* note 22, at ¶ 21; *Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council Twentieth Session*, *supra* note 91, at ¶ 81 (listing the "risk of absconding" and danger to public security as a legitimate objective for detention); El Hadji Malick Sow (Chairperson-Rapporteur), *Report of the Working Grp. on Arbitrary Det to the U.N. Human Rights Council Thirteenth Sess*., ¶ 59, U.N. Doc. A/HRC/13/30 (Jan. 15, 2010) [hereinafter WGAD *Report to the U.N. Human Rights Council Thirteenth Sess*.] (listing as reasons for detention the "risk of absconding" or the identification of an irregular migrant, as well as expulsion of a migrant with removal order); U.N. High Comm'r for Refugees and Ass'n for the Prevention of Torture, *Monitoring Immigr. Det. Practical Manual*, § 2.6 (2014); *F.J. et al v. Australia*, Commc'n No. 2233/2013, Human Rights Comm., ¶ 10.3 (Mar. 22, 2016) ("[A]sylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identify if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security."); Gilman, *supra* note 38, at 274-276; *Zadvydas v. Davis*, 121 S.Ct. 2491 (2001) (observing that immigration detention could be justifiably used when a migrant poses a flight risk or a danger to society); *Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council Twentieth Session*, *supra* note 91, at ¶ 69.

Detention for a short period of time may also be legitimate if used for the purposes of documenting entry, recording claims, or verifying identify.[123] In contrast, illegitimate purposes for immigration detention include detention as a penalty for illegal entry and/or as a deterrent to seeking asylum and detention of asylum-seekers on grounds of expulsion.[124]

During its visit to the U.S., the WGAD observed that "the mandatory detention of persons seeking to migrate to the U.S. appeared to be implemented to deter individuals from continuing their immigration claims and could result in asylum seekers revoking their legitimate immigration claims."[125] This conclusion is supported by the U.S.' own actions and statements.[126] Although deterrence as a goal of immigration detention policy is not entirely new in the U.S.,[127] it has been particularly advanced in the past several years.[128]

In 2009 at a congressional hearing on effective immigration detention management, Ranking Member of the Subcommittee on Border Maritime and Global Counterterrorism Mark Souder (R-IN) stated, "Detention is important for homeland security, public safety, and is a deterrent for illegal border crossers and false claims of asylum."[129] In a July 2014 statement to the Senate, Jeh Johnson, former Secretary of Homeland Security described an "aggressive

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[123] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 12; *see A v. Australia*, *supra* note 94, at ¶ 9.4; *see* WGAD *Report to the U.N. Human Rights Council Thirteenth Sess*., *supra* note 122, at ¶59.
[124] DETENTION WATCH NETWORK, ENDING THE USE OF IMMIGRATION DETENTION TO DETER MIGRATION, 1-2 (Apr. 2015).
[125] WGAD *Report on Visit to USA*, *supra* note 103, at ¶ 27.
[126] ENDING THE USE OF IMMIGR. DETT. TO DETER MIGRATION, *supra* note 124, at 1, 3; *see In re D-J-*, 23 I&N Dec. 572, 578 (A.G. 2003) ("The Coast Guard states that "[a]necdotal reporting and operational experience strongly suggests that detaining and swiftly repatriating those who illegally and unsafely attempt to enter the United States by sea is a significant deterrent to surges in illegal immigration and mass migration" (citing INS Brief, Exh. C, ¶ 9, Declaration of Captain Kenneth A. Ward, USCG)); AMNESTY INTERNATIONAL, USA: "YOU DON'T HAVE ANY RIGHTS HERE," 28-29 (2018).
[127] *See* Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Det. of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 277 (1999) (quoting Administration's Proposals on Immigration and Refugee Policy: Joint Hearing Before the Subcomm. On Immigration, Refugees, and Int'l Law of the H. Comm. On the Judiciary, 97th Cong. 6 (1981) (statement of William French Smith, Att'y Gen. of the United States.)).
[128] Aaron Korthuis, *Det. and Deterrence: Insights from the Early Years of Immigr. Det. at the Border*, 129 YALE L.J. FORUM 238 (2019).
[129] *Moving Toward More Effective Immigration Detention Management Before the Subcommittee on Border Marittime and Global Counterterrorism*, 111th Cong. 2 (2009).

deterrence strategy" as one of the aims of detention and removal under President Obama's administration.[130] Under the Obama Administration, the Department of Homeland Security ("DHS") opened a new detention center "billed as an 'effective deterrent' to continued family migration,"[131] and Immigration and Customs Enforcement ("ICE") "cit[ed] deterrence as a reason to justify families' continued detention during bond hearings when those families sought release."[132] Although a federal court ultimately enjoined the use of deterrence as a rationale for long-term detention for asylum seekers,[133] that did not stop the Trump Administration from using its own increasingly extreme immigration policies, including separating asylum-seeking families at the border,[134] eliminating the right to a bond hearing,[135] and limiting parole for asylum seekers,[136] to create a deterrent effect. By using detention as a means of deterrence, the U.S. violates its international legal obligations regarding the prohibition on arbitrary detention.[137]

Additionally, the WGAD found that the U.S.' immigration detention system was "influenced by economic incentives," noting the incentives of meeting "bed quotas" for private detention companies.[138] During President Obama's first term in office, a national immigration bed quota was introduced into Congress' annual appropriations bills.[139] Soon after, Congress

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[130] Jeh Johnson, Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Comm. on Appropriations (Jul. 10, 2014), https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations.
[131] Korthuis, *supra* note 128, at 241; Julia Preston, *Det. Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014).
[132] Korthuis, *supra* note 128, at 241-242; *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 175-76 (D.D.C. 2015).
[133] *R.I.L.-R. v. Johnson*, 80 F.Supp.3d 164, 186-91 (D.D.C. 2015).
[134] *See* Dept. of Justice: Office of Public Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry, Press Release No. 18-417 (Apr. 6, 2018); *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F.Supp. 3d 1133, 1136-40 (D.D. Cal. 2018).
[135] *See* Matter of M-S-, 271 I. &N. Dec. 5109-1- (A.G. 2019) (eliminating the right of asylum seekers who establish a bona fide claim to asylum to seek release through a bond hearing).
[136] *See, e.g.*, *Damus v. Nielson*, 313 F.Supp. 3d 317, 325 (D.D.C. 2018).
[137] ENDING THE USE OF IMMIGRATION DETENTION TO DETER MIGRATION, *supra* note 124, at 2.
[138] WGAD *Report on Visit to USA*, *supra* note 103, at ¶ 31; AMNESTY INT'L, U.S.: ARBITRARY DET. REMAINS EMBEDDED IN IMMIGR. CIVIL AND MILITARY DET. SYSTEMS (Aug. 20, 2017) (recognizing that the U.S.' detention bed mandate and funding works in tandem with mandatory detention laws to increase the arbitrary detention of migrants and asylum seekers).
[139] Anita Sinha, *Arbitrary Det.? The Immigr. Det. Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 86 (2017).

began urging ICE to require all detention beds remain filled.[140] Although ICE is not technically required to *fill* all of the beds, it is highly probable that ICE officers feel the political pressure to do so, leading them to detain immigrants more often than required.[141] In fact, a DHS Office of Inspector General ("OIG") report found that the bed quota led ICE "to make release decisions based on bed space availability, not only whether detention [was] necessary for public safety or to effect removals."[142] Private prison companies, particularly The GEO Group, Inc. and CoreCivic, have been the primary beneficiaries of these "bed quotas." [143] Since the number of immigrants in detention has grown substantially in the last few decades, the federal government has turned to private prison corporations to accommodate the increasing demand for "beds."[144] As a result of the profitability of immigration detention centers, private prison corporations are incentivized to increase the number of immigrants detained and to increase the bed quota, leading them to lobby the federal government extensively for the expansion of immigration detention.[145] Detention imposed for the purpose of filling beds and the pockets of private prison corporations fails the reasonableness requirement for immigration detention. As a result, the

[140] Silky Shah et al., Detention Watch Network and Center for Constitutional Rights, BANKING ON DETENTION: LOCAL LOCKUP QUOTAS & THE IMMIGRANT DRAGNET 2 (2015). In May 2014, however, former DHS Secretary Jeh Johnson testified before the House Comm. on the Judiciary that the immigration bed quota did not require the beds to remain filled. Torrey, *supra* note 108, at 906; *see U.S. Dep't of Homeland Sec.: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 70 (2014) (statement of Jeh Johnson, Sec'y of U.S. Dep't of Homeland Sec.) ("The statutory requirement is beds, not people. A lot of people think it's people, but it says beds.").
[141] Fatma E. Marouf, *Alternatives to Immigr. Det.*, 38 CARDOZO L. REV. 2141, 2145 (2017); Robert Koulish, *Immigr. Det. in the Risk Classification Assessment Era*, 16 CONN. PUB. INT. L.J. 1, 9 (2017).
[142] Dep't of Homeland Security, Office of the Inspector General (OIG), OIG-14-116 (Revised), ICE'S RELEASE OF IMMIGR. DETAINEES 18 (2014); Koulish, *supra* note 141, at 13; WGAD *Report on Visit to USA*, *supra* note 103, at ¶ 92(d).
[143] Sinha, *supra* note 139, at 77; HUMAN RIGHTS WATCH, US: NEW REPORT SHINES SPOTLIGHT ON ABUSES AND GROWTH IN IMMIGRANT DETENTION UNDER TRUMP (Apr. 30, 2020) (as of January 2020, 81% of detained people are in facilities owned and/or oprated by private companies).
[144] Sinha, *supra* note 139, at 77.
[145] *Ibid.* at 83; Angela E. Addae, *Challenging the Constitutionality of Private Prisons: Insights from Israel*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 527, 531 (2019); Suevon Lee, *By the Numbers: The U.S.'s Growing For-Profit Det. Industry*, PROPUBLICA. In 2014, the GEO Group reported $2.5 million in direct lobbying expenditures, $2.2 million of which was spent at the state and local levels. THE GEO GROUP, POLITICAL ACTIVITY AND LOBBYING REPORT 4 (2014); Clint Smith, *Why the U.S. is Right to Move Away from Private Prisons*, THE NEW YORKER (Aug. 24, 2016).

current immigration detention system, which seeks to fulfill illegitimate aims of the U.S., is arbitrary and in violation of the U.S.' international legal obligations.

3. The United States' Immigration Detention System Fails the Necessity Requirement because the United States Fails to Provide Individual Assessments to Migrants to Consider Alternatives to Detention.

For immigration detention to be necessary, it must be "indispensable for achieving the intended purpose," such that no other less restrictive means of achieving the purpose exists.[146] As a result, international law requires that states make available to immigrants and asylum seekers alternatives to detention.[147] In "examining whether less restrictive or coercive measures could achieve the same ends in each individual case," a state "helps ensure that detention is used only as a measure of last resort."[148] In its opinions, the Human Rights Committee has repeatedly emphasized that a showing of necessity requires that less restrictive measures be considered prior to imposing detention.[149] The WGAD has stressed that "alternative and noncustodial measures, such as reporting requirements, should ***always*** be considered before resorting to detention."[150] (emphasis added). Other international and UN bodies have reiterated and reinforced this requirement.[151] Moreover, there are specific standards regarding alternatives to detention that

[146] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 23.
[147] AMNESTY INT'L, IRREGULAR MIGRANTS AND ASYLUM-SEEKERS: ALTERNATIVES TO DET. 4 (2009); *Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council Twentieth Session*, *supra* note 91, at ¶ 68.
[148] Marouf, *supra* note 141, at 2190.
[149] *Bakhtiyari v. Australia*, Commc'n No. 1069/2002, Human Rights Comm., ¶ 9.3 (Nov. 6, 2003) (concluding that since less intrusive measures than detention were not considered, the detention of the complainant and her children without appropriate justification was arbitrary); *Baban v. Australia*, *supra* note 67, at ¶7.2; *C v. Australia*, *supra* note 67, at ¶ 8.2 (consideration must be given to "less invasive means of achieving the same ends").
[150] Working Grp. on Arbitrary Det., *Report on the Visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum Seekers*, ¶ 33, U.N. Doc. E/CN.4/1999/63/Add.3 (Dec. 18, 1998).
[151] Gabriela Rodriguez Pizarro (Special Rapporteur on the Human Rights of Migrants), *Report of the Special Rapporteur on Migrant Workers to the U.N. Commission on Human Rights Fifty-Ninth Sess*., U.N. Doc. E/CN.4/2003/85 (Dec. 30, 2002) (suggesting that when detention cannot be completely abolished, governments should take measures "ensuring that non-custodial measures and alternatives to detention are made available to migrants, including through providing for such measures in law and ensuring that the prescribed conditions are not

must be followed for asylum seekers.[152] Typical alternative measures include registration requirements, release on bail/bond/surety, release to NGO supervision, reporting requirements, directed residence, residence in open centers, and residence in semi-closed centers.[153] In considering alternatives to detention such as these, states "must take full account of individual circumstances."[154]

In the U.S., ICE detains more immigrants than it releases despite a number of alternatives to detention that are available.[155] Alternatives to detention "include releasing an individual on her own recognizance, through a grant of parole, under an order of supervision, upon payment of a bond, into an electronic monitoring program, or into a community-based case management program."[156] Moreover, the US Supreme Court has found that immigration detention must "bear[] [a] reasonable relation to the purpose for which the individual [was] committed."[157] A reasonable relation cannot be found without an individualized assessment. Yet, in the U.S., not all immigrants are subject to case-by-case assessments, as the Immigration and Nationality Act

discriminatory against non-nationals"); Council of Europe, Comm. of Ministers, *Twenty Guidelines on Forced Return*, Guideline 6 (May 4, 2005) (a person may only be detained after it has been determined that the "removal order cannot be ensured as effectively by resorting to noncustodial measures such as supervision systems, the requirement to report regularly to the authorities, bail, or other guarantee systems."); *Velez Loor v. Panama, supra* note 90, at ¶ 171; Case C-61/11, El Dridi Reference for a Preliminary Ruling, ¶ 38-41, 2011 E.C.R. I-03015 ("Member States must carry out the removal using the least coercive measures possible"); Int'l Org. for Migration (IOM), *Global Compact Thematic Paper: Immigr. Det. and Alternatives to Det.* 2 (2017); *Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council Twentieth Session*, *supra* note 91, at ¶ 68.

[152] UNHCR Detention Guidelines, *supra* note 22, at Guideline 4 ("Alternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions"); *see also* U.N. Refugee Agency, *Det. of Asylum-Seekers and Refugees: The Framework, the Problem, and Recommended Practice*, U.N. Doc. EC/49/SC/CRP/13 (Jun. 4, 1999); U.N. Sub-Commission on the Promotion and Protection of Human Rights, Res. 2000/21 ¶ 6 (Aug. 18, 2000) (encouraging states to adopt alternatives to detention).

[153] IRREGULAR MIGRANTS AND ASYLUM-SEEKERS: ALTERNATIVES TO DET., *supra* note 147, at 11.

[154] *Ibid.* at 9; *see also Global Compact Thematic Paper: Immigr. Det. and Alternatives to Det.*, *supra* note 151, at 2.

[155] Marouf, *supra* note 141, at 2155.

[156] For a full discussion of these alternatives to detention *see* Marouf, *supra* note 141, at 2155-2170.

[157] *Zadvydas v. Davis*, 121 S.Ct. 2491, 2499 (2001) (citing *Jackson v. Indiana*, 92 S.Ct. 1845, 1858 (1972)).

("INA") provides that certain categories of immigrants are subject to mandatory detention.[158]

The decision to detain in the U.S. works as follows:

> When taking a noncitizen into custody, ICE officers must decide whether to detain the individual or release him or her pending deportation. Two basic steps are involved in this decision. First, ICE determines whether the noncitizen individual is a member of certain classes that ***must*** be detained until their deportation proceedings end, per U.S. Congressional mandates (subject to some court-imposed limits). This is referred to as mandatory detention. Second, ICE officers and supervisors may exercise discretion in those cases where Congress has not mandated detention, and generally do so based on two categories of risk factors: flight and public safety.[159] (emphasis added).

The mandatory detention provisions prevent ICE from using alternative measures even when the immigrant does not pose a risk of absconding from future legal proceedings or administrative processes, present a danger to themselves or others, or pose a risk to national security.[160] Without an individualized assessment showing the necessity of detention for all immigrants, the U.S.' immigration detention system is arbitrary.

C. The United States Immigration Detention System is Arbitrary because the Conditions of Detention are Punitive.

Immigration detention is a form of administrative detention meant to be used for preventative purposes.[161] It is not intended to be a punitive measure, either in purpose or effect.[162] The Special Rapporteur on the Human Rights of Migrants has advised that "[a]dministrative detention should not be applied as a punitive measure for violations of immigration laws and regulations, as those violations should not be considered criminal

[158] Immigration and Nationality Act § 235, 8 U.S.C. § 1225 (2012); Immigration and Nationality Act § 236(c)(1), 8 U.S.C. § 1226(c)(1).
[159] Koulish, *supra* note 141, at 8-9.
[160] *Ibid*. at 29.
[161] Whitney Chelgren, *Preventative Det. Distorted: Why is it Unconstitutional to Detain Immigrants Without Procedural Protection*s, 44 LOY. L.A. L. REV. 1477, 1489 (2011).
[162] *Monitoring Immigr. Det. Practical Manual*, *supra* note 122, at 27; *Zadvydas v. Davis*, 121 S.Ct. 2491, 2499 (2001) (describing immigration detention as civil in nature and non-punitive and purpose and effect); WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 14.

offences."[163] It is well recognized under international law that illegal entry into a country by an immigrant should not be considered a criminal offense.[164] As a result of its non-punitive nature, "the detention of asylum seekers or other irregular migrants must not take place in facilities such as police stations, remand institutions, prisons and other such facilities since these are designed for those within the realm of the criminal justice system."[165] Additionally, migrants should be kept separate from other detainees who are being held as part of the criminal justice system.[166]

In the U.S., there is an extensive civil enforcement scheme around federal immigration laws; however, immigration-related offenses, including illegal entry, are being increasingly criminalized at both the federal and state level.[167] The U.S. is experiencing what is called a criminalization of immigration law:

> The convergence of criminal and immigration law has occurred on at last three fronts as Congress has (1) increased the number of immigration-related criminal offenses as well as the severity of punishment, (2) expanded the number of criminal offenses that require deportation, and (3) delegated more immigration enforcement to state and local law enforcement officers.[168]

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[163] *Report of the Special Rapporteur on the Human Rights of Migrants to the Human Rights Council Twentieth Session*, *supra* note 91, at ¶ 70.

[164] Refugee Convention, *supra* note 3, at art. 31; Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, *General Comment No. 2: On the Rights of Migrant Workers in Irregular Situation and Members of Their Families*, ¶ 24, U.N. Doc. CMW/C/GC/2 (Aug. 28, 2013); Working Grp on Arbitrary Det., *Report of the Working Grp. on Arbitrary Det. to the Human Rights Council Seventh Sess*., ¶ 53, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) ("criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention"); Council of Europe, Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Immigration Detention: Factsheet* 1, CPT/Inf(2017)3 (Mar. 2017); *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 24.

[165] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 44.

[166] *Ibid*. at ¶ 44.

[167] AMERICAN CIVIL LIBERTIES UNION, ISSUE BRIEF: CRIMINALIZING UNDOCUMENTED IMMIGRANTS 1-2 (Feb. 2010); 8. U.S.C. §§ 1325-1326; Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); For a history of the criminalization of immigration in the United States, see Leisy Abrego et al., *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, JOURNAL ON MIGRATION AND HUMAN SECURITY 645 (2017); Barbara A. Frey and X. Kevin Zhao, *The Criminalization of Immigr. and the Int'l Norm of Non-Discrimination: Deportation and Det. in U.S. Immigr.*, 29 LAW & INEQ. 279, 281 (2011).

[168] Frey and Zhao, *supra* note 167, at 241.

Moreover, while immigration detention in the U.S. is designed to serve an administrative goal, the system itself is incredibly punitive.[169] For starters, ICE regularly places immigrants in local jails and prisons alongside and even commingled with the criminal population.[170] Even when immigrants are placed into separate immigration detention centers, there is still a "carceral nature" to their detention.[171] Professor César Cuauhtémoc García Hernández has written,

> 'Whatever the actual reason for detention and despite immigration detention's legal characterization as civil, individuals in immigration confinement are frequently perceived to be no different than individuals in penal confinement,' and, '[b]y so intertwining immigration detention and penal incarceration, Congress created an immigration detention legal architecture that, in contrast with the prevailing legal characterization [as civil detention] is formally punitive.'[172]

In many immigration detention centers, the conditions include "overcrowding, lack of adequate visitation hours, insufficient ventilation, poor food, inadequate water, unclean quarters, malfunctioning toilets, and both verbal and physical abuse inflicted by inmates and guards."[173] Other inhumane treatment such as the shackling of detainees' arms and legs and solitary confinement is also commonplace.[174] Unfortunately, despite the extensive use of immigration detention in the U.S., there are no binding and enforceable standards regarding immigration

[169] Chelgren, *supra* note 161, at 1494.
[170] *Ibid*. at 1486.
[171] Rene Lima-Marin and Danielle C. Jefferis, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigr. Det. Theoretically Possible?*, 96 DENV. L. REV. 955, 956 (2019)
[172] *Ibid.* at 957-958 (citing César Cuauhtémoc García Hernández, *Immigr. Det. as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014)).
[173] Chelgren, *supra* note 161, at 1495; see Barbara Macgrady, *Resort to Int'l Human Rights Law in Challenging Conditions in the U.S. Immigr. Det. Centers*, 23 BROOK. J. INT'L L. 271, 272 (1997); *see* Eunice Hyunhye Cho, Tara Tidwell Cullen, and Clara Long, AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS WATCH, NATIONAL IMMIGRANT JUSTICE CENTER, JUSTICE-FREE ZONES: U.S. IMMIGR. DET. UNDER THE TRUMP ADMINISTRATION (2020).
[174] Macgrady, *supra* note 173, at 272.

detention specifically.[175] What does exist is derived from criminal standards.[176] Moreover, immigration detention in the U.S. is "characterized by a 'climate of governmental indifference" to detainees' well-being and a culture of secrecy and impunity,"[177] making it difficult to monitor immigration detention conditions generally.

The criminalization of immigrants as well as the poor conditions in detention centers were recognized by the WGAD in its 2016 visit to the U.S..[178] In its report, the WGAD called the U.S.' immigration detention system punitive, noting the "degrading conditions" that immigrants are subjected to in detention centers.[179] This conclusion has been regularly supported by those working within the immigration detention system and by those studying it.[180] Given the criminalization of immigrants in the U.S. as well as the exceedingly poor conditions they are subjected to while held in detention, the current immigration detention system is in practice punitive. As a result, the U.S.' immigration detention system is arbitrary.

D. Immigration Detention That Does Not Abide by the Principles of Non-Discrimination is Arbitrary.

Detention based solely on a distinction of race, color, sex, language, religion, political or other opinion, national or social origin, economic position, birth, nationality or ***any other status*** is arbitrary.[181] (emphasis added). Critically, ICCPR protections, including Article 9, are

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[175] AMERICAN CIVIL LIBERTIES UNION, IMMIGRATION DETENTION STANDARDS, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/immigration-detention-conditions; Anil Kalhan, *Rethinking Immigr. Det.*, 110 COLUM. L. REV. SIDEBAR 42, 51-2 (2010) (noting that the Obama Administration declined to promulgate enforceable immigration detention standards).
[176] Heeren, *supra* note 107, at 614; see Dora Schiro, Dep't of Homeland Security, Immigration and Customs Enforcement, *Immigration Detention, Overview and Recommendations* 16 (Oct. 6, 2009).
[177] Kalhan, *supra* note 175, at 52; Serena Hoy, *The Other Detainees 28*, LEGAL AFFAIRS, Sept./Oct. 2004; Nina Bernstein, *Officials Obscured Details of Migrant Deaths in Jail*, N.Y. TIMES (Jan. 10, 2010) (describing a "culture of secrecy" permeating immigration detention).
[178] WGAD *Report on Visit to USA*, *supra* note 103, at ¶ 34.
[179] *Ibid*. at ¶¶ 27, 87.
[180] *See, e.g.* Altaf Saadi, Maria-Elena De Trinidad Young, et.al., *Understanding US Immig. Det.: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, HEALTH HUMAN RIGHTS 187 (Jun. 2020).
[181] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 21.

"guaranteed without discrimination between citizens and aliens" unless expressly stated otherwise.[182] The Human Rights Committee has consistently endorsed "the non-discrimination norm as the general rule, and citizenship-based distinctions as the exception."[183] Other international treaties and bodies have done the same.[184] Accordingly, any immigration detention imposed on a migrant must not be discriminatory.[185] Even with the principle of non-discrimination though, international law recognizes a state's right to control its borders and to deport non-citizens.[186] That right remains limited however by fundamental human rights principles, including non-discrimination and the prohibition of arbitrary detention. In 2018, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment ("Special Rapporteur on Torture") Nils Melzer stated that "criminal or administrative detention based solely on migration status exceeds the legitimate interests of States in protecting their territory and regulating irregular migration and should be regarded as arbitrary."[187]

It has been argued that the U.S.' immigration detention system today is inconsistent with the principle of non-discrimination.[188] Some scholars point to the "categorical approach" to deportation as the violation of the non-discrimination norm.[189] Others point to the lack of

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[182] Human Rights Comm., *General Comment No. 15: The Position of Aliens Under the Covenant, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 18, U.N. Doc. HRI/GN/1/Rev. 1 (1994).
[183] Frey and Zhao, *supra* note 167, at 289.
[184] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. The United States has signed but not ratified the ICESCR. International Covenant on Economic, Social and Cultural Rights, U.N. Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en; Office of the U.N. High Comm'r for Human Rights, *The Rights of Non-Citizens*, U.N. Doc. HR/PUB/06/11, 12 (2006) ("States may not draw distinctions between citizens and non-citizens as to social and cultural rights").
[185] WGAD *Revised Deliberation No. 5*, *supra* note 1, at ¶ 21.
[186] ICCPR, *supra* note 3, at art. 17; Stefanie Grant, *Immigr. Det.: Some Issues of Inequality*, 7 THE EQUAL RIGHTS REVIEW 69, 70 (2011).
[187] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 24.
[188] Frey and Zhao, *supra* note 167, at 298.
[189] *Ibid.* at 300.

minimum rights and poor detention conditions afforded to non-citizens placed in detention as compared to citizens in criminal detention.[190] Even more point to the different standard of medical care that non-citizens receive in detention.[191] As compared to other immigration detention violations the U.S. is responsible for, this one is most likely the least clear. However, there are strong arguments to be put forth to argue that the U.S.' immigration detention system is arbitrary as a result of inappropriate discrimination.

IV. Arbitrary Immigration Detention System Increases the Likelihood of Violations Under the Prohibition of Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment.

Throughout the last decade, international human rights experts and monitoring bodies have been expressing especial concern over the increasing use of immigration detention, often arbitrarily. One of the reasons for this concern is that the use of administrative detention, including for immigration purposes, increases the likelihood that torture and cruel, inhuman, and degrading treatment will take place. In 2012, the WGAD recognized that "[t]he practice of administrative detention is particularly worrying as it increases the likelihood of . . . acts of torture and other forms of ill-treatment."[192] In 2016, the Human Rights Committee in *F.J. et al. v. Australia* expressed similar concerns about the link between arbitrary detention and torture and other ill-treatment while considering claimants' indefinite detention in Australian migration detention centers:

[190] Grant, *supra* note 186, at 74.
[191] HUMAN RIGHTS WATCH, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION (Jun. 20, 2018) [hereinafter CODE RED]; Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Report of the Special Rapporteur to the Commission on Human Rights Sixtieth Session*, ¶ 25, U.N. Doc. E/CN.4/2004/49/Add.1 (Mar. 1, 2004) (recognizing the principle of non-discrimination as among the most important to health).
[192] WGAD *Deliberation No. 9*, *supra* note 2, at ¶ 73.

> The Committee considers that the combination of the arbitrary character and indefinite nature of [detainee victims] protracted detention, the refusal to provide information and procedural rights to the [detainee victims] and the difficult conditions of detention cumulatively inflicted serious psychological harm upon them, and constitute treatment contrary to article 7 of the [ICCPR].[193]

Special Rapporteur on Torture Nils Melzer in 2018 produced an entire report on migration-related torture and ill-treatment and stated the following in it: "While not every case of arbitrary detention will automatically amount to torture or ill-treatment, there is an undeniable link between both prohibitions . . . experience shows that any form of arbitrary detention exposes migrants to increased risks of torture and ill-treatment."[194] Importantly, Special Rapporteur Melzer advised that "[t]he threshold of prohibited ill-treatment generally will be reached sooner with regard to migrants with an irregular status or with other vulnerabilities."[195] The abuses committed with the U.S.' immigration detention system against migrants unfortunately demonstrate the truth of these statements.

[193] *F.J. et al v. Australia, supra* note 122, at ¶ 10.6.
[194] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session, supra* note 91, at ¶ 25.
[195] *Ibid.* at ¶ 19

Section 2: Prohibition on Torture and Other Cruel, Inhuman, and Degrading Treatment

V. The United States Has an International Legal Obligation to Uphold the Prohibition on Torture and Other Cruel, Inhuman, and Degrading Treatment Under both Treaty Law and Customary International Law.

Torture and other cruel, inhuman, and degrading treatment is absolutely prohibited under international law.[196] This prohibition is found in both treaty law as well as CIL.[197] The U.S. has legal obligations to uphold this prohibition under both treaty law and CIL.

[196] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 113 [hereinafter Convention against Torture]; UDHR, *supra* note 17, at art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); DIGNITY: DANISH INSTITUTE AGAINST TORTURE, DIGNITY FACT SHEET COLLECTION: LEGAL NO. 1 – DEFINING TORTURE; Comm. against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 5, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter CAT *General Comment No. 2*]; *see* David Weissbrodt, *The Absolute Prohibition of Torture and Ill-Treatment*, 6 LONG TERM VIEW 22 (2006) [hereinafter *The Absolute Prohibition of Torture and Ill-Treatment*].

[197] Convention Against Torture, *supra* note 196.; American Convention, *supra* note 3, at art. 5(2) ("(1) Every person has the right to have his physical, mental, and moral integrity respected. (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."); African Charter, *supra* note 7, at art. 5 ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited."); ICCPR, *supra* note 3, at art. 4 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation"); Arab Charter, *supra* note 9, at art. 8 ("1. No one shall be subjected to physical or psychological torture or to cruel,, degrading, humiliating, or inhuman treatment."); European Convention, *supra* note 10, at art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); U.N. Convention on the Rights of the Child art. 37, *entered into force* Nov. 20, 1989, 1577 U.N.T.S. 3 ("No child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment."); U.N. Convention on Persons with Disabilities art. 15, *entered into force* May 3, 2008, U.N. Doc. A/RES/61.106, Annex I ("(1)(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; […] (c) outrages upon personal dignity, in particular humiliating and degrading treatment"); Convention on the Prevention and Punishment of the Crime of Genocide art. 2(c), *entered into force* Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, *entered into force* Oct. 21, 1950, 6. U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, entered into force Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Rome Statute for the Int'l Criminal Court art. 8(2)(a) ("(ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health"); UDHR, *supra* note 17, at art. 5; *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2nd Cir. 1980).

A. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the Primary Treaty Prohibiting Torture and Cruel, Inhuman, or Degrading Treatment.

The U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture") was "designed to prevent torture, prosecute torturers, and to compensate victims of torture."[198] The Convention against Torture grew out of a broader response to the atrocities committed in World War II, including the development of the international human rights regime.[199] In the early 1970s, Amnesty International galvanized the international community to work towards abolishing the use of torture globally.[200] Amnesty's work led to numerous advancements in the international sphere, including the U.N. General Assembly's adoption of the Declaration on Torture in 1975.[201] By the 1980s, an international consensus on the need for a treaty prohibiting torture had developed.[202] On December 10, 1984, on the anniversary of the UDHR, the U.N. General Assembly adopted the Convention against Torture, taking an affirmative step towards the eradication of torture.[203] It would enter into force only a few years later in 1987.[204] The Convention against Torture thus became "the only legally

[198] Kirsten B. Rosati, *The U.N. Convention against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT'L L. & POL'Y 533, 536 (1998); *see generally* Convention against Torture, *supra* note 196.
[199] Matthew Lippman, *The Development and Drafting of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275, 289-90 (1994); *The Absolute Prohibition of Torture and Ill-Treatment*, *supra* note 196, at 23; J. HERMAN BURGERS & HANS DANELIUS, THE U.N. CONVENTION AGAINST TORTURE 5 (1988).
[200] *See* AMNESTY INTERNATIONAL, REPORT ON TORTURE (1973); AMNESTY INTERNATIONAL, CONFERENCE FOR THE ABOLITION OF TORTURE: FINAL REPORT (1973); AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES (1984); Lippman, *supra* note 199, at 294-300; NIGEL RODLEY, HUMAN RIGHTS: FROM PRACTICE TO POLICY (Carrie Booth Walling and Susan Waltz eds., 2011).
[201] G.A. Res. 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/3452(XXX) (Dec. 9, 1975).
[202] Lippman, *supra* note 199, at 311.
[203] G.A. Res. 39/46, Convention against Torture, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).
[204] U.N. Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (last visited Feb. 15, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

binding convention at the universal level concerned exclusively with the eradication of torture."[205]

1. The Definition of Torture under the Convention against Torture

At the time of its adoption, the Convention against Torture was the first international treaty to explicitly define torture.[206] Article 1 defines torture as:

> [A]ny 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[207]

Under this definition, for an act to amount to torture, there must be "(1) severe pain or suffering, whether physical or mental; (2) intentionality; (3) specific purpose; and (4) official capacity."[208] Thus, determining whether torture has occurred requires an incredibly context and fact specific analysis.[209] Critically though, the understanding of torture is constantly evolving, as it is shaped by changing state and societal expectations.[210]

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[205] LENE WENDLAND, ASS'N FOR THE PREVENTION OF TORTURE, A HANDBOOK ON STATE OBLIGATIONS UNDER THE UN CONVENTION AGAINST TORTURE 7, (2002).
[206] Gerrit Zach, *Definition of Torture*, *in* THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 23 (Manfred Nowak, Moritiz Birk, & Giuliana Monina eds., 2nd ed. 2019).
[207] Convention against Torture, *supra* note 196, at art. 1.
[208] DIGNITY FACT SHEET COLLECTION: LEGAL NO. 1 – DEFINING TORTURE, *supra* note 196.
[209] TORTURE, INT'L JUSTICE RESOURCE CENTER, https://ijrcenter.org/thematic-research-guides/torture/.
[210] DIGNITY FACT SHEET COLLECTION: LEGAL NO. 1 – DEFINING TORTURE, *supra* note 196.

a) Severe Pain or Suffering

The nature or degree of pain and suffering required is not set by Article 1 other than requiring it be "severe."[211] Although the definition of "severe" is not defined in the Convention against Torture itself, a review of the *travaux preparatoires* can help in interpretation. During the drafting process, the International Association of Penal Law submitted a draft text which defined "severe" as "encompass[ing] prolonged coercive or abusive conduct which itself is not severe, but becomes so over a period of time."[212] Although this draft text was ultimately rejected, its definition of severity "resulted in perhaps the most useful formalization" of what is meant by "severe".[213] It is also well recognized, however, that a single and isolated act alone may rise to the level of torture if grave enough.[214]

Fundamentally though, what constitutes "severe" is dependent upon the exact facts of the case as well as the personal characteristics of the victims.[215] In the foundational *Ireland v. U.K.* case, the European Court of Human Rights considered Article 3 of the European Convention on Human Rights and found the following: "[I]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of

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[211] Several attempts were made to eliminate the word "severe" from the definition of "torture" under the Convention against Torture, but these efforts were unsuccessful. *See* Pnina Baruh Sharvit, *The Definition of Torture in the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 23 ISRAEL Y.B. HUM. RTS. 147, 154 (1993).

[212] Ahcene Boulesbaa, THE UN CONVENTION ON TORTURE AND PROSPECTS FOR ENFORCEMENT 17-18 (1999); *see* The Draft Convention for the Prevention and Suppression of Torture, submitted by the International Association of Penal Law, U.N. Doc. E/CN.4/NGO.213 (1978).

[213] Boulesbaa, *supra* note 212, at 17.

[214] Deborah E. Anker, *Understanding "Suffering," Yet Misconstruing Intentionality: U.S. Compliance and Non-Compliance with the Convention against Torture*, REF LAW (Aug. 6, 2017); Deborah E. Anker, *§ 7.20. Severe Physical Pain or Suffering, in* LAW OF ASYLUM IN THE UNITED STATES (2020); BURGERS AND DANELIUS, *supra* note 199, at 117-118 (a proposal during the drafting process which would have required that pain be inflicted systematically was rejected).

[215] Boulesbaa, *supra* note 212, at 18; *see* Michael K. Addo and Nicholas Grief, *Is There a Policy Behind the Decisions and Judgments Relating to Article 3 of the European Convention on Human Rights?*, 20 EUR. L. REV. 178, 189 (1995); Comm. against Torture, *General Comment No. 4: On the Implementation of Article 3 of the Convention in the Context of Article 22*, ¶17, U.N. Doc. CAT/C/GC/4 (Sep. 4, 2018) [hereinafter CAT *General Comment No. 4*].

things, relative; it depends on all the circumstances of the case, such as the duration of the treatments, its physical or mental effects and in some cases, the sex, age and state of health of the victim, etc."[216] This position that severe pain and suffering is relative has been consistently reiterated by both international and regional bodies.[217] The Human Rights Committee, for example, has indicated that determining whether a particular treatment or punishment violates Article 7 of the ICCPR "depends on all circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."[218] Beyond the objective evaluation of all the circumstances, a subjective evaluation of the victim's individual circumstances and experiences is also required.[219] As a result, the severity requirement is an elusive and hard to measure concept, as there is no defined or uniform criteria for assessing it.[220] International mechanisms however, such as the Special

[216] *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at ¶162 (1978); *see e.g.*, *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at ¶¶ 29, 80 (1978); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser A) at ¶ 100 (1989).
[217] *See e.g.*, *Lysias Fleury et al v. Haiti*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (series C) No. 236, ¶ 73 (Nov. 23, 2011) ("the Court has indicated that the violation of an individual's right to physical and mental integrity has different levels that range from torture to other types of abuse or cruel, inhuman or degrading treatment, the physical and mental consequences of which vary in intensity according to factors that are endogenous and exogenous to the individual such as, duration of the treatment, age, sex, health, context, and vulnerability, which must be analyzed in each specific situation"); *Loayza-Tamayo v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (series C) No. 33 ¶ 57 (Sep. 17, 1997); *see also* Nils Melzer (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Report of the Special Rapporteur on Extra-Custodial Use of Force and the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the General Assembly Seventy-Second Session*, ¶ 28, U.N. Doc. A/72/178 (Jul. 20, 2017); Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Report of the Special Rapporteur to the General Assembly Sixty Third Session*, ¶ 47, U.N. Doc. A/63/175 (Jul. 28, 2008).
[218] *Vuolanne v. Finland*, H.R.C. Commc'n No. 265/1987, ¶ 9.2, U.N. Doc. CCPR/C/35/D/265/1987 (Apr. 7, 1989).
[219] CAT *General Comment No. 4, supra* note 214, at ¶ 17 ("The Committee considers that severe pain or suffering cannot always be assessed objectively. It depends on the negative physical and/or mental repercussions that the infliction of violent or abusive acts has on each individual, taking into account all relevant circumstances of the case, including the nature of the treatment, the sex, age and state of health and vulnerability of the vicim and any other status or factors."); ASS'N FOR THE PREVENTION OF TORTURE & CENTER FOR JUSTICE AND INT'L LAW, TORTURE IN INT'L LAW: A GUIDE TO JURIS. 12 (2008) ("Assessing the severity of physical or mental pain or suffering includes a subjective element. Where the State agent inflicting pain or suffering or acquiescing in its infliction is aware that the victim is particularly sensitive, it is possible that acts which would otherwise not reach the threshold of severity to constitute torture may do so."); *see also Dzemajl and Others v. Yugoslavia*, Commc'n No. 161/2000, Comm. against Torture, U.N. Doc. CAT/C/29/D/161/2000, ¶ 9.2 (Nov. 21, 2002).
[220] *See e.g.*, Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L.J. 1913, 1927-28 (1996); BURGERS AND DANELIUS, *supra* note 199, at 40, 122-23; Sharvit, *supra* note 211, at 155; *see also* Zach, *supra* note 206, at 50 (noting that the Comm. against Torture "seems to decide based on the specific circumstances of each case, whether

Rapporteur on Torture, have worked to flesh out examples of what sort of acts meet the severity threshold.[221]

b) Intentionality

There is also an intentionality requirement to the acts, but it is widely regarded as "only a general intent to commit the act that causes severe pain and suffering."[222] The fact that drafters of the Convention against Torture explicitly rejected a definition of torture which would have required the acts be "deliberately and maliciously inflicted" supports this interpretation of the intentionality requirement.[223] The Committee against Torture has recognized that a finding of intent does not require direct evidence of the mental state of the perpetrator but can be inferred from the facts and circumstances of the case.[224] Thus, no subjective malevolent intent is required

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an inflicted treatment amounts to 'severe pain and suffering'… without providing any detailed analysis or assessment").

[221] Pieter Kooijmans (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment), *Report of the Special Rapporteur on Torture to the Commission on Human Rights Forty-Second Sess.*, ¶ 35, U.N. Doc. E/CN.4/1986/15 (Feb. 19, 1986) (providing a non-exhaustive list of acts that would amount to torture including beatings, burns, electric shocks, suspension, suffocation, exposure to excessive light or noise, sexual aggression, administration of drugs, prolonged denial of sleep, food, hygiene, or medical assistance, total isolation and sensory deprivation, being kept in total uncertainty as to time and space, threats to kill or torture relatives, being forced to help torture relatives, total abandonment, and simulated executions and disappearances of relatives); *Interim Report of the Special Rapporteur to the General Assembly Sixty Third Session*, *supra* note 217, at ¶¶ 52-59 (recognizing "the harmful physical and mental effects of prolonged solitary confinement" and the "physical, mental, and sexual violence" facing people with disabilities); Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment), *Report of the Special Rapporteur on Torture to the Human Rights Council Seventh Sess.*, ¶ 64, U.N. Doc. A/HRC/10/44 (Jan. 14, 2009) (noting that forcible testing for HIV or hepatitis C can be in violation of Article 3 of the European Convention on Human Rights).

[222] Deborah E. Anker, *§ 7.26. Specific Versus General Intent*, *in* LAW OF ASYLUM IN THE UNITED STATES (2020) [hereinafter *§ 7.26. Specific Versus General Intent*]..

[223] *Ibid*; Kee Wouters, INT'L LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 443 (2009) ("The term 'intentionally' refers not just to the specific intent, but also to the so-called 'general intent, whereby the torturer knows that a certain conduct will cause severe pain or suffering, even though that is not necessarily his objective."); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 325 (1994) ("The intent required under the international torture conventions is simply the general intent to do the act which clearly or foreseeably causes terrible suffering."); BURGERS AND DANELIUS, *supra* note 199, at 41 (noting explicit rejection of proposals requiring deliberate, malicious, or systematic infliction of torture).

[224] CAT *General Comment No. 2*, *supra* note 196, at ¶ 9; Zach, *supra* note 206, at 53.

under Article 1.[225] The Immigrant and Refugee Board of Canada ("IRB"), for example, has found that "[s]evere pain or suffering is considered to be intentionally inflicted if it is a desired consequence or it is known to be a likely consequence."[226] Moreover, the IRB will presume pain or suffering was intended "where the perpetrator commits an act which is objectively harmful."[227] International war crimes tribunals have come to similar conclusions:

> [T]he tribunals have found that severe pain and suffering must be the "likely and logical consequence" of the deliberate act. The lack of a subjective desire to cause severe pain or suffering does not constitute a valid defense. Rather, knowledge that prohibited consequences would result from intentional acts satisfies the intentionality requirement.[228]

However, for an act to be intentional, it may not be accidental.[229] While negligent acts will not satisfy this standard, reckless acts may.[230] Also important is that Article 1 intentional acts may include omissions.[231]

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[225] *§ 7.26. Specific Versus General Intent, supra* note 222*;* Canada Immigration and Refugee Board, Consolidated Grounds in the Immigration and Refugee Protection Act: Person in Need of Protection - Danger of Torture 5.1.4 (May 15, 2002).
[226] Canada Immigration and Refugee Board, *supra* note 225.
[227] *Ibid.*
[228] *§ 7.26. Specific Versus General Intent, supra* note 222*; Prosecutor v. Kunarac,* Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶153 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 12, 2002) ("Even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct."); *Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Chamber Judgment, ¶ 238 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) ("It is irrelevant that the perpetrator may have had a different motivation, if he acted with the requisite intent."); see, e.g., *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 520 (Int'l Crim. Trib. for Rwanda Sep. 2, 1998) (finding that the defendant had the specific intent to commit genocide where "he knew or should have known that the act committed would destroy, in whole or in part, a group.").
[229] *§ 7.26. Specific Versus General Intent, supra* note 222; BURGERS AND DANELIUS, *supra* note 199, at 118 ("[W]here pain and suffering is the result of an accident or mere negligence, the criteria for regarding the act as torture are not fulfilled"); Sharvit, *supra* note 211, at 156; *see also* 8 C.F.R. §§ 208.18(a)(5), 1208.18(a)(5) ("An act that results in unanticipated or unintended severity of pain and suffering is not torture").
[230] DIGNITY FACT SHEET COLLECTION: LEGAL NO. 1 – DEFINING TORTURE, *supra* note 196; Juan E. Mendez & Andra Nicolescu, *Evolving Standards for Torture in Int'l Law, in* TORTURE AND ITS DEFINITION IN INT'L LAW (Metin Başoğlu ed. 2017); TORTURE IN IN'L LAW: A GUIDE TO JURIS., *supra* note 219, at 12; BURGERS AND DANELIUS, *supra* note 199, at 118.
[231] CAT *General Comment No. 2, supra* note 196, at ¶ 15; *see, e.g.*, Wouters, *supra* note 223, at 440; Boulesbaa, *supra* note 212, at 12-15; Ahcene Boulesbaa, *An Analysis of the 1984 Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 4 Dick. J. Int'l L. 185 (1986); Sharvit, *supra* note 211, at 153; *Prosecutor v. Delalic,* Case No. IT-96-21-T, Trial Chamber Judgment ¶ 468 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) ("[O]missions may also provide the requisite material element, provided that the mental or physical suffering caused meets the required level of severity and that the act or omission was intentional, that is an act which, judged objectively, is deliberate and not accidental."); Robert Cryer et al., AN INTRODUCTION TO INT'L CRIM. LAW AND PROCEDURE 337 (4th ed. 2019).

c) Purpose

Additionally, for an act to amount to torture, it must be undertaken with a purpose "usually understood to have some connection with the interests or policies of the State and its organs."[232] This element of purpose "identif[ies] the goals or functions of violence at issue [and] helps to elucidate the evil of torture."[233] The purpose may include, although is not limited to, obtaining information or a confession, intimidation, punishment, or discrimination of any kind, towards a victim or third person.[234] It is generally agreed by the international community however that this purpose element should be "liberally construed."[235] Accordingly, the purpose element should not be used "as a specific limitation whereby intentional infliction of severe suffering could, under some circumstances, *not* constitute torture."[236] In *Ireland v. United Kingdom*, the European Court of Human Rights reiterated that "[t]orture is torture whatever its object may be or even if it has none, other than to cause pain, provided it is inflicted by force."[237]

[232] BURGERS AND DANELIUS, *supra* note 199, at 119.
[233] Copelon, *supra* note 223, at 329-30.
[234] Convention against Torture, *supra* note 196, at art. 1; DIGNITY FACT SHEET COLLECTION: LEGAL NO. 1 – DEFINING TORTURE, *supra* note 196; *see* COMM. AGAINST TORTURE, CONTRIBUTION OF THE COMM. AGAINST TORTURE TO THE PREPARATORY PROCESS FOR THE WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 2, U.N. Doc. A/CONF.189/PC.2/17 (Feb. 26, 2001) ("discrimination of any kind can create a climate in which torture and ill-treatment of the 'other' group subjected to intolerance and discriminatory treatment can be more easily accepted").
[235] Deborah E. Anker, *§ 7.27. Illicit Purpose, in* LAW OF ASYLUM IN THE UNITED STATES (2020) [hereinafter *§ 7.27. Illicit Purpose*]; *see* BURGERS AND DANELIUS, *supra* note 199, at 118-19; David Weissbrodt and Isabel Horteiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulment Provisions of Other Int'l Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 10-11 (1999); Nigel Rodley and Matt Pollard, THE TREATMENT OF PRISONERS UNDER INT'L LAW 75-78 (3rd ed. 2009); P.J. Duffy, *Article 3 of the European Convention on Human Rights*, 32 INT'L & COMP. L.Q. 316, 316-17 (1983).
[236] *§ 7.27. Illicit Purpose, supra* note 235; Weissbrodt and Horteiter, *supra* note 235, at 10-11, 15.
[237] *Ireland v. United Kingdom, supra* note 216, at ¶ 33.

d) Official Capacity

For an act to be torture under the Convention against Torture, it must be undertaken with some state involvement. Article 1 dictates that the prohibited torture must occur "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[238] Thus, there must be some state responsibility for the prohibited act.[239] The entire state government need not be involved or complicit in the torture however.[240] Prohibited acts undertaken by a single public official can give rise to state responsibility, as a state is always responsible for the torturous acts of its officials, even if the conduct itself was not specifically approved.[241] Moreover, state responsibility may exist as a result of acts by a private party if the state or a public official consents or acquiesces to that private act.[242] In these cases, it is not necessary that the state have actual knowledge of the torture; awareness or willful blindness is sufficient.[243] By failing to intervene to stop the private act of torture, the state breaches its legal

[238] Convention against Torture, *supra* note 196, at art. 1.
[239] BURGERS AND DANELIUS, *supra* note 199, at 119 (noting that the drafters of the Convention concluded that only torture for which the state authorities could be held responsible should fall within [Article 1's] definition); *see also* Rosati, *supra* note 198, at 1775 (describing the public official requirement to be "perhaps the most significant limitation on Torture Convention relief").
[240] *See Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138-39 (7th Cir. 2015) ("The petitioner did not have to show that the entire Mexican government is complicit in the misconduct of individual police officers."); *see also* Steven H. Schulman, *Judge Posner's Road Map for Convention Against Torture Claims when Central American Governments Cannot Protect Citizens Against Gang Violence*, 19 SCHOLAR: ST. MARY'S L. REV. RACE & SOC. JUST. 297, 309 (2017).
[241] Deborah E. Anker, *§ 7.31. Actions under Color of Law, in* LAW OF ASYLUM IN THE UNITED STATES (2020); *see* Radhika Coomarasway (Special Rapporteur on Violence against Women, its Causes and Consequences), *Report of the Special Rapporteur on Violence against Women to the Commission on Human Rights Fifty-Third Session*, ¶ 14, U.N. Doc. E/CN.4/1997/47 (Feb. 12, 1997) (commenting that even under an older "strict interpretation" of human rights law, the state is responsible for the actions of its agents).
[242] Efrain Staino, *Suing Private Military Contractors for Torture: How to Use the Alien Tort Statute Without Granting Sovereign Immunity – Related Defenses*, 50 SANTA CLARA L. REV. 1277, 1288-89 (2010).
[243] *Ibid*. at 1288-89; *Gomez-Zuluaga v. Att'y Gen*., 527 F.3d 330, 350 (3d Cir. 2008) (holding that the Convention against Torture as interpreted by Congress requires only "that the government in question is willfully blind to such activities" (quoting *Silva-Rengifo v. Att'y Gen*., 473 F.3d 58 (3d Cir. 2007)); *Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003) ("One of the 'understandings' in the Senate resolution of the ratification of the Convention against Torture was that acquiescence of a public official requires 'awareness' and not 'knowledge' or 'willful acceptance."); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354-55 (5th Cir. 2002) (finding that willful blindness is sufficient to show acquiescence under the Convention against Torture).

obligations and becomes directly responsible of its own right.[244] State responsibility can also result from "acts for which the public authorities could otherwise be considered to have some responsibility."[245]

2. The Definition of Cruel, Inhuman or Degrading Treatment or Punishment under the Convention against Torture.

Article 16 of the Convention against Torture requires that cruel, inhuman, or degrading treatment be prevented. It provides in part:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[246]

This provision on cruel, inhuman, or degrading treatments should be understood simultaneously as part of the right not to be subjected to torture and as its own "distinct form of harm."[247] Unfortunately, the Convention against Torture does not itself define the terms "cruel, inhuman, or degrading." However, the *travaux preparatories* of the Convention against Torture, existing international case law, as well as other international materials can provide guidance on how to interpret this provision. However, it is important to note that neither the Committee against Torture nor the Human Rights Committee have "found it necessary to make stark distinctions between torture and other prohibited ill-treatment."[248]

[244] Rosati, *supra* note 198, at 1775.
[245] BURGERS AND DANELIUS, *supra* note 199, at 45; Deborah E. Anker, *§ 7.28. Public Authority: Instigation, Consent, or Acquiescence - Generally*, *in* LAW OF ASYLUM IN THE UNITED STATES (2020).
[246] Convention against Torture, *supra* note 196, at art. 16.
[247] Elaine Webster, DIGNITY, DEGRADING TREATMENT AND TORTURE IN HUMAN RIGHTS LAW: THE ENDS OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15 (2018).
[248] TORTURE IN INT'L LAW: A GUIDE TO JURIS., *supra* note 219, at 7.

The most recent Commentary to the Convention against Torture provides the following definition for ***cruel and inhuman*** treatment or punishment:

> Cruel and inhuman treatment or punishment can be defined as the infliction of severe pain or suffering, whether physical or mental, by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Such conduct can be both intentional or negligent, *with or without a particular purpose*.[249] (emphasis added).

Another definition can also be pulled from the International Criminal Court (ICC). The term "inhuman treatment" is defined in the ICC Elements of Crimes as the infliction of "severe physical or mental pain or suffering."[250] Both the Commentary and ICC definitions align with the Committee against Torture's comment that ill-treatment "does not require proof of impermissible purposes."[251]

The Commentary defines ***degrading*** treatment or punishment as "the infliction of pain or suffering, whether physical or mental, which aims at *humiliating* the victim. Even the infliction of pain or suffering which does not reach the threshold of 'severe' must be considered as degrading treatment or punishment if it contains a particularly humiliating element."[252] Both the European Court of Human Rights and the European Commission of Human Rights have found degrading treatment or punishment to exist "if it grossly humiliates [the victim] before others or

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[249] Gerrit Zach and Moritz Birk, *Cruel Inhuman or Degrading Treatment or Punishment, in* THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 441, 443 (Manfred Nowak, Moritiz Birk, and Giuliana Monina eds., 2nd ed. 2019).
[250] Int'l Crim. Court Elements of Crimes at art. 8(2)(a)(ii)-2.
[251] CAT *General Comment No. 2*, *supra* note 196, at ¶ 10; *see also* Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur on Civil and Political Rights, Including the Questions of Torture and Detention to the Commission on Human Rights Sixty-Second Session*, ¶ 39, U.N. Doc. E/CN.4/2006 (Dec. 23, 2005) ("a thorough analysis of the *travaux preparatoires* of articles 1 and 16 of CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from [cruel, inhuman, and degrading treatment or punishment] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.").
[252] Zach and Birk, *supra* note 249, at 444.

drives him to act against his will or conscience"[253] and if it "arouse[s] in the victims feelings of fear, anguish, and inferiority capable of humiliating and debasing [the victims]"[254] The European Court of Human Rights has even found a violation where there has been no evidence of intent to either humiliate or debase the victim.[255] Of the types of ill-treatment listed in Article 16, degradation is understood to be "closest to a line between prohibited harm and non-prohibited harm."[256]

3. Obligations Under the Convention against Torture

The Convention against Torture provides guidance on how to (1) prevent torture and ill-treatment; (2) investigate, prosecute, and punish perpetrators; and (3) provide redress for victims.[257] While the Convention against Torture does not contain explicit language prohibiting torture, it is assumed to be implicit.[258] The Committee against Torture has stated that the obligation to prevent torture and the obligation to prevent cruel, inhuman, and degrading treatment and punishment are "indivisible, interdependent, and interrelated," making them congruent in practice.[259] Accordingly, "the measures required to prevent torture must be applied to prevent ill-treatment."[260]

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[253] *The Greek Case*, App. No. 3321/67, 3322/67, 3323/67, 3344/67, 1972 Y.B. Eur. Conv. on H.R. (Eur. Comm'n on H.R.).
[254] Zach and Birk, *supra* note 249, at 444; *see, e.g. Kudla v. Poland*, 2000-XI Eur. Ct. H.R. 197, ¶ 92 (2000); *Jalloh v. Germany* 2006-IX Eur. Ct. H.R. 281, ¶ 68 (2006).
[255] Zach and Birk, *supra* note 249, at 444; Webster, *supra* note 247, at 25; *see, e.g., T. v. United Kingdom*, App. No. 24724/94, 30 Eur. H.R. Rep. 12, ¶ 69 (1999); *Price v. United Kingdom*, 2001-VII Eur. Ct. H.R. 153, ¶ 30 (2001); *Mayzit v. Russia*, App. No. 63379/00, 43 Eur. H.R. Rep. 805, ¶42 (2006).
[256] Webster, *supra* note 247, at 6.
[257] CONVENTION AGAINST TORTURE INITIATIVE, UN CONVENTION AGAINST TORTURE – EXPLAINER 1.
[258] Gerrit Zach, *Obligation to Prevent Torture*, *in* THE UNITED NATIONS CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 72, 78 (Manfred Nowak, Moritiz Birk, and Giuliana Monina eds., 2nd ed. 2019) [hereinafter Zach, *Obligation to Prevent Torture*].
[259] Zach and Birk, *supra* note 249, at 446; CAT *General Comment No. 2*, *supra* note 196, at ¶ 3.
[260] CAT *General Comment No. 2*, *supra* note 196, at ¶ 3.

The Convention against Torture contains numerous substantive provisions aimed at the prevention of torture and other ill-treatment. Article 2 is one of the most important of those, as it acts as an "umbrella clause" for the prevention of torture: "Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[261] States are entitled to the widest possible jurisdiction when implementing this provision, as the prohibition on torture is a *jus cogens* norm subject to universal jurisdiction.[262] The Committee against Torture in its General Comment No. 2 clarified that the terminology "any territory under its jurisdiction" includes "all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law."[263] Article 16 is the corresponding "umbrella clause" for the prevention of cruel, inhuman, and degrading treatment and punishment.[264]

Both Article 2 and Article 16 should be interpreted to include the obligation of state parties to "*respect* and *protect* the human right not to be subjected to torture [and other ill-treatment]" and, most importantly, to "*fulfil* on effective measures to prevent acts of torture [and other ill-treatment]."[265] Importantly, the formal prohibition of torture and other ill-treatment alone is not sufficient to satisfy these preventative obligations; the preventative measures chosen must be *effective*, meaning that acts of torture and ill-treatment must actually be prevented from occurring.[266] The Convention Against Torture itself explicitly outlines a number of preventative obligations including: "the prohibition of refoulement (Article 3), the obligations relating to the

[261] Convention against Torture, *supra* note 196, at art. 2.1; *see* CAT *General Comment No. 2*, *supra* note 196, at ¶ 7.
[262] Zach, *Obligation to Prevent Torture*, *supra* note 258, at 90; Harold Hongju Koh (Legal Adviser, U.S. Dept. of State), *Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict* 14, 16-18, U.S. DEPT. OF STATE (Jan. 21, 2013); CAT *General Comment No. 2*, *supra* note 196, at ¶ 16.
[263] CAT *General Comment No. 2*, *supra* note 196, at ¶ 16.
[264] Zach and Birk, *Cruel Inhuman or Degrading Treatment or Punishment*, at 448.
[265] Zach, *Obligation to Prevent Torture*, *supra* note 258, at 78.
[266] BURGERS AND DANELIUS, *supra* note 199, at 123.

criminal prosecution of perpetrators of torture (Articles 4 to 9), the obligation to provide education and training to law enforcement and other personnel (Article 10), to systematically review interrogation methods and conditions of detention (Article 11), to investigate ex officio possible acts of torture (Article 12), and any torture allegations (Article 13), and the prohibition of invoking evidence extracted by torture in any proceeding (Article 15)."[267] Importantly, among these positive obligations under the duty to *fulfil* is an obligation for states to exercise due diligence to prevent, investigate, prosecute, and punish private actors who commit acts of torture or ill-treatment.[268] The Convention against Torture does not only create positive obligations for states; there are also negative obligations. The duty to *respect* requires that states "refrain from engaging in or knowingly contributing to any act of torture or ill-treatment, whether through acts or omissions, whenever they exercise their power and authority."[269] Accordingly, a state's preventative measures should effectively prevent public officials or those acting in an official capacity from "directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture."[270]

B. Customary International Law Prohibits Torture and Cruel, Inhuman, or Degrading Treatment.

Not only is torture and cruel, inhuman, and degrading treatment prohibited under treaty law, but the prohibition is also a norm of CIL.[271] J. Herman Burgers and Hans Danelius, key participants in the drafting of the Convention against Torture, have poignantly stated:

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[267] Zach, *Obligation to Prevent Torture*, *supra* note 258, at 73.
[268] CAT *General Comment No. 2*, *supra* note 196, at ¶ 18.
[269] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 12.
[270] CAT *General Comment No. 2*, *supra* note 196, at ¶ 17.
[271] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 10; David Weissbrodt and Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343, 361 (2011); INT'L COMM. OF THE RED CROSS, RULE 90. TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90; TORTURE IN INT'L LAW: A GUIDE TO JURIS., *supra* note 219, at 2.

> Many people assume that the Convention's principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment. This assumption is correct insofar as it would imply that the prohibition of these practices is established under international law by the Convention only and that this prohibition will be binding as a rule of international law only for those States which have become parties to the Convention. On the contrary, *the Convention is based upon the recognition that the above-mentioned practices are already outlawed under international law*. The principal aim of the Convention is to strengthen the existing prohibition of such practices by a number of supportive measures.[272] (emphasis added).

Even prior to the adoption of the Convention against Torture, the prohibition against torture and other ill-treatment was included in numerous international treaties and fundamental declarations, including the 1948 UDHR which proclaimed: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[273] Language prohibiting torture and other ill-treatment permeates the body of international law norms, and the prohibition has been consistently upheld in international case-law.[274]

Moreover, "the large majority of countries worldwide prohibit the use of torture in their national constitutions or contain provisions in specific human rights and/or criminal legislation."[275] The prohibition can also be found in numerous military manuals around the world.[276] This density of international treaties and domestic law prohibiting torture and other ill-treatment evidences the consistent and practically universal state practice needed for an international norm to be CIL. Although some states have at times practiced torture, this does not

[272] BURGERS AND DANELIUS, *supra* note 199, at 1.
[273] *Ibid*. at 10-11; UDHR, *supra* note 17, at art. 5.
[274] *See, e.g., Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.),* Judgment, 2012 I.C.J. 44, ¶ 99 (July 20); *Urritia v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103 ¶ 92 (Nov. 27, 2003); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 80, ¶¶ 100-03; *Prosecutor v. Furundzija*, Case No. IT-95-17/I-T, Judgment, ¶¶ 144, 147 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); *Prosecutor v. Delalic, supra* note 231, at ¶¶ 452-54; *Prosecutor v. Kunarac, supra* note 228, at ¶466.
[275] CONVENTION AGAINST TORTURE INITIATIVE, UN CONVENTION AGAINST TORTURE – EXPLAINER 2; *Questions Relating to the Obligation to Prosecute or Extradite Case*, *supra* note 274, at ¶ 99.
[276] RULE 90. TORTURE AND CRUEL, INHUMAN AND DEGRADING TREATMENT, *supra* note 271.

lessen the prohibition's CIL status. The ICJ in the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* stated:

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[277]

Moreover, even states that do practice torture still recognize the existence of an international prohibition on torture: "[E]veryone involved in the commission of torture acts on the assumption that it is illegal; no one acts on the assumption that it is legal under a new rule which would allow torture."[278] Consistently, it is widely accepted that states act out of a sense of legal obligation, or *opinio juris*, regarding the prohibition of torture and ill-treatment.[279] As a result, the prohibition on torture and ill-treatment satisfies both of the elements required for an international norm to acquire CIL status.

1. The Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment is a Non-Derogable Norm of International Law as it Enjoys a *Jus Cogens* Status.

The prohibition against torture and other cruel, inhuman, and degrading treatment is a *jus cogens* norm of international law binding on all nations.[280] In *Belgium v. Senegal*, the ICJ affirmatively stated the following: "In the Court's opinion, the prohibition of torture is part of

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[277] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J Rep. 14, ¶¶ 98 (Jun. 27).
[278] Joshua A. Decker, *Is the U.S. Bound by the Customary Int'l Law of Torture? A Proposal for ATS Litigation in the War on Terror*, 6 CHI. J. INT'L LAW. 803, 818 (2006); Jean-Marie Henckaerts, *Int'l Humanitarian Law as Customary Int'l Law*, 21 REFUGEE SURVEY Q 186, 190 (2002).
[279] Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under Int'l Law: The Office of Legal Counsel Memorandum*, AM. U. INT'L L. REV. 9, 12 (2005); *Questions Relating to the Obligation to Prosecute or Extradite Case*, *supra* note 274, at ¶ 99.
[280] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 10; Weissbrodt and Heilman, *supra* note 271, at 362; UN CONVENTION AGAINST TORTURE – EXPLAINER 2, *supra* note 275; Human Rights Watch, *The Legal Prohibition Against Torture* (Jun. 1, 2004), https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture.

customary international law and it has become a peremptory norm (*jus cogens*)."[281] In *Urritia v. Guatemala*, the Inter-American Court of Human Rights affirmatively declared that "[t]he absolute prohibition of torture, in all its forms, is now part of international *jus cogens*."[282] Furthermore, the Inter-American Court of Human Rights extended the character of *jus cogens* to the prohibition of cruel, inhuman, or degrading treatment or punishment in a 2003 Advisory Opinion.[283] Consistently, international and regional jurisprudence has affirmed the *jus cogens* status of the prohibition on torture and other ill-treatment.[284]

As a result of this *jus cogens* status, the prohibition on torture and ill-treatment is absolute and without exception, making it non-derogable.[285] The Convention against Torture affirms this non-derogable status in Article 2 by clarifying that there are no circumstances which justify the use of torture, including war, the threat of war, internal political instability, or any other public emergency.[286] Although there is no explicit provision in the Convention against Torture which prohibits derogation from the prohibition of cruel, inhuman or degrading treatment, "the Preamble of the Convention clearly refers to the existing standards under the [ICCPR] and the 1975 Declaration and affirms the desire of the drafters to make more effective (and not less effective) the struggle against torture and cruel, inhuman or degrading treatment."[287] The

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[281] *Questions Relating to the Obligation to Prosecute or Extradite Case*, *supra* note 274, at ¶ 99.
[282] *Urritia v. Guatemala*, *supra* note 274, at ¶ 92.
[283] Diana Contreras-Garduno & Ignacio Alvarez-Rio, A BARREN EFFORT? THE JURIS. OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON JUS COGENS 112, 121; *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 97-101 (Sep. 17, 2003); *see also Dacosta-Cadogan v. Barbados*, Preliminary Objections, Merits, Reparations, and Costs (Separate Opinion Judge Garcia Ramirez), Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 5 (Sep. 24, 2009).
[284] Weissbrodt and Heilman, *supra* note 271, at 362; *see, e.g.*, *Prosecutor v. Furundzija*, *supra* note 274, at ¶ 144; *Al-Adsani v. United Kingdom*, *supra* note 274, at ¶¶ 100-03; *Prosecutor v. Delalic*, *supra* note 231, at ¶ 454; *Prosecutor v. Kunarac*, *supra* note 228, at ¶ 466.
[285] Zach, *Obligation to Prevent Torture*, *supra* note 258, at 91; *Prosecutor v. Furundzija*, *supra* note 274, at ¶ 144.
[286] Convention against Torture, *supra* note 196, at art. 2.2 ("2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.").
[287] Zach, *Obligation to Prevent Torture*, *supra* note 258, at 91.

Committee against Torture in its General Comment No. 2 directly affirmed the *jus cogens* status of the prohibition against cruel, inhuman, and degrading treatment: "the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure."[288] Additionally, Article 4(2) of the ICCPR explicitly provides that state parties may not derogate from Article 7's right not to be subjected to torture or other ill-treatment.[289] The Human Rights Committee has reaffirmed this point, observing that "no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons …"[290]

C. The United States is Obligated by Treaty Law and Customary International Law to Uphold the International Norm on the Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment.

1. United States' Treaty Obligations

The U.S. has legal obligations relating to the prohibition against torture arising out of several different treaties. To start, the U.S. is party to the Geneva Conventions, which contain categorical bans on torture and other inhumane treatment in situations of armed conflict.[291]

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[288] CAT *General Comment No. 2*, *supra* note 196, at ¶ 3; *see, e.g.*, Comm. against Torture, *Concluding Observations on the Second Report of the USA*, ¶14-15, U.N. Doc. CAT/C/USA/CO/2 (Jul. 25, 2006) [hereinafter CAT *Concluding Observations on the Second Report of the USA*] (reiterating that that the Convention against Torture applies in times of war and on territory over which the State Party exercises de facto control); *Agiza v. Sweden*, CAT Commn'n No. 233/2003, ¶ 13.8, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005) (emphasizing that "the Convention's protections are absolute, even in the context of national security concerns").

[289] ICCPR, *supra* note 3, at art. 4(2).

[290] Human Rights Comm., *General Comment No. 20: Article 7 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 3 (1992) [hereinafter HRC *General Comment No. 20*].

[291] *See* Geneva Conventions Common Article 3; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 12, 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 12, 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva III, *supra* note 197, at arts. 13, 14, 130; Geneva IV, *supra* note 197, at arts. 27, 32, 147; *see also* Weissbrodt and Heilman, *supra* note 271, at 363; Press Release, Office of the Press Sec'y, The White House, Statement by NSC Spokesperson Bernadette Meehan on the U.S. Presentation to the Comm. against Torture (Nov. 12, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a; *Prosecutor v. Furundzija*, *supra* note 274, at ¶ 134.

Torture is prohibited under each of the Geneva Conventions by Common Article 3, and it is considered a grave breach in an international armed conflict.[292] The U.S. is also a party to the ICCPR, of which Article 7 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[293] Critically and perhaps most importantly, the U.S. is a party to the Convention against Torture; it was ratified on October 21, 1994.[294] Each of these treaties imposes legal obligations on the U.S. related to the prohibition of torture and other cruel, inhuman, and degrading treatment and punishment.

a) United States' Reservations, Understandings, and Declarations

Importantly, the U.S. ratification of the Convention against Torture was subject to several reservations, understandings, and declarations ("RUDs"). To start, the U.S. entered a declaration noting that articles 1 through 16 of the Convention against Torture are not self-executing.[295] It also entered the following critical reservation:

> That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman, or degrading treatment or punishment', only insofar as the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.[296]

This reservation to the Convention against Torture is consistent with the U.S.' reservation to the ICCPR regarding Article 7. Upon ratification of the ICCPR, the U.S. submitted the following reservation: "(3) That the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or

[292] INT'L COMM. OF THE RED CROSS, WHAT DOES THE LAW SAY ABOUT TORTURE?*(*Jun. 24, 2011).
[293] ICCPR, *supra* note 3, at art. 7.
[294] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Treaty Collection, (last visited Feb. 24, 2021), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en.
[295] *Ibid.*
[296] *Ibid.*

punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."[297] For any reservation to be valid though, it must be consistent with the object and purpose of the treaty.[298] In 1995, the Human Rights Committee stated "The Committee regrets the extent of the [U.S.'] reservations, declarations and understandings to the [ICCPR] … The Committee is also particularly concerned at reservations to … article 7 of the [ICCPR], which it believes to be incompatible with the object and purpose of the Covenant."[299] Similarly, the Committee against Torture has expressed concern about the U.S.' reservation limiting the definition of cruel, inhuman or degrading treatment or punishment under Article 16 of the Convention against Torture.[300] These treaty monitoring body concerns suggest that these limiting reservations by the U.S. may in fact be impermissible, and thus unenforceable, as contrary to the object and purpose of the treaties to which they are made.

> The U.S. also made the following understandings to the Convention against Torture:
>
> (1)(a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality;

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[297] International Covenant on Civil and Political Rights, U.N. Treaty Collection, (last visited Mar. 19, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.
[298] Vienna Convention on the Law of Treaties, *supra* note 27, at art. 19(c) ("A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (c) …the reservation is incompatible with the object and purpose of the treaty"); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28) (articulating an object and purpose test for appraising whether a reservation is permitted or prohibited when a treaty is silent with respect to reservations); *see generally* Richard W. Edwards Jr., *Reservations to Treaties*, 10 MICH. J. INT'L L 362 (1989).
[299] Human Rights Comm., *Concluding Observations on the USA*, U.N. Doc. CCPR/C/79/Add.50, ¶ 14 (Apr. 7, 1995).
[300] Comm. against Torture, *Report of the Comm. against Torture to the General Assembly Fifty-Fifth Session*, U.N. Doc. A/55/44, ¶¶ 175-180 (1999/2000).

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control;

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture;

(d) That with reference to article 1 of the Convention, the United States understands that the term `acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity;

(e) That with reference to article 1 of the Convention, the Unites States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.[301]

These understandings are reflected in the laws and regulations implementing the Convention against Torture in the U.S.[302] It should be noted that understanding (1)(d) recognizes acquiescence as requiring awareness. Subsequent U.S. jurisprudence as well as administrative decisions however have established "that 'willful blindness' by officials to torture may constitute 'acquiescence' warranting protection under CAT."[303]

[301] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Treaty Collection, (last visited Feb. 24, 2021), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en.
[302] Michael John Garcia, CONGRESSIONAL RESEARCH SERVICE, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 4 (Jan. 21, 2009).
[303] *Ibid*. at 4; *Silva-Rengifo v. Att'y Gen*., 473 F.3d 58, 70 (3d Cir. 2007) ("acquiescence to torture requires only that government officials remain willfully blind to torturous conduct and breach their legal responsibility to prevent it"); *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003) (declaring that the correct inquiry in deciding whether a Chinese immigrant was entitled to relief from removal from U.S. under CAT was not whether Chinese officials would commit torture against him, but whether public officials would turn a blind eye to the immigrant's torture by specified individuals); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354-55 (5th Cir. 2002) (upholding Board of Immigration Appeals' deportation order, but noting that "willful blindness" constitutes acquiescence under CAT); *see also Pascual-Garcia v. Ashcroft*, 73 Fed.Appx. 232 (9th Cir. 2003) (holding that relief under CAT does not require that torture will occur while victim is in the custody or physical control of a public official).

2. United States' Customary International Law Obligations

The U.S. is obligated to uphold the prohibition of torture and other ill-treatment under CIL. To enjoy customary status in the U.S., an international norm must be "specific, universal, and obligatory."[304] Typically, the violation of a *jus cogens* norm is enough to satisfy this standard.[305] A further discussion of CIL recognition in the U.S. can be found earlier in the Report in Section 1: Arbitrary Detention. The U.S. has recognized the prohibition on torture and other ill-treatment as enjoying customary status under international law. The Restatement (Third) of Foreign Relations Law § 702 includes "torture or other cruel, inhuman, or degrading treatment or punishment" on its non-exhaustive list of CIL norms which have *jus cogens* status.[306] U.S. courts have also confirmed that the prohibition of torture and other cruel, inhuman, and degrading treatment is a recognized norm of CIL in the U.S. In *Filartiga,* the Supreme Court found that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."[307] Citing international consensus surrounding torture, the Court recognized that the prohibition on torture "has become part of customary international law":

> Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the work of jurists we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.[308]

[304] *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"); *see Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2nd Cir. 1980).
[305] *Alvarez-Machain v. U.S.*, 331 F.3d 604, 613 (9th Cir. 2003); *see In re Estate of Ferdinand Marcos*, 25 F.3d at 1475.
[306] The Restatement (Third) of Foreign Relations Laws of the United States, *supra* note 2, at § 702(n).
[307] *Filartiga v. Pena-Irala*, 630 F.2d at 881.
[308] *Id.* at 884.

This conclusion has since been reaffirmed within the judicial system.[309] Moreover, the U.S. in its amicus brief in *Filartiga* recognized that torture and other ill-treatment were already "comprehensively prohibited by both treaties and customary international law at the time the [Convention against Torture] was adopted."[310] Moreover, the legislative history of the Torture Victim Protection Act of 1991 indicates that Congress identified the prohibition of torture as CIL.[311]

3. United States Legislation Implementing the Prohibition of Torture and Other Cruel, Inhuman and Degrading Treatment

The U.S.' ratification of the Convention against Torture was dependent on a declaration that Articles 1 through 16 were not self-executing. [312] Non-self-executing treaties require domestic implementing legislation for there to be judicial application.[313] As a result, there are no judicially enforceable rights arising directly from the Convention against Torture in the U.S., as any claims must arise under U.S. law implementing the treaty.[314]

The Torture Victim Protection Act of 1991 ("TVPA") was enacted in 1991 in response to the U.S.' ratification of the Convention against Torture and to the US Supreme Court decision in *Filartiga*.[315] It is a core piece of Convention against Torture implementing legislation.[316] The TVPA defines "torture" as follows:

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[309] *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995); *Bowoto v. Chevron Corp*., 557 F.Supp.2d 1080, 1091 (N.D. Cal. 2009); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996).
[310] Koh, *supra* note 262, at 15.
[311] H. REP. NO. 102-367(I), at 2 (1991) ("Official torture … violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law."); S. REP. NO. 102-249, at 3 (1991).
[312] 136 Cong. Rec. S17486-01, at III(1) (1990); Sen. Exec. R. 101-30, Resolution of Advice and Consent to Ratification, at 12 (1990); *see* Garcia, *supra* note 302, at 3.
[313] *See, e.g., Pierre v. Gonzales*, 502 F.3d 109, 119 (2d Cir. 2007); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 (3d Cir. 2003); *Mannington Mills, Inc. v. Congoleum Corp*., 595 F.2d 1287, 1298 (3d Cir. 1979) (citing *Head Money Cases*, 112 U.S. 580, 589-90 (1884)).
[314] *Pierre v. Gonzales*, 502 F.3d at 119; *Mu-Xing Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003).
[315] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2006) [hereinafter TVPA].
[316] *See United States v. Belfast*, 611 F.3d 783, 807-09 (11th Cir. 2010).

> [T]he term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

This definition "borrows extensively from" the definition found in Article 1 of the Convention against Torture.[317] The TVPA created a private cause of action for individuals subjected to official torture or extrajudicial executions. It enhanced the remedy already available under the Alien Tort Statute by extending a civil remedy to US citizens who have suffered torture or extrajudicial killing under the color of law of a foreign state.[318] The TVPA states:

> Liability. – An individual who, under actual or apparent authority, or color of law, of any foreign nations –
> (1) Subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> (2) Subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[319]

Then, in 1994, Congress passed the Extraterritorial Torture Statute providing for federal criminalization of torture by public officials outside of the U.S.[320] It states:

> (a) Offense – Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
> (b) Jurisdiction – There is jurisdiction over the activity prohibited in subsection (a) if –
> (1) The alleged offender is a national of the United States; or
> (2) The alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender[321]

[317] AM. SOC'Y OF INT'L LAW, BENCHBOOK ON INT'L LAW III.E-31 (Diane Marie Amann ed., 2014).
[318] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2006) at § 2; *see* S. REP. NO. 102-249, *supra* note 311.
[319] 28 U.S.C. § 1350 note (2006) at § 2(a).
[320] Extraterritorial Torture Statute, 18 U.S.C. §§ 2340, 2340A (2001); For the legislative history of this statute, *see* Elise Keepler et.al., *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr.*, 15 HUMAN RIGHTS BRIEF 18 (2008).
[321] 18 U.S.C. § 2340A (2001).

The Extraterritorial Torture Statute also provides its own definition of torture:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
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> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
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> (3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.[322]

The Department of Justice (DOJ) has interpreted this statute to prohibit conduct "specifically intended to inflict severe physical or mental pain or suffering."[323] Severe pain is not limited to "excruciating or agonizing" pain or pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death."[324]

In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA").[325] Like the TVPA, FARRA contributed to the domestic legislation implementing the Convention against Torture. FARRA "announced the policy of the United States not to expel, extradite, or otherwise effect the involuntary removal of any person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture."[326] Additionally, FARRA requires relevant agencies to "promulgate and enforce

[322] Extraterritorial Torture Statute, 18 U.S.C. § 2340 (2001).
[323] Dept. of Justice, Definition of Torture Under 18 U.S.C. §§2340-2340A (Dec. 30, 2004).
[324] *Ibid.*
[325] Foreign Affairs Reform and Restructuring Act, 8 U.S.C. § 1231 note.
[326] Garcia, *supra* note 302.

regulations to implement CAT" subject to the U.S.' RUDs.[327] CAT-implementing regulations concerning the removal of migrants from the U.S. are primarily covered by Sections 208.16-208.18 and 1208.16-1208.118 of Title 8 of the Code of Federal Regulations. For purposes of these regulations, "torture" is "understood to have the meaning prescribed in CAT Article 1" subject to the U.S.' RUDs.[328]

In addition to legislation implementing the Convention Against Torture, Congress also passed the War Crimes Act of 1996 to "codify the Geneva Conventions 'grave breach' provisions into federal criminal law."[329] The War Crimes Act criminalizes grave breaches of the Geneva Conventions, including certain violations of Common Article 3, committed by or against a national of the U.S.[330] Such violations of Common Article 3 include both torture and cruel or inhuman treatment. Torture is defined as:

> The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.[331]

Importantly cruel or inhuman treatment is also defined in the War Crimes Act:

> The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

This definition is important because US courts have chosen to use it when considering torture and other ill-treatment rather than the definition provided in reservations to both the ICCPR and

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[327] Garcia, *supra* note 302.
[328] *Ibid.*
[329] *In re XE Services Alien Tort Litigation*, 665 F.Supp.2d 569, 585 (E.D. Va. 2009); Congressional Research Services, *The War Crimes Act: Current Issues* (Jan. 22, 2009); War Crimes Act of 1996, 18 U.S.C. § 2441 (2006); For the legislative history of this statute, see Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AM. J. OF INT'L L. 48 (2007).
[330] War Crimes Act of 1996, 18 U.S.C. § 2441(d)(1)(A).
[331] 18 U.S.C. § 2441(d)(1)(B).

the Convention against Torture. In *Al-Shimari v. CACI Premier Tech., Inc*., the court stated that it was "aware of no court that has used the reservation's standard as the basis for assessing a CIDT violation under the [Alien Tort Statute]."[332] The court suggested that the definition from the War Crimes Act was more appropriate since it was passed after the reservation to the Convention against Torture was entered, making it last in time.[333]

Additionally, in 2004, Congress approved the "Sense of Congress and Policy Concerning Persons Detained by the United States" resolution.[334] In this resolution, Congress declared that "the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody of the United States."[335] Congress also affirmed that "no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States."[336] Although "Sense of" resolutions are not legally binding because they are not presented to the President for signature, they are understood to reflect formal opinions by the US Congress.[337]

D. The United States' Arbitrary Immigration Detention System Increases the Likelihood of Violations Under the Prohibition of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

As discussed in this report's Section 1: Arbitrary Detention, the U.S.' use of immigration detention should be viewed as arbitrary under international law. This arbitrary immigration detention system heightens the possibility of detained migrants being subjected to torture and

[332] *Al Shimari v. CACI Premier Tech., Inc*., 263 F.Supp.3d 595, Footnote 12 (E.D. Va. 2017).
[333] *Id.*; War Crimes Act of 1996, 18 U.S.C.A. § 2441 (2006); *see Whitney v. Robertson*, 124 U.S. 190, 193-94 (1888) (When an act of Congress conflicts with a prior treaty, the act controls).
[334] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375 (2004).
[335] Sense of Congress and Policy Concerning Persons Detained by the United States §1091, 10 U.S.C. § 801 note.
[336] *Id*.
[337] *See* Paul S. Rundquist, CONGRESSIONAL RESEARCH SERVICE, "SENSE OF" RESOLUTIONS AND PROVISIONS (Oct. 16, 2019).

other cruel, inhuman and degrading treatment or punishment in violation of the U.S.' legal obligations under both treaty law and CIL. Evidence of abuses against detained migrants in the U.S. is well documented, and many of these abuses may rise to the level of torture or other ill-treatment. Unfortunately, these abuses are not consistently and continually framed by policy or legal advocates as violations of the prohibition of torture and other cruel, inhuman and degrading treatment or punishment. This section of the report aims to provide an illustrative list of some of the most recurrent and abhorrent abuses occurring within US immigration detention centers which may constitute torture and other ill-treatment in the context of immigration detention. The examples in this section are intended to provide advocates with the necessary tools, particularly the international law, needed to begin thinking about and framing the abuses occurring within US immigration detention centers as violations of the prohibition of torture and other cruel, inhuman, and degrading treatment.

E. The United States' Use of Solitary Confinement within Immigration Detention Centers Violates the Prohibition on Torture and Other Ill-Treatment.

International hard and soft law has consistently affirmed that the use of solitary confinement may result in violations of the prohibition of torture and ill-treatment. In the U.S., the use of solitary confinement against migrants regularly does so.

1. Norms on the Use of Solitary Confinement

As early as 1990, the UN General Assembly adopted the Basic Principles for the Treatment of Prisoners which called for "efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use."[338] In 1992, the Human Rights Committee noted in its General Comment 20 that "prolonged solitary confinement of the

[338] G.A. Res. 45/111, Basic Principles for the Treatment of Prisoners, ¶ 7 (Dec. 14, 1990).

detained or imprisoned person may amount to acts prohibited by article 7 [of the ICCPR]."[339] Accordingly, the Human Rights Committee in *Campos v. Peru* found a violation of Article 7 of the ICCPR resulting from the solitary confinement of a detainee for nine months in a 2 by 2 meters cell without electricity or water, in which the detainee was only released for 30 minutes a day for physical activity.[340] The Committee against Torture has also "expressly stated that States parties should limit the use of solitary confinement as a measure of last resort, for a period of time as short as possible and under strict supervision, with the possibility for judicial review, as well as in line with international standards."[341] Moreover, numerous UN bodies and experts have concluded that the imposition of solitary confinement of any length on children constitutes cruel, inhuman or degrading treatment or punishment or even torture.[342]

In 2008, Special Rapporteur on Torture Manfred Nowak presented a report, which contained a section on solitary confinement, to the UN General Assembly. Special Rapporteur Nowak stated that in his opinion "the prolonged isolation of detainees may amount to cruel, inhuman or degrading treatment or punishment and, in certain circumstances, may amount to

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[339] HRC *General Comment No. 20, supra* note 290, at ¶ 6.
[340] *Rosa Espinoza de Polay v. Peru*, Commc'n No. 577/1994, Human Rights Comm., U.N. Doc. CCPR/C/61/D/577/1994 (Nov. 6, 1994).
[341] Zach and Birk, *supra* note 249, at 453; Comm. against Torture, *Report of the Comm. against Torture to the General Assembly Forty-Third & Forty-Fourth Sess.*, ¶¶ 50-51, U.N. Doc. A/65/44 (2009/2010); *see also* Comm. against Torture, *Report of the Comm. against Torture to the General Assembly Fifty-Second Session*, ¶¶ 181, 186, 220, 225, U.N. Doc A/52/44 (Sep. 10, 1997); Comm. against Torture, *Report of the Comm. against Torture to the General Assembly Fifty-Third Session*, ¶ 154, 156, U.N. Doc. A/53/44 (Sep. 16, 1998); Human Rights Comm., *Concluding Observations on the Third Periodic Report of France*, ¶ 19, U.N. Doc. CAT/FRA/CO/ 3 (Apr. 3, 2006); CAT *Concluding Observations on the Second Report of the USA*, *supra* note 288, at ¶ 36; Comm. against Torture, *Concluding Observations on the Third Periodic Report of New Zealand*, ¶¶ 5(d), 6(d), U.N. Doc. CAT/C/CR/32/4 (Jun. 11, 2004).
[342] Juan Mendez (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Twenty-Eighth Sess.*, ¶ 44, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) ("In accordance with views of the Comm. against Torture, the Subcommittee on Prevention of Torture and the Comm. on the Rights of the Child, the Special Rapporteur is of the view that the imposition of solitary confinement, of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture."); *U.N. Rules for the Protection of Juveniles Deprived of Their Liberty*, *supra* note 22, at ¶ 67; Comm. on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, ¶ 89, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

torture."[343] Annexed to his 2008 report was the 2007 Istanbul Statement on the Use and Effects of Solitary Confinement ("Istanbul Statement") which was adopted by the International Psychological Trauma Symposium.[344] The Istanbul Statement recognized the serious psychological and physiological ill effects caused by the use of solitary confinement and concluded that it should only be used "in very exceptional cases, for as short a time as possible and only as a last resort."[345]

In 2011, Special Rapporteur Nowak's successor Juan E. Méndez further developed the norms around solitary confinement by releasing an entire report looking at the practice of solitary confinement within detention regimes.[346] In this report, Special Rapporteur Méndez made the following critical conclusions:

> Depending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture.[347]
>
> Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is of the view that where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment.[348]

These determinations have been echoed by the UN General Assembly, which in 2015 adopted a revised version of the Standard Minimum Rules for the Treatment of Prisoners

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[343] *Interim Report of the Special Rapporteur to the General Assembly Sixty Third Session, supra* note 217, at ¶ 77.
[344] *Ibid.* at Annex.
[345] INTERNATIONAL PSYCHOLOGICAL TRAUMA SYMPOSIUM, THE ISTANBUL STATEMENT ON THE USE AND EFFECTS OF SOLITARY CONFINEMENT 5 (Dec. 9, 2007) [hereinafter ISTANBUL STATEMENT].
[346] Juan Mendez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Report of the Special Rapporteur to the General Assembly Sixty-Sixth Sess.*, U.N. Doc. A/66/268 (Aug. 5, 2011).
[347] *Ibid.* at ¶ 80.
[348] *Ibid.* at ¶ 81. Solitary confinement is considered prolonged when it is in excess of 15 days. *Ibid.* at ¶ 79.

("Mandela Rules").[349] The revised Mandela Rules "tightened the U.N.'s restrictions on solitary confinement and recommended that solitary confinement 'be used only in exceptional cases as a last resort, for as short a time as possible.'"[350]

Concern over the use of solitary confinement has also been expressed at the regional level. The European Court of Human Rights, the former Commission on Human Rights, and the European Committee for the Prevention of Torture ("CPT") have all made clear that the use of solitary confinement, depending on the specific circumstances as well as the conditions and duration of the detention, may constitute torture or inhuman or degrading treatment under Article 3 of the European Convention on Human Rights.[351] The European Prison Rules also instruct that "[s]olitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible."[352] The Inter-American Court of Human Rights has also held that prolonged solitary confinement constitutes cruel and inhuman treatment: "prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, harmful to the psychological and moral integrity of the person and a violation of any detainee to respect

[349] G.A. Res. 70/175, *U.N. Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/RES/70/175 (Jan. 8, 2016) [hereinafter Nelson Mandela Rules].
[350] Samuel Fuller, *Torture as a Management Practice: The Convention Against Torture and Non-Disciplinary Solitary Confinement*, 19 CHI. J. INT'L L. 102, 109 (2018); Nelson Mandela Rules, *supra* note 349, at Rule 45(1).
[351] ISTANBUL STATEMENT, *supra* note 345, at 3*; see e.g.*, *Ramirez Sanchez v. France*, 2006-IX Eur. Ct. H.R. 171, ¶ 123 (2006) ("complete sensory isolation coupled with total isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."); ROD MORGAN & MALCOLM EVANS, COMBATING TORTURE IN EUROPE: THE WORK AND STANDARDS OF THE EUROPEAN COMM. FOR THE PREVENTION OF TORTURE (2001) (discussing the CPT's recognition that solitary confinement may amount to torture or other ill-treatment and its critique of such practimes); *see also* Comm. of Ministers, Council of Europe, *Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and Other Long-Term Prisoners*, ¶¶ 7, 20, 22 (Oct. 9, 2003).
[352] Comm. of Ministers, Council of Europe, *Recommendation Rec(2006)2 to Member States on the European Prison Rules*, ¶ 60.5 (Jan. 11, 2006).

for his inherent dignity as a human being."[353] Furthermore, the Inter-American Principles on Detention provide strict guidelines for when solitary confinement is acceptable:

> Solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evidence that it is necessary to ensure legitimate interests relating to the institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel. In all cases, the disposition of solitary confinement shall be authorized by the competent authority and shall be subject to judicial control, since its prolonged, inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman or degrading treatment or punishment.[354]

Given this dense international critique of solitary confinement, both at the UN and regional levels, it is not surprising that Special Rapporteur Melzer has continued to address solitary confinement in the context of torture and ill-treatment. His February 2020 report to the Human Rights Council summed up the state of international law on solitary confinement:

> Under international law, solitary confinement may be imposed only in exceptional circumstances, and "prolonged solitary confinement, in excess of 15 consecutive days, is regarded as a form of torture or ill-treatment. The same applies to frequently renewed measures which, in conjunction, amount to prolonged solitary confinement.[355]

Expectedly, Special Rapporteur Melzer has also listed the use of solitary confinement as a current problem associated with immigration detention.[356]

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[353] *Castillo Petruzzi et al. v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 194 (May 20, 1999); *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 156 (Jul. 29, 1988); *Godínez Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 164 (Jan. 20, 1989); *Fairén Garbi and Solís Corrales v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 6, ¶149 (Mar. 15, 1989).

[354] Inter-Am. Comm'n H.R., Res. 1/08 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle XXII(3) (Mar. 13, 2008).

[355] Nils Melzer (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Forty-Third Sess.*, ¶ 57, U.N. Doc. A/HRC/43/49 (Mar. 20, 2020).

[356] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 18; *Report of the Special Rapporteur to the Human Rights Council Twenty-Eighth Sess.*, *supra* note 342, at ¶ 44.

2. The Use of Solitary Confinement in Immigration Detention Center by the United States

The U.S. has a history of heavily using solitary confinement against detainees, including those in immigration detention.[357] In 2014, the Committee against Torture in its Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States stated that it was concerned with the use of solitary confinement in immigration facilities.[358] At the time, the Committee against Torture gave the following recommendations related to solitary confinement:

(a) Limit the use of solitary confinement as a measure of last resort, for as short a time as possible, under strict supervision and with the possibility of judicial review[359]

(b) Prohibit the use of solitary confinement for juveniles, persons with intellectual or psychosocial disabilities, pregnant women, women with infants and breastfeeding mothers, in prison[360]

(c) Ensure compliance with United States Immigration and Customs Enforcement directive, Review of the Use of Segregation for ICE Detainees, of 4 September 2013, and Performance-Based National Detention Standards 2011, in all immigration detention facilities[361]

DHS and ICE use two forms of solitary confinement: administrative and disciplinary segregation.[362] Disciplinary solitary confinement is considered punitive while administrative solitary confinement is not.[363] Formally, ICE considers solitary confinement a "serious step

[357] Nathan Craig and Margaret Brown Vega, *Why Doesn't Anyone Investigate This Place: An Investigation Into Complaints and Inspections at the Otero County Processing Center in New Mexico*, DETAINED MIGRANT SOLIDARITY COMM. & FREEDOM FOR IMMIGRANTS (2018); Cho, Cullen & Long, *supra* note 173, at 38.
[358] Comm. against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the USA*, ¶ 19, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014).
[359] *Ibid.* at ¶ 20(a)
[360] *Ibid.* at ¶ 20(b).
[361] *Ibid.* at ¶ 19(c)
[362] *Solitary Confinement*, NATIONAL IMMIGRANT JUSTICE CENTER, https://immigrantjustice.org/issues/solitary-confinement.
[363] *Ibid.*

that requires careful consideration of alternatives."[364] As a result, ICE policy states that solitary confinement should only be used when "necessary," and "placement in administrative segregation due to a special vulnerability should be used only as a last resort and when no other viable housing options exist."[365] In practice however, "ICE uses isolation as a go-to tool, rather than a last resort, to manage and punish even the most vulnerable detainees."[366] A 2019 DHS Office of Inspector General (OIG) report specifically raised concern with the placement of immigrants in solitary detention, noting that its inspection of immigration detention facilities "identified serious issues with the administrative and disciplinary segregation of detainees."[367]

Unfortunately, to date, the US Constitution as currently interpreted has been unable to act as a strong check on the use of solitary confinement despite attempts to challenge the practice under the Eighth Amendment.[368] However, there is a growing momentum, nationally and internationally, of medical and mental health organizations, human rights groups, and others, denouncing the use of solitary confinement. This momentum has value, as US courts have acknowledged that whether an inmate's conditions of confinement amount to cruel and unusual punishment must be measured against "the evolving standards of decency that mark

[364] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES § 2 (Sep. 4, 2013).
[365] REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES, *supra* note 364, at § 2.
[366] Spencer Woodman *et al*., *Solitary Voices: Thousands of Immigrants Suffer in Solitary Confinement*, THE INTERCEPT (May 20, 2019), https://theintercept.com/2019/05/21/ice-solitary-confinement-immigration-detention/.
[367] Cho, Cullen & Long, *supra* note 173, at 38; DEP'T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GEN.., NO. OIG-19-47, CONCERNS ABOUT DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (2019).
[368] For a review of US litigation challenges to solitary confinement, *see* Andrew Leon Hanna, *The Present Constitutional Status of Solitary Confinement*, 21 U. PA. J. CONST. L. ONLINE 1 (2019); Laura Rovner, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, DIGNITY AND THE EIGHTH AMENDMENT: A NEW APPROACH TO CHALLENGING SOLITARY CONFINEMENT (2015); *U.S. Supreme Court Cases*, SOLITARY WATCH, https://solitarywatch.org/resources/u-s-supreme-court-cases/.

the progress of a maturing society."[369] Thus, it is critical that arguments against the use of solitary confinement are continually and consistently framed in the language of the prohibition of torture and other ill-treatment.

a) Prolonged Solitary Confinement

In 2019, the International Consortium of Investigative Journalists "analyzed more than 8,400 records describing the placement of immigrant detainees in solitary confinement in facilities operated by U.S. Immigration & Customs Enforcement."[370] The data from this analysis showed that more than half of the solitary confinements exceed 15 days, at least 537 solitary confinements were for 90 days or more, and 32 solitary confinements lasted over a year.[371] This solitary confinement exceeding 15 days passes the threshold set by the Special Rapporteur for Torture for *prolonged* solitary confinement, and as a result, it constitutes cruel, inhuman, and degrading treatment.[372] The use of prolonged solitary confinement against migrants in immigration detention should be seen as a violation of the U.S.' international obligations prohibiting torture and other ill-treatment. This is especially so given the systemic and prevalent nature of the prolonged solitary confinement of migrants.

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[369] *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Trop v. Dulles*, 356 U.S. 86, 101 (1958); The US Supreme Court has established that under the "evolving standards of decency" doctrine, several actors should be considered in determining whether a type of punishment violates society's evolving standards of decency, including the actions of state legislatures, the opinions of relevant professional organizations, international norms, and the history of the type of practice's use. Hanna, *supra* note 368, at 3.; *see, e.g.* Samuel B. Lutz, *The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition*, 80 N.Y.U. L. REV. 1862, 1867-68 (2005).

[370] Antonio Cucho and Karrie Kehoe, *How US Immigration Authorities Use Solitary Confinement*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/solitary-voices/how-us-immigration-authorities-use-solitary-confinement/.

[371] *Ibid.*

[372] *Interim Report of the Special Rapporteur to the General Assembly Sixty-Sixth Sess., supra* note 346, at ¶ 81.

b) Coercive Solitary Confinement

Solitary confinement has also been used in U.S. immigration detention centers for coercive purposes. In 2019, current and former detainees at the Stewart Detention Center ("Stewart") in Lumpkin, Georgia brought a class action lawsuit against CoreCivic, Inc, the private contractor which owns and operates Stewart.[373] These detainees alleged that CoreCivic coerced detainees to perform labor as part of a "voluntary" work program through nefarious tactics including the use of solitary confinement: "When detained immigrants refuse to work, CoreCivic obtains their labor through sanctions, up to and including solitary confinement."[374] One of the detainees in this case, Shoaib Ahmed, told The Intercept that "[Stewart] placed him in isolation for 10 days after an officer overheard him simply saying 'no work tomorrow.'"[375] Ahmed's case is not unique, as "[a]cross the country, detainees and advocates have said that the ICE contractors used solitary confinement as a cudgel to force work."[376]

The use of solitary confinement for the illegitimate purpose of coercing labor in a "voluntary" program is incredibly far from the standard of solitary confinement as the "last resort" or an "exceptional measure." In fact, the coercion of detainees through the threat of solitary confinement may be framed as a violation of the prohibition of torture and other ill-treatment. Not only is there extensive documentation suggesting that solitary confinement may

[373] Brief of Appellees, *Barrientos v. CoreCivic, Inc*., 2019 WL 1986809 (11th Cir. 2019) (No. 18-15081-G).
[374] *Id*. at 2.
[375] Spencer Woodman, *Private Prison Continues to Send ICE Detainees to Solitary Confinement for Refusing Voluntary Labor*, THE INTERCEPT (Jan. 11, 2018), https://theintercept.com/2018/01/11/ice-detention-solitary-confinement/.
[376] *Ibid.*

cause severe pain and suffering, but coercion is specifically considered as one of the acts prohibited under the Convention against Torture. [377]

c) Solitary Confinement to "Deal" with Mental Illness and Disability

Rather than seeking appropriate care for detainees with mental illness concerns or disabilities in immigration detention centers, detention center staff regularly resort to putting these detainees in solitary confinement.[378] A review of the records obtained by the International Consortium of Investigative Journalists' 2019 investigation of solitary confinement cases in facilities operated by ICE found that "40 percent of the records show detainees placed in solitary have mental illness. At some detention centers, the percentage is much higher."[379] The Florida Immigrant Advocacy Center provides a telling example of this in their report *Dying for Decent Care: Bad Medicine in Immigration Custody* where they share the experience of Mr. Vasquez, a migrant detainee at the South Texas Detention

[377] There is well-established documentation of the severe pain and suffering caused by solitary confinement. *See, e.g.*, Henrisk Steen Anderson et. al., *A Longitudinal Study of Prisoners on Remand: Psychiatric Prevalence, Incidence, and Psychopathology in Solitary vs. Non Solitary Confinement*, 102 ACTA PSYCHIATRICA SCANDINAVIA 19, 20, 21 (2000) (finding inmates in solitary confinement were more likely to develop a psychiatric disorder than inmates not in solitary confinement (28% vs. 15% respectively) through a longitudinal study of 133 inmantes in and 95 inmates not in solitary confinement); E. FULLER ET. AL., TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 7 (2014); Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956 (2008); Rebecca Merton, Cynthia Galaz, & Christina Fialho, FREEDOM FOR IMMIGRANTS, IMMIGRATION DETENTION IS PSYCHOLOGICAL TORTURE: STRATEGIES FOR SURVIVING IN OUR FIGHT FOR FREEDOM (2019); Reiter K. Ventura et. al., *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017-2018*, 110 AM. J. PUB. HEALTH 56 (2020); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325 (2006); HUMAN RIGHTS WATCH, OUT OF SIGHT: SUPER MAXIMUM SECURITY CONFINEMENT IN THE US (Feb. 1, 2000); Jeffrey L. Metzner and Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethic*s, 38 J. AM. ACADEMY OF PSYCHIATRY & L. (2010); Rosalind Dillon, *Banning Solitary for Prisoners with Mental Illness: The Blurred Line Between Physical and Psychological Harm*, 14 NW J. L. & SOC. POL'Y 265 (2019).

[378] *See e.g.*, Nick Schwellenbach et. al., *ISOLATED: ICE Confines Some Detainees with Mental Illness in Solitary for Months*, PROJECT ON GOVERNMENT OVERSIGHT (Aug. 14, 2019); AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA (2012).

[379] *Ibid.*

Complex in Pearsall, Texas.[380] Mr. Vasquez suffered from paranoid schizophrenia and depression; however, the medical staff at the detention center took him off his medication believing that he was faking his illness.[381] Resultingly, Mr. Vasquez's health deteriorated, and he was put on suicide watch. When he "began to smear feces and spit in his cell," staff responded by eliminating his psychotropic medication.[382] Mr. Vasquez then began to act irrationally and defy staff; he was thrown in solitary confinement as punishment.[383]

International bodies have expressed concern over the U.S.' use of solitary confinement for detainees with mental illness. In 2010, the Inter-American Commission on Human Rights stated the following in a report on US Immigration Detention:

> Even more disturbing is the fact that ICE does not have specially designed facilities to address the mental health needs of detained immigrants. Due to the absence of an environment appropriate for treatment, the Inter-American Commission has learned that various immigrant detainees with mental illnesses spend a significant portion of their time in solitary confinement ("administrative segregation") and are allowed out of their cells for an hour each day. The condition of many of these detainees deteriorates in solitary confinement, which also delays their immigration proceedings due to competency concerns.[384]

The Special Rapporteur has specifically named detainees with mental disabilities as a vulnerable group that should not be subjected to solitary confinement, and this conclusion has been supported by other international bodies including the Committee against Torture.[385] Thus, within the international framework, the solitary confinement of migrants with mental

[380] FLORIDA IMMIGRANT ADVOCACY CENTER, DYING FOR DECENT CARE: BAD MEDICINE IN IMMIGRATION CUSTODY 35 (2009) [hereinafter DYING FOR DECENT CARE].
[381] *Ibid.*
[382] DYING FOR DECENT CARE, *supra* note 380.
[383] *Ibid.*
[384] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON IMMIGR. IN THE U.S.: DET. AND DUE PROCESS, ¶292 (2010).
[385] *See e.g., Interim Report of the Special Rapporteur to the General Assembly Sixty-Sixth Sess., supra* note 346, at ¶ 81; Comm. against Torture, *Concluding Observation on the Seventh Periodic Report of Switzerland*, ¶19(f), U.N. Doc. CAT/C/CHE/CO/7 (Sep. 7, 2015).

illnesses and disabilities is a clear violation of the U.S.' legal obligations under the prohibition of torture and ill-treatment. This is particularly true given the systemic nature of the violation.

d) "Protective" Solitary Confinement of LGBTQI Identifying Detainees

Within US immigration detention centers, lesbian, gay, bisexual, transgender, queer, intersex ("LGBTQI") or otherwise gender nonconforming identifying detainees are disproportionately subjected to solitary confinement as "protective custody."[386] Detention center staff often place LGBTQI detainees in solitary confinement due to their vulnerability, using it as a tool to separate them from the general population.[387] In 2011, the National Immigrant Justice Center filed a complaint with DHS on behalf of detained LGBTQI individuals who were "told that they were held in long-term solitary confinement for their own protection and for their feminine appearance."[388] This 2011 complaint alleged, among other abuses, that at the Theo Lacy Facility in Orange County, California,

> Sexual minorities were assigned to 22-hour lock down ("protective custody") without individualized analysis of the need for this restriction, and without affording detainees the opportunity to rebut this classification. Individuals in "protective custody" had far less freedom of movement and access to recreation than individuals in the general population. Facility staff often restricted recreation time for sexual minorities to less than one hour a day.[389]

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[386] Amy Frew, Aline Fausch, & Kaleb Cox, INT'L DETENTION COALITION, LGBTI PERSONS IN IMMIGR. DET. 10 (2016); Fuller, *supra* note 350, at 110; Catherine Hanssens et. al., *A Roadmap for Change: Fed. Policy Recommendations for the Criminalization of LGBT People and People Living with HIV* 32, CENTER FOR GENDER AND SEXUALITY LAW AT COLUMBIA LAW SCHOOL (2014).

[387] AMERICAN CIVIL LIBERTIES UNION, WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION BEFORE THE U.S. SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS 6 (Jun. 19, 2012).

[388] Azadeh Shahshahani & Ayah Natasha El-Sergany, *Challenging the Practice of Solitary Confinement in Immigr. Det. in Georgia and Beyond*, 16 CUNY L. REV. 243, 250 (2013); *see* NATIONAL IMMIGRANT JUSTICE CENTER, SUBMISSION OF CIVIL RIGHTS COMPLAINTS REGARDING MISTREATMENT AND ABUSE OF SEXUAL MINORITIES IN DHS CUSTODY (Apr. 13, 2011), https://immigrantjustice.org/sites/default/files/OCRCL%20Global%20Complaint%20Letter%20April%202011%20FINAL%20REDACTED_0.pdf.

[389] SUBMISSION OF CIVIL RIGHTS COMPLAINTS REGARDING MISTREATMENT AND ABUSE OF SEXUAL MINORITIES IN DHS CUSTODY, *supra* note 388, at 5.

Studies on immigration detention in the U.S. consistently show that LGBTQI individuals are subjected to higher rates of solitary confinement, in effect, punishing them for their sexual and/or gender identity.[390] In 2010, the Inter-American Commission on Human Rights expressed concern over this exact issue:

> [T]he Inter-American Commission is deeply troubled by the use of confinement ("administrative segregation" or "disciplinary segregation") in the case of vulnerable immigration detainees, including members of the LGBT community. Using confinement to protect a threatened population amounts to a punitive measure.[391]

LGBTQI detainees are particularly vulnerable to abuse and neglect in immigration detention.[392] The International Detention Coalition has reported that LGBTQI detainees are at "a heightened risk of marginalization, discrimination, and violence, both at the hands of fellow detainees and detention centre personnel."[393] The use of solitary confinement to "protect" these vulnerable detainees is inapposite, as LGBTQI detainees can experience especially damaging effects, both psychologically and physically, as a result of solitary confinement.[394] For example, "depression and suicidal behavior, which are common conditions among LGBT detainees, can be exacerbated by forced segregation and

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[390] *See, e.g.*, Catherine Hanssens et. al., *supra* note 386, at 32; Lauren Zitsch, *Where the American Dream Becomes a Nightmare: LGBT Detainees in Immigr. Det. Facilities*, 22 WM. & MARY J. WOMEN & L. 105, 115-17 (2015); Shahshahani and El-Sergany, *supra* note 388, at 249-251; Frew, Fausch, & Cox, *supra* note 386, at 12-13.
[391] REPORT ON IMMIGR. IN THE U.S.: DET. AND DUE PROCESS, *supra* note 384, ¶ 337.
[392] Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention*, ¶ 231, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010); Kathleen M. Rice et. al., Congressional Letter to DHS Secretary Kirstjen Nielson (May 30, 2018), https://kathleenrice.house.gov/uploadedfiles/2018.05.30_lgbt_immigrants_in_ice_detention_letter_to_sec_nielsen.pdf.
[393] Frew, Fausch, & Cox, *supra* note 386, at 9; *see* Sabine Jensen and Thomas Spijkerboer, COC NETHERLANDS & VU UNIVERSITY AMSTERDAM, FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE (2011).
[394] WRITTEN STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION BEFORE THE U.S. SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS, *supra* note 387, at 6.

isolation."[395] Moreover, solitary confinement exposes LGBTQI detainees to higher risks of physical violence by detention center staff, as they are often out of view of surveillance cameras or other potential witnesses.[396] Additionally, in using solitary confinement as alleged "protection," LGBTQI detainees are effectively denied "the opportunity to access existing health, pyscho-social, legal support services and other fundamental rights in places of immigration detention."[397] For example, detainees in solitary confinement are regularly deprived of "privileges and resources" such as phone calls, showers, group religious worship, and visitations.[398]

International and regional bodies have expressed concern over the vulnerability of LGBTQI people to discrimination, including in detention settings.[399] UNHCR Detention Guidelines highlight the special vulnerability of LGBTI detainees:

> Measures may need to be taken to ensure that any placement in detention of lesbian, gay, bisexual, transgender or intersex asylum-seekers avoids exposing them to risk of violence, ill-treatment or physical, mental or sexual abuse; that they have access to

[395] Zitsch, *supra* note 390, at 116; *see also* Erin McCauley and Lauren Brinkley-Rubinstein, *Institutionalization and Incarceration of LGBT Individuals, in* TRAUMA, RESILIENCE AND HEALTH PROMOTION IN LGBT PATIENTS (Kristen L. Eckstarnd & Jennifer Potter eds. 2017).
[396] Zitsch, *supra* note 390, at 117.
[397] Frew, Fausch, & Cox, *supra* note 386, at 13.
[398] Zitsch, *supra* note 390, at 117; *see Tates v. Blanas*, 2003 WL 23864868 3-5 (E.D. Cal. 2003) (in which a detainee in solitary confinement was "prohibited from attending religious services," rarely permitted to exercise, and was only allowed to use the phones and showers during the middle of the right); Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in Gender Binarism*, 6 MICH. J. GENDER & L. 499, 530 (2000) (discussing a detainee who was denied "adequate 'recreation, living space, educational and occupational rehabilitation opportunities . . .").
[399] Int'l Commission of Jurists, Yogyakarta Principles – Principles on the Application of Int'l Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007) [hereinafter Yogyakarta Principles]; U.N. Comm. on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/GC/20 (Jul. 2, 2009); U.N. Comm. on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter ESCR *General Comment No. 14*]; U.N. Comm. on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water*, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); *Case of Atala Riffo and Daughters v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser C.) No. 239 (2012); *see, e.g.*, Euroepan Union, Charter of Fundamental Rights of the European Union art. 21, 2000/C 364/01 (Dec. 18, 2000); Organization of American States, Human Rights, Sexual Orientation, and Gender Identity, AG/RES.2721 (XLII-)/12) (Jun. 4, 2012); Organization of American States, Human Rights, Sexual Orientation, and Gender Identity, AG/RES.2435 (XXXVII-O/08) (Jun. 3, 2008).

> appropriate medical care and counselling, where applicable; and that detention personnel and all other officials in the public and private sector who are engaged in detention facilities are trained and qualified, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation nor gender identity.[400]

The Special Rapporteur on Torture has explicitly recognized that sexual minorities "are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations."[401] Consistent with this vulnerability, the Special Rapporteur on Torture has concluded that "the purpose and intent elements of the definition of torture are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality."[402] Moreover, the Special Rapporteur on Torture has also advised that the "placement of [LGBTQI individuals] in solitary confinement or administrative segregation for their own 'protection' can constitute an infringement on the prohibition of torture and ill-treatment."[403] The European Court of Human Rights in *X v. Turkey* held that the holding of a homosexual detainee in solitary confinement for more than eight months, out of concern that he would be harmed by fellow prisoners, constituted inhuman and degrading treatment in violation of Article 3 of the ECHR.[404] The court found that discrimination on the basis of sexual orientation had

[400] UNHCR Detention Guidelines, *supra* note 22, at Guideline 9.7 ¶ 65.
[401] Sir Nigel Rodley (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Interim Report on the Question of Torture to the General Assembly Fifty-Sixth Sess.*, ¶ 19, U.N. Doc. A/56/156 (Jul. 3, 2001).
[402] Juan Mendez (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Thirty-First Sess.*, ¶ 8, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016); Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Seventh Sess.*, ¶ 30, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008).
[403] *Report of the Special Rapporteur to the Human Rights Council Thirty-First Sess.*, *supra* note 402, at ¶ 35.
[404] *X v. Turkey*, App. No. 24626/09, Eur. Ct. H.R., ¶ 45 (2012).

contributed to the prisoner's placement in solitary confinement.[405] The decision in *X v. Turkey* is consistent with the Special Rapporteur on Torture's recognition that

LGBQI migrant detainees in US immigration detention centers often experience solitary confinement similar to that of the detainee in *X v. Turkey*. Just as the court did in *X v. Turkey*, advocates seeking to abolish the use of solitary confinement for LGBTQI detainees should frame their arguments around the prohibition of torture and other ill-treatment, which prohibits the imposition of severe pain and suffering on the basis of discrimination.

F. The United States' Failure to Provide Appropriate Medical Treatment and Care to Migrants in Immigration Detention Violates the Prohibition on Torture and Other Ill-Treatment.

International hard and soft law has consistently affirmed that a failure to provide adequate and appropriate medical treatment and care to detainees may result in violations of the prohibition of torture and ill-treatment. In the U.S., medical care to migrant detainees is thoroughly inadequate, and when it is provided, it may be inappropriate and unsolicited.

1. International Norms on Medical Treatment and Care of Detainees

Under international law, a failure to provide adequate medical treatment and care to detainees, including in immigration detention, can amount to a violation of the prohibition of torture and other ill-treatment. This arises out of a state's duty of care to detainees, which includes the positive obligation to "secure physical and psychological integrity and the well-being of all detainees."[406]

[405] *Id.* at ¶ 57.
[406] Ass'n for the Prevention of Torture, *Torture and Ill-Treatment Key Elements,* https://www.apt.ch/en/knowledge-hub/detention-focus-database/treatment/torture-and-ill-treatment.

International bodies have repeatedly held that the "denial of free access to medical treatment in detention factors into findings of torture or ill-treatment."[407] For example, the ICTY in *Prosecutor v. Delalic* found that the medical care provided at a makeshift prison-camp was inadequate, and this finding contributed to a holding of ill-treatment. In *Kaing Guek Eav alias Duch*, ECCC judges found "deprivation of medical treatment" to include the treatment of cuts, bruises and other injuries with salty water, the provision of inadequate or ineffective medication, and the insufficient treatment of rashes, malaria, diarrhea, and severe dehydration.[408] International bodies have also focused on the specific medical needs of individuals. In *Sendic v. Uruguay*, a detainee suffered from a hernia which prevented him from eating solid foods and walking independently. Yet, the detainee was not provided the medical attention he needed, including an operation. The Human Rights Committee took this omission of medical care into consideration when finding that the detainee had been subjected to torture and ill-treatment. The Inter-American Court of Human Rights in *Velez Loor v. Panama* found that a detainee who suffered from a previous cranial fracture was subjected to cruel, inhuman, or degrading treatment because he was denied "specialized treatment" while in detention.

Support for the denial of medical care constituting torture or ill-treatment has also been found in other UN organs. Special Rapporteur Nowak concluded that "the de facto denial of access to pain relief, if it causes severe pain and suffering, constitutes cruel, inhuman or degrading treatment or punishment."[409] The Nelson Mandela Rules, adopted by the UN General

[407] Ackerman et. al., NON-TYPICAL FORMS OF TORTURE AND ILL-TREATMENT: AN ANALYSIS OF INT'L HUMAN RIGHTS AND INT'L CRIM. JURIS., BERKELEY LAW INT'L HUMAN RIGHTS CLINIC (July 2018).
[408] *Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/TC, Judgment, ¶273 Extraordinary Chambers in the Courts of Cambodia (July 26, 2010).
[409] *Report of the Special Rapporteur on Torture to the Human Rights Council Seventh Sess*., *supra* note 221, at ¶ 72.

Assembly, contain several provisions relating to health-care services for detainees. Some of the most important are the following:[410]

> Rule 24
> (1) The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.
>
> (2) Health care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infections diseases, as well as for drug dependence.
>
> Rule 25
> (1) Every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention not prisoners with special health-care needs or with health issues that hamper their rehabilitation.
>
> (2) The health-care service shall consist of an interdisciplinary team with sufficient qualified personnel acting in full clinical independence and shall encompass sufficient expertise in psychology and psychiatry. The services of a qualified dentist shall be available to every prisoner.
>
> Rule 27
> (1) All prisons shall ensure prompt access to medical attention in urgent cases. Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care.

Although the Nelson Mandela Rules are technically soft law, in practice, compliance with the Convention against Torture requires that they be followed.[411] The Committee against Torture has emphasized that Article 16 requires that detention conditions be in line with internationally recognized standards, in particular the Nelson Mandela Rules.

[410] Nelson Mandela Rules, *supra* note 349.
[411] Zach and Birk, *supra* note 249, at 451.

1. The United States' Inadequate Medical Treatment and Care to Migrant Detainees in Immigration Detention Centers

Migrant detainees in the U.S. receive dangerously substandard medical care while in immigration detention.[412] Human Rights Watch has documented three major health care failings in immigration detention centers: "(1) unreasonable delays in providing care, (2) poor practitioner and nursing care, and (3) botched emergency responses."[413] All too often, practitioners operating in immigration detention centers have been:

> . . . failing to act on abnormal vital signs or test results, failing to ensure patients make informed decisions to refuse care, practicing beyond the scope of their licenses, and failing to respond to requests for care. In some cases, these failures caused delays in patients accessing care; in others practitioners or nurses made decisions that may have contributed or did contribute to worse outcomes.[414]

A 2017 Report by the Department of Homeland Security's Office of Inspector General (OIG) found that its inspections of immigration detention centers "revealed delayed and improperly documented medical care including 'instances of detainees with painful conditions, such as infected teeth and a knee injury waiting days for a medical intervention.'[415] Even more nefarious than delay though is the complete denial of care. The Southern Poverty Law Center has reported that at the Irwin Detention Center in Ocilla, Georgia several detainees were "denied diagnostic tests required for treatment of chronic and life-threatening conditions."[416] Unsurprisingly, an

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[412] Craig and Vega, *supra* note 357; JUSTICE-FREE ZONES: U.S. IMMIGR. DET. UNDER THE TRUMP ADMINISTRATION, *supra* note 173. (2020); PROJECT SOUTH, COMPLAINT RE: LACK OF MEDICAL CARE, UNSAFE WORK PRACTICES, AND ABSENCE OF ADEQUATE PROTECTION AGAINST COVID-19 FOR DETAINED IMMIGRATIONS AND EMPLOYEES ALIKE AT THE IRWIN COUNTRY DET. CENTER (Sept. 14, 2020); SOUTHERN POVERTY LAW CENTER, SHADOW PRISONS: IMMIGRANT DET. IN THE SOUTH (Nov. 2016) [hereinafter SHADOW PRISONS]; NEW YORK LAWYERS FOR THE PUBLIC INTEREST, STILL DETAINED AND DENIED: THE HEALTH CRISIS IN IMMIGR. DET. CONTINUES (2020); CODE RED, *supra* note 191.
[413] CODE RED, *supra* note 191, at 45.
[414] *Ibid.* at 46-47.
[415] *Ibid.* at 13; DEPT. OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DET. FACILITIES, December 11, 2017, https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf.
[416] SHADOW PRISONS, *supra* note 412, at 14.

independent review of ICE detainee deaths conducted in 2018 by medical experts found evidence of substandard care in almost all of the cases reviewed and concluded that "medical lapses likely led or contributed to … the deaths."[417] Disconcertingly, ICE has released detainees immediately before a projected death in order to avoid having to publicly report the death.[418]

The dangerous substandard care provided to migrant detainees has led to many lawsuits. In 2007 for example, the American Civil Liberties Union filed a class action lawsuit on behalf of migrant detainees at San Diego Correctional Facility ("SDCF") charging that inadequate medical and mental health care had caused unnecessary suffering and even avoidable death:

> SDCF medical staff routinely ignore requests for urgent care by detainees with dangerous and painful health problems. Detainees often must submit multiple written sick call requests, over the course of several weeks or months, before they are able to see a doctor or nurse. When they are seen by medical staff, detainees typically receive superficial or inappropriate care, often by staff unqualified to provide proper care. In many cases, detainees receive nothing more than pain medication for the medical problems and are denied necessary treatments and essential diagnostic tests based on official DIHS policies that result in unnecessary pain and suffering, and create a substantial risk of serious injury or death.[419]

Official policy for U.S. immigration detention states that migrant detainees are supposed to receive medical care. For example, ICE's Performance-Based National Detention Standards (PBNDS) outline basic standards for medical care and treatment while in ICE custody.[420] In practice however, migrant detainees do not receive the medical care they are legally entitled to. Because neither international or national prison standards relating to medical care and treatment are followed in immigration detention centers, migrant detainees suffer from severe pain, both physical and mental. As a result, the systemic failures to provide adequate and appropriate health

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[417] CODE RED, *supra* note 191, at 15; see also Cho, Cullen & Long, *supra* note 173, at 32-33.
[418] SHADOW PRISONS, *supra* note 412, at 14; Cho, Cullen & Long, *supra* note 173, at 34.
[419] Complaint, *Woods v. Myers*, 2013 WL 4823171 (D.C. Ca. 2013); American Civil Liberties Union, *ACLU Sues Over Lack of Medical Treatment at San Diego Det. Facility*, https://www.aclu.org/other/aclu-sues-over-lack-medical-treatment-san-diego-detention-facility.
[420] U.S. IMMIG. AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DET. STANDARDS 2011, Standard 4.3 (2011).

care to migrant detainees in the U.S. should be viewed as violations of the prohibition against torture and ill-treatment.

a) Especial Vulnerability of LGBTQI Detainees

Migrant detainees who identity as LGBTQI regularly experience particularly poor medical care and treatment in US immigration detention centers.[421] LGBTQI detainees often have health care needs that relate specifically to their sexual orientation or gender identity, and when these needs are not met, they may experience negative health implications.[422] Transgender detainees, for example, often have pre-existing psychological problems, such as depression, anxiety, and posttraumatic stress disorder, resulting from trauma in their home countries.[423] They may also need continued hormone replacement therapy and other treatment associated with gender transition.[424] These mental health concerns need treatment through trans-affirming health care.[425] Transgender detainees "who do not have their gender affirmed in the way they are treated or with appropriate medical care may experience negative physical and psychological consequences."[426] LGBTQI detainees may also, for example, need access to appropriate care for HIV/AIDS. LGBTQI detainees may be infected prior to detention, and they be more vulnerable than the general population to being infected while in detention due to their heightened risk of sexual violence while detained.[427]

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[421] Shana Tabak & Rachel Levitan, *LGBTI Migrants in Immigration Detention: A Global Perspectiv*e, 37 HARV. J. L. & GENDER 1, 33 (2014);
[422] *Ibid*. at 34.
[423] AMERICAN PSYCHOLOGICAL ASS'N, LGBTQ ASYLUM SEEKERS: HOW CLINICIANS CAN HELP 3.
[424] Frew, Fausch, & Cox, *supra* note 386, at 16.
[425] LGBTQ ASYLUM SEEKERS: HOW CLINICIANS CAN HELP, *supra* note 423, at 3.
[426] *Ibid*. at 2.
[427] Frew, Fausch, & Cox, *supra* note 386, at 16; Tabak and Levitan, *supra* note 421, at 34. "Many LGBTI refugees report experiences of sexual violence throughout their lives, which may form the core of their claims for refugee status on the basis of sexual orientation or gender identity in the first place; others report engaging in survival sex work both in countries of origin and of migration …" Tabak and Levitan, *supra* note 421, at Footnote 154; When incarcerated, LGBTQI people face a higher risk than heterosexual, cisgender people of being victims of sexual abuse by other prisoners and staff. NAT'L PRISON RAPE ELIMINATION COMM'N REPORT 73-74 (2009).

Unfortunately, LGBTQI detainees in US immigration detention centers are consistently denied the medical care and treatment they need as a result of their gender identity or sexual orientation. In 2019, sixty LGBTQ, civil rights, and immigration justice organizations submitted a complaint to DHS citing medical neglect and abuse suffered by LGBTQI detainees in eight different immigration detention centers.[428] One major concern is that LGBTQI detainees living with serious medical conditions, including HIV, tuberculosis, and syphilis, do not receive timely and adequate medical care.[429] Many migrant detainees are completely denied access to HIV-related care and others experience significant delays, risking the health of HIV positive detainees.[430] For example, at the Otay Mesa Detention Center in San Diego, California, a 34 year-old HIV-positive trans woman detainee was denied HIV medication for over six months.[431] Another HIV-positive bisexual detainee held at Irwin Country Detention Center in Ocilla, Georgia regularly goes without her HIV medication. In order to receive her medication "she has to write a letter to the warden every month . . . and if she does not write the letter she does not receive her refill." Trans migrant detainees are also regularly denied hormone treatment, causing them to suffer both physically and mentally.[432]

International human rights law has confirmed that LGBTQI individuals are entitled to health-care which meets their specific needs. The Special Rapporteur on the Right of Everyone

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[428] Anna Castro, *LGBTQ and Immigrant Rights Organizations Demand ICE Release All People Currently Detained & Shut Down All Det. Centers in Light of Global Health Crisis*, TRANSGENDER LAW CENTER (Mar. 17, 2020); *see* TRANSGENDER LAW CENTER ET. AL., COMPLAINT TO DHS: FAILURE TO PROVIDE ADEQUATE MEDICAL AND MENTAL HEALTH CARE TO LGBTQ PEOPLE AND PEOPLE LIVING WITH HIV IN IMMIGR. DET. FACILITIES (Sep. 25, 2019), http://transgenderlawcenter.org/wp-content/uploads/2019/10/Complaint-on-LGBTQ-Detention-Final-October.pdf.
[429] Laura Gomez, *Migrants Held in ICE's Only Transgender Unit Plead for Help, Investigation in Letter*, AZ MIRROR (Jul. 9, 2019); AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO ET. AL., COMPLAINT TO DHS: DETENTION CONDITIONS IMPACTING THE SAFETY AND WELL-BEING OF IMMIGRANTS IN THE CIBOLA COUNTY CORRECTIONAL CENTER IN MILAN, NEW MEXICO (Apr. 16, 2019).
[430] COMPLAINT TO DHS: FAILURE TO PROVIDE ADEQUATE MEDICAL AND MENTAL HEALTH CARE TO LGBTQ PEOPLE AND PEOPLE LIVING WITH HIV IN IMMIGR. DET. FACILITIES, *supra* note 428, at 4.
[431] *Ibid*. at 5.
[432] *Ibid*; Gaby Del Valle, *For LGBT Undocumented Immigrants, Det. Means More Fear and Humiliation*, VICE (Mar. 17, 2017).

to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health has advised that "[h]ealth-care providers must be cognizant of and adapt to the specific needs of lesbian, gay, bisexual, transgender and intersex persons."[433] The Committee on Economic, Social and Cultural Rights has indicated that the ICESCR "proscribes any discrimination in access to health-care and the underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of sexual orientation and gender identity."[434] The Special Rapporteur on Torture has recognized the denial of appropriate health care to LGBTQI individuals as a concern under the prohibition of torture and other ill-treatment.[435] Finally, the Yogyakarta Principles provide: "Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity."[436] Accordingly, the specific denials of health care in immigration detention related to LGBTQI detainees' sexual orientation and gender identity should framed around the prohibition of torture and other ill-treatment, which prohibits the imposition of severe pain and suffering on the basis of discrimination.

2. International Norms on Ethical Medical Care and Treatment

Medical care that is inappropriate and non-compliant with international principles of medical ethics may constitute a violation of the prohibition of torture and ill-treatment. The UN

[433] Anand Grover (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Report of the Special Rapporteur to the General Assembly Sixty-Fourth Sess.*, ¶ 46, U.N. Doc. A/64/272 (Aug. 10, 2009); Juan Mendez (Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess.*, ¶ 38, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).
[434] ESCR *General Comment No. 14*, *supra* note 399, at ¶ 18; *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess*., supra note 433, at ¶ 38.
[435] *Report of the Special Rapporteur to the Human Rights Council Thirty-First Sess*., *supra* note 402, at ¶¶ 48-49.
[436] Yogyakarta Principles, *supra* note 399, at Principle 17. While the Yogyakarta Principles themselves are non-binding, they affirm binding international norms which state parties are obligated to uphold.

Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UN Principles of Medical Ethics) includes the following important principle:

> It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.[437]

The Human Rights Committee considers adherence to these UN Principles of Medical Ethics in considering whether detained persons are receiving humane treatment as required under ICCPR Article 10.[438]

In 2008, Special Rapporteur Nowak recognized that certain medical treatment may itself constitute torture and ill-treatment. He suggested such medical treatments would include those "of an intrusive and irreversible nature, when they lack a therapeutic purpose."[439] Additionally, he recognized that "[i]n a given context, the particular disability of an individual may render him or her more likely to be in a dependent situation and make him or her an easier target of abuse."[440] In a 2013 report focused specifically on "abuses in health-care settings that may cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment"[441] Special Rapporteur Mendez further developed Nowak's comment on dependency. He recognized that patients in health-care settings are often reliant on health-care

[437] G.A. Res. 37/194, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Principle 2 (Dec. 18, 1982).
[438] Human Rights Comm., *General Comment No. 21: Article 10 Humane Treatment of Persons Deprived of their Liberty*. ¶ 5 (1992).
[439] *Interim Report of the Special Rapporteur to the General Assembly Sixty Third Session*, *supra* note 217, at ¶ 47.
[440] *Ibid.* at ¶ 50
[441] *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess.*, *supra* note 433.

workers to provide them services, putting them in a situation of powerlessness, a presupposed element of torture violations.[442] Although Special Rapporteur Mendez's 2013 report does not specifically focus on health-care in detention settings, the principles in it are applicable there. One primary principle drawn out of the report is the necessity of informed consent for medical interventions.[443]

a) Especial Vulnerability of Women

The Committee against Torture has explicitly recognized that women in particular are more at risk of torture or ill-treatment from inappropriate medical treatment, particularly involving reproductive decisions.[444] Special Rapporteur Mendez in 2013 recognized the "dubious grounds of medical necessity" used to justify "intrusive and irreversible procedures . . . without full free and informed consent" against women specifically.[445] He provided the example of forced sterilizations of women: "the administration of non-consensual medication or involuntary sterilization is often claimed as being a necessary treatment for the so-called best interest of the person concerned."[446] As a result of these concerns, Special Rapporteur Mendez posited that a questioning of the doctrine of "medical necessity" was required. Critically, he found:

> [A]buse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender. Examples of such violations include abusive treatment and humiliation in institutional settings, involuntary sterilization, denial of legally available health services such as abortion and post-abortion care, forced abortions and sterilizations, female genital mutilation, violations of medical secrecy and confidentiality in health-care settings . . . and the practice of attempting to obtain a confessions as a condition of potentially life-saving medical treatment after abortion.[447]

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[442] *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess., supra* note 433, at ¶ 31.
[443] *Ibid.* at ¶¶ 28-30.
[444] CAT *General Comment No. 2, supra* note 196, at ¶ 13.
[445] *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess., supra* note 433, at ¶ 34.
[446] *Ibid.* at ¶ 32.
[447] *Ibid.* at ¶ 46.

Special Rapporteur Mendez went on to say that "[f]orced sterilization is an act of violence, a form of social control, and violation of the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment."[448] The International Federation of Gynecology and Obstetrics has also emphasized that

> [S]terilization for prevention of future pregnancy cannot be ethically justified on grounds of medical emergency. Even if a future pregnancy may endanger a woman's life or health, she . . . must be given the time and support she needs to consider her choice. Her informed decision must be respected, even if is considered liable to be harmful to her health."[449]

Additionally, Special Rapporteur Mendez recognized that forced abortions as well as denials of therapeutic abortions may constitute torture or ill-treatment.[450] The Human Rights Committee has also explicitly stated that forced abortions as well as denial of access to safe abortions to women pregnant as a result of rape constitute a breach of Article 7 of the ICCPR.[451]

3. Improper and Unethical Reproductive Care of Women Migrants

In September 2020, a whistleblower complaint revealed that women migrants at the Irwin County Detention Center ("Irwin"), owned and operated by the private prison company LaSalle Corrections, were being improperly subjected to unethical reproductive care.[452] A licensed practical nurse employed by Irwin expressed concern over the high numbers of detained immigrant women at Irwin receiving hysterectomies:

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[448] *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess., supra* note 433, at ¶ 48.
[449] FIGO, ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY (2012).
[450] *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess., supra* note 433, at ¶ 448-49; see Human Rights Comm., *Karen Noelia Llantoy Huaman. v. Peru*, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005).
[451] Human Rights Comm., *General Comment No. 28: Article 3 The Equality of Rights Between Men and Women*, ¶ 14, CCPR/CO.70/ARG (2000).
[452] COMPLAINT RE: LACK OF MEDICAL CARE, UNSAFE WORK PRACTICES, AND ABSENCE OF ADEQUATE PROTECTION AGAINST COVID-19 FOR DETAINED IMMIGRATIONS AND EMPLOYEES ALIKE AT THE IRWIN COUNTRY DET. CENTER, *supra* note 412, at 18.

> Everybody he sees has a hysterectomy – just about everybody. He's even taken out the wrong ovary on a young lady [detained immigrant woman]. She was supposed to get her left ovary removed become it had a cyst on the left ovary; he took out the right one. She was upset. She had to go back to take out the left and she would up with a total hysterectomy. She still wanted children – so she has to go back home now and tell her husband that she can't bear kids . . . she said that she was not all the way out under anesthesia and heard him [doctor] tell the nurse that he took the wrong ovary.[453]

Concerningly, the nurse shared that many of the women who received these hysterectomies "didn't fully understand why they had to get a hysterectomy" and that there was a lack of informed consent for the procedures.[454]

In December 2020, lawyers representing over 40 migrant women at Irwin filed a class-action lawsuit alleging "non-consensual, medically unindicated, and/or invasive gynecological procedures" by Doctor Mahendra Amin.[455] The complaint indicated that in October 2020 a team of independent medical professionals had reviewed the medical records for 19 women detained at Irwin and found an "alarming pattern" of medical abuse including exposure to multiple unnecessary gynecological procedures and surgeries without informed consent.[456] For example, one petitioner, Ms. Oldaker, received ICE approval to see Dr. Amin to request a estrogen patch to deal with her hot flashes.[457] The medical care she received was inappropriate, nonconsensual, and unethical:

> Instead of prescribing a patch, [Doctor Amin] asked her to undress for an ultrasound. Ms. Oldaker explained to [Doctor Amin] that she had undergone a hysterectomy, but he said that he did ultrasounds on all his patients. [Doctor Amin] then violently jammed a transvaginal ultrasound monitor inside her and, after removing it, pushed several fingers into her vagina, causing her excruciating pain. Ms. Oldaker squirmed and told him "no," but he kept going. A survivor of sexual violence, Ms. Oldaker described it as feeling like she was "being raped again." At the end of the visit, he prescribed her Estrace pills.[458]

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[453] COMPLAINT RE: LACK OF MEDICAL CARE, UNSAFE WORK PRACTICES, AND ABSENCE OF ADEQUATE PROTECTION AGAINST COVID-19 FOR DETAINED IMMIGRATIONS AND EMPLOYEES ALIKE AT THE IRWIN COUNTRY DET. CENTER , *supra* note 412, at 19
[454] *Ibid*. at 19-20.
[455] Complaint, *Oldaker v. Giles*, No. 7:20-CV-00224 (M.D. Ga. 2020).
[456] *Ibid*. at ¶95-96.
[457] *Ibid.* at ¶ 131.
[458] *Ibid*. at ¶132.

When Ms. Oldaker returned to Dr. Amin for a medication refill, she was given a painful pap smear despite her protest that it was unnecessary given the fact that she had had a full hysterectomy:

> The pap smear that [Doctor Amin] performed was exceedingly painful. He inserted a metal clamp in Ms. Oldaker's vagina. He scraped inside and when he pulled the metal clamp out, it hurt even more. She was in agonizing pain. When she wiped, she realized [Doctor Amin] had not used lubrication. The pain Ms. Oldaker experienced lasted for days afterward. She had trouble sitting, was sore and could not wipe herself for several days.[459]

The complaint alleges that these "procedures were performed in the presence of unnamed [Irwin] officials" and that since 2018 "women at [Irwin] have reported [Doctor Amin's] abusive behavior to [Irwin] guards, officers, and medical staff, and to ICE employees."[460] In fact the DOJ had already investigated Doctor Amin; in *United States v. Hospital Authority of Irwin Country*, the DOJ alleged that "Dr. Amin has a standing order at ICH [Irwin County Hospital] that requires that certain tests always be run on pregnant patients, without any medical evaluation and regardless of her condition."[461] Yet, neither Irwin staff nor ICE officials adequately investigated the complaints against Doctor Amin made by migrant women.[462] Moreover, when these migrant women spoke out about their abuse, they were subjected to retaliatory actions. These included: placement or threat of placement in medical units or solitary confinement, placement on cell restriction, transfer to other units to separate protesters, physical assault, rationing or threat of rationing access to water, limiting access to phones, tablets, and video calls, denying access to

[459] Complaint, *Oldaker v. Giles*, No. 7:20-CV-00224, ¶ 137-8. (M.D. Ga. 2020).
[460] *Ibid.* at ¶ 1.
[461] *Ibid.* at ¶ 63.
[462] Complaint, *Oldaker v. Giles*, No. 7:20-CV-00224 (M.D. Ga. 2020).

the law library, and delayed delivery of prescribed medication.[463] Additionally, ICE began retaliatory deporting of the migrant women petitioners in the lawsuit.[464]

As the details over these women's reproductive medical abuses continue to be discussed and developed in the coming months, it is critical that the abuses are recognized for the torture and ill-treatment that they are. The women migrants who were taken to Doctor Amin were in a position of powerlessness, due to their detained condition but also due to their language barrier. Doctor Amin, a state official, knowingly performed medically unnecessary as well as nonconsensual gynecological treatment on these detained migrant women, and it caused them extreme pain and suffering as well as humiliation. Moreover, Doctor Amin's treatment can be viewed as having as having a discriminatory purpose. The Special Rapporteurs on Torture have consistently stated that "with regard to a gender-sensitive definition of torture, that the purpose element is always fulfilled when it comes to gender-specific violence against women, in that such violence is inherently discriminatory and one of the possible purposes enumerated in the [Convention against Torture] is discrimination."[465] Accordingly, these abuses should be framed within the context of torture and ill-treatment.

G. Sexual Abuse Against Women Migrants in Immigration Detention Violates the Prohibition on Torture and Other Ill-Treatment.

The international community has recognized that women, including transgender women, face specific risks of being subjected to torture or ill-treatment while in detention. In the U.S. women migrant detainees are regularly the object of sexual abuse by detention staff and other officials.

[463] Complaint, *Oldaker v. Giles*, No. 7:20-CV-00224, ¶ 2. (M.D. Ga. 2020).
[464] *Ibid.* at ¶ 99.
[465] *Report of the Special Rapporteur to the Human Rights Council Seventh Sess., supra* note 402, at ¶ 68; *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess., supra* note 433, at ¶ 37.

1. International Norms Around Sexual Abuse as Torture and Ill-Treatment

Today, the international community has confidently recognized rape and other forms of sexual violence as constituting torture and other ill-treatment. The ICTY in *Prosecutor v. Delalic* was the first international court to find that rape amounted to torture as a war crime.[466] The judgment in *Delalic* found that the deputy commander of a Muslim-run detention camp for Serbians "raped two Serbian female prisoners in order to intimidate the other female detainees and to discourage dissent among the prisoners, in particular the women."[467] In another ICTY case, *Prosecutor v. Tadic*, the defendant was charged with torture in a case where "two Bosnian Muslim male prisoners were forced to lick the buttocks of another male prisoner, suck his penis, and then were told to bite off his testicles.[468] The ICTY decision finding him guilty of torture set the stage for the development of the law viewing sexual violence as a violation of the prohibition of torture.

Since these ICTY cases, the international community has affirmed that rape and sexual violence can constitute torture and cruel, inhuman, and degrading treatment. In its General Comment No. 2, the Committee against Torture clarified that where state authorities fail to exercise due diligence to prevent, investigate, prosecute and punish non-state actors, its officials are considered complicit.[469] In that same paragraph, the Committee against Torture when on to recognize the applicability of this principle "to States parties' failure to prevent and protect victims of gender-based violence, such as rape, domestic violence, female genital mutilation, and

[466] *Prosecutor v. Delalic, supra* note 231, at ¶¶ 941, 963.
[467] Patricia Viseur Sellers, *Sexual Torture as a Crime Under International Criminal and Humanitarian Law*, 11 N.Y. CITY L. REV. 339, 343 (2008); *Prosecutor v. Delalic, supra* note 231, at ¶¶ 4, 130, 941.
[468] *Prosecutor v. Tadic*, Case No. IT-9401-T, Judgment, ¶ 206 (Int. Crim. Trib. for the Former Yugoslavia May 7, 1997).
[469] CAT *General Comment No. 2, supra* note 196, at ¶18.

trafficking."[470] In *CT and KM v. Sweden* for example, the Committee against Torture found that rape by public officials constitutes torture.[471] Special Rapporteur Nowak stated that "[i]t is widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials."[472] Regional courts have also found that rape was constitutive of torture.[473]

In the U.S., domestic courts have recognized that rape and sexual assault may constitute torture and other ill-treatment under the Convention against Torture. In *Zubeda v. Ashcroft*, the Third Circuit Court of Appeals found that "[r]ape can constitute torture," as it is "a form of aggression constituting an egregious violation of humanity." U.S. courts have found that this is especially true when inflicted on the basis of sexual orientation or transgender identity.[474]

Both the Committee against Torture and the Special Rapporteur on Torture have expressed concern with women's special vulnerabilities while detained, noting issues of "sexual violence and assault, including rape, insults, humiliation, and unnecessary invasive body searches, especially when women are not separated from male detainees or male staff are responsible for their care."[475] Thus, it would be correct to say that under international law, the

[470] CAT *General Comment No. 2*, *supra* note 196, at ¶18.
[471] Comm. against Torture, *C.T. and K.M. v. Sweden*, Commc'n No. 279/2005, ¶ 7.5, U.N. Doc. CAT/C/37/D/279/2005 (Nov. 17, 2006).
[472] *Report of the Special Rapporteur to the Human Rights Council Seventh Sess*., *supra* note 402, at ¶ 36.
[473] *Aydin v. Turkey*, 1997-VI, Eur. Ct. H.R. (1997).
[474] *Xochihua-Jaimes v. Barr*, 962 F.3d 1175, 1183 (9th Cir. 2020) ("Rape and sexual assault may constitute torture, and 'certainly rise to the level of torture for CAT purposes' when inflicted due to the victim's sexual orientation.); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015); Boer-Sedano v. Gonzales, 418 F.3d 1082, 1089 (9th Cir. 2005); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (finding that sexual assaults perpetrated against a transgender woman 'undoubtedly constitute persecution').
[475] Zach and Birk, *supra* note 249, at 457; *see, e.g.*, Comm. against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, ¶ 20, U.N. Doc. CAT/C/TGO/CO/1; CAT (July 28, 2006); Comm. against Torture, *Concluding Observations of the Comm. against Torture on The Philippines*, ¶ 18, UN Doc CAT/C/PHL/CO/2 (May 29, 2008); Comm. against Torture, *Concluding Observations of the Comm. against Torture on Cambodia*, ¶ 19, U.N. Doc. CAT/C/KHM/CO/2 (Jan. 20, 2011).

sexual assault of detainees, especially that perpetrated by detention staff, amounts to torture or other ill-treatment.[476]

2. Sexual Abuse of Women Migrants by Detention Officials

Sexual abuse, assault, and harassment are widespread within U.S. immigration detention centers. In 2017, Community Initiatives for Visiting Immigrants in Confinement ("CIVIC") filed a federal complaint with the Office for Civil Rights & Civil Liberties within DHS.[477] The complaint alleged that in the past three years, CIVIC had documented 27 cases of sexual abuse-related claims by migrants in immigration detention. It also noted that "an additional 1,016 people, at least, under the custody of [DHS] in detention have submitted sexual abuse-related complaints to the Office of the Inspector General at DHS since 2010." The complaint also pointed out that the five detention centers with the most sexual assault complaints were all privately-run.[478] In May 2020, a woman migrant detainee held in ICE custody at the Houston Processing Center brought a lawsuit against the U.S. and CoreCivic, the private contractor which owns and operates the Houston Processing Center, alleging sexual abuse while in detention. The complaint alleges that the night before the woman migrant detainee was to be released to Mexico, she and two other women detainees "were removed from the general detainee population and taken to a dark cell in an isolated area of the facility."[479] Then, "around midnight, three men entered the isolated cell and brutally attacked and sexually assaulted" her and the other

[476] JUST DETENTION INT'L, PRISONER RAPE IS TORTURE UNDER INT'L LAW (Feb. 2009).
[477] Freedom for Immigrants, *Widespread Sexual Assault*, https://www.freedomforimmigrants.org/sexual-assault.
[478] The five detention centers with the most sexual assault complaints are Jena/Lasalle Detention Center in Louisiana, Houston Contract Detention Facility in Texas, Adelanto Correctional Facility in California, Northwest Detention Center in Washington, and San Diego Contract Detention Facility in California.
[479] Complaint, *Doe v. CoreCivic, Inc*., 2020 WL 3640058 ¶ 3 (D.C. Tex 2020).

two women.[480] The next morning, all of the women were deported to Mexico.[481] As a result of being vaginally raped during the assault, the woman detainee became pregnant.[482]

These complaints of sexual assault in immigration detention centers are not new. As early as 1998, the Immigration and Naturalization Service ("INS"), the predecessor to ICE, was defending lawsuits by immigration detainees alleging rampant sexual abuse.[483] An investigation conducted by the DOJ in 2000 revealed that "roughly 10 percent" of female detainees at the INS Krome Service Processing Center in Miami, Florida "had come forward with reports of sexual misconduct by INS officers that included sexual harassment, fondling during searches, and sexual assault."[484] In 2002, a former security guard at the Port Isabel Service Processing Center in Los Fresnos, Texas released "Between the Fences: Inside a U.S. Immigration Camp," documenting how detention offers solicited sexual favors in exchange for preferential treatment and favors or outright forced detainees to have sex with them.[485]

Although ICE and the private prison companies that run immigration detention centers claim to have a "zero tolerance" policy towards sexual assault, the facts show otherwise. Despite years of awareness of the issue of rampant sexual assault in immigration detention centers, the problem continues unabated. Not only have ICE and the private prison companies that run the detention centers failed to keep migrant detainees safe from sexual abuse, they are regularly the perpetrators of the harm.

These sexual abuses against migrant women detainees should be viewed as violations of the prohibition of torture and cruel, inhuman, and degrading treatment. Rape and sexual assault

[480] Complaint, *Doe v. CoreCivic, Inc*., 2020 WL 3640058 ¶ 4 (D.C. Tex 2020).
[481] *Id.* at ¶ 4.
[482] *Id*. at ¶ 5.
[483] *See, e.g., Jama v. U.S*. I.N.S., 22 F. Supp. 2d 353 (D.N.J. 1998).
[484] NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 175 (June 2009), https://www.ojp.gov/pdffiles1/226680.pdf.
[485] TONY HEFNER AND JACALYN MCLEOD, BETWEEN THE FENCES: INSIDE A U.S. IMMIGRATION CAMP (2002).

certainly cause severe pain and suffering, both physical and mental. The officials who commit these abuses do so with intentionality and not accidentally, often taking extraordinary measures to prepare for the perpetration. There is certainly state action involved in these abuses; when detention officials are the perpetrators then the abuse is committed by the state. Even when the abuse is not committed by an official, there is still state acquiescence, as the U.S. has failed to take appropriate measures to curb the pattern of sexual abuse despite complete awareness of the problem. Finally, the element of purpose can be satisfied based on discrimination. The Special Rapporteur on Torture has consistently stated that "with regard to a gender-sensitive definition of torture, that the purpose element is always fulfilled when it comes to gender-specific violence against women, in that such violence is inherently discriminatory and one of the possible purposes enumerated in the [Convention against Torture] is discrimination."[486]

H. The United States' Use of Immigration Detention and Ill-Treatment to Coerce Migrants into Withdrawing Their Claims to Stay in the United States Violates the Prohibition of Torture and Other Ill-Treatment.

The use of immigration detention and ill-treatment imposed while in detention to deter migrants from entering the country or to coerce migrants already in the country into withdrawing their legal claims to stay to is condemned by the international community. Moreover, such behavior may amount to a violation of the prohibition of torture or other ill-treatment.

[486] *Report of the Special Rapporteur to the Human Rights Council Seventh Sess., supra* note 402, at ¶ 68; *Report of the Special Rapporteur to the Human Rights Council Twenty-Second Sess., supra* note 433, at ¶ 37.

1. Norms on Deterring Migrants From Entering a Country and Coercing Withdrawal of Legal Claims to Stay in the Country

The prohibition of torture and other ill-treatment, under both customary and treaty law, includes the principle of non-refoulement "which prohibits States from 'deporting'[487] any person to another State's jurisdiction or any other territory where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or ill-treatment."[488] Article 3 of the Convention against Torture explicitly provides: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[489] The Human Rights Committee in General Comment No. 31 has affirmed this principle of non-refoulment:

> The article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel, or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the [ICCPR].[490]

International and regional courts have done the same, interpreting the rights to life and freedom from torture to include a prohibition against refoulement.[491] This principle of non-refoulement,

[487] The term "deportation" is here used for any removal of persons from the jurisdiction of a State without their genuine, fully informed and valid consent, including expulsions, extraditions, forcible returns, forcible transfers, renditions, rejections at the frontier, pushbacks and any other similar acts. *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session, supra* note 91, at Footnote 56.
[488] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session, supra* note 91, at ¶ 38; Convention against Torture, *supra* note 196, at art. 3(1); CAT *General Comment No. 4, supra* note 214, at ¶¶ 15-17, 26, 28-29; HRC *General Comment No. 20, supra* note 290, at ¶ 9; Comm. on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sep. 1, 2005).
[489] Convention against Torture, *supra* note 196, at art. 3(1).
[490] Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).
[491] *Afghanistan v. Sec'y of State for the Home Dept*. [2011] EWHC 2937 (U.K.); *Case of M.S.S. v. Belg. and Greece*, Merits and Just Satisfaction, App. No. 30696/09, Eur. Ct. Hr. (2011).

for the protection against the risk of torture and ill-treatment, is both absolute and non-derogable under all circumstances.[492]

Thus, in his 2018 report looking at migration-related torture and ill-treatment, Special Rapporteur Melzer expressed concern with the use of "refoulement in disguise" where immigration detention and its associated policies are intentionally designed and used "to prompt migrants to withdraw their requests for asylum, subsidiary protection or other stay and agree to 'voluntary' return in exchange for their release."[493] Special Rapporteur Melzer noted the use of deliberately harsh reception conditions faced by migrants:

> States increasingly subject migrants to unnecessary, disproportionate and deliberately harsh reception conditions designed to coerce them to 'voluntarily' return to their country of origin, regardless of their need of non-refoulement protection. This may include measures such as the criminalization, isolation and detention of irregular migrants, the deprivation of medical care, public services and adequate living conditions, the deliberate separation of family members, and the denial or excessive prolongation of status determination or habeas corpus proceedings. In the view of the Special Rapporteur, deliberate practices such as these amount to 'refoulement in disguise' and are incompatible with the principle of good faith.[494]

Special Rapporteur Melzer also reiterated that detention of migrants must "take place in appropriate, sanitary, non-punitive facilities" and that treatment and conditions must be consistent with universally recognized standards such as the Nelson Mandela Rules.[495] Immigration detention regimes which fail to do so, either as a matter of deliberate policy or as a consequence of negligence, complacency, or impunity are incompatible with the prohibition of torture and other ill-treatment.[496] Moreover,

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[492] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 39; CAT *General Comment No. 4*, *supra* note 214, at ¶¶ 9-10.
[493] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 20.
[494] *Ibid.* at ¶ 45.
[495] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶¶ 19-20; HRC *General Comment No. 35*, *supra* note 30.
[496] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 20; *Case of M.S.S. v. Belg. and Greece*, *supra* note 491, at §233; Case of Klashnikov v. Russia, Judgment, App. No. 47095/99, § 102, Eur. Ct. H.R. (2002); Human Rights Comm., *Mukong v. Cameroon*, Commc'n No.458/1991, §9.4,

> [I]ll-treatment or grossly inadequate detention conditions can even amount to torture if they are intentionally imposed, encouraged or tolerated by states for reasons based on discrimination of any kind, including based on immigration status, or for the purpose of deterring, intimidating, or punishing migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, [or] agreeing to 'voluntary' return."[497]

Thus, Special Rapporteur Melzer made incredibly clear that a state's treatment of migrant detainees should in no way be inflicted in a manner intended to coerce them into giving up any claims they may have to stay in the country.

2. The United States Has Attempted to Deter Migrants From Entering the Country and to Coerce Withdrawal of Legal Claims to Stay in the Country.

The U.S. has increasingly attempted to deter migrants from entering the country and to coerce migrant detainees to "voluntarily" leave the U.S. and withdraw any legal claims they may have to stay. It has done this using deliberately harsh immigration detention policies and conditions at the southern border as well as forcibly through violent acts and threats.

a) Coercion through Family Separation and Harsh Detention Conditions at the Southern Border

President Trump's policy of separating migrant families at the US-Mexico border once in custody had a deterrent and coercive impact on migrants. Amnesty International has reported:

> As early as 2017, the US government considered the use of family separations in order to "deter" asylum-seekers from coming to the United States. Since then, the practice surged under the Trump administration, with the same restated objective of deterring asylum-seekers from coming to the United States to request international protection, or to compel them to give up their claims and return to their countries-of-origin where they had fled persecution."[498]

U.N. Doc. CCPR/C/51/D/458/1991 (Aug. 10, 1994); *Case of Suarez-Rosero v. Ecuador*, Merits, Judgment, Inter-Am. Ct. H.R. (ser C) No. 35, § 91 (Nov. 12, 1997).

[497] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 91, at ¶ 20.

[498] USA: "YOU DON'T HAVE ANY RIGHTS HERE," *supra* note 126, AT 29; *see* MSNBC, Exclusive: Trump Administration Plans Expanded Immigration Detention (Mar. 3, 2017) ("Under the plan under consideration, DHS would break from the current policy keeping families together. Instead, it would separate women and children after they've been detained – leaving mothers to choose between returning to their country-of-origin with their children,

Prior to and during the implementation of the "zero-tolerance" policy, which was responsible for family separations at the border, DHS Secretary John Kelly defended the policy as a "tough deterrent – a much faster turnaround on asylum-seekers."[499]

Ultimately, the policy of family separation was used to compel asylum-seekers to "voluntarily" give up their claims and accept deportation. This is supported by the fact that on June 23, 2018, DHS stated that "it planned to reunite separated families only for the purpose of deporting them to their countries-of-origin, yet would keep families separated while they pursued their asylum claims."[500] In August 2018, the American Immigration Council and the American Immigration Lawyers Association filed a complaint with DHS oversight bodies, "detailing widespread and extreme coercive tactics used by DHS to compel separated families to give up their asylum claims, in exchange for the possibility of reunification."[501] For example, the complaint documents the case of a migrant woman, D.P., who entered the U.S. with her 9 year-old daughter and immediately sought asylum:

> Shortly after her arrival, CBP officers called D.P. into a room to interview her, without her daughter. A male CBP official interviewed her and then told her to sign some paperwork that she believed were deportation papers. She refused to do so because she was afraid to return to her country. The officer then threatened her and told her that if she did not sign the papers, "I would never see my child again because she was going to be adopted." D.P

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or being separated from their children while staying in detention to pursue their asylum claim."); *see also* Attorney General Jeff Sessions, *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, DOJ (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions; Attorney General Jeff Sessions, *Attorney General Sessions Delivers Remarks to the Association of State Criminal Investigative Agencies 2018 Conference*, DOJ (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-association-state-criminal-investigative.

[499] USA: "YOU DON'T HAVE ANY RIGHTS HERE," *supra* note 126, at 30; CNN Interview, *Kelly: DHS is Considering Separating Undocumented Children from Their Parents at the Border* (Mar 7, 2017), https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/; NPR Interview with John Kelley (May 10, 2018), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr (transcript).

[500] USA: "YOU DON'T HAVE ANY RIGHTS HERE," *supra* note 126, at 31; DHS FACT SHEET ON FAMILY SEPARATIONS AND REUNIFICATIONS (Jun. 23, 2018), https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification.

[501] USA: "YOU DON'T HAVE ANY RIGHTS HERE," *supra* note 126, at 31.

> began crying, but again refused to sign any papers despite the officer's threats. When D.P. returned from the interview, her daughter was missing.[502]

Later after being found to not have a credible fear of persecution, D.P. was given a voluntary departure form from an ICE officer to sign.[503] When she refused to sign it, the officer stated, "Fine, stay in detention for a year waiting for your daughter."[504] In general, separated migrant parents reported that "ICE officers yelled at and insulted them, used intimidation tactics, such as isolation and denying food, and taunted them with threats that their children already had, or would be put up for adoption."[505] Critically, "the trauma of having a child forcibly removed from an asylum-seeking parent created an environment so coercive that parents were unable to participate meaningfully in the asylum process." Even when migrant parents and children were reunified, ICE continued to use coercive tactics. During reunification, ICE officials handed out pre-completed forms to parents indicating that the parent was "voluntarily" choosing to be deported with their child.[506] ICE refused to permit parents to select available options other than the one pre-selected, and when parents tried to do so, they were verbally assaulted.[507] This policy of family separation at the U.S. border is a clear violation of the prohibition on torture and other ill-treatment, not just because of the severe pain and suffering caused by the forcible separation of parent and child, but also as a measure intended in practice to refoul migrants by coercing them into giving up their legal claims to stay in the country in order to be reunited with separated family members.

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[502] AMERICAN IMMIGRATION COUNCIL & AMERICAN IMMIGRATION LAWYERS ASSOCIATION, THE USE OF COERCION BY U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) OFFICIALS AGAINST PARENTS WHO WERE FORCIBLY SEPARATED FROM THEIR CHILDREN 13-14 (Aug. 23, 2018).
[503] *Ibid.* at 14.
[504] *Ibid.* at 14.
[505] *Ibid.* at 9.
[506] *Ibid.* at 7.
[507] *Ibid.* at 7.

Moreover, the conditions in U.S. Customs and Border Protection (CBP) detention centers located at the border are grossly inadequate.[508] High Commissioner for Human Rights Michelle Bachelet stated that in 2019 that she was "appalled by the conditions in which migrants and refugees – children and adults – are being held in detention in the United States of America after crossing the southern border."[509] In July 2019, the DHS Office of Inspector General (OIG) released a report documenting severe overcrowding at Border Patrol facilities in the Rio Grande Valley, leading to security and safety concerns for both detainees and facility staff.[510] The report also documented severe non-compliance with CBP's Transport, Escort, Detention and Search (TEDS) standards for both adult and child detainees including a lack of access to showers, limited access to fresh clothing, lack of laundry facilities, and lack of access to hot meals for children.[511] Also in 2019, the ACLU of Texas and the ACLU Border Rights Center filed an administrative complaint over the mistreatment of migrants detained at Rio Grande Valley Border Patrol facilities, alleging that detained asylum seekers, including families and children, "reported being forced to remain for multiple nights in outdoor detention facilities on muddy and rocky ground and in harsh weather conditions."[512] In the recently released decision *Unknown Parties v. Niellsen,* a district court acknowledged the specific harms of overcrowding in CBP facilities in the Tucson Sector:

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[508] Adam Serwer, *A Crime by Any Name: The Trump Administration's Commitment to Deterring Immigr. Through Cruelty Has Made Horrifying Conditions in Det. Facilities Inevitable*, THE ATLANTIC (Jul. 3, 2019).
[509] UNHCHR, *Bachelet Appalled by Conditions of Migrants and Refugees in Detention in the US* (Jul. 8, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24800&LangID=E.
[510] Jennifer L. Costello, DHS OFFICE OF INSPECTOR GENERAL, MANAGEMENT ALERT – DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY 7-8 (Jul. 2, 2019).
[511] *Ibid.* at 5-9; *see also* Joseph V. Cuffari, DHS OFFICE OF INSPECTOR GENERAL, CBP STRUGGLED TO PROVIDE ADEQUATE DETENTION CONDITIONS DURING 2019 MIGRANT SURGE (Jun. 12, 2020).
[512] American Civil Liberties Union Texas, *ACLU Uncovers Dangerous and Abusive Conditions at Border Patrol Detention Facility* (May 17, 2019).

> Surveillance video reveals overcrowding so severe that, at times, detainees have no place to sit, much less lie down on mats; detainees (including children) sleep in toilet stalls for lack of space; detainees (including mothers holding children) are forced to climb over benches to reach toilets and drinking water; and detainees are forced to sleep sitting up.[513]

These grossly inadequate and abhorrent conditions of immigration detention at the border have the impact of deterring migrants from entering the country and of coercing those already in the country to abandon their legal claims to stay just to escape the abhorrent conditions of detention.

The forced family separation as well as the harsh detention conditions at the US southern border are the exact reception conditions which the Special Rapporteur on Torture determined to be inappropriately coercive as they are imposed "for the purpose of deterring, intimidating, or punishing migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, [or] agreeing to 'voluntary' return."[514] These policies are "refoulment in disguise" which do not conform with the principle of good faith required in meeting obligations under the prohibition of torture and other ill-treatment.[515] Accordingly, advocacy around forced family separations and inadequate detention conditions at CBP facilities should frame the policies as improperly coercive under the prohibition of torture and other ill-treatment such that they violate the principle of non-refoulment.

b) Use of Physical and Verbal Abuse to Obtain "Voluntary" Deportation

In October 2020, the Southern Poverty Law Center along with several other immigrant rights organizations submitted a complaint with DHS, the DHS Office of Inspector General, and the Office of Civil Rights and Civil Liberties condemning the use of force to coerce

[513] *Unknown Parties et. al., v. Nielsen, et. al*., No. CV-15-00250-TUC-D, ¶ 29, 2020 WL 813774CB (D.C. Ariz. 2020).
[514] *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session, supra* note 91, at ¶ 20.
[515] *Ibid.*, at ¶ 45.

Cameroonian asylum seekers into signing their own deportation papers.[516] The complaint alleged that eight Cameroonian migrants detained by ICE at the Adams County Correctional Center ("Adams") in Natchez, Mississippi were subjected to forcible coercive tactics, including the use of threats of violence and direct physical abuse, in an attempt to secure signature of removal documents. The Cameroonian migrants at Adams each independently reported a series of assaults intended to secure their deportation:

> ICE officers handcuffed one man or several men, brought these men to the medical unit in attempts to force signature, then brought them to a dorm named Zulu, which is known amongst the men as a place where those are punished are taken. ICE officers and Security Officers employed by CoreCivic took turns beating up the men and forcing them to sign travel documents. If the men refused to sign, ICE officers would take their thumbprint as a signature after they were restrained. In some instances, individuals were physically forced to place their thumbprint on documents while handcuffed, despite their physical attempts to stop this from taking place.[517]

The descriptions of physical abuse by these Cameroonian detainees are graphic and extensive. Cameroonian detainee B.J. reported that after he refused to sign a deportation form, he was pepper sprayed in the eyes and strangled "almost to the point of death" despite telling the officer "I can't breathe" As a result of the physical violence, the officer was able to forcibly obtain J.B's fingerprint on the deportation form. Another Cameroonian detainee D.F. reported that an ICE officer "pressed my neck into the floor," causing him to lose blood circulation after he refused to sign a deportation form. The ICE officers threatened to kill him. J.B.'s fingerprint was also obtained through this physical violence. Cameroonian detainee C.A. was subjected to similar

[516] SOUTHERN POVERTY LAW CENTER, ICE IS USING TORTURE AGAINST CAMEROONIAN IMMIGRANTS TO COERCE DEPORTATION, ACCORDING TO NEW COMPLAINT FILED BY IMMIGRANT RIGHTS GROUPS (Oct. 8, 2020), https://www.splcenter.org/presscenter/ice-using-torture-against-cameroonian-immigrants-coerce-deportation-according-new.

[517] SOUTHERN POVERTY LAW CENTER & FREEDOM FOR IMMIGRANTS, IMMIGR. AND CUSTOMS ENFORCEMENT OFFICERS' USE OF TORTURE TO COERCE IMMIGRANTS INTO SIGNING IMMIGR. DOCUMENTS AT ADAMS COUNTY CORRECTIONAL FACILITY (Oct. 7, 2020), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5f7f17f39e044f47175204fb/1602164723244/Re+CRCL+Complaint+ICE%27s+Use+of+Torture+to+Coerce+Immigrants+to+Sign+Immigration+Documents+at+Adams+County+Correctional+Facility.pdf.

physical violence after he also refused to sign deportation papers, citing that he needed to talk to his attorney before signing anything. C.A. was dragged across the ground by his hands and some of his fingers were broken. Like the others, C.A.'s fingerprint was eventually obtained. Other Cameroonian detainees at Adams also cited violence and threats of violence by ICE and security officers used against them to obtain their voluntary signature on deportation papers.

Only a month later in November 2020, the Southern Poverty Law Center and Freedom for Immigrants again filed another complaint alleging torturous acts against Cameroonian detainees, this time at the Jackson Parish Correctional Facility ("Jackson") in Louisiana.[518] This complaint alleges that six asylum seekers were physically harmed by ICE officials in an effort to coerce them to sign deportation papers. Cameroonian detainee BN described ICE officers "stripping off my pants and underwear" so that he was "completely naked and exposed" after he tried to hide under a table to avoid the physical violence. Like the Cameroonian detainees at Adams, BN and the other Cameroonian detainees at Jackson were all physically forced to thumbprint what they believed to be deportation documents. The Southern Poverty Law Center has also documented physical abuse to coerce "voluntary" deportation at the Winn Correctional Center in Louisiana.[519]

These coercive acts intended to obtain the "voluntary" departure of the Cameroonian detainees are blatantly acts of torture as prohibited under the Convention against Torture and customary international law. Torture is defined within the Convention against Torture as "any act

[518] SOUTHERN POVERTY LAW CENTER & FREEDOM FOR IMMIGRANTS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)'S PATTERN OF TORTURE IN SIGNING OF DEPORTATION DOCUMENTS FOR CAMEROONIAN MIGRANTS (Nov. 5, 2020), https://www.splcenter.org/sites/default/files/crcl_complaint_ice_s_pattern_of_torture_in_signing_of_deportation_documents_for_cameroonian_migrants.pdf.

[519] SOUTHERN POVERTY LAW CENTER, THREE INCIDENTS OF VIOLENT ABUSE OF AUTHORITY AT WINN CORRECTIONAL CENTER (Aug. 7, 2020), https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:7bbe78f6-75e5-4d3c-a155-549b8a3fb1a8.

by which severe pain or suffering, whether physical or mental, is inflicted on a person for such purposes as … intimidating or coercing him … when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official."[520] All of these elements can clearly be satisfied here. Strong arguments can be made that the Cameroonian detainees suffered severe pain and suffering due to the physical violence they experienced, which often made them fear their own death, as well as the death threats they were given. These physical acts of violence and threats of violence were undertaken intentionally, and not by accident, by ICE officials, who are public officials, and CoreCivic security officers, who are acting in an official capacity. Finally, the acts which caused the severe pain and suffering were undertaken for a prohibited purpose of coercion, and that coercion was related to the state aim of deporting the detainees. Thus, the abuses which occurred in Adams against migrant detainees should certainly be framed as torture and at the least cruel, unusual and degrading treatment or punishment.

Section 3: State Responsibility & the Use of Private Detention Centers

VI. The Use of Private Detention Centers Raises International Responsibility Concerns for the United States as the Conduct of these Detention Centers is Attributable to the State.

A state is responsible for an internationally wrongful act "when conduct consisting of an action or omission: a) is attributable to the State under international law; and b) constitutes a breach of an international obligation of the State."[521] The principle that a state is responsible for

[520] Convention against Torture, *supra* note 196, at art. 1.
[521] Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* U.N. Doc. A/56/10, art. 2 (2001) [hereinafter ILC Articles]; These elements were also specified by the Permanent Court of International Justice in *Phosphates in Morocco (Italy v. France)*, Preliminary Objections, 1938 P.C.I.J. (serA/B) No.

its internationally wrongful acts is well established in international law.[522] An internationally wrongful act giving rise to state responsibility can include a violation of an international human rights obligation.[523] Importantly, private action can at times engage this state responsibility.[524] The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles") contain three relevant provisions on attribution to the state: Article 4: "entity is an organ of the state"; Article 5: "entity exercises elements of governmental authority"; and Article 8: "entity is controlled by the state." [525] These provisions focus on an entity's structure, function, and control, respectively, to determine whether its conduct can be attributed to the state.[526] While the "[ILC] Articles are not binding, they are widely regarded as a codification of customary international law."[527]

74 (June 14); *U.S. Diplomatic and Consular Staff in Tehran, supra* note 22, at ¶ 30; *Dickson Car Wheel Company (U.SA.) v. United Mexican States*, 4 RIAA 669, 678 (1931).

[522] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. 2005 Rep. 168, ¶ 251 (Dec. 19); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovinia v. Serbia and Montenegro*), Judgment, 2007 Rep. 43, ¶385 (Feb. 26); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (Sep. 25, 2007); *Ilascu and others v. Russia and Moldova,* App. No. 487887/99, 2004-VII Eur. Ct. H.R. (July 8, 2004).

[523] Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELB J. INT'L L. 1, 13 (2004) ("the duty of states to protect individuals or groups from violations of their human rights by private actors is well established in international law"); Nicola Jagers, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY145-6 (2002); Viljam Engstrom at 15; Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in Human Rights Law, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca J. Cook ed.,1994); *Rainbow Warrior (New Zealand v. France)*, 20 RIAA 217 (1990); *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, Merits, 1997 I.C.J. Rep. 88 (Sep. 25).

[524] Ira P. Robbins, *Privatization of Corrections: A Violation of U.S. Domestic Law, Int'l Human Rights, and Good Sense*, HUMAN RIGHTS BRIEF 12, 15 (2006)

[525] ILC Articles, *supra* note 521; Yuka Shiotani, The 2019 Philip C. Jessup International Law Moot Court Competition, The Case Concerning Aurok and Rakkab: Memorial for the Applicant 19 (2019).

[526] Michael Feit*, Responsibility of the State under Int'l Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. INT'L LAW 142 (2010).

[527] Chirwa, *supra* note 523, at 5; Viljam Engstrom, Institute for Human Rights, Abo Akademi University, *Who is Responsible for Corporate Human Rights Violations* 13 (2002); *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, ¶69 (12 Oct., 2005); *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/14, Decision on Jurisdiction, ¶149 (Jun. 16, 2006).

A. State Responsibility Attaches to the Actions of a State Organ.

The proposition that a state organ's acts can give rise to state responsibility is a fundamental principle within international law. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* the ICJ affirmed this principle:

> … the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the state under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State.[528]

ILC Article 4(2) guides the analysis of whether an entity is a state organ for the purposes of state responsibility under international law. Article 4(2) uses non-exclusive phrasing, providing that "[a]n organ *includes* any person or entity which has that status in accordance with the internal law of the State."[529] (emphasis added). Thus, entities not classified as state organs under internal laws may still be deemed *de facto* state organs in certain circumstances where traditional state organ functions are performed.[530] Article 4(1) of the ILC Articles provides that a state organ's conduct is attributable to the state if it "exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the States."[531]

Private correctional or immigration detention centers should be considered a state organ under Article 4 of the ILC because they perform the core state function of providing detention services. Historically, "the construction and operation of a prison has . . . been a government

[528] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 522, at ¶ 385.
[529] ILC Articles, *supra* note 521, at art. 4(2).
[530] Camilla Wee, *Regulating the Human Rights Impact of State-Owned Enterprises: Tendencies of Corporate Accountability and State Responsibility* 22, INT'L COMM'N OF JURISTS (2008); Jennifer Maddocks, *Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution*, 59 VA. J. INT'L L. 47, 58 (2019) (a de facto state organ is not recognized under domestic law but is "nonetheless analogous to state organs in terms of their complete dependence on the state and lack of autonomy.").
[531] *Articles*, Art. 4(1); Wee, *supra* note 530, at 22.

responsibility,"[532] and those detained are considered wards of the state.[533] Scholars note that since the government is responsible for promulgating the laws that lead to detention, the government is also responsible for the enforcement and overseeing of those laws.[534] Although immigration detention is distinguishable from criminal incarceration, both of these forms of detention arise out of traditional sovereign state powers.[535] While criminal incarceration comes from a state's power to punish, immigration detention is rooted in "the sovereign power to control borders."[536] Although these roots are different, criminal incarceration and immigration both manifest in the same way: deprivation of liberty.[537] It is this act of deprivation that is a fundamental state function. Put poignantly, "The ability to deprive citizens of their freedom, force them to live behind bars and totally regulate their lives, is unlike any other power the government has."[538] Given this, detention centers should be viewed as state organs, and as a result, states should have responsibility for their conduct.

B. State Responsibility Attaches when an Entity Exercises Elements of Governmental Authority.

Article 5 of the ILC Articles provides that "[t]he conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to

[532] Joseph E. Field, *Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649, 669 (1987). PENNSYLVANIA LEGIS. BUDGET AND FINANCE COMM., REPORT ON A STUDY OF ISSUES RELATED TO THE POTENTIAL OPERATION OF PRIVATE PRISONS IN PENNSYLVANIA 30 (Oct. 1985).
[533] Martin E. Gold, *The Privatization of Prisons*, 28 THE URBAN LAWYER 359, 374 (1996).
[534] Field, *supra* note 532, at 669.
[535] Fiona O'Carroll, *Inherently Governmental: A Legal Argument for Ending Private Fed. Prisons and Det. Centers*, 67 EMORY L.J. 293, 325 (2017).
[536] *Ibid.* at 325; *see U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977); Chase Whiting, *Constitutional Bases to Retroactively Alter Private Prison Contracts*, 54 AM. CRIM. L. REV. 339 ("States cannot bargain away the reserved sovereign power to regulate criminal punishment"); Vijay Raghavan, *Guidelines for Public-Private Partnership in Prison Management* 16-17, ECONOMIC AND POLITICAL WEEKLY (2011)
[537] O'Carroll, *supra* note 535, at 326.
[538] Field, *supra* note 532, at 669; Letter to Joseph E. Field from Thomas A. Coughlin III, Commissioner of Corrections (Nov. 14, 1986) (describing this power as 'the most onerous of state prerogatives'); *see* Harv. L. Rev. Assoc., *The Law of Prisons*, 115 HARV. L. REV. 1838, 1839 (2002) ("Of all the powers of government, the power to incarcerate is second only to the power to take a life.").

exercise elements of the governmental authority shall be considered an act of the State under international law."[539] Article 5 can apply to numerous entities, including private companies and semi-public companies, as long as the entity is legally empowered to exercise public functions normally exercised by State organs.[540] In fact, the ILC Article 5 Commentary specifically provides a prison example: "in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations."[541] Attribution under Article 5 can result even when an entity exercises independent discretion and does not act solely under state control.[542]

If not *de facto* state organs under Article 4, then private detention centers are at least entities exercising governmental authority under Article 5. The ILC Articles provide guidance for when Article 4 exercise of governmental authority may occur:

> The [ILC Articles] commentary identifies four factors that are of particular importance when determining whether a function performed by a non-state actor falls within the sphere of governmental authority. These are: (1) the content of the powers, (2) the way the powers are conferred on an entity, (3) the purposes for which the powers are to be exercised, and (4) the extent to which the entity is accountable to the government in the exercise of its powers.[543]

As discussed earlier, the operation of detention centers is generally understood to be a traditional and core governmental role.[544] The U.S.' private detention centers exist almost entirely as a means for the government to address budget shortfalls and rapid detainee growth.[545]

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[539] ILC Articles, *supra* note 521, at art. 5.
[540] ILC Articles, *supra* note 521, at art. 5 commentary, ¶ 2.
[541] *Ibid.* at art. 5 commentary, ¶ 2.
[542] *Ibid*. at art. 5 commentary, ¶ 7.
[543] Jennifer Maddocks at 63; ILC Articles at art. 5 commentary, ¶ 6.
[544] Field, *supra* note 532, at 669; *see* Letter to Joseph E. Field from Thomas A. Coughlin III, *supra* note 538; *see* HARV. L. REV. ASSOC., *supra* note 538, at 1839.
[545] *See e.g.*, CORRECTIONS CORPORATION OF AMERICA, A PRIMER OF PRIVATE SECTOR SUCCESS IN MANAGING PRISONS: PUBLIC-PRIVATE PARTNERSHIP IN AMERICAN CORPORATIONS; *see generally* HARV. L. REV. ASSOC., *supra*

They operate solely as the result of government contracts; the government solicits bids from private contractors to construct and operate private detention centers, and the private contractor is only allowed to provide those detention services once awarded the contract.[546]

When the U.S. contracts for private detention centers, it tasks the private entity with all responsibilities required for their operation.[547] The private detention center is responsible for all detainee care – "including the provision of food, clothing, sanitary supplies, medical care, and disciplinary authority."[548] The privately-employed staff at these private detention centers have a great deal of discretion, making daily decisions over detainee's "life, liberty, and property."[549] Thus, when a private detention center is used, it fully undertakes to perform the traditionally public function of administering correctional and immigration-related detention.[550] The powers that private detention centers are given by the government via contract allow them to exercise elements of governmental authority as envisioned under Article 5.

C. State Responsibility Attaches when an Entity is Controlled by the State.

In addition to attribution under ILC Articles 4 or 5, a private entity's conduct may also be attributed to a state under ILC Article 8 which provides, "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in

note 538, at 1838; Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L. J. 113, 115 (2009).

[546] Federal Bureau of Prisons, *Contract Prisons*; *see* Andre Douglas Pond Cummings and Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL'Y 407 (2016); Michael B. Mushlin, 4 RIGHTS OF PRISONERS § 18.1 (5th ed.); Spencer Bruck, *The Impact of Constitutional Liability and Private Contracting on Health Care Services for Immigrants in Civil Detention*, 25 GEO. IMMIGR. L.J. 487, 492 (2011); *see* Dept. of Homeland Security, *Do Business with DHS*, https://www.dhs.gov/do-business-dhs.

[547] Arielle M. Stephenson, *Private Prison Management Needs Reform: Shift Private Prisons to a True Public-Private Partnership*, AMERICAN BAR ASSOC. (Jul. 16, 2020).

[548] Anderson, *supra* note 548, at 121.

[549] David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 821-22 (1987); Anderson, *supra* note 548, at 120.

[550] Anderson, *supra* note 548, at 116-17.

carrying out the conduct."[551] The principle that a state will be responsible for conduct it authorizes, even if undertaken by a non-state entity or actor, is well accepted in international jurisprudence.[552] The amount of "control" required for state attribution to occur was addressed in the foundational ICJ case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).*[553] In this case, the ICJ held that "a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State," suggesting that a high degree of control is required. [554] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), however, also addressed the issue of control in *Prosecutor v. Duško Tadić*:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[555]

The contrast between these international court opinions evidences the fact that the amount of control required for attribution to occur is not entirely settled.[556] Regardless of the standard of control required though, Article 8 requires that the direction or control be related to the wrongful conduct itself.[557]

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[551] ILC Articles, *supra* note 521, at art. 8.
[552] *See, e.g., Zafiro Case (Great Britain v. U.S.)*, 6 RIAA 160 (1925); *Stephens Case (U.S. v. United Mexican States)*, 6 RIAA 265, 267 (1927); *Sabotage Cases (U.S. v. Germany)*, 8 RIAA 84 (1930).
[553] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 227, at ¶¶ 51, 86.
[554] ILC Articles, *supra* note 521, at art. 8 commentary, ¶ 4.
[555] *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeals Chamber Decision ¶ 117 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
[556] While the ICJ requires "effective" control, requiring the state to direct specific actions, the ICTY as well as the International Criminal Court ("ICC") look for a less stringent "overall" control ILC Articles, *supra* note 521, at art. 8 commentary, ¶ 5; *see Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 227.
[557] ILC Articles, *supra* note 521, at art. 8 commentary, ¶ 7.

Although technically a public-private partnership ("PPP"), in practice, the U.S. government provides little oversight to the private detention centers it contracts with.[558] Private detention centers are obligated to follow applicable local, state, and federal laws as well as codes and regulations.[559] They are also required to adhere to some policies set by the government as well as any terms laid out in their contract. Despite this, private prisons are still almost completely in control of actual operations: "As opposed to robust involvement, the United States' PPPs for prisons generally relinquish control from the government and allow the contractor to make essentially all of the decisions including building and managing the prisons."[560] The privately-employed staff at these private detention centers have a great deal of discretion, making decisions without government guidance on detainee's treatment regularly.[561] The U.S.' "hands-off" relationship with private detention centers has led scholars and experts to repeatedly express concern over lack of accountability and transparency.[562] Given the lack of involvement by the U.S. governing in the operation of private detention centers, attribution under Article 8 would likely be the most challenging method of alleging state responsibility.

D. International Bodies are Consistent in Their Assertation that States Remain Responsible for Private Detention Centers.

United Nations and other international bodies have consistently reinforced that states cannot abdicate their responsibilities to detainees, including their international legal responsibility for acts of torture and other forms of ill-treatment, through the use of private

[558] Stephenson, *supra* note 547.
[559] *Contract Prisons*, supra note 546.
[560] Stephenson, *supra* note 547.
[561] Wecht, *supra* note 549, at 821-2.
[562] *See e.g.*, Carl Takei, *The ACLU Is at the UN Tomorrow to Testify on the Horrific Human Rights Record of US Private Prison Companies*, AMERICAN CIVIL LIBERTIES UNION; Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J. L. REFORM 249 (1995); Jesse Franzblau, *Coalition Calls on Congress to Enhance Transparency and Accountability for Private Prisons*, OPEN THE GOVERNMENT; Stephen Raher, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 RICH. J.L. & PUB. INT. 209 (2010).

detention centers.[563] In regard to immigration detention centers specifically, the WGAD has clearly stated the following:

> If a state outsources the running of migration detention facilities to private companies or other entities, it remains responsible for the way such contractors carry out that delegation. The State in question cannot absolve itself of the responsibility for the way the private companies or other entities run such detention facilities, as a duty of care is owed by the State to those held in such detention.[564]

The Committee against Torture has also focused on a state's inability to derogate their duties to private detention centers. In its General Comment No. 2, the Committee against Torture stated, "where detention centres are privately owned or run, the Committee considers that personnel are acting in an official capacity on account of their responsibility for carrying out the State function without derogation of the obligation of State officials to monitor and take all effective measures to prevent torture and ill-treatment."[565] In that same General Comment, the Committee against Torture also reiterated that "[s]tates bear international responsibility for the acts and omissions of their officials and others, including agents, *private contractors, and others acting in official capacity or acting on behalf of the state*, in conjunction with the State, under its direction or control, or otherwise under colour of law."[566] (emphasis added). Existing international norms fully support the conclusion that the U.S. bears state responsibility for internationally wrongful conduct in its private detention centers.

[563] Zach and Birk, *supra* note 249,, at 444-45; Nils Melzer (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Thirty-Fourth Sess.*, ¶ 47, U.N. Doc. A/HRC/34/54 (Feb. 14, 2017).
[564] WGAD *Revised Deliberation No. 5, supra* note 1, at ¶ 46.
[565] CAT *General Comment No. 2, supra* note 196, at ¶ 17.
[566] *Ibid.* at ¶¶ 15, 17.

VII. The Use of Private Detention Centers in the United States Raise Constitutional Concerns Under the Non-Delegation Doctrine as the Operation of Detention Centers is an Inherently Governmental Function, Making it Nondelegable.

For private detention centers to exist, the government is required to delegate its powers to private entities.[567] In the U.S., the use of private detention centers raises constitutional concerns under the non-delegation doctrine.[568] This doctrine "refers to the idea that Congress may not delegate its' powers to other branches of government or to private parties."[569] The non-delegation doctrine has been implied under Article I, Section I of the US Constitution.[570] It is "rooted in the principle of separation of powers that underlies our tripartite system of Government."[571] The doctrine, despite its name, does not prevent *any* delegation of power. Rather, the courts have created an "intelligible principle" test to determine when delegation is permissible.[572] Under the test, so long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[573] In practice, courts routinely approve of delegation without challenge.[574]

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[567] *See e.g.*, Ira. P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 915 (1988); Warren L. Ratliff, *The Due Process Failure of American Prison Privatization Statutes*, 30 SETON HALL L. REV. 371 (1997); Wecht, *supra* note 549, at 815; Field, *supra* note 532.
[568] *See generally e.g.*, Robbins, supra note 567; Ratliff, *supra* note 567; Wecht, *supra* note 549, Field, *supra* note 532; Mushlin, *supra* note 546, at § 18:6.
[569] Stacey Jacovetti, *The Constitutionality of Prison Privatization: An Analysis of Prison Privatization in the United States and Israel*, 6 GLOBAL BUS. L. REV. 61, 81 (2016); Robbins, supra note 567, at 915.
[570] *Gundy v. U.S.*, 139 S.Ct. 2116, 2123 (2019 ("accompanying that [Art. 1 § 1] assignment of power to Congress is a bar on its further delegation"); Jacovetti, *supra* note 569, at 81.
[571] *Mistretta v. U.S.*, 109 S.Ct. 647, 654 (1989); Jacovetti, *supra* note 569, at 81; Robbins, *supra* note 567, at 919.
[572] For a discussion of the intelligible principle test and the challenges of actually applying it, see Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 103 VA. L. REV. 1229 (2018).
[573] *Mistretta v. U.S.*, 109 S.Ct. at 655 (citing *J.W. Hampton, Jr. & Co. v. U.S.*, 48 S.Ct. 348, 352 (1928)); *Gundy v. U.S.*, 139 S.Ct. at 2123.
[574] Sullivan, *supra* note 572, at 1241; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328-29 (2002); Jacovetti, *supra* note 569, at 84.

Even with this "intelligible principle" test though, Congress is "not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[575] In 1966, the Office of Management and Budget published Circular A-76 which provided that federal agencies "must rely on private sector services for service provision when it is cost effective and would not impact governmental operations," but an exception was included for when the service "requires an exercise of discretion in applying governmental authority."[576] In 1998, The Federal Activities Inventory Reform Act defined such services as "inherently governmental functions."[577] An "inherently governmental function" is:

> a function that is so intimately related to the public interest as to mandate performance by Government employees .... An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government .... An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to ... (iii) Significantly affect the life, liberty, or property of private persons.[578]

Since confinement in detention is possibly the most significant deprivation of liberty, the operation of detention facilities should be understood as an inherently governmental function.[579] Moreover, the operation of detention facilities requires the regular exercise of governmental discretion such as deciding when to administer punishment, when to reduce a sentence on good behavior, and when a detainee should receive parole.[580] Law Professor Angela Addae posits that

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[575] *A.L.A. Schechter Poultry Corp. et al., v. U.S*., 55 S.Ct. 837, 843 (1935); *see also Carter v. Carter Coal Co*., 56 S.Ct. 855, 872 (1936); *see* Anderson, *supra* note 548, at 120; *see* Jacovetti, *supra* note 569, at 87.
[576] Anderson, *supra* note 548, at 123; Office of Management and Budget, Circular A-76, Performance of Commercial Activities (1966), *amended by* 61 Fed. Reg. 14, 338 (Apr. 1, 1996), *further amended by* 68 Fed. Reg. 32, 134 (May 29, 2003).
[577] 31 U.S.C. § 501 (2006); *see* 61 Fed. Reg. at 14, 340 (Apr. 1, 1996) ("Inherently governmental functions are not commercial in nature, are not subject to the Circular and cannot be converted to contract performance.").
[578] Federal Acquisition Regulation (FAR), 48 C.F.R. 2.101.
[579] Addae, *supra* note 145, at 537-38.
[580] Anderson, *supra* note 548, at 124. There are scholars that argue the operation of detention centers are not inherently governmental functions under the Office of Budget and Management's definition. *See* Jacovetti, *supra* note 569, at 101 ("arguably, the care of prisoners does not involve an inherently governmental function because the exercise of discretion as to decisions that involve an inmate's life and liberty are minimally intrusive").

"[S]trong arguments exist that 1) liberty deprivation should be classified as a solely state function, and 2) the delegation of incarceration to private corporations violates the nondelegation doctrine."[581] Although this argument exists and is largely well-founded, it is likely to be a challenging one to put forth given that "the use of doctrine has dissipated over time" such that it is considered "moribund."[582]

[581] Addae, *supra* note 145, at 537.
[582] *Ibid*. at 537; *see Fed. Power Comm'n v. New England Power Co*., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring). The Supreme Court has not upheld a nondelegation challenge since *Carter v. Carter Coal Co.* in 1936.