



The
CENTER for
VICTIMS of
TORTURE

Backgrounder:

Arbitrary & Cruel: How U.S. Immigration Detention Violates the Convention against Torture and Other International Obligations

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A more in-depth legal analysis of the issues this Backgrounder addresses is available [here](#).

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."¹

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 U.S. immigration system as a complete whole. This backgrounder, and the more in-depth legal analysis on which it is based (linked above), attempt to fill this gap.

The report analyzes the [U.N. Convention against Torture and Cruel, Inhuman and Degrading Treatment and Punishment \(Convention against Torture\)](#) 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. The report ultimately concludes both that the system is arbitrary and that U.S. immigration detention 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 United States 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

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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*, ¶ 25, U.N. Doc. A/HRC/37/50 (Nov. 23, 2018).

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.²

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.

A Brief Overview of the U.S. Immigration Detention System

According to the National Immigrant Justice Center, the United States Department of Homeland Security (DHS) “manages the largest immigration detention system in the world and spends more on immigration enforcement than on all other federal enforcement agencies combined.”³ Detentions occur at both the United States border and throughout the interior of the country. Migrant men, women, and children – including torture survivors, asylum seekers, visa holders, and people who have been granted the right to live permanently in the U.S. – are held, often indefinitely, while they await a determination as to whether they qualify to receive immigration status.⁴

The U.S. immigration detention system is run by U.S. Immigration and Customs Enforcement (ICE) within DHS and is comprised of over 200 dedicated detention centers, state jails, and local jails nation-wide. Private prison companies with which ICE contracts operate many of these facilities. The system currently holds as many as 500,000 migrants per year.⁵

The U.S. Immigration Detention System Is Arbitrary and Therefore Violates International Law.

Arbitrary detention is absolutely prohibited under international law. All major international and regional instruments relating to the protection and promotion of human rights contain the prohibition, including the International Covenant on Civil and Political Rights (ICCPR).⁶ Article 9 of the ICCPR provides that “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.”⁷

As a State party to the ICCPR, as well as other treaties containing the same protection, the U.S. has

² Services for Survivors of Torture, OFFICE OF REFUGEE RESETTLEMENT; Anne Kalt, et al., *Asylum Seekers, Violence and Health: A Systemic Review of Research in High Income Host Countries*, AM. J. PUBLIC HEALTH (2013).

³ *Immigration Detention & Enforcement*, NATIONAL IMMIGRANT JUSTICE CENTER, <https://immigrantjustice.org/issues/immigration-detention-enforcement>.

⁴ *Immigration Detention 101*, DETENTION WATCH NETWORK.

⁵ *Ibid.*

⁶ International Covenant on Civil and Political Rights art. 9, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; 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; Arab Charter on Human Rights art. 14, *entered into force* Mar. 15, 2008, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005); 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.

⁷ ICCPR, *supra* note 6, at art. 9.

an international legal obligation to uphold the prohibition on arbitrary detention.⁸ Executive Order 13107—Implementation of Human Rights Treaties reinforces the same: “It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR...”⁹

Arbitrary detention is also prohibited by customary international law, which results not from any formal agreement but from a general and consistent practice of States that is followed out of a sense of legal obligation.¹⁰ Indeed, the prohibition on arbitrary detention is included in the foundational 1948 Universal Declaration of Human Rights¹¹ and has since enjoyed widespread ratification, codification, and recognition—through treaties, national constitutions and laws, and U.N. resolutions, recommendations and reports.¹² The prohibition on arbitrary detention is recognized, including by the United States, as a *jus cogens* or peremptory norm of international law, meaning that it is binding at all times, everywhere, under any circumstance.¹³

The prohibition on arbitrary detention does not revoke States’ right to control entry into and departure from their territory. However, any mechanism used for that purpose must comply with international human rights law.¹⁴ Immigration detention is only permissible as an exceptional measure of last resort.¹⁵ Specifically, unless immigration detention is proportionate, reasonable, and necessary, it is arbitrary and therefore unlawful.¹⁶ Detention that is either punitive or discriminatory is similarly unlawful.

⁸ ICCPR, *supra* note 6, at art. 9; U.N. Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 137; The American Declaration of the Rights and Duties of Man art. XXV, O.A.S. Res. XXX (1948); American Convention on Human Rights art. 7(3), Org. of Am. States, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁹ Implementation of Human Rights Treaties, Exec. Order No. 13107, 63 Fed. Reg. 68, 991 (Dec. 10, 1998).

¹⁰ U.N. Working Grp. on Arbitrary Det., *Deliberation No. 9 Concerning the Definition and Scope of Arbitrary Deprivation of Liberty under Customary International Law*, ¶ 43, U.N. Doc. A/HRC/22/44 (Dec. 2012) [hereinafter *WGAD Deliberation No. 9*].

¹¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 9 (Dec. 10, 1948).

¹² *WGAD Deliberation No. 9, supra* note 10, at ¶ 43.

¹³ *WGAD Deliberation No. 9, supra* note 10, at ¶ 51; see Human Rights Committee, *General Comment No. 35: Article 9 Liberty and Security of Person*, ¶ 68, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter *HRC General Comment No. 35*]; Restatement (Third) of the Foreign Relations Laws of the United States § 702(n) (American Law Institute 1987).

¹⁴ *Velez Loo v. Panama*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 97 (Nov. 23, 2010).

¹⁵ U.N. Working Grp. on Arbitrary Det., *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants*, ¶ 12, U.N. Doc. A/HRC/39/45 (Jul. 2018) [hereinafter *WGAD Revised Deliberation No. 5*]; U.N. High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention*, Guideline 4.1 (2012) [hereinafter *UNHCR Detention Guidelines*].

¹⁶ *WGAD Revised Deliberation No. 5, supra* note 15, at ¶ 20; *HRC General Comment No. 35, supra* note 10, at ¶ 18; U.N. High Commissioner for Refugees, *Compilation of International Human Rights Law and Standards on Immigration. Detention.*, Guideline 4.2 (Feb. 2018).

Immigration detention is only permissible as an exceptional measure of last resort. Specifically, unless immigration detention is

- **proportionate,**
- **reasonable, and**
- **necessary,**

it is arbitrary and therefore unlawful. Detention that is either

- **punitive or**
- **discriminatory**

is similarly unlawful.

As explained below, the U.S. immigration detention system, in whole or in part, fails each of these requirements.

The U.S. Immigration Detention System Is Not Proportionate

Automatic or mandatory immigration detention is not *proportionate*.¹⁷ The principle of proportionality requires that less restrictive alternatives to detention be considered in every circumstance.¹⁸ In the U.S., mandatory detention is imposed on large swaths of migrants without individual assessment. Detention is the presumptive norm, with the system prioritizing abstract legal categories over case-specific facts.¹⁹

The U.S. Immigration Detention System Is Not Reasonable

Immigration detention is only *reasonable* if

used to serve a legitimate State interest.²⁰ That interest, and the reasons it justifies detention, must be prescribed and explained clearly by domestic legislation.²¹ For example, in specific circumstances and with appropriate safeguards, according to the United Nations High Commissioner for Refugees, immigration detention may be considered reasonable when a person presents a legitimate national security threat.²² Some period of detention could also potentially be reasonable when, after a meaningful individualized assessment, a government determines a person is not a “*bona-fide* asylum-seeker” and there are strong grounds the person is likely to abscond.²³ Detention for a short period of time may also be legitimate if used for the purposes of documenting entry, recording claims, or verifying identity.²⁴ (Of course, any such detentions would still need to satisfy the necessity, proportionality, non-discrimination, and “no-punitive-use” requirements.”).

The U.S. uses immigration detention for illegitimate purposes, rendering the system unreasonable. Examples include penalizing irregular entry, detention in punitive conditions, and deterring individuals from entering the country to seek asylum.²⁵ Moreover, the U.S. immigration detention

¹⁷ WGAD Revised Deliberation No. 5, *supra* note 15, at ¶ 19.

¹⁸ *Ibid.* at ¶ 24.

¹⁹ Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the U.S.*, 36 FORDHAM INT’L L.J. 243, 246 (2013).

²⁰ Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, ¶ 83 (2010); *A v. Australia*, Communication No. 560/1993, Human Rights Committee, ¶ 9.2 (Apr. 30, 1997).

²¹ WGAD Revised Deliberation No. 5, *supra* note 15, at ¶ 22.

²² UNHCR Detention Guidelines, *supra* note 15, at ¶ 21; Francois Crepeau (Special Rapporteur on the Human Rights of Migrants), *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶¶69, 81, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) [hereinafter 2012 Report of SP on HR of Migrants]; El Hadji Malick Sow (Chairperson-Rapporteur), *Report of the Working Group on Arbitrary Detention to the U.N. Human Rights Council Thirteenth Sess.*, ¶ 59, U.N. Doc. A/HRC/13/30 (Jan. 15, 2010); U.N. High Commissioner for Refugees, *Monitoring Immigration Detention Practical Manual*, § 2.6 (2014).

²³ UNHCR Detention Guidelines, *supra* note 15, at ¶ 21; 2012 Report of SP on HR of Migrants, *supra* note 22, at ¶¶69, 81; *Report of the Working Group on Arbitrary Detention to the U.N. Human Rights Council Thirteenth Session*, *supra* note 22, at ¶ 59; *Monitoring Immigration Detention Practical Manual*, *supra* note 22, at § 2.6.

²⁴ WGAD Revised Deliberation No. 5, *supra* note 15, at ¶ 12; see *A v. Australia*, *supra* note 18, at ¶ 9.4.

²⁵ Working Grp. on Arbitrary Det., *Report of the Working Group on Arbitrary Detention on its Visit to the U.S.*, ¶ 27, U.N. Doc. A/HRC/36/37/Add.2 (Jul. 17, 2017). [hereinafter *WGAD Visit to the U.S.*].

system is improperly influenced by economic incentives, including the meeting of “bed quotas” for private detention companies.²⁶

The U.S. Immigration Detention System is Not Necessary

For immigration detention to be necessary, it must be “indispensable for achieving the intended purpose.”²⁷ As the U.N. Special Rapporteur on the Rights of Migrants has explained: “Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure.”²⁸

In considering alternatives to detention, States must fully consider individual circumstances.²⁹ Typical alternative measures include registration requirements, release on bail, bond, or surety, release to NGO supervision, reporting requirements, directed residence, residence in open centers, and residence in semi-closed centers.³⁰

In the U.S., migrants are detained more than they are released despite the availability and well-documented efficacy of alternatives to detention,³¹ and not all migrants are subject to case-by-case assessments.³²

The U.S. Immigration Detention System is Punitive

The U.N. Working Group on Arbitrary Detention has explicitly recognized the U.S. immigration detention system as punitive, noting the degrading conditions that migrants are subjected to while detained.³³ ICE regularly places migrants in local jails and prisons.³⁴ Even when migrants are placed into separate immigration detention centers, there is still a “carceral nature” to their detention.³⁵ Conditions in these facilities 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.”³⁶

The U.S. Immigration Detention System Violates Explicit and Repeated Commitments by the U.S. to Prohibit Torture and Other Ill-Treatment.

Torture is categorically prohibited by myriad human rights instruments, both universal and regional,³⁷

²⁶ *Ibid.* at ¶ 31; Amnesty Int’l, U.S.: *Arbitrary Detention Remains Embedded in Immigration Civil and Military Detention Systems* (Aug. 20, 2017).

²⁷ WGAD *Revised Deliberation No. 5*, *supra* note 15, at ¶ 23.

²⁸ 2012 Report of SP on HR of Migrants, *supra* note 22, at ¶ 68; *Bakhtiyari v. Australia*, Communication No. 1069/2002, Human Rights Committee, ¶ 9.3 (Nov. 6, 2003); *Baban v. Australia*, Communication No. 1014/2001, Human Rights Committee, ¶ 7.2 (Aug. 6, 2003).

²⁹ Amnesty International, *Irregular Migrants and Asylum-Seekers: Alternatives to Detention*, 9 (2009).

³⁰ *Ibid.* at 11.

³¹ Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2155 (2017).

³² 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).

³³ WGAD *Visit to the U.S.*, *supra* note 25, at ¶¶ 27, 87.

³⁴ Whitney Chelgren, *Preventative Detention Distorted: Why is it Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1486 (2011).

³⁵ Rene Lima-Marín and Danielle C. Jefferis, *It’s Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955, 956 (2019).

³⁶ Chelgren, *supra* note 34, at 1495; see Barbara MacGrady, *Resort to International Human Rights Law in Challenging Conditions in the U.S. Immigration Detention Centers*, 23 BROOK. J. INT’L L. 271, 272 (1997).

³⁷ *What does the law say about torture?*, INTERNATIONAL COMMITTEE OF THE RED CROSS (June, 24, 2011); For example, the Universal Declaration of Human Rights (Article 5), the International Covenant on Civil and Political Rights (Article 7),

in particular the Convention against Torture.³⁸ It is similarly prohibited by customary international law and by State constitutions and national laws worldwide.³⁹ The prohibition has also been consistently upheld in international case-law.⁴⁰

The prohibition on torture is also recognized as a *jus cogens* norm from sources ranging from U.S. courts,⁴¹ to the International Court of Justice,⁴² to the Restatement of U.S. foreign relations law,⁴³ to the International Law Commission.⁴⁴

The United States has reiterated that the prohibition on torture is universal and always applicable in every periodic report it has submitted to the Committee Against Torture during the 26 years since the U.S. ratified the Convention against Torture, including in its most recent follow-up response to its 2015 periodic report recommendations:

The United States upholds the bedrock principle that torture and cruel, inhuman, and degrading treatment or punishment are categorically and legally prohibited always and everywhere, violate U.S. and international law, and offend human dignity. Torture is contrary to the founding principles of our country and to the universal values to which we hold ourselves and the international community.⁴⁵

The Convention against Torture explicitly 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.⁴⁶

The Convention against Torture does not define cruel, inhuman, or degrading treatment or punishment, and in practice, treaty-monitoring bodies such as the Human Rights Committee and the Committee Against Torture have not made stark distinctions between torture and other ill-treatment.⁴⁷ The most recent Commentary to the Convention against Torture provides the following definition for cruel and inhuman treatment or punishment:

the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Convention on Human Rights (Article 5[2]), the African Charter on Human and Peoples' Rights (Article 5) and the Arab Charter on Human Rights (Article 8) all contain provisions on this prohibition.

³⁸ 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];

³⁹ *Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, Judgment, 2012 I.C.J. 44, ¶ 99 (July 20)

⁴⁰ *Questions Relating to the Obligation to Prosecute or Extradite*, *supra* note 39, at ¶99; *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).

⁴¹ *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2nd Cir. 1980).

⁴² *Questions Relating to the Obligation to Prosecute or Extradite*, *supra* note 39, at ¶ 99.

⁴³ The Restatement (Third) of Foreign Relations Laws of the United States, *supra* note 13, at § 702(n).

⁴⁴ *Report of the International Law Commission to the General Assembly Seventy-Fourth Session*, Conclusion 23, U.N. Doc. A/74/10 (Aug. 2019).

⁴⁵ One Year Follow-Up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports on Implementation of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ¶ 10 (Nov. 27, 2015)

⁴⁶ Convention Against Torture, *supra* note 38, at art. 1.

⁴⁷ ASSOCIATION FOR THE PREVENTION OF TORTURE & CENTER FOR JUST. AND INT'L LAW, TORTURE IN INT'L LAW: A GUIDE TO JURIS. 7 (2008)

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.⁴⁸

Determining whether torture or other ill-treatment has occurred requires a context and fact specific analysis.⁴⁹

States party to the Convention against Torture must prevent torture and other ill-treatment, investigate, prosecute, and punish perpetrators, and provide redress for victims.⁵⁰

Notwithstanding the United States' explicit, repeated commitment to upholding the prohibition on torture – and its legal obligation to do so as a ratifying party to the Convention against Torture – core features of its immigration detention system have, and continue, to violate this prohibition.

Indefinite Immigration Detention in the U.S. May Constitute Torture or Other Ill-Treatment

The U.N. Special Rapporteur on Torture has identified prolonged and indefinite detention of migrants as a significant cause for concern as it relates to the prohibition on torture and other ill-treatment.⁵¹ In particular, the “legal ‘limbo’” in which migrants are kept – where they have “no realistic prospect of release or alternative measures and no practical means of influencing the process or its duration” – may amount to torture or other ill-treatment under international law.⁵²

Immigration detention in the U.S. is typically “indefinite” in nature; it is without charge or trial for an undefined duration throughout which the individual does not know when or whether they will be released. In the immigration context, length of detention often depends on a variety of factors, most of which are entirely outside of detainees' control and are not clearly communicated or predictable. Individuals typically have limited access to information about their options or what they can do or expect at each stage, and the information they do receive may be in a language (or legal jargon) they do not understand.⁵³ Moreover, they can rarely obtain counsel due to financial or other constraints, such as the remote location of many detention centers.

Over the course of three decades of experience healing torture survivors, The Center for Victims of Torture has documented that indefinite detention can cause such severe and protracted health problems that it regularly rises to the level of cruel, inhuman, and degrading treatment.⁵⁴

⁴⁸ Gerrit Zach and Moritz Birk, *Cruel Inhuman or Degrading Treatment or Punishment*, in THE U.N CONVENTION AGAINST TORTURE AND ITS OPTIONAL PROTOCOL: A COMMENTARY 441, 443 (Manfred Nowak, Moritz Birk, and Giuliana Monina eds., 2nd ed. 2019).

⁴⁹ CONVENTION AGAINST TORTURE INITIATIVE, UN CONVENTION AGAINST TORTURE – EXPLAINER 1.

⁵⁰ CONVENTION AGAINST TORTURE INITIATIVE, UN CONVENTION AGAINST TORTURE – EXPLAINER 1.

⁵¹ *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 1, at ¶ 20.

⁵² *Ibid.*

⁵³ THE CENTER FOR VICTIMS OF TORTURE AND THE TORTURE ABOLITION AND SURVIVOR SUPPORT COALITION, TORTURED: SURVIVOR STORIES OF U.S. IMMIGRATION DETENTION 11 (2013) (hereinafter TORTURED AND DETAINED).

⁵⁴ Brief for the Center for Victims of Torture as Amicus Curiae, p. 8, *Al Bihani et al. v. Trump*, 09-cv-00745-RCL (D.C. Dist. Ct. 2018) (hereinafter “CVT Guantanamo Amicus Brief”), <https://www.cvt.org/sites/default/files/Final%20Amicus%20Brief-4-Jan%202018.pdf> (citing Curt Goering, The Center for Victims of Torture, Testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights: Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications 1 (2013), <http://www.cvt.org/sites/default/files/attachments/u10/downloads/CVT-Testimony-SenateClosingGuantanamo-2013July.pdf>); see also Juan Mendez (U.N. Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Twenty-Eighth Session*, ¶ 80, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) (calling on states to “expeditiously and completely, cease the detention of children, with or without their parents, on the basis of immigration status,” and concluding that “the deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity,” ... “becomes grossly disproportionate,” and “may constitute cruel, inhuman or degrading treatment of migrant children.”).

The indeterminacy of indefinite detention can be overpowering—it creates such uncertainty, unpredictability, and loss of control over the basic aspects of one’s life that it seriously harms healthy individuals, independent of other aspects or conditions of the individual or detention.

Indeed, “medical examinations have documented indefinite detention leading to profound depression and vegetative symptoms, with all the attendant degradation of multiple aspects of health.”⁵⁵ Indefinite detention’s harmful psychological and physical effects can include:

- Severe and chronic anxiety and dread;
- Pathological levels of stress that have damaging effects on the core physiologic functions of the immune and cardiovascular systems, as well as on the central nervous system;
- Depression and suicide;
- Post-traumatic stress disorder (PTSD); and
- Enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release.

Over the course of three decades of experience healing torture survivors, The Center for Victims of Torture has documented that indefinite detention can cause such severe and protracted health problems that it regularly rises to the level of cruel, inhuman, and degrading treatment.

⁵⁵ CVT Guantanamo Amicus Brief, *supra* note 54, at 8.

The Indefinite Nature of Immigration Detention Runs Counter to the U.S.’s Obligations under the U.N. Convention Against Torture

Many asylum-seeking clients of The Center for Victims of Torture who were subjected to indefinite detention speak of the absolute despair they felt, never knowing if their detention would come to an end.

Fahran worked as a translator to the U.S. Army in Afghanistan. He fled to the United States after being targeted for this work. After several months of travel via planes, road, and rivers through Dubai, Brazil, Ecuador, Colombia, Central America, and Mexico, he arrived at the U.S. border. He was ultimately transferred to a Texas detention center, where he remained for 23 months before being granted asylum. He spoke of the state he observed in other detainees there. “I saw people who lost their minds. They couldn’t take it. It just became too much. One guy was not able to eat. He wouldn’t talk. He felt too much pressure; he started to breakdown. Then he just vanished from the dorms and we never knew what happened to him.”

The profound health consequences of indefinite immigration detention are intensified in people who have been traumatized before being detained. For survivors of torture, even detention for a short period can be extremely harmful, bringing the original torture experience back to mind and exacerbating their mental health symptoms.⁵⁶

As CVT has reported:

Detention is a daunting experience for anyone, but particularly egregious for survivors of torture. To experience torture is to be dehumanized, psychologically dismantled, humiliated, forced to endure excruciating pain, and rendered powerless. For survivors, whose torture may have occurred while in a confinement setting, the immigration detention experience is often retraumatizing and may lead survivors to relive their horrid experiences of torture, including the profound sense of powerlessness and loss of sense of self, contributing to further psychological damage.⁵⁷

Multiple studies evaluating the detention of asylum seekers have demonstrated that detention has a particularly negative impact on trauma survivors.⁵⁸ Negative impacts have been shown even when detention was no more than 30 days.⁵⁹ These findings are consistent with CVT’s clinical experience.

⁵⁶ TORTURED AND DETAINED, *supra* note 51, at 12; PHYSICIANS FOR HUMAN RIGHTS, PUNISHMENT BEFORE JUSTICE: INDEFINITE DETENTION IN THE U.S. 11 (2011) (“[These harms] threaten to severely exacerbate existing severe physical and psychological symptoms, perpetuate mental suffering, and thereby foreclose any opportunity for healing.”).

⁵⁷ TORTURED AND DETAINED, *supra* note 51, at 2-3.

⁵⁸ *Ibid.* at 13.

⁵⁹ Janet Cleveland and Cecile Rousseau., *Psychiatric Symptoms Associated with Brief Detention of Adult Asylum Seekers*

According to CVT's former Director of Client Services, Dr. Andrea Northwood:

One of the features of PTSD is that its symptoms (nightmares, flashbacks, feeling the same terror one felt during a previous trauma, etc.) are often triggered by exposure to reminders of that trauma. Immigration detention facilities are replete with these reminders: uniformed guards, institutional settings, guns, limited control or movement, shackles, wearing a prison-like uniform, being threatened with forced removal (routinely regarded as a death sentence for CVT asylum-seeking clients), being under the control of a government authority. These are all common features of traumatic events that persons who are fleeing political persecution and human rights violations have already experienced. In my experience, trauma survivors in institutional settings such as locked hospital wards or prisons experience significant exacerbation of their PTSD re-experiencing and hyper-arousal symptoms in the presence of these triggers, with accompanying heightened distress and emotional dysregulation.

Moreover, indefinite detention has detrimental effects that go beyond the detainee themselves. When a loved one is indefinitely detained, families are separated; parents, spouses, and children can suffer – and have suffered – similar feelings of uncertainty, unpredictability, and uncontrollability, leading to the physical and psychological effects described above.

The U.S. Regularly Uses Solitary Confinement within Immigration Detention Centers in Ways that Violate the Prohibition on Torture and Other Ill-Treatment

International law standards have consistently affirmed that the use of solitary confinement should be reserved as a measure of last resort due to the severe pain and suffering it may cause to the detainee.⁶⁰ In 1992, the U.N. Human Rights Committee recognized that prolonged solitary confinement may amount to a violation of the ICCPR's prohibition on torture and other ill-treatment.⁶¹ U.N. Special Rapporteurs on Torture have also advised that solitary confinement, depending on the circumstances, may amount to either torture or other ill-treatment.⁶²

Special concern has been expressed by international expert bodies regarding the use of solitary confinement within the context of immigration detention.⁶³ In 2020, U.N. Special Rapporteur on Torture Nils Melzer reaffirmed that solitary confinement exceeding 15 days is a form of torture or other ill-treatment due to its prolonged nature.⁶⁴ While all solitary confinement is problematic when not used as a measure of last resort, confinement lasting 15 or more days is now understood to presumptively be a breach of the prohibition of torture and other ill-treatment.

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 in the U.S.⁶⁵ A 2019 DHS Office of Inspector General report also

in Canada, THE CANADIAN JOURNAL OF PSYCHIATRY, 409-416 (2013).

⁶⁰ Zach and Birk, *supra* note 48, at 453; Committee Against Torture, *Report of the Committee Against Torture to the General Assembly Forty-Third & Forty-Fourth Session*, ¶¶ 50-51, U.N. Doc. A/65/44 (2009/2010).

⁶¹ Human Rights Committee, *General Comment No. 20: Article 7 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 6 (1992) [hereinafter ICCPR General Comment No. 20].

⁶² Juan Méndez (U.N. Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment and Punishment), *Interim Report of the Special Rapporteur to the General Assembly Sixty-Sixth Session*, ¶ 80, U.N. Doc. A/66/268 (Aug. 5, 2011).

⁶³ *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 1, at ¶ 44.

⁶⁴ 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 Session*, ¶ 57, U.N. Doc. A/HRC/43/49 (Mar. 20, 2020).

⁶⁵ Committee 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).

raised concerns over the placement of migrants in solitary detention.⁶⁶ More specifically, in 2019, the International Consortium of Investigative Journalists analyzed more than 8,400 records describing the placement of migrant detainees in solitary confinement in facilities operated by ICE, and the data showed that more than half of the solitary confinements exceeded 15 days.⁶⁷

The U.N. Special Rapporteur on Torture has specifically named detainees with mental disabilities as a vulnerable group that should not be subjected to solitary confinement at all, and this conclusion has been supported by the Committee Against Torture.⁶⁸ Yet, rather than seeking appropriate care for migrant detainees with mental health concerns or disabilities, detention center staff regularly resort to putting these detainees in solitary confinement.⁶⁹ In a one-year period at Stewart Detention Center in Lumpkin, Georgia, two young men with known mental health diagnoses committed suicide in solitary confinement after being deprived of care and isolated for 19 and 21 days each, in clear violation of U.S. obligations under the Convention against Torture.⁷⁰

Deadly Misuse of Solitary Confinement at Stewart Detention Center in Georgia Violates U.N. Convention Against Torture

The misuse of solitary confinement at Stewart Detention Center, a large privately-run detention centers located in Lumpkin, Georgia, has resulted in the death of two men with diagnosed mental health issues within a one-year period. In July 2018, Efrain Romero de la Rosa, a 40-year-old immigrant detained at Stewart with bipolar disorder, died of suicide after 21 days in solitary confinement. Shortly before, on May 15, 2017, Jeancarlo Jiménez-Joseph, a 27-year-old migrant with schizophrenia at Stewart, died of suicide by hanging himself after 19 days in solitary confinement. A “detainee death review” conducted by the U.S. Immigration and Customs Enforcement Agency found that staff failed to refer Mr. Jimenez-Joseph for an “urgent mental health assessment,”

⁶⁶ Eunice Hyunhye Cho, Tara Tidwell Cullen, and Clara Long, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 38 (2020); DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, No. OIG-19-47, CONCERNS ABOUT DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (2019).

⁶⁷ 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/>.

⁶⁸ *Interim Report of the Special Rapporteur to the General Assembly Sixty-Sixth Session*, supra note 62, at ¶ 81; Committee Against Torture, *Concluding Observation on the Seventh Periodic Report of Switzerland*, ¶19(f), U.N. Doc. CAT/C/CHE/CO/7 (Sep. 7, 2015).

⁶⁹ 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).

⁷⁰ Jose Olivares, *How Solitary Confinement Kills: Torture and Stunning Neglect End in Suicide at Privately Run ICE Prison*, THE INTERCEPT (Aug. 29, 2019); Spencer Woodman and Jose Olivares, *Immigrant Detainee Called ICE Help Line Before Killing Himself in Isolation Cell*, THE INTERCEPT (Oct. 8, 2018).

even after he reported hallucinations and told staff he was trying to kill himself when he jumped from a second-tier balcony.

Both of these cases are examples of violations of the U.N. Convention Against Torture. Pursuant to the U.N. Special Rapporteur on Torture and the Committee Against Torture, solitary confinement of more than 15 days constitutes a form of torture and should not be used at all in cases of vulnerable detainees suffering from mental health issues.

The U.N. Special Rapporteur on Torture has also advised that placing LGBTQI individuals in solitary confinement purportedly for their own protection can constitute a violation of the prohibition on torture and other ill-treatment.⁷¹ LGBTQI or otherwise gender nonconforming migrant detainees are nevertheless disproportionately subjected to solitary confinement under the guise of “protective custody.”⁷² LGBTQI detainees can experience especially damaging effects, both psychologically and physically, as a result of solitary confinement.⁷³ For example, “depression and suicidal behavior, which are common conditions among LGBT detainees, can be exacerbated by forced segregation and isolation.”⁷⁴ 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.⁷⁵

Solitary confinement has also been used in U.S. immigration detention centers for coercive and punishment purposes, which is cause for concern under the Convention against Torture. In 2019, for example, migrant detainees at Georgia’s Stewart Detention Center alleged that they were coerced into a “voluntary” work program through nefarious tactics including the use of or threat of solitary confinement.⁷⁶ In 2020, after women detained at Irwin Detention Center in Ocilla, Georgia spoke out about receiving harmful and invasive medical procedures without their consent, advocates reported that a number of the women were promptly placed in solitary confinement.⁷⁷

⁷¹ Juan Méndez (U.N. Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment and Punishment), *Report of the Special Rapporteur to the Human Rights Council Thirty-First Session*, ¶ 35, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

⁷² Amy Frew, Aline Fausch, & Kaleb Cox, INTERNATIONAL DETENTION COALITION, *LGBTI PERSONS IN IMMIGRATION DETENTION* 10 (2016); Samuel Fuller, *Torture as a Management Practice: The Convention Against Torture and Non-Disciplinary Solitary Confinement*, 19 CHI. J. INT’L L. 102, 110 (2018); Catherine Hanssens et. al., *A Roadmap for Change: Fed. Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV* 32, CENTER FOR GENDER AND SEXUALITY LAW AT COLUMBIA LAW SCHOOL (2014).

⁷³ 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).

⁷⁴ Lauren Zitsch, *Where the American Dream Becomes a Nightmare* 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).

⁷⁵ Lauren Zitsch, *Where the American Dream Becomes a Nightmare*, *supra* note 74, at 117.

⁷⁶ Brief of Appellees, *Barrientos v. CoreCivic, Inc.*, 2019 WL 1986809 (11th Cir. 2019) (No. 18-15081-G).

⁷⁷ *Request for Thematic Hearing During 180th Period of Sessions of the Inter-American Commission on Human Rights Addressing Violations of International Law Endemic to Immigrant Detention in the United States, as Exemplified in the System of Privatized Immigration Detention in the U.S. State of Georgia*, PENN LAW TRANSNATIONAL LEGAL CLINIC AND PROJECT SOUTH (Apr. 21, 2021), https://projectsouth.org/wp-content/uploads/2021/04/IACHR-Hearing-Req-Immigrant-Detention_180th-Period-of-Sessions_2021.04.21.pdf [hereinafter “Request for Thematic Hearing”].

The U.S.'s Failure to Provide Adequate Medical Treatment and Care to Migrants in Immigration Detention Violates the Prohibition on Torture and Other Ill-Treatment

Failure to provide adequate medical treatment and care to detainees in immigration detention can amount to a violation of the prohibition of torture and other ill-treatment.⁷⁸ States have a duty of care to detainees, which includes the positive obligation to “secure physical and psychological integrity and the well-being of all detainees.”⁷⁹ Medical care and treatment must also comply with international medical ethics principles.

Many detained migrants in the U.S. receive dangerously substandard medical care, including an almost complete absence of mental health services.⁸⁰

In 2018, investigative journalists uncovered a trove of records from the DHS’s Office of Inspector General that revealed serious medical issues at Stewart, including inadequate medical staff and long-term use of solitary confinement.⁸¹ Although Stewart is one of the country’s largest immigration detention centers, records confirm that it had no psychiatrist on staff, “chronic shortages” of almost all medical positions, and was described by its own staff as a “ticking bomb.”⁸²

Lack of access to adequate mental health care coupled with the use of prolonged solitary confinement for people suffering from mental health issues poses a grave risk of harm and death, as illustrated by the tragic suicides at Stewart Detention Center noted above. The risk is particularly great for detained migrants who have endured severely traumatic experiences, such as war and torture.⁸³

Based on an independent review of ICE detainee deaths conducted in 2018 by medical experts, Human Rights Watch 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.⁸⁴ In almost all of the cases reviewed, evidence supported the conclusion that “medical lapses likely led or contributed to ... the deaths.”⁸⁵ Advocates also report that ICE has even released detainees immediately before a projected death in order to avoid having to publicly report that death.⁸⁶

LGBTQI individuals have the right to health care which meets their specific needs.⁸⁷ The U.N. Special Rapporteur on Torture has recognized that denying appropriate health care to LGBTQI individuals

⁷⁸ Astrid Ackerman et. al., *Non-Typical Forms of Torture and Ill-Treatment: An Analysis of International Human Rights and International Criminal Jurisdiction* 3, BERKELEY LAW INTERNATIONAL HUMAN RIGHTS LAW CLINIC (July 2018).

⁷⁹ ASSOCIATION FOR THE PREVENTION OF TORTURE, TORTURE AND ILL-TREATMENT, <https://www.apr.ch/en/knowledge-hub/detention-focus-database/treatment/torture-and-ill-treatment>.

⁸⁰ 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 COMMITTEE & FREEDOM FOR IMMIGRANTS (2018); Cho, Cullen & Long, *supra* note 51.

⁸¹ Ely Yu, *Exclusive: An ICE Detention Center's Struggle With 'Chronic' Staff Shortages*, WABE (May 13, 2018) (citing Records of U.S. Department of Homeland Security, Office of Inspector General, Office of Inspections & Evaluations, provided in response to Freedom of Information Request dated January 11, 2018, https://www.wabe.org/wp-content/uploads/2018/05/2018-IGFO-00059_Final-Response_watermark-4.pdf)

⁸² *Ibid.*

⁸³ See e.g., TORTURED AND DETAINED, *supra* note 51.

⁸⁴ Human Rights Watch, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 45 (Jun. 20, 2018) [hereinafter CODE RED].

⁸⁵ CODE RED, *supra* note 82, at 15; Cho, Cullen & Long, *supra* note 66, at 32-33.

⁸⁶ Southern Poverty Law Center, SHADOW PRISONS: IMMIGRATION DETENTION IN THE SOUTH 14 (2016); Cho, Cullen & Long, *supra* note 51, at 34.

⁸⁷ *Report of the Special Rapporteur to the Human Rights Council Thirty-First Session*, *supra* note 71, at ¶¶ 48-49; U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 18, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

raises concern with respect to the prohibition on torture and other ill-treatment.⁸⁸ Still, migrant detainees who identify as LGBTQI routinely receive particularly poor medical care and treatment in U.S. immigration detention centers.⁸⁹ For example, LGBTQI detainees living with serious medical conditions, including HIV, tuberculosis, and syphilis, often do not receive timely and adequate medical care, if they receive any at all.⁹⁰

The Committee Against Torture has explicitly recognized that women are at higher risk of torture or ill-treatment from inappropriate medical treatment, particularly involving reproductive decisions.⁹¹ Indeed, according to the U.N. Special Rapporteur on Torture, women abused and mistreated in the context of seeking reproductive health services may have been subject to torture and other ill-treatment.⁹² The U.N. Special Rapporteur on Torture has explicitly recognized forced sterilization as a form of torture and other cruel, inhuman, and degrading treatment.⁹³

In a case that sparked international outrage in 2020 and likely contributed to the recent closure of the Irwin County Detention Center in Georgia, a nurse on staff alleged that women detained at the center had been routinely subjected to medical abuse, neglect, and mismanagement, including unnecessary gynecological procedures that resulted in some women being stripped of their ability to have children without their knowledge or consent.⁹⁴ Following a long history of abuses documented at Irwin,⁹⁵ these latest allegations resulted in numerous legal actions, including multiple submissions to the Inter-American Commission on Human Rights, the U.N. Special Rapporteur on the Human Rights of Migrants, and other UN entities.⁹⁶

⁸⁸ *Report of the Special Rapporteur to the Human Rights Council Thirty-First Session*, *supra* note 71, at ¶¶ 48-49.

⁸⁹ Shana Tabak & Rachel Levitan, *LGBTI Migrants in Immigration Detention: A Global Perspective*, 37 HARV. J. L. & GENDER 1, 33 (2014).

⁹⁰ 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).

⁹¹ Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 13, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *CAT General Comment No. 2*].

⁹² 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 Session*, ¶¶ 46, 48, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

⁹³ *Ibid.*

⁹⁴ PROJECT SOUTH, *Re: Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against Covid-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center 18* (Sep. 14, 2020).

⁹⁵ Penn State Law, Center for Immigrants' Rights Clinic, and Project South, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRATION DETENTION CENTERS (May 2017); *Request for Thematic Hearing*, *supra* note 77.

⁹⁶ See, e.g., *Request for Thematic Hearing*, *supra* note 77; Penn Law Transnational Legal Clinic, Project South, Detention Watch Network, et.al., *Communication Addressing U.S. Violations of International Law at Immigration Detention Facilities in the U.S. State of Georgia and Calling for a Coordinated Site Visit and International Condemnation* (Nov. 19, 2020), https://projectsouth.org/wp-content/uploads/2020/11/2020.11.19_UN-Communication-ICDC-Medical-Neglect-and-Abuse.pdf.

Severe and Irreversible Medical Abuse of Women at Georgia's Irwin County Detention Center, including Forced Sterilizations, Violates the U.N. Convention Against Torture

In a case that sparked international outrage in 2020 and prompted the recent closure of the Irwin County Detention Center in Georgia, a nurse on staff alleged that women detained at the center had been routinely subjected to medical abuse, neglect and mismanagement, including unnecessary gynecological procedures that resulted in some women being stripped of their ability to have children without their knowledge or consent.

The Special Rapporteur on Torture and other UN mandate holders expressed grave concerns about violations of the Convention Against Torture and demanded that the US provide an explanation and take corrective action in accordance with its treaty obligations. The Inter-American Commission also sounded the alarm, noting that the “the United Nations Committee against Torture has pointed out that gender, in combination with other personal characteristics such as race, migratory status, or age, can determine the ways in which women and girls suffer or are at risk of torture and ill-treatment.” While the U.S. Government announced its decision to close Irwin on May 20, 2021, it is not yet clear if it will take steps to prevent future violations of the Convention Against Torture of this kind or provide redress to the women the women who have suffered.

Nine UN mandate holders, including the U.N. Special Rapporteur on Torture, expressed grave concerns about violations of the prohibition of torture and ill-treatment at Irwin and demanded that the U.S. provide an explanation and take corrective action pursuant to its treaty obligations.⁹⁷ The Inter-American Commission also sounded the alarm, noting that “the United Nations Committee against Torture has pointed out that gender, in combination with other personal characteristics such as race, migratory status, or age, can determine the ways in which women and girls suffer or are at risk of torture and ill-treatment.”⁹⁸

On May 20, 2021, the US Government announced its decision to close the facility, stating that it “will

⁹⁷ See Communication from Mandates of the UN Special Rapporteur on the Human Rights of Migrants and Eight Additional Mandate Holders to the U.S. of January 15, 2021, US USA 34/2020, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25835> [hereinafter Communication from Mandates to the U.S.].

⁹⁸ Press Release: IACHR Expresses Its Concern Over Reports of Sterilizations and Surgical Interventions Without Consent in Migrant Detention Centers in the United States, ORGANIZATION OF AMERICAN STATES (Oct. 30, 2020); see also, Communication from Mandates to the U.S., supra note 93.

not tolerate the mistreatment of individuals in civil immigration detention or substandard conditions of detention.”⁹⁹ However, it is not clear at the writing of this report if it will take steps to prevent future violations of the Convention against Torture of this kind by closing remaining immigration detention centers across the country or provide redress to the women who have been harmed.

Detained Migrants Have Been Sexually Abused in Ways that Violate the Prohibition of Torture and Other Ill-Treatment.

The international community has recognized rape and other forms of sexual violence as constituting torture and other ill-treatment. The Committee Against Torture and the U.N. Special Rapporteur on Torture have both recognized that rape carried out by or at the instigation of or with the consent of public officials constitutes torture.¹⁰⁰ Moreover, both the Committee Against Torture and the U.N. 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.”¹⁰¹

Complaints of sexual assault in U.S. 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.¹⁰² Despite years of awareness of sexual assault in immigration detention centers, the problem continues. Besides the failure by ICE and private prison companies that run the detention centers to keep migrant detainees safe from sexual abuse, they are regularly the perpetrators of the harm.

In 2017, Community Initiatives for Visiting Immigrants in Confinement (“CIVIC”) filed a federal complaint with the Office for Civil Rights & Civil Liberties within DHS.¹⁰³ The complaint alleged that in the previous three years, CIVIC had documented 27 cases of sexual abuse-related claims by detained migrants.¹⁰⁴ It also noted that “an additional 1,016 people, at least, under the custody of [DHS] in detention [had] submitted sexual abuse-related complaints to the Office of the Inspector General at DHS since 2010.”¹⁰⁵

Despite years of awareness of sexual assault in immigration detention centers, the problem continues. Besides the failure by ICE and private prison companies that run the detention centers to keep migrant detainees safe from sexual abuse, they are regularly the perpetrators of the harm.

⁹⁹ *ICE To Close Two Detention Centers*, DEPARTMENT OF HOMELAND SECURITY (May 20, 2021).

¹⁰⁰ *CT and KM v. Sweden*, Communication No. 279/2005, ¶ 7.5, U.N. Doc. CAT/C/37/D/279/2005 (Nov. 17, 2006); Manfred Nowak (U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), *Report of the Special Rapporteur to the Human Rights Council Seventh Session*, ¶ 36, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008).

¹⁰¹ Zack and Birk, *supra* note 48, at 457.

¹⁰² See *Jama v. U.S. I.N.S.*, 22 F. Supp. 2d 353 (D.N.J. 1998).

¹⁰³ FREEDOM FOR IMMIGRANTS, COMPLAINT RE: SEXUAL ABUSE, ASSAULT, AND HARASSMENT IN U.S. IMMIGRATION DETENTION FACILITIES (Apr. 11, 2017), https://www.freedomforimmigrants.org/s/SexualAssault_Complaint.pdf.

¹⁰⁴ COMPLAINT RE: SEXUAL ABUSE, ASSAULT, AND HARASSMENT IN U.S. IMMIGRATION DETENTION FACILITIES, *supra* note 99.

¹⁰⁵ *Ibid.*

Detention Related Policies and Practices That Have Coerced Migrants into Withdrawing their Claims to Stay in the U.S. Have Resulted in Violations of the Prohibition of Torture and Other Ill-Treatment.

The prohibition on torture and other ill-treatment includes the principle of non-refoulement, “which prohibits States from ‘deporting’ 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.”¹⁰⁶ The U.N. Special Rapporteur on Torture has 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.”¹⁰⁷ In this same vein, the U.N. Special Rapporteur on Torture has recognized that ill-treatment or grossly inadequate detention conditions may amount to torture when intentionally imposed to coerce migrants into withdrawing legal claims they may have and agreeing to “voluntary” deportation.¹⁰⁸

The policy that led to family separations at the U.S. southern border has been used to deter asylum-seekers from coming to the U.S. and to compel those already in the country to give up their claims and return to their countries-of-origin.¹⁰⁹ As the Trump administration did not devise an appropriate system to track children’s relationship to adults, this policy led to the removal of parents without their children. The effect of such separation on a parent and child’s mental health is severe, causing nightmares, fears, anxiety and depression in children and feelings of hopelessness and suicidal thoughts in parents.¹¹⁰

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.”¹¹¹ This former policy of family separation at the U.S. border is a 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 which caused the refoulement of individuals with legitimate claims of persecution by coercing them into giving up their legal claims to request asylum to be reunited with separated family members.

Moreover, conditions in U.S. Customs and Border Protection (CBP) detention centers located at the

¹⁰⁶ *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 1, at ¶ 38; Convention Against Torture, *supra* note 35, at art. 3(1); Comm. Against Torture, *General Comment No. 4: On the Implementation of Article 3 of the convention in the Context of Article 22*, ¶¶ 15-17, 26, 28-29, U.N. Doc. CAT/C/GC/4 (Sep. 4, 2018); ICCPR *General Comment No. 20*, *supra* note 51, at ¶ 9.

¹⁰⁷ *Report of the Special Rapporteur to the Human Rights Council Thirty-Seventh Session*, *supra* note 1, at ¶ 20, ¶ 43.

¹⁰⁸ *Ibid.* at ¶ 19.

¹⁰⁹ AMNESTY INTERNATIONAL, USA: “YOU DON’T HAVE ANY RIGHTS HERE”: ILLEGAL PUSHBACKS, ARBITRARY DETENTION & ILL-TREATMENT OF ASYLUM-SEEKERS IN THE UNITED STATES 29 (2018).

¹¹⁰ The Center for Victims of Torture and Mount Sinai Human Rights Program, STATEMENT FOR THE RECORD TO THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND REFORM: “THE TRUMP ADMINISTRATION’S CHILD SEPARATION POLICY: SUBSTANTIATED ALLEGATIONS OF MISTREATMENT” (Jul. 12, 2019), https://www.cvt.org/sites/default/files/attachments/u101/downloads/statement_for_the_record_hjor_fam_separation_7.12.2019_final2.pdf; THE CENTER FOR VICTIMS OF TORTURE, STATEMENT FOR THE RECORD TO THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY: “OVERSIGHT OF THE TRUMP ADMINISTRATION’S FAMILY SEPARATION POLICY (Feb. 26, 2019), https://www.cvt.org/sites/default/files/attachments/u101/downloads/cvt.statement_for_the_record_hjc_on_family_separation_final1.feb_2019.pdf?fbclid=IwAR2NW0xRuZDGB0VbScOM7Mzkyi1LNpuidtd2c-U7LmOQwfE6-UFqI7T0BkA.

¹¹¹ *Ibid.* at 31; AMERICAN IMMIGRATION COUNCIL & AMERICAN IMMIGRATION LAWYERS ASSOCIATION, COMPLAINT RE: THE USE OF COERCION BY U.S. DEPT. OF HOMELAND SECURITY (DHS) OFFICIALS AGAINST PARENTS WHO WERE FORCIBLY SEPARATED FROM THEIR CHILDREN 13-14 (Aug. 23, 2018).

border are grossly inadequate.¹¹² U.N. High Commissioner for Human Rights Michelle Bachelet stated 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.”¹¹³ In July 2019, the DHS Office of Inspector General 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.¹¹⁴ The report also documented severe non-compliance with CBP’s Transport, Escort, Detention and Search 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.¹¹⁵

These grossly inadequate and abhorrent conditions of immigration detention have the impact of deterring migrants from entering the country and of coercing those already in the country and detained at the border to abandon their legal claims to stay in the U.S. just to escape the abhorrent conditions of detention.¹¹⁶

Even migrants not detained by CBP along the southern border are subjected to ill-treatment and abuses with the purpose of coercing and forcing the withdrawal of legal claims to stay in the U.S.

Eight Cameroonian migrants detained by ICE at the Adams County Correctional Center in Natchez, Mississippi, for example, were subjected to forcible coercive tactics in an attempt to secure signature of removal documents.¹¹⁷ The Cameroonian migrant detainees reported graphic abuses at the hands of detention center staff and ICE officers including being strangled, having their necks pressed into the ground, having their fingers broken, being dragged across the ground, and being threatened with death.¹¹⁸ Similar physical violence for the same purpose was used against detainees at the Jackson Parish Correctional Facility and the Winn Correctional Center, both located in Louisiana.¹¹⁹

States Remain Legally Responsible for Private Detention Centers and Can Be Held Accountable for Violations of Their International Legal Obligations Which Take Place within Those Private Detention Centers.

U.N. bodies have consistently reinforced that States cannot abdicate their responsibilities to detainees, including their international legal obligation to abide by the prohibition on torture and other

¹¹² Adam Serwer, *A Crime by Any Name: The Trump Administration’s Commitment to Deterring Immigration Through Cruelty Has Made Horrifying Conditions in Detention Facilities Inevitable*, THE ATLANTIC (Jul. 3, 2019).

¹¹³ U.N. High Commissioner for Human Rights, *Bachelet Appalled by Conditions of Migrants and Refugees in Detention in the US* (Jul. 8, 2019).

¹¹⁴ 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).

¹¹⁵ *Ibid.* at 5-9; Joseph V. Cuffari, DHS OFFICE OF INSPECTOR GENERAL, CBP STRUGGLED TO PROVIDE ADEQUATE DETENTION CONDITIONS DURING 2019 MIGRANT SURGE (Jun. 12, 2020).

¹¹⁶ U.N. Experts to US: “Release Migrant Children from Detention and Stop Using Them to Deter Irregular Migration”, U.N. OFFICE OF THE HIGH COMMISSION OF HUMAN RIGHTS (Jun. 22, 2018).

¹¹⁷ SOUTHERN POVERTY LAW CENTER AND FREEDOM FOR IMMIGRANTS, COMPLAINT RE: IMMIGRATION AND CUSTOMS ENFORCEMENT OFFICERS’ USE OF TORTURE TO COERCE IMMIGRANTS INTO SIGNING IMMIGRATION DOCUMENTS AT ADAMS COUNTY CORRECTIONAL FACILITY (Oct. 7, 2020).

¹¹⁸ *Ibid.*

¹¹⁹ SOUTHERN POVERTY LAW CENTER & FREEDOM FOR IMMIGRANTS, COMPLAINT RE: U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)’S PATTERN OF TORTURE IN SIGNING OF DEPORTATION DOCUMENTS FOR CAMEROONIAN MIGRANTS (Nov. 5, 2020); SOUTHERN POVERTY LAW CENTER, COMPLAINT RE: THREE INCI

forms of ill-treatment, by using private detention centers.¹²⁰ According to the U.N. Working Group on Arbitrary Detention:

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.¹²¹

The Committee against Torture has similarly stated that “where detention centres are privately owned or run,” such as in Georgia, where Stewart, Irwin and other detention centers are operated by private prison companies, “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.”¹²² The Committee Against Torture has 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.”¹²³ Existing international norms fully support the conclusion that the U.S. bears state responsibility for internationally wrongful conduct in its private detention centers, including those used for immigration purposes.

DENTS OF VIOLENT ABUSE OF AUTHORITY AT WINN CORRECTIONAL CENTER (Aug. 7, 2020).

¹²⁰ Zach and Birk, *supra* note 48, at 444-45; Nils Melzer (U.N. Special Rapporteur on Torture and Other Cruel, Inhuman, and 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).

¹²¹ WGAD Revised Deliberation No. 5, *supra* note 15, at ¶ 46.

¹²² CAT General Comment No. 2, *supra* note 91, at ¶ 17.

¹²³ *Ibid.* at ¶¶ 15, 17.

