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International Covenant on Civil and Political Rights*

**Treatment of Foreign Nationals, including Refugees and Asylum-seekers, Disparately  
Impacting Black People and other Peoples Protected by the Covenant and the Convention  
on the Elimination of All Forms of Racial Discrimination**

**Submitted By:**

Haitian Bridge Alliance, the UndocuBlack Network, Cameroon Advocacy Network, Center for  
Constitutional Rights, National Immigrant Justice Center, RFK Human Rights, Institute for  
Justice & Democracy in Haiti, and the University of Miami School of Law Human Rights Clinic



**Endorsed By:**

Global Justice Clinic, New York University School of Law\*  
Center for Gender & Refugee Studies

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\*This communication does not purport to represent the institutional views, if any, of New York University.

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## **I. Introduction**

1. This Shadow Report is submitted for the fifth periodic review of the United States of America (“U.S.”) by the Human Rights Committee (“Committee”). The report provides data, research, and analysis on the U.S. treatment of foreign nationals, including migrants, refugees, and asylum seekers (collectively referred herein as “migrants” unless otherwise indicated), in violation of the International Covenant on Civil and Political Rights (“Covenant”). It focuses on Black people in transnational migration, including Haitians, Cameroonians, and other people of African descent.
2. The report provides data, research, and analysis on the right to life, and security of person, the prohibition of torture and cruel, inhumane or degrading treatment or punishment, the prohibition of refoulement, the treatment of persons deprived of their liberty, excessive use of force by law enforcement agents, the right to non-discrimination, the right to an effective remedy, and the right to self-determination. We thank the Committee for the opportunity to share this information and its consideration of the actions we recommend to address these serious violations.

## **II. Executive Summary**

3. Anti-Blackness is not an anomaly within the U.S. immigration enforcement system; it is the standard. This defining characteristic of disparate treatment based on race and nationality is in violation of both U.S. domestic law and numerous international human rights treaties and obligations. Yet, the U.S. continues to harm vulnerable populations seeking refuge within its borders. Most recently, these harms manifest in the form of deterrence policies, mandatory detention, lack of due process for detained individuals, arbitrary bond amounts, and deportations to deadly conditions. When it comes to recent “pull factors” for migration from majority Black countries such as Haiti, the adage “we are here, because you were there” rings true. With little to no recourse in the form of reparations or other remedies for the historic violence and lingering consequences of colonialism, slavery, and imperialism, the U.S. must welcome those seeking asylum within its borders in a dignified manner. This report analyzes the deliberate ways in which the U.S. falls short of this duty.
4. The first Black migrants in the U.S. were forcibly brought for the exploitation of their labor. Some of the earliest forms of policing and legal restrictions on the movement of Black bodies in the U.S. were slave patrols. From its inception, the U.S. used its constitution and policy making regime to restrict the rights of Black people. From codifying the absurd notion that Black people were only 3/5<sup>ths</sup> of a human being, to the adoption of modern “prevention through deterrence” policies, the U.S. continues to pursue its goal of preventing migrants of African descent, especially Haitians, from seeking security.
5. The increased militarization of the Southern border is a palpable example of the U.S. dedication to restricting the rights of migrants. Through federal budget increases for the

U.S. Department of Homeland Security and local policies from border states and towns, we have seen the construction of a physical border wall, the denial of the right to asylum through metering and the Title 42 policies, and the busing of migrants from the border to interior cities such as New York and Washington DC. The U.S. has also manipulated its diplomatic relations to expand the reach of deterrence policies through bilateral agreements, safe-third country agreements, and joint military operations. These efforts create the false notion that Black migrants might find safety in several countries while *en route* to the U.S. Many of the countries with whom the U.S. enters these agreements have little to no infrastructure for seeking asylum, are rife with anti-Black racism, and have their own internal issues causing their nationals to also flee and seek refuge in the U.S.

6. The U.S.' violations of international human rights through its immigration deterrence policies can be categorized into three areas: (1) violations of non-refoulement—through maritime interdictions and ongoing deportations; (2) the use of mandatory/mass detention and detention conditions that amount to arbitrary deprivations of life and liberty and torture; and (3) the externalization of U.S border control by expanding the effective control of U.S. border policy to countries far from U.S. territory. Each of these categories of harm uniquely and disparately impacts Black migrants.
7. Despite multiple lawsuits and the outcry of advocacy groups highlighting the illegality of these practices, victims of the U.S.' violation of non-refoulement, arbitrary detention, and general racial discrimination have no access to judicial remedies. As suggested by former Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance E. Tendayi Achiume, migration and forced displacement must be analyzed with the added context of a lack of global reparatory justice for slavery, colonialism, and neo-colonial imperialism, as well as ongoing violations against the right to self-determination for majority Black countries such as Haiti.<sup>1</sup>
8. This report interrogates the U.S.'s intentional dismissal of its obligations under its own domestic laws, the Covenant, the Protocol relating to the Status of Refugees ("Refugee Protocol"), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT"), and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). It also presents clear recommendations to remedy the aforementioned harms.

### **III. Constitutional and legal framework implementing the Covenant (art. 2)**

9. The U.S. has a rigorous constitutional and legal framework that purports to protect rights, but since its inception the U.S. has designed and manipulated this framework to exclude non-white people considered non-citizens or foreign nationals from accessing protections under domestic and international law, including under the Covenant. As detailed below, and using its reservations to international human rights treaties, the U.S. legal framework empowers a broad array of strategies to deter and prevent Black, Indigenous, and other

non-white peoples from the Global South from exercising their rights to human mobility, presenting at the U.S. border, and entering the U.S.

10. The U.S. created its ongoing “Prevention through Deterrence” policies and practices partly in response to new political sentiment coalescing around the migration of Black people, particularly Haitian nationals, seeking legal protections through rights guaranteed by the Covenant.<sup>2</sup> As alleged by plaintiffs in *Haitian Bridge Alliance et al. v. Biden*, these Prevention through Deterrence policies, including the “Haitian Deterrence Policy,” are animated by “a discriminatory purpose toward Black and Haitian migrants; a desire to keep Black and Haitian migrants out of the country; and a plan to send a message to other Haitian asylum seekers not to come to the United States.”<sup>3</sup> The Prevention through Deterrence policies have a special focus on Haitian nationals, but they impact all African people, People of African Descent, and other non-white peoples subject to racism, as defined by ICERD.

#### **A. U.S. Constitutional Framework**

11. The U.S. Constitution creates a three-part governmental system<sup>4</sup> composed of an executive, legislative, and judicial branch.<sup>5</sup> The executive branch is empowered to make and enter into treaties on behalf of the U.S.;<sup>6</sup> though the Constitution requires the legislative branch to accede to treaties in order for them to take domestic effect.<sup>7</sup> Courts and localities are bound by treaties once given effect, subject to reservations or declarations made upon ratification.<sup>8</sup>
12. The legislative branch is responsible for creating laws regarding naturalization and citizenship; the executive branch is responsible for enforcement; and the judicial branch is responsible for adjudicating cases and controversies related to citizenship and the treatment of foreign nationals.<sup>9</sup>

#### **B. International Covenant on Civil and Political Rights**

13. The U.S. ratified the Covenant in 1992.<sup>10</sup> The U.S. asserts that the Convention does not apply to foreign nationals or to foreign nationals under the U.S.’s effective control while outside of U.S. territory, including the Covenant’s prohibition against refoulement.<sup>11</sup> Reservations make the Convention non-self-executing—claiming that the provisions in U.S. law already guarantee adequate protections against racism—and so no person, citizen or non-citizen, can assert a claim or access judicial remedies based on the Covenant.

#### **C. Other Relevant Treaties**

14. In 1968, the U.S. became a party to the 1967 Protocol relating to the Status of Refugees and thus the substantive framework of the 1951 Refugee Convention.<sup>12</sup> The treaty prohibits governments from returning refugees to a country where their life or liberty would be threatened on the basis of a protected ground, and from imposing penalties on refugees who entered without inspection in search of asylum if they present themselves to immigration authorities without delay.<sup>13</sup>

15. In 1994, the U.S. acceded to the CAT,<sup>14</sup> which prohibits States from returning any individual to a country where it is more likely than not that she would face torture.<sup>15</sup>
16. The U.S. signed the ICERD in 1966, amid a mass movement for human rights for people of African descent, but the legislature did not accede to the treaty until 1994—with significant reservations<sup>16</sup> and ongoing assertions that discrimination towards non-citizens is not regulated by ICERD.<sup>17</sup>
17. In April 2023, the Committee on the Elimination of All Forms of Racial Discrimination (“CERD”) reiterated to the U.S. and all States in the Americas the need to protect Haitians in human mobility; called on the U.S. and States in the Americas to immediately suspend all deportations and returns of Haitians to Haiti; and called on the U.S. and States to take other measures immediately to comply with ICERD in the context of transnational migration.<sup>18</sup>

#### **D. U.S. Legislative Branch Laws and Executive Branch Policies under Law**

18. The U.S. has enacted law and policy designed to violate the Covenant’s prohibitions against refoulement, torture, and arbitrary detention; its guarantees of the right to life, liberty, security and integrity of the person; the application of the Covenant in extraterritorial settings; and the Covenant’s right to an effective legal remedy.

##### **(1) Legislative Branch Laws**

19. The original U.S. naturalization laws restricted citizenship to “white persons”<sup>19</sup> and rendered people of African descent non-citizens, capable of being owned as property, forced into involuntary servitude, traded, separated from families, tortured, and unable to access the courts or seek justice for crimes perpetrated against them.<sup>20</sup> Following a brutal civil war in the mid-19th Century, the U.S. amended its constitution to provide citizenship to all people born in the U.S.—thus granting citizenship to all people of African descent born in the U.S. who had previously been denied.<sup>21</sup> Shortly thereafter, the legislative branch amended its original naturalization laws to allow for people of African descent to seek citizenship if they did not already have it, though people of Asian descent were still barred until 1952.<sup>22</sup>
20. In 1952, the U.S. synthesized its various provisions into one act entitled the Immigration and Nationality Act (“INA”). In 1965, amidst the Civil Rights Movement, the legislature amended the INA to lift a racial quota system that had in effect limited non-citizens of African descent from seeking U.S. citizenship.
21. The INA includes sweeping mandatory detention provisions and allows executive branch discretionary detention.<sup>23</sup>
22. Under the INA, “any alien who is physically present in the United States or who arrives in the United States (whether or not it is at a port of arrival), irrespective of the alien’s status may apply for asylum.”<sup>24</sup>

23. The INA and other legislative provisions give the Executive Branch broad and sweeping authority.<sup>25</sup> Other laws also empower the Executive Branch with broad and sweeping authority to enact policy related to the border and immigration.<sup>26</sup>
24. Though the U.S. created domestic legislation on asylees and refugees following its accession to the 1967 Protocol with the 1980 Refugee Act,<sup>27</sup> the subsequent 1986 Immigration Reform and Control Act<sup>28</sup> and the “1996 laws”<sup>29</sup> expanded its border enforcement and detention capabilities; expanded its authority to deport foreign nationals on the basis of contact with the State’s criminal justice system; and created an expedited removal process that allows for deportations without judicial review.<sup>30</sup>
25. As a result of the 1996 laws, the racial disparities infecting the U.S. criminal system are directly transferred to the U.S. immigration system. Black and Brown immigrants who have contact with the criminal system often as a result of racially discriminatory police and adjudication practices face a second harsh punishment of detention and deportation.<sup>31</sup>
26. The Homeland Security Act of 2002 reorganized agencies within the executive branch to regulate immigration based on security interests and the so-called War on Terror. It created a new agency, the Department of Homeland Security (“DHS”), and provided the DHS Secretary with “the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens.”<sup>32</sup>

## (2) Executive Branch Policies

### *a. 1978 Haitian Program*

27. In 1978, as part of a broader campaign to “craft immigration policies that specifically targeted Haitians for disparate treatment to keep them off U.S. soil,”<sup>33</sup> the Executive Branch created a policy known as the “Haitian Program,” which “jailed arriving Haitians and universally denied their asylum claims despite known atrocities being committed by the Duvalier regime at the time.”<sup>34</sup>

### *b. 1980-present Maritime Interdictions in Florida Straits and the Caribbean Sea*

28. Since 1980, successive executive branch administrations have attempted to deter Haitians from accessing asylum in the U.S. by using maritime interdictions in international waters.<sup>35</sup> Employing the power granted under the INA to suspend entry of “any aliens” whose entry it deems “would be detrimental to the interests of the United States,” Presidents have issued four executive orders governing maritime interdictions in the Florida Straits and Caribbean Sea.<sup>36</sup>
29. Since surviving judicial branch review and being reorganized after the creation of DHS, the U.S. Maritime Migrant Interdiction Operations, housed in the DHS and led by the U.S. Coast Guard, employ “air and sea military assets” to patrol the Florida straits and the Caribbean Sea to intercept people attempting to migrate to the U.S. by sea, primarily from Haiti and Cuba.<sup>37</sup> DHS intercepts boats “as far from U.S. borders as possible.”<sup>38</sup> As

declared by the DHS Secretary, “any migrant intercepted at sea, regardless of their nationality, will not be permitted to enter the United States.”<sup>39</sup>

30. The Executive Branch maintains the position that its obligations to asylum seekers under international and domestic law are not engaged when it operates in international waters,<sup>40</sup> even though the Human Rights Committee has expressly stated that such practice is outside the rule of law.<sup>41</sup>

*c. 1981 Executive Branch Policy of Detention as Deterrence*

31. In addition to responding to the increase in Haitian and Cuban seeking asylum by sea in the seventies and in 1980-1981 with maritime interdictions, the Executive Branch in 1981 started detaining asylum seekers as a strategy to deter people from migrating to the U.S.<sup>42</sup>

*d. 1994 Executive Branch’s Border Policy of Prevention through Deterrence*

32. The Executive Branch adopted a border policy of ‘prevention through deterrence’ in 1994.<sup>43</sup> The policy “sought to deter irregular border crossing by ‘disrupt[ing]...traditional entry and smuggling routes’ so migrants would be ‘forced over’ more ‘hostile terrain’ far away from populated areas where those at risk of death by exposure to harsh elements might be able to seek help.”<sup>44</sup>

*e. 1980s-present Border Militarization*

33. With its explicit adoption of “Prevention through Deterrence” strategies, the U.S. has poured resources into militarizing its southern border to prevent and deter migration access.<sup>45</sup> Since the Homeland Security Act took effect, the budget for immigration detention and border securitization has tripled.<sup>46</sup> Both the Executive Branch<sup>47</sup> and local governments on the border have continued to construct a physical border wall as well as use military and technological resources to prevent and deter people from entering the U.S. or applying for protections under U.S. naturalization law.
34. In its 2006 Concluding Observations on the U.S., the Committee “remain[ed] concerned about the increased level of militarization on the southwest border with Mexico” and emphasized the need for immigration enforcement that complies with the rights under the Covenant.<sup>48</sup>

*f. 2016-present Pushback Policies: Metering, Title 42, including the mass expulsions of Haitians in Del Rio, Texas, and the “Asylum/Transit Ban”*

35. Since 2016, DHS has been implementing some form of metering, a policy through which U.S. Customs and Border Protection (“CBP”—a sub-agency within the DHS) restricted access to the asylum process at U.S.-Mexico ports of entry by mandating that officers turn back asylum seekers at the border. The metering policy started in 2016 at the San Ysidro Port of Entry<sup>49</sup> in response to an increase in the number of Haitian migrants presenting at the U.S.-Mexico border. A local paper published a story entitled “Surge of Haitians at San



Ysidro Port of Entry,” noting a swell of approximately 200 migrants around the port. In response, a senior DHS official emailed the port director at San Ysidro: “Need to get that asylum line out of the public viewing.” In turn, the port director instructed his staff, “[we] need to get this under control. The media is asking about our influx of Haitians . . . I would like to have this done immediately.”<sup>50</sup>

36. As a result, CBP coordinated with Mexican immigration authorities and other third parties to implement an illegal waitlist system that created life-threatening delays in processing asylum seekers. Some tens of thousands of individuals would be turned back from applying from asylum even when they had already reached U.S. territory, a fact that CBP internally acknowledged broke federal immigration rules and laws.<sup>51</sup> The metering policy was implemented across nearly every pedestrian port of entry along the U.S.-Mexico border, but was ultimately struck down in 2021 by a federal court in California (though the government has appealed).<sup>52</sup>
37. In March 2020, under the guise of a public health emergency, the President Trump and Biden administrations wielded a public health policy (that had not been invoked since 1929) to expel over a million migrants during the COVID-19 pandemic without a screening for asylum or CAT protection.<sup>53</sup> This DHS policy caused Daniel Foote, the U.S. Special Envoy to Haiti, to resign in protest, noting that he refused to “be associated with the United States’ inhumane, counterproductive decision to deport thousands of Haitian refugees and [] immigrants to Haiti . . . a country where American officials are confined to secure compounds because of the danger posed by armed gangs.”<sup>54</sup>
38. The Title 42 policy exerted extreme forms of State violence on Haitian nationals in Del Rio, Texas in September 2021. From September 9 to 25, 2021, at least 15,000 Haitians and other nationals were held in a makeshift CBP encampment near the Del Rio International Bridge in Texas after they crossed the U.S.-Mexico border to seek asylum. But U.S. ports of entry remained closed due to the Title 42 policy and the U.S. government responded with militarized force.<sup>55</sup> They restricted movement within and out of the encampment, which was blocked off using shoulder-height fences constructed of chicken wire and abutted the Rio Grande River. Texas state police troopers were stationed across the river’s northern bank, while Mexican state police and officers from Mexico’s National Migration Institute (“INM”) lined the southern bank. Because the U.S. government effectively detained these individuals and prevented them from leaving the encampment, they owed the people in the encampment a duty of care to provide basic human necessities.<sup>56</sup> Instead, the people trapped in the encampment were subjected to desert heat, no housing, hunger, dehydration, medical neglect, and other inhumane conditions as they awaited processing by CBP.<sup>57</sup>
39. The U.S. government authorized a first-of-its-kind “emergency” contract with a private prison company to rapidly deport thousands of these individuals to Haiti. The contract was entered without full and fair competition and ultimately cost nearly 1900% more per flight than the average cost of a deportation flight.<sup>58</sup>

40. As described in the complaint in *Haitian Bridge Alliance et al. v. Biden*, a lawsuit pending in U.S. district court that was filed by the victims, the U.S. intentionally organized a “brutal and rapid expulsion of asylum seekers.”<sup>59</sup> The complaint alleges: “In the resulting series of expulsion flights to Haiti, ICE officials expelled at least one mother with a days-old-baby born in the United States. Some expelled individuals did not even realize they had been sent to Haiti until they got off the plane, because officers had lied about where the asylum seekers were being taken. Many individuals were expelled in shackles; ... none were given an opportunity to request asylum or screening for fear or risk of torture and death upon return to Haiti or Mexico.”<sup>60</sup>
41. The Biden administration has tried to dismiss the lawsuit filed by victims, including Mirard Joseph whom CBP officers assaulted on horseback, images of which caused international outrage and empty promises of accountability as his photo went viral.<sup>61</sup>

*g. Bi-lateral agreements, safe-third country agreements, and joint military operations*

42. Formal and informal U.S. agreements with countries in the Americas result in new restrictions, closed borders, and other measures that increasingly restrict access to asylum protection throughout the region and expose people to ongoing violations under the Covenant. As the Special Rapporteur on Contemporary Forms of Racism observed, “the racist and xenophobic politics of the United States are enforced even beyond the territories of that country because they are outsourced for enforcement by Mexican and other officials long before refugees and migrants even approach the US border.”<sup>62</sup>
43. U.S. pressure on its southern border also extends to other regional actors, such as Colombia,<sup>63</sup> Guatemala,<sup>64</sup> and Mexico.<sup>65</sup> Although the U.S. justifies these agreements with its southern neighbors as fighting smuggling networks, the intent to halt migration is key to a 2023 campaign launched by the U.S., Colombia, and Panama.<sup>66</sup> Such efforts would choke asylum access before migrants reach the U.S. border.
44. In recent years, the U.S. has subsidized and fueled the dramatic expansion of Panama’s border enforcement to track and restrict migration north to the U.S. For many Latin American, Caribbean, and transcontinental asylum seekers from Africa, Panama has become their first touchpoint with the U.S. enforcement apparatus.<sup>67</sup> The U.S. has supplied Panamanian authorities with biometrics capability to track migrants and capture their information as they head north to the U.S.<sup>68</sup>
45. The U.S. military has also been working with Panama and Colombia to train their border forces and expand the securitization of their borders—further expanding over a century of U.S. military presence in Panama.<sup>69</sup> Panamanian enforcement and security-based cooperation with the U.S. has endured<sup>70</sup> in spite of ample evidence that the needs facing migrants, including a growing number of children,<sup>71</sup> are humanitarian in nature and do not require a militarized and surveillance response. In April 2023, the U.S. announced joint military operations with the Panamanian and Colombian militaries.<sup>72</sup>

46. The Trump administration pursued agreements with Mexico and Central American nations to formalize the pushback of migrants seeking protection at its borders. Threatening to cut millions of foreign assistance programs, President Trump pressured the governments of El Salvador, Honduras, and Guatemala to enter into “safe” third country agreements, absent any indicia that these nations currently had the capacity to protect the rights of asylum seekers. Far from “safe third countries,” these agreements amounted to “deportation[s] with a layover” according to human rights watchdogs.<sup>73</sup>

**IV. Current and ongoing treatment of foreign nationals, including refugees and asylum seekers, disparately impacting Black people and other people protected by ICERD (arts. 2, 9, 10, 13, 14, 17, 23, 24 and 26)**

47. The U.S.’s Prevention through Deterrence policy and practice includes the following three parts: (A) intentional violations of non-refoulement—through maritime interdictions, “pushbacks,”<sup>74</sup> especially at the U.S.’s land border with Mexico, and ongoing deportations to places where it is likely the people will experience deprivations of rights under the Covenant; (B) mass detention and conditions of detention that violate the Covenant’s guarantees against arbitrary deprivations of life and liberty and its prohibition against torture; and (C) externalization of U.S border control on spaces far from U.S territory, using regional, bi-lateral, and multilateral agreements and joint military partnerships, and spreading U.S. Prevention through Deterrence policies and practices, including the Haitian Deterrence Policy. These laws, policies, and practices disparately target and impact Black people and other people protected by ICERD.

**A. Intentional violations of non-refoulement through maritime interdictions, pushbacks, and deportations**

**(1) Ongoing maritime interdictions of Haitians**

48. Through its maritime interdiction operations, the U.S. detains people aboard military ships and at an offshore detention center—with no ability to contact family or legal counsel—and then without judicial review returns them to countries of origin with disregard for national and international legal protections afforded to migrants, refugees, and asylum seekers, including the Covenant’s guarantee against refoulement.
49. Once interception occurs, the U.S. takes people aboard Coast Guard ships, where, as described in a February 2023 article by a U.S. Coast Guard leader, “[i]t is not uncommon for hundreds of migrants to be squeezed on a flight deck measuring 1,500 square feet”; where “hundreds of temporary migrants live, eat, sleep, defecate, and receive medical care in this one spot, sometimes for days on end, until repatriation can be coordinated;” and where “the situation is also often on the verge of devolving into riots” and “operations are, in no small way, akin to combat.”<sup>75</sup>
50. In this environment, DHS asserts that Coast Guard operatives employ a ‘manifestation of fear’ test, where they visually scan people on board the ship to determine whether anyone demonstrates a fear of return to their country of origin. No verbal questions are asked of

migrants, though the U.S. government claims that a person can shout out.<sup>76</sup> Access to counsel is not allowed. If a Coast Guard agent identifies a person as manifesting fear, that person can be transferred to the Migrant Operation Center located on the island of Guantanamo Bay (which is also used to hold enemy combatants) for a “credible fear interview,” a process created through the U.S.’s expedited removal laws, where an Executive Branch official within DHS asks questions and decides whether the person credibly fears returning to their country.

51. Maritime interdictions have increased since 2018; in fiscal year 2022, the Coast Guard interdicted more than 12,000 Haitians and Cubans.<sup>77</sup> Throughout this process, from being interdicted, to being visually scanned, to possibly receiving a more in-depth credible fear interview, people cannot be located by family or by legal counsel. The vast majority of these interactions lead to deportation to their country of origin or to a third country. According to the DHS’s 2020 Maritime Law Enforcement Assessment, the U.S. Coast Guard “employs repatriation agreements with the Dominican Republic, Haiti, and Cuba; the three most frequent nationalities interdicted in the Caribbean region.”<sup>78</sup> Under new rules created by the Executive Branch, “Circumvention of Lawful Pathways,” people who are interdicted at sea are barred from applying for certain forms of humanitarian parole.<sup>79</sup>
52. DHS’s Office for Civil Rights and Civil Liberties (“CRCL”) opened an investigation in January 2023 into whether DHS policies relating to maritime interdictions diminishes the civil rights and civil liberties of migrants seeking protection.<sup>80</sup>

(2) Ongoing Pushbacks at the U.S.’s land border with Mexico

53. From February through December 2020, the U.S. reported using 400,000 pushbacks on the southern U.S. border with Mexico.<sup>81</sup> These pushbacks are ongoing. As stated above, the end of Title 42 expulsions in 2023 ushered in a return to metering, albeit in a slightly different form.
54. In conjunction with the publication of the rule “Circumvention of Lawful Pathways,”<sup>82</sup> DHS and CBP rolled out “CBP One,” a mobile application migrants are essentially required to use to schedule an advance appointment to present for inspection and processing, including processing for asylum, at ports of entry along the southern border. Like metering in 2016, DHS’s policy harmed Black migrants the most, as predicted by advocates during the comment period before the rule was implemented.<sup>83</sup> The app is functionally inaccessible for huge swaths of the migrant populations. The application prevented many individuals with darker complexions from making appointments because of photographic incapability. Many advocates recognized the difficulty Black migrants experienced obtaining appointments, including Felicia Rangel-Samponaro, co-director of the non-profit Sidewalk School, who observed that “[t]here are about 4,000 Black asylum seekers waiting in Reynosa and at least another 1,000 Haitians in Matamoros. Hardly anyone is getting an asylum appointment.”<sup>84</sup>
55. Observing that the application was metering in a different form, the same advocates and lawyers who brought the original *Al Otro Lado v. Mayorkas* have sued again in federal

court alleging that the practice is illegal, unconstitutional, and violates international human rights and refugee law.<sup>85</sup> As discussed further below, the combination of these ongoing pushbacks and bi-lateral agreements with Mexico continue to expose people waiting along the U.S.-Mexico border to ongoing violations of rights under the Covenant, with a disparate impact on Black people subject to racism and violence.<sup>86</sup>

(3) Ongoing Deportations to Haiti, Cameroon and other African and Black-majority States in violation of *non-refoulement*

56. Despite persistent and widespread calls to stop all deportations to Haiti,<sup>87</sup> the U.S. expelled more than 26,000 Haitians between September 2021 and June 2022,<sup>88</sup> deported 1,532 people to Haiti in FY2022,<sup>89</sup> and continues to deport an undisclosed number of Haitians.<sup>90</sup>
57. U.S. deportations of individuals who are ineligible for humanitarian relief from removal are concerning due to the Haitian government's historical practice of illegally detaining individuals with criminal records who have been deported.<sup>91</sup> Upon arrival, individuals deported to Haiti from the U.S. with past criminal records have been apprehended by the Haitian National Police, detained in horrific conditions where they face torture, and, in some cases, death.<sup>92</sup> In the prisons, deported individuals and other detainees are denied basic necessities, including physical safety, food, water, medical supplies, and adequate living conditions.<sup>93</sup> Prisoners who protest this treatment are met with retaliatory physical violence and threats of death from the prison guards.<sup>94</sup>
58. In a March 2023 thematic hearing on deportations from the U.S. to Haiti before the Inter-American Commission on Human Rights ("IACHR"), advocates detailed the horror and hardship faced by individuals deported to Haiti as well as the impact on U.S. family members left behind to deal with precarious economic and emotional situations created by the absence of their loved ones.<sup>95</sup> U.S. officials at the IACHR hearing insisted that U.S. courts apply a "totality of the circumstances" analysis in deportation proceedings, but failed to address how the U.S. regards the principle of non-refoulement in these proceedings.<sup>96</sup>
59. In its concluding observations accompanying the U.S. review during the 110<sup>th</sup> session, the Human Rights Committee expressed its concern for "the mandatory nature of the deportation of foreigners, without regard to elements such as the seriousness of crimes and misdemeanors committed, the length of lawful stay in the United States, health status, family ties and the fate of spouses and children staying behind, or the humanitarian situation in the country of destination."<sup>97</sup> The Committee also expressed its concern for "[The U.S.'s] reliance on diplomatic assurances that do not provide sufficient safeguards [for refoulment]" and "[The U.S.] position that the principle of non-refoulement is not covered by the Covenant, despite the Committee's established jurisprudence and subsequent State practice (arts. 6 and 7)."<sup>98</sup> The U.S. has demonstrated through its policies and actions in the context of deportations to Haiti a disregard for the Covenant and the guidance provided by the Committee.<sup>99</sup>
60. The U.S.'s aggressive focus on deporting Black immigrants, some of whom have lived in the U.S. for decades or have fled certain death in other countries, is not limited to Haitians.

On October 13, 2020, U.S. Immigration and Customs Enforcement (ICE) deported approximately 60 Cameroonian and 28 Congolese immigrants, most of whom fled persecution and violence in their native countries, on a secretive charter flight operated by Omni Air.<sup>100</sup> These deportations followed a mass expulsion involving nationals of Somalia, Kenya, Sudan, and Sri Lanka in September 2020, as well as others to West Africa and Jamaica over that summer. In FY 2022, ICE reports it deported hundreds of people to countries in West Africa, Central Africa, and the Caribbean, including 342 people to Jamaica, 33 people to the Democratic Republic of Congo, 20 people to Eritrea, 5 people to Ethiopia, 28 people to Cameroon, and 7 people to Mauritania.<sup>101</sup>

61. Deportations of Black people in violation of non-refoulement are ongoing.

**B. Mass detention for civil immigrations proceedings and conditions of detention that violate the Covenant.**

62. The U.S. uses immigration detention to imprison over 30,000 people a day in a nationwide network of remote and isolated private prisons and jails cut off from legal assistance.<sup>102</sup> The U.S. government's own investigators describe conditions of confinement in immigration detention as "barbaric" and "negligent."<sup>103</sup> Detainees have suffered grave physical and psychological harms, including torture and death.<sup>104</sup>

63. This Committee has requested that the U.S. "provide information on the conditions within immigrant detention facilities, both publicly and privately owned, including access to health care" and information on "any oversight mechanisms in place" to safeguard against human rights abuses.<sup>105</sup> In response, the U.S. declines to comment on conditions of its detention facilities.

64. Survivors and witnesses of human rights abuses in immigration detention describe official conduct and conditions of confinement that violate the inherent right to life (Art 6.1);<sup>106</sup> the right to be free from cruel, inhuman, or degrading treatment or punishment (Art. 7);<sup>107</sup> the right to be free from compulsory labor (Art. 8.3(a));<sup>108</sup> the right to freedom from arbitrary detention (Art. 9);<sup>109</sup> the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Art. 10);<sup>110</sup> the right to freedom of thought, conscience, and religion (Art. 18);<sup>111</sup> and the guarantee to all persons of equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, or national or social origin, amongst other statuses (Art. 26).<sup>112</sup>

65. The U.S. claims that the DHS's Office of Inspector General "actively investigates conditions in immigration detention facilities, often based on unannounced visits."<sup>113</sup> It describes visits to four detention centers in 2019 where "the Inspector General recommended that ICE improve its oversight of detention facility management and operations" and how "all four facilities completed corrective actions related to the follow-up inspections."<sup>114</sup>

66. But the U.S. obscures from this Committee that U.S. immigration officials commonly ignore or dispute the Inspector General's recommendations, which do not hold the force of

law. In 2022, the Inspector General twice recommended immediate closure of a detention center due to dangerous and inhumane conditions. U.S. immigration officials rebuked the Inspector General's office as biased and refused to comply with the closure recommendations.<sup>115</sup>

67. U.S. immigration officials inflict human rights abuses with ongoing impunity, according to credible, detailed reports by U.S. government oversight agencies, civil society organizations, and current and formerly detained individuals. In August 2023, a federal judge ordered the DHS's Office of Civil Rights and Civil Liberties ("CRCL") to release more than 1,600 pages of secret inspection reports it had illegally withheld from the public.<sup>116</sup> The reports examined more than two dozen detention facilities in 16 states, from 2017 to 2019.<sup>117</sup> The reports detail conditions common in facilities across the nation and over a sustained period of time: negligent medical and mental health care leading to serious injury and death, conditions of confinement described as "unsafe and filthy," and racist and violent abuse of people in detention, including pepper-spraying of individuals with disabilities.<sup>118</sup>
68. These official reports are echoed by numerous scholarly studies, civil society complaints and reports, and firsthand testimonies from detained people containing reliable evidence of human rights abuses at the hands of U.S. immigration detention officials.<sup>119</sup>
69. Black immigrants are especially vulnerable to abuse in immigration detention, as noted by CERD in its August 2022 Concluding Observations upon review of the U.S.<sup>120</sup> Black people in immigration detention are more than six times more likely to be locked in solitary confinement than other racial groups.<sup>121</sup> Black immigrants are more likely to suffer prolonged and arbitrary immigration detention, including longer periods of detention and lesser likelihood of release on bond or parole than individuals of other races.<sup>122</sup> From 2020 to 2022, at least a dozen civil rights complaints were filed before U.S. courts and agencies by Black immigrants detailing racist abuse and excessive force, anti-Black discrimination, and other human rights abuses while in detention.<sup>123</sup>
70. Winn Correctional Center in Louisiana has been the subject of years of complaints about inadequate medical care, filthy conditions of confinement, and abuse of detainees.<sup>124</sup> In 2021, CRCL recommended immediate closure of Winn due to "serious concerns for the health and safety of the detainees" and "a culture and conditions that can lead to abuse, mistreatment, and discrimination against detainees."<sup>125</sup> At least one individual held at Winn died due to denial of medical care.<sup>126</sup> Another asylum seeker held there told reporters, "I never imagined or expected to receive this inhumane treatment."<sup>127</sup>
71. Baker County Detention Center in Florida has also received scrutiny for cruel and degrading treatment of detained people. Since 2017, at least 191 complaints of human rights abuses at Baker have been recorded, detailing assault by guards, racist and anti-immigrant animus, abusive or unwarranted use of solitary confinement, sexual assault, and filthy conditions.<sup>128</sup> In May 2023, a woman formerly detained at Baker County Detention Center filed a sex trafficking civil lawsuit against guards who raped her in exchange for

access to toilet paper and sanctuary napkins and then locked her in solitary confinement when she reported the abuse.<sup>129</sup>

72. Contracts with the federal government to detain immigrants at Winn Correctional Center and Baker County Detention Center are pending negotiation for renewal in 2024. Human rights advocates, led by current and formerly detained individuals, are calling instead for their permanent shutdown in light of damning records of abuse of detained people.

**C. Externalization of U.S. border control throughout the Americas, subjecting foreign nationals in extraterritorial settings to ongoing violations of the Covenant.**

73. The U.S.'s Prevention through Deterrence policy and practice, intended to track or deter the migration as far from the U.S. border as possible, enabled by a variety of reservations and intentional violation of international law, creates zones of space throughout the Americas where people are subject to the effective control of the U.S. Executive Branch, including in the Florida Straits and in the Caribbean Sea as described above, but also along the U.S.'s Border with Mexico, and in the Darién Gap. U.S. law and current judicial opinion enable Executive Branch policy and practice to carry the force of U.S. law and empowers a broad assertion of the Executive Branch's authority in the context of law enforcement and military operations in these spaces.

**(1) Along the U.S.-Mexico Border: Effects of U.S partnerships and agreements with Mexico and ongoing violations of the Covenant**

74. The Trump administration failed to secure a safe third country agreement with Mexico, though the U.S. similarly waged economic penalties and public pressure on its southern neighbor to enter a bilateral agreement.<sup>130</sup> Eventually, the U.S. reached a no less devastating policy with Mexico, sending tens of thousands of asylum seekers facing asylum adjudications in U.S. courts to wait in Mexican border towns.<sup>131</sup> This policy, known as the Migrant Protection Protocols or "Remain in Mexico," created a humanitarian crisis that endures to this day, fueling the presence of criminal cartels and corrupt Mexican authorities who prey on desperate individuals pushed back by the U.S. Today, migrants continue to wait in the same dangerous conditions in Mexico as they attempt to obtain a CBP One appointment, a process that regularly takes months.<sup>132</sup> Kidnappings, torture, extortion, rape, and even murder of asylum seekers has become a fixture for Mexican border towns, as a direct result of U.S. externalization policies.<sup>133</sup>
75. The Biden administration has continued to push the Mexican government to heavily regulate travel to and within Mexico to prevent migrants from reaching the U.S. Black migrants trapped in Mexico as a result of enforcement actions by Mexican migration officials have faced the brunt of the country's hardline approach, including serious human rights abuses by Mexican authorities and months-long waits in inhumane conditions in southern Mexico.<sup>134</sup> In one shocking case, four Mexican police officers were arrested for the murder of a Haitian woman, who had been detained by the officers in southern Mexico in October 2021.<sup>135</sup> Haitian and other Black asylum seekers are also at risk of refoulement



in Mexico. Mexican authorities have even racially profiled and illegally deported Afro-descendent Mexican citizens.<sup>136</sup>

76. Unable to seek asylum in the U.S. due to these policies at the border, unable to return to their home countries due to persecution and other life-threatening conditions, and unable to firmly settle elsewhere in the Americas because of discriminatory policies and treatment, many Haitians have been stuck for years in the U.S.-Mexico border region in dangerous, cartel-controlled territories in Mexico where they also face pervasive anti-Black discrimination. Exposure to violations of the Covenant while waiting along the U.S.-Mexico border are ongoing.<sup>137</sup>

(2) The Darién Gap: Effects of U.S. agreements and partnerships in Panama and ongoing violations of the Covenant

77. As reported to the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women in the Committee's recent reviews of Panama, people in transnational migration through the Darién Gap are subjected to deprivations of life and sexual and gender-based violence. As Haitian Bridge Alliance documented to the Committees, Black women and girls transiting the country are subjected to sexual assault, in addition to reported killings and other serious human rights abuses, and a lack of access to justice for harms suffered.<sup>138</sup>
78. Since at least the 2010 Earthquake in Haiti, the Darién Gap has increasingly become a passageway for transnational migration, including for Black women and girls.<sup>139</sup> The region becoming this pathway was partly in response to the lack of legal pathways created by U.S. Prevention through Deterrence policy and practices through the above-named and ongoing maritime interdictions, increasing pushbacks at the U.S. border, border militarization, detention, and refoulement practices.
79. An HBA-led delegation of U.S. civil society organizations in October 2022 witnessed the huge humanitarian and legal need for people transiting through the Darién Gap, from Colombia to Panama, and ultimately to the U.S.-Mexico border. Black women and girls are at the epicenter of the structural violence caused by the U.S.'s externalization of Prevention through Deterrence border control policies and practices without regard to violations of the Covenant's prohibition against non-refoulement or recognition of its applications in extraterritorial obligations when the State exerts effective control.<sup>140</sup>
80. The Panamanian and U.S. governments' collusion to track and stop migration to the U.S. has extended to restriction of humanitarian relief. The U.S. routinely leans on information-sharing by the Panamanian authorities to deny access to parole programs to Cubans, Haitians, Nicaraguans, and Venezuelans who cross into Panama without authorization.<sup>141</sup>
81. The U.S. is obligated to guarantee rights under the Covenant to the extent that it exerts effective control on people migrating through Panama's Darién Gap.

**V. Foreign nationals subject to violations through the U.S. Prevention through Deterrence policies and practices do not have the right to an effective legal remedy as guaranteed under the Covenant.**

82. Article XIV of the Covenant guarantees the right to access courts, tribunals and equality before them, irrespective of nationality or status.<sup>142</sup> However, the U.S. does not fulfill this obligation through its mandatory detention provisions on foreign nationals and its ongoing refoulement of foreign nationals. Both are legislative policies, upheld by the judicial branch, and supported by the executive branch.

**A. Access to justice for violation of prohibition against refoulement and harms occurring outside of State's territory.**

83. Non-refoulement has been described as the cornerstone of refugee law, enshrined in Article 33 of the 1951 Refugee Convention. It guarantees that no one should be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment and other irreparable harm. The Human Rights Committee has found a right of non-refoulement to be implicit in its provisions where individuals face a real risk of their rights under the Covenant being violated upon return to another country.<sup>143</sup> This protection would include—as nearly all interpretations of the scope of non-refoulement do—a prohibition on rejection at the frontier or pushback operations because, to the Committee, the Covenant applies wherever a State exercises jurisdiction or effective control over an individual.<sup>144</sup> International tribunals have long accepted that a State's human rights obligations accrue wherever that State exercises de facto control over the person.<sup>145</sup> Tribunals have used this reasoning to denounce pushbacks on the high seas and at the border.<sup>146</sup>

84. However, in 1993 in *Sale v. Haitian Centers Council, Inc.*, the U.S. Supreme Court addressed the U.S. Coast Guard's policy of interdicting (majority Haitian) migrants on the high seas and returning them to States where they were likely to face persecution.<sup>147</sup> *Sale* held that Article 33 was silent on whether the non-refoulement language applied to protect migrants interdicted by the U.S. Coast Guard.<sup>148</sup>

85. The UNHCR called *Sale* “a setback to modern international refugee law.” By the time *Sale* reached the Supreme Court in 1993, leading human rights organizations had made non-rejection at the frontier an essential part of non-refoulement.<sup>149</sup> Although *Sale* read Article 33(1) not to include non-rejection at the frontier, the IACHR immediately disagreed with Court's ruling in *Haitian Centre for Human Rights v. United States*.<sup>150</sup> The Executive Committee of the UN High Commissioner for Refugees has stated that the “duty not to *refouler*” is a prohibition against “any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution ... [including] rejection at the frontier . . .”.<sup>151</sup>

86. International tribunals such as the European Court of Human Rights have consistently held that non-refoulement encompasses non-rejection at the border.<sup>152</sup> The Committee against

Torture has interpreted the CAT’s non-refoulement mandate to include “rejection at the frontier and pushback operations.” A number of other international organizations have joined the chorus,<sup>153</sup> and perhaps the strongest denouncement of rejection at the border comes from non-Western countries.<sup>154</sup> The scholarship on this issue speaks definitively.<sup>155</sup> In a recent report to the Human Rights Council, the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales said that States must unequivocally put an end to pushback practices.<sup>156</sup>

87. However, the U.S. continues to resist the Committee’s interpretation of the Covenant as imposing a non-refoulement requirement and rejects an interpretation consistent with modern international law.<sup>157</sup>
88. There also exists no forum to address adequately the U.S.’s pushbacks, turnbacks, and other forms of collective expulsion that plague Black migrants. In 2017, advocates and lawyers brought *Al Otro Lado v. Mayorkas*, a federal class action lawsuit alleging that the metering policy violated federal law, the U.S. Constitution, and the international humanitarian norm of non-refoulement.<sup>158</sup> The litigation revealed a systemic policy of rejecting migrants presenting for asylum at POEs along the southern border. Accordingly, in 2021 a federal judge in California declared the metering policy illegal and unconstitutional, holding that turnbacks of asylum seekers attempting to present at a port of entry are “unlawful regardless of their purported justification.”<sup>159</sup> However, the district court subsequently ruled that an intervening Supreme Court case, *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022) prevented class wide injunctive relief.<sup>160</sup>
89. To the U.S.—both the Department of Justice<sup>161</sup> and the U.S. Courts<sup>162</sup>—so long as migrants are outside of its physical borders, they will remain outside of the law. While this conclusion is rebutted by contemporary international law and scholarship, it demonstrates an absence of substantive recognition for rights established in international human rights and refugee law.
90. With federal courts turning a blind eye toward international humanitarian norms, the Executive Branch encouraging pushbacks, and the Congress disinterested in subjecting the U.S. to the jurisdiction of regional tribunals that could remediate human rights violations, Black migrants are left without recourse entirely.

#### **B. Access to judicial remedies for arbitrary detention and harms suffered**

91. Mandatory and discretionary detention in violation of the Covenant’s prohibition against arbitrary deprivations of liberty are written into U.S. legislative branch law, and the judicial branch has upheld those provisions, including the use of indefinite detention.<sup>163</sup> As noted above, U.S. immigration officials inflict human rights abuses with ongoing impunity, according to scores of credible, detailed reports by U.S. government oversight agencies, civil society organizations, and current and formerly detained individuals.
92. Furthermore, the vast majority of those held in immigration detention – 62% by the government’s latest statistics – are considered by ICE to be held in “mandatory detention,” meaning they are not able to access a bond hearing throughout their time in detention,

which might last months or years. For these individuals, the only way to access judicial review of their ongoing detention is to file a habeas corpus petition in federal court, a remedy inaccessible for most because of obstructed access to counsel and access to the courts.<sup>164</sup>

**C. Access to judicial remedies for racial discrimination based on disparate impact.**

93. Black people in migration who manage to arrive in the U.S. face disparate treatment and a racially discriminatory immigration system. This includes racial profiling in immigration enforcement actions; excessive force, medical neglect, and other discriminatory treatment by U.S. personnel in immigration detention; prolonged and arbitrary detention, including the imposition of higher bonds on Black migrants; inadequate access to legal information, legal counsel or proper interpretation in detention; low rates of successful asylum screenings and approval rates for individuals from Black-majority countries from which many refugees are seeking international protection; and racially disparate rates of deportation.<sup>165</sup>
94. Many Black, Brown and Indigenous people are disparately impacted by these policies and practices, such as with lack of language access for speakers of Haitian Kreyol, Mauritanian Pulaar or Soninke, or Indigenous languages.
95. CERD's Concluding Observations on the U.S. in August 2022 noted that "mandatory detention of non-citizens without due process or access to legal representation, in detention centres under inadequate conditions...has a disparate impact on asylums-seekers of African and Caribbean descent;"<sup>166</sup> and pointed out "[t]he disparate impact of asylum-related policies on migrants of African descent and migrants of Hispanic/Latino origin, such as criminal prosecution for irregular entry and expulsion under Title 42 of the United States Code and under the Migrant Protection Protocols."<sup>167</sup>
96. CERD also highlighted the inability to bring disparate impact claims and seek effective judicial remedies for racial discrimination on these grounds.<sup>168</sup>

**VI. The lack of global reparatory justice for slavery, colonialism, and neo-colonial imperialism and ongoing violations against the right to self-determination are root causes of the transnational migration and forced displacement of Black people.**

97. The Covenant's right to an effective legal remedy includes the right to reparatory justice for crimes committed through slavery,<sup>169</sup> including the Covenant's guarantees to ensure the cessation and non-recurrence of violations<sup>170</sup> and for combating impunity.<sup>171</sup> However, the U.S. does not afford this remedy to Black people in the U.S. and Black foreign nationals suffering from related harms, such as Haitian nationals. The UN's Permanent Forum on People of African Descent ("PFPAD") acknowledged in 2023 that the lack of global reparatory justice is a root cause of the ongoing forced displacement and transitional migration of Peoples of African Descent, highlighted by the ongoing lack of reparatory justice for Haiti and ongoing forced displacement of Haitians.<sup>172</sup>

98. The PFPAD recently “recognized that the neo-colonial burdens imposed on the Republic of Haiti have significantly contributed to the current crisis in the country.”<sup>173</sup> Haiti won its 1804 Independence by defeating Napoleon Bonaparte’s army on the battlefield. But the Atlantic World at the time was dominated by countries that had obtained their status through slavery, especially France, the U.S., Great Britain, and Spain. The white supremacist ideology underlying their success could not survive the example of a free, prosperous Haiti.<sup>174</sup> So the slave-owning countries worked together for centuries to ensure that Haiti would not succeed. This campaign included refusal of recognition or normal trade relations, the forced Independence Debt in 1825, and persistent economic and military interventions for over two centuries.<sup>175</sup> This coordinated campaign has been highly successful: it has kept Haiti impoverished,<sup>176</sup> unstable and unable to exercise its sovereignty up through the present.<sup>177</sup>
99. The Special Rapporteur on Contemporary Forms of Racism called on States in 2019 to take into consideration “the historical racial injustices of slavery and colonialism that remain largely unaccounted for today, but which nevertheless require restitution, compensation, rehabilitation and guarantees of non-repetition.”<sup>178</sup> She urged States to consider “the contemporary racially discriminatory effects of structures of inequality and subordination resulting from failures to redress the racism of slavery and colonialism.”<sup>179</sup> She declared that “one of the persisting legacies of slavery and colonialism remains the unequal application of the law to descendants of historically enslaved and colonized peoples.”<sup>180</sup>
100. The U.S.’s Prevention through Deterrence scheme on migration, as applied to Haitians and other people of African descent, is a “persisting structure of racial inequality” and an emblematic example of how persisting legacies continue to lead to the unequal application of the law to descendants of historically enslaved and colonized people. The PFPAD identified the “crimes of enslavement, colonialism, and neo-colonialism as root causes of Haitian migration” and called on States to provide global reparatory justice for histories and legacies of colonialism and enslavement and to end the abuse of Haitian nationals and people of African descent during transnational migration.<sup>181</sup> It called on States “to end practices such as arbitrary detention, deportations, and pushbacks.”<sup>182</sup> Additionally, the PFPAD urged for “the separation of civil migration systems from criminal legal systems” and emphasized “the importance of ensuring that migration processes adhere strictly to international human rights standards and laws.”<sup>183</sup>
101. Ongoing U.S. interference undermines Haiti’s stability and right to self-determination and perpetuates the root causes of migration. Per the Committee’s General Comment No. 12, Art. 1 requires States to “refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.”<sup>184</sup>
102. Haiti’s reparations claims—like those of other people of African descent—did not stop accumulating with the end of slavery, but include continuing economic and political interference. In 2003 Haiti’s government under President Jean-Bertrand Aristide initiated proceedings to pursue restitution under the unjust enrichment theory.<sup>185</sup> France, the U.S.

- and other nations that still retained the global hegemony they had built on slavery knew that justice in the form of reparations could lead to political sovereignty and human and economic development in those countries that would undermine the unequal global world order that still rests on the foundation of colonialism, enslavement, and white supremacy.<sup>186</sup>
103. When their political and economic coercion did not stop Haiti from pursuing its restitution claim, France, the U.S., and Canada removed Haiti's democratically-elected president.<sup>187</sup> The French ambassador to Haiti at the time later acknowledged that Aristide's overthrow was at least in part a response to his efforts to seek reparations.<sup>188</sup>
104. The coup ushered in a steady erosion of Haiti's democracy through a series of governments supported by the international community<sup>189</sup> that were favorable to foreign interests even as they were corrupt and unresponsive to the Haitian people.<sup>190</sup> They weakened democratic and judicial institutions, extracted Haiti's wealth with no checks, used gangs for political violence, and stole \$2 billion dollars from public funds, which left Haiti in a cycle of crises.<sup>191</sup> As of September 2023, gangs control over half the country and have unleashed catastrophic levels of violence, half of all Haitians suffer from hunger, and the country lacks a single elected official.<sup>192</sup>
105. Such undermining and the ongoing lack of global reparatory justice for slavery and colonialism create the root cause conditions for forced displacement and transnational migration seeking refuge and asylum in the U.S.

## **VII. Conclusion and Recommendations**

106. The Committee should reaffirm Concluding Observations from 2014 made during its last U.S. review on maritime interdictions and the extraterritorial application of the ICCPR;<sup>193</sup> the absolute prohibition against refoulement;<sup>194</sup> mandatory detention and deportation;<sup>195</sup> conditions of detention and solitary confinement;<sup>196</sup> excessive use of force by law enforcement officials;<sup>197</sup> and legislation prohibiting torture.<sup>198</sup>
107. The Committee should direct the U.S. to follow CERD's 2023 Statement under its Early Action and Urgent Warning Procedure,<sup>199</sup> including by suspending all deportations and returns of people to Haiti, and to observe CERD's 2022 Concluding Observations, including by ending mandatory detention for immigration matters.
108. The Committee should cite to the PFPAD's 2023 Preliminary Conclusions and Recommendations calling on access to justice for slavery, colonialism, and neo-colonialism through global reparatory justice processes, emphasizing how the lack of such justice is a root cause of ongoing forced displacement and transnational migration.
109. The Committee can further recommend that the U.S. take the following action to fulfill its obligations under the Covenant:
- a. Rescind and replace Executive Order 13286 with an order that guarantees migrants subject to maritime interdictions are treated in accordance with international law and the recommendations of the UN Special Rapporteur on the Human Rights of Migrants, where States should "cooperate internationally to protect the lives and safety of migrants at land and at sea; ensure that migrants rescued at sea are

promptly brought to a port recognized by the international community as safe, and are given access to individualized procedures and adequate care...”<sup>200</sup>

- b. Codify the principle of non-refoulement, including under the Covenant as interpreted by the Human Rights Committee, in federal legislation, irrespective of territorial status, for people in the effective control of the U.S.

Rescind the Circumvention of Lawful Pathways policy and stop all forms of metering and pushbacks (including bi-lateral agreements with Mexico) that expose migrants waiting along the U.S.-Mexico border to ongoing violations of rights under the Covenant.

- c. Provide meaningful access to judicial remedies for arbitrary detention and harms suffered, racial discrimination based on disparate impact, and violations of prohibition against refoulement and harms occurring outside of State’s territory.
- d. U.S. policy, to the extent it exercises effective control, should help Panama satisfy the recommendations of the Committee made in its March 2023,<sup>201</sup> and should also observe Panama’s Concluding Observations of CEDAW in February 2022,<sup>202</sup> and the CESCR in 2023.<sup>203</sup>
- e. Take all necessary action in its foreign policies to satisfy its obligations under Article I and the right to self-determination, especially with respect to Haiti and Mexico and their people’s right to self-determine.

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<sup>1</sup> E. Tendayi Achiume (Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance), *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, at ¶ 6, U.N. Doc. A/74/321, (Aug. 21, 2019), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/259/38/PDF/N1925938.pdf>.

<sup>2</sup> See, e.g., Amnesty International, “*They Did Not Treat Us Like People*”: Race and Migration-Related Torture and Other Ill Treatment of Haitians Seeking Safety in the US, (Sept. 22, 2022), <https://www.amnesty.org/en/documents/amr36/5973/2022/en/> (describing “practices of ill-treatment, sometimes rising to the level of torture, towards Haitians [that] are widespread and have occurred historically at different times and in different places, pointing to a long-term, and perhaps even institutionalized tendency at the level of DHS and its sub-agencies to punish and in turn deter Haitian asylum seekers from seeking refuge in the USA”).

<sup>3</sup> Class Action Complaint for Injunctive and Declarative Relief at ¶ 62, *Haitian Bridge Alliance et. al v. Biden*, No. 21-3317 (EGS), 2022 U.S. Dist. LEXIS 105503 (D.D.C. June 14, 2022) (No. 1:21-cv-03317), available at <https://int.nyt.com/data/documenttools/hba-v-biden/a8106eacd7c45afe/full.pdf>. [hereinafter HBA v. Biden Complaint].

<sup>4</sup> U.S. Const. art. I, § 1, § 2, cl. 1; U.S. Const. art. II, § 1, cl. 1-2, § 2, cl. 2; U.S. Const. art. III, § 1.

<sup>5</sup> The executive and legislative branch are elected by a federated network of localities, and the judicial branch is composed of executive branch appointments who must be confirmed by the legislative branch.

<sup>6</sup> The Constitution and domestic law proscribe broad powers to the executive branch in their treaty power and also military power, in terms of entering into less formal, non-ratified executive agreements with other States to regulate and achieve the State’s objectives.

<sup>7</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>8</sup> U.S. Const. art. III, § 2, cl. 1; U.S. Const. art. VI, cl. 2.

<sup>9</sup> U.S. Const. art. I, § 8, cl. 4; U.S. Const. art. II, § 3; U.S. Const. art. III, § 2, cl. 1.

<sup>10</sup> International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (ratified by U.S. on Jun. 8, 1996). The Covenant guarantees rights and liberties to foreign nationals under the effective control of the State Party, including guarantees for people who may be subject to the State’s operations

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outside of the State's territory. *See* Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligations on State Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004) [hereinafter HRC General Comment No. 31], (stating that “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” and that “[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”) (*internal citations omitted*); *See also* Human Rights Committee, General Comment No. 36: Right to Life, ¶ 63, U.N. Doc. CCPR/C/GC/35 (Sept. 3, 2019) [hereinafter HRC General Comment No. 36], (stating that “a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control” and making clear that “[t]his includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.” General Comment No. 36 further clarifies that “States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life”; that “State parties must respect and protect the lives of individuals located in places, which are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant”; that “State parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea”; and that “[g]iven that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.”).

These rights include a prohibition against refoulement. *See* HRC General Comment No. 31, at ¶ 12, (describing how “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 Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”). These rights further include a prohibition against torture; the right to liberty and security of persons, prohibiting detention that is unreasonable, unnecessary, disproportionate, or otherwise arbitrary. *See* Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), ¶¶ 15, 18, U.N. Doc. CCPR/C/GC/35, (Dec. 16, 2014) [hereinafter HRC General Comment No. 35], (stating that “[t]o the extent that States parties impose security detention (sometimes known as administrative detention or internment), not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty” and that “States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited, and that they fully respect the guarantees provided for by Article 9 in all cases.” General Comment No. 35 further requires that “[p]rompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for these conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken,”; and clarifies that “[d]etention 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 light of the circumstances, and reassessed as it extends in time.” Importantly, it makes clear that “[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 identity if it is in doubt,” but that “[t]o 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.” The Comment clarifies that any detention in this circumstance must “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 reevaluation and judicial review,” must “also take into



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account the effect of the detention on their physical or mental health”; should only “take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons” and that “[t]he inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention. Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.”).

These rights include the right to an effective remedy. *See* Human Rights Committee, General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial, ¶¶ 9, 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter HRC General Comment No. 32], (stating that “[t]he right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party” ; that “[a] situation in which an individual’s attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence”; and that “[t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.”).

And these rights include the right to self-determination. *See* Human Rights Committee, General Comment No. 12: Article 1 (The right to self-determination of peoples), ¶ 6, U.N. Doc. (1984) [hereinafter HRC General Comment No. 12], (requiring “that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination” and that “[s]uch positive action must be consistent with the States’ obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.”).

<sup>11</sup> *See* Fifth periodic report submitted by the United States of America under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020, ¶14, U.N. Doc. CCPR/C/USA/5 (Jan. 15, 2021) [hereinafter U.S. State Party Report], (stating that “[t]he United States has not changed its position that Article 2(1) creates obligations for a State Party only with respect to individuals who are both within the territory of the State Party and within that State Party’s jurisdiction”; that the U.S. “do[es] not agree that Article 2(1) creates obligations for a State Party with respect to individuals on State Party-registered ships located beyond that State Party’s territorial sea, or on State Party-registered aircraft flying in international airspace or in another State’s airspace; and expressing the position that “[m]erely being on a ship or aircraft registered in a State (and thereby being generally subject to its exclusive jurisdiction on the high seas, for example) does not constitute being in a State’s territory for the purposes of Article 2(1) of the Covenant.”); *See also* U.S. State Party Report, Annex B, ¶ 4 (clarifying the U.S. position that “[a]s noted in the July 2006 written responses of the United States to Committee questions and in the 2007 observations by the United States on General Comment 31, the Covenant does not impose a non-refoulement obligation upon States Parties”).

<sup>12</sup> The Refugee Convention by virtue of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, *entered into force* 4 October 1967.

<sup>13</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention or Refugee Convention].

<sup>14</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, 1465 U.N.T.S. 85, 113 [hereinafter CAT or Torture Convention].

<sup>15</sup> Implementation of the Convention Against Torture, 8 CFR § 208.18.

<sup>16</sup> The U.S.’s reservations contradict the Convention’s definition of racism by claiming that disparate impact is not enough to establish a claim of racial discrimination. The reservations deny the State duty to regulate hate speech and racist propaganda and deny the duty of the State to regulate private racist conduct. The reservations make the Convention non-self-executing—claiming that the provisions in U.S. law already guarantee adequate protections against racism—and so no person, citizen, or non-citizen, can assert a claim or access judicial remedies based on the Convention. *See* Maya K. Watson, *The United States’ Hollow Commitment to Eradicating Global Racial Discrimination*, American Bar Association’s Human Rights Magazine (Jan. 6, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future-part-](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-)

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[ii/the-united-states--hollow-commitment-to-eradicating-global-racial/](#), for further discussion on U.S. failure to adhere to its obligations under ICERD.

<sup>17</sup> See Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined tenth to twelfth reports of the United States of America*, UN Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/495/96/PDF/G2249596.pdf> [hereinafter CERD Concluding Observations]. (making clear that, under the Convention, States have a duty to guarantee the human rights of all persons, either citizen or non; preserve their right to due process; and “[e]nsure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin.”) See also Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 on discrimination against non-citizens, ¶¶ 1-5, 9, UN Doc. CERD/C/64/Misc.11/rev.3 (2004).

<sup>18</sup> CERD, *Situation of migrants, asylum seekers and refugees of Haitian origin in the Americas region* (Apr. 28, 2023), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FSWA%2F9755&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FSWA%2F9755&Lang=en).

<sup>19</sup> Naturalization Act of 1790, 1 Stat. 103, (repealed 1795).

<sup>20</sup> See, e.g., Ariela Gross & Alejandro de la Fuente, *Citizenship once meant whiteness. Here’s how that changed.*, WASH. POST (July 18, 2019), <https://www.washingtonpost.com/outlook/2019/07/18/citizenship-once-meant-whiteness-heres-how-that-changed/>.

<sup>21</sup> Martha Jones, *How the 14th Amendment’s Promise of Birthright Citizenship Redefined America*, TIME (July 9, 2018), <https://time.com/5324440/14th-amendment-meaning-150-anniversary/>.

<sup>22</sup> Naturalization Act of 1870, 16 Stat. 254, 256; Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163; see also, *Takao Ozawa v. United States*, 260 U.S. 178 (1922), available at <https://www.law.cornell.edu/supremecourt/text/260/178>; *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923), available at <https://www.loc.gov/item/usrep261204/>.

<sup>23</sup> See INA § 236(a), INA § 236(c), INA § 235(b), and INA § 241(a); See also *The Law of Immigration Detention: A Brief Introduction*, Congressional Research Service (Sept. 1, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11343>.

<sup>24</sup> Immigration and Nationality Act of 1965, § 101(a)(42), 79 Stat. 911; 8 U.S.C. § 1101(a)(42)(A), (defining “Refugee,” “Immigration,” and “Nationality”).

<sup>25</sup> 8 U.S.C. § 1182(f). (proscribing that “[w]henver the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem be appropriate.”).

<sup>26</sup> E.g., 42 U.S.C. § 265, (known as “Title 42”).

<sup>27</sup> INA § 241(b)(3); 8 U.S.C. § 1231(b)(3) (barring the removal of individuals who meet the refugee definition under U.S. law, with certain exceptions based on allegations of past conduct including a conviction for an offense deemed a “particularly serious crime.”)

<sup>28</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-1000, § 111(a)(1), 100 Stat. 3381, available at <https://www.congress.gov/bill/99th-congress/senate-bill/1200> ( providing for “increased enforcement and administrative activities of the Border Patrol, the Immigration and Naturalization Service and other appropriate Federal agencies” and for “the identification of Department of Defense facilities that could be made available to incarcerate deportable or excludable aliens.”).

<sup>29</sup> Two 1996 immigration laws passed by Congress—the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) and the Antiterrorism and Effective Death Penalty Act (“AEDPA”)—led to the expansion of the use of detention in the U.S. civil immigration system, a decrease in fundamental due process for people in immigration proceedings, and the entrenchment of the modern-day “criminal”-to-deportation pipeline. See Shamira Ibrahim, *Ousman Darboe could be deported any day. His story is a common one for black immigrants*, Vox (Feb. 5, 2020, 11:58 AM EST), <https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-deportation-pipeline>.

First, the 1996 bills added processes for expedited deportations without judicial review to speed up the removal process thereby depriving many immigrants of basic due process.

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Second, the bills also added new provisions to existing immigration law that permit the federal government to enter agreements with local law enforcement agencies that authorize local police officers to enforce federal immigration law, including directly arresting immigrants for detention and removal proceedings. These “287(g) agreements” have a track record of resulting in increased racial profiling of Black and Brown people by local police and undermine public safety by creating mistrust between immigrant communities and local law enforcement agencies. For further discussion, see ACLU, *License to Abuse: How ICE’s 287(g) Program Empowers Racist Sheriffs* (2022), [https://www.aclu.org/wp-content/uploads/legal-documents/2022-06-02-sheriffresearch\\_1.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/2022-06-02-sheriffresearch_1.pdf).

Finally, the 1996 bills significantly expanded the list of criminal convictions that trigger detention and deportation without regard for a person’s rehabilitation, the recency of a person’s conviction or its severity. As a result, the U.S. immigration system frequently deprives a disproportionate number of Black and Brown immigrants of their liberty and livelihood through detention and deportation on the basis of criminal convictions that are decades-old or minor in nature, and despite years of rehabilitated life and deep ties to the United States. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <https://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html>.

<sup>30</sup> See, e.g., Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. (2018), [https://lawreview.law.ucdavis.edu/issues/52/1/Symposium/52-1\\_Das.pdf](https://lawreview.law.ucdavis.edu/issues/52/1/Symposium/52-1_Das.pdf).

<sup>31</sup> In 2017, almost 74% of people arrested by Immigration Customs Enforcement (ICE) had a criminal conviction. Jeremy Raff, *The ‘Double Punishment’ for Black Undocumented Immigrants*, THE ATLANTIC (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425/>; Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271 (2013), <https://escholarship.org/uc/item/8gw8r8xj>.

<sup>32</sup> 8 U.S.C. § 1103(a)(5) (providing that DHS “shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens”).

<sup>33</sup> HBA v. Biden Complaint, *supra* n. 3 at ¶ 44, citing ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882*, 213-14 (2004), (describing how “[i]t is instructive to note that, despite the ideological differences between the Carter, Reagan, Bush I, Clinton, and Bush II administrations, each has persistently discriminated against Haitian entrants . . .”).

<sup>34</sup> *Id.* at ¶ 45, citing Carl Lindskoog, *Violence and Racism Against Haitian Migrants Was Never Limited to Agents on Horseback*, WASH. POST (Sept. 30, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/10/02/violence-racism-against-haitian-migrants-was-never-limited-horseback-riders/>.

<sup>35</sup> Jeffrey S. Kahn, “*Guantánamo’s Other History*,” BOSTON REVIEW (Oct. 15, 2021), available at <https://www.bostonreview.net/articles/guantanamos-other-history/>.

<sup>36</sup> See Ronald Reagan, *Executive Order 12324, Interdiction of Illegal Aliens* (September 29, 1981), available at <https://www.presidency.ucsb.edu/documents/executive-order-12324-interdiction-illegal-aliens>; George Bush, *Executive Order 12807, Interdiction of Illegal Aliens* (May 24, 1992), available at <https://www.presidency.ucsb.edu/documents/executive-order-12807-interdiction-illegal-aliens>; George W. Bush, *Executive Order 13276, Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region* (November 15, 2002), available at <https://www.presidency.ucsb.edu/documents/executive-order-13276-delegation-responsibilities-concerning-undocumented-aliens>; George W. Bush, *Executive Order 13286, Amendment of Executive Orders, and Other Actions, in Connection with the Transfer of Certain Functions to the Secretary of Homeland Security* (February 28, 2003), available at <https://www.presidency.ucsb.edu/documents/executive-order-13286-amendment-executive-orders-and-other-actions-connection-with-the>.

<sup>37</sup> See Press Release, *Secretary Mayorkas Overviews U.S. Maritime Migrant Interdiction Operations* (July 13, 2021), <https://www.dhs.gov/news/2021/07/13/secretary-mayorkas-overviews-us-maritime-migrant-interdiction-operations>; Press Release, *Operation Vigilant Sentry: Stopping illegal migration at sea* (Jan. 27, 2023), <https://www.news.uscg.mil/Press-Releases/Article/3280774/operation-vigilant-sentry-stopping-illegal-migration-at-sea/>.

<sup>38</sup> United States Coast Guard, *Maritime Law Enforcement Assessment: Fiscal Year 2020 Report to Congress* (Dec. 9, 2020), [https://www.dhs.gov/sites/default/files/publications/uscg\\_-\\_maritime\\_law\\_enforcement\\_assessment.pdf](https://www.dhs.gov/sites/default/files/publications/uscg_-_maritime_law_enforcement_assessment.pdf).

<sup>39</sup> *Id.*

<sup>40</sup> See U.S. State Party Report, *supra* n. 11.

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<sup>41</sup> See HRC General Comment No. 36, *supra* n. 10.

<sup>42</sup> See Smith Ghosh and Mary Hoopes, *Learning to Detain Asylum Seekers and the Growth of Mass Immigration Detention in the United States*, 46 Law & Social Inquiry 993 (2021), available at <https://doi.org/10.1017/lsi.2021.11>; see also Emily Ryo, *Detention as Deterrence*, 79 Stan. L. Rev. 237, 238 (2019), available at <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/03/71-Stan.-L.-Rev.-Ryo.pdf>; Maureen A. Sweeney, Sirine Shebaya, & Dree K. Collopy, *Detention as Deterrent: Denying Justice to Immigrants and Asylum Seekers*, 36 Geo. Immigr. L.J. 291 (2021), available at <https://www.law.georgetown.edu/immigration-law-journal/wp-content/uploads/sites/19/2022/01/GT-GILJ210006.pdf>.

<sup>43</sup> See Human Rights Watch, *Statement of Human Rights Watch: The Human Cost of Harsh US Immigration Deterrence Policies* (July 26, 2023, 3:00 PM EDT), <https://www.hrw.org/news/2023/07/26/statement-human-rights-watch-human-cost-harsh-us-immigration-deterrence-policies>, (citing US Border Patrol, *Border Patrol Strategic Plan 1994 and Beyond* (July 1994), <https://www.documentcloud.org/documents/5987025-Border-Patrol-Strategic-Plan-1994-and-Beyond.html> (last visited Sept. 11, 2023)).

<sup>44</sup> *Id.*

<sup>45</sup> From 1980 to 1995, the border enforcement budget increased sevenfold. It then tripled again from 1995 to 2003, when border enforcement then became a part of the newly created Department of Homeland Security. See Chad C. Haddad, *Border Security: the Role of the U.S. Border Patrol*, CONGRESSIONAL RESEARCH SERVICE (Aug. 11, 2010), <https://crsreports.congress.gov/product/pdf/RL/RL32562/16>.

<sup>46</sup> See American Immigration Council, *The Cost of Immigration Enforcement and Border Security* (Jan. 20, 2021), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security>.

<sup>47</sup> The Executive Branch's proposed 2023 budget included nearly \$25 billion for border security and immigration enforcement. See The White House, *FACT SHEET: President Biden's Budget Strengthens Border Security, Enhances Legal Pathways, and Provides Resources to Enforce Our Immigration Laws* (Mar. 9, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/09/fact-sheet-president-bidens-budget-strengthens-border-security-enhances-legal-pathways-and-provides-resources-to-enforce-our-immigration-laws/>.

<sup>48</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee: United States of America, ¶ 28, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf> [hereinafter HRC 2006 Concluding Observations]; see also Sophia Porotsky, *Rotten to the Core: Racism, Xenophobia, and the Border and Immigration Agencies*, 36 Geo. Immigr. L.J. 349 (2021), available at <https://www.law.georgetown.edu/immigration-law-journal/wp-content/uploads/sites/19/2022/01/GT-GILJ210008.pdf>.

<sup>49</sup> The San Ysidro port of entry is the busiest pedestrian entry point along the U.S. Mexico border, processing at least 20,000 northbound pedestrians per day. See U.S. General Service Administration, *San Ysidro Land Port of Entry*, <https://www.gsa.gov/about-us/regions/region-9-pacific-rim/land-ports-of-entry/san-ysidro-land-port-of-entry>, (last visited Sep. 10, 2023).

<sup>50</sup> Appellees/Cross-Appellants' Redacted Principal and Response Brief at p. 6, *Al Otro Lado v. Mayorkas*, (No. 22-55988), available at <https://ccrjustice.org/sites/default/files/attach/2023/03/23%20Ps%20Cross%20Appeal%20Brief%202023.02.21.pdf>.

<sup>51</sup> Plaintiffs' Memorandum of Points and Authorities in Support of their Motion for Summary Judgement (Redacted Public Version) at p. 2, *Al Otro Lado v. Mayorkas*, (No. 3:17-cv-02366-BAS-KSC), available at <https://ccrjustice.org/sites/default/files/attach/2020/09/AOL%20MSJ.pdf>.

<sup>52</sup> *AOL et. al v. Mayorkas*, (S.D. Cal.) (Case No. 3:17-cv-02366-BAS-KSC, pending).

<sup>53</sup> The policy came to be known as the "Title 42 policy," in reference to the relevant section of the U.S. Code. See *supra* n. 26.

<sup>54</sup> L. Carol Ritchie & Michele Kelemen, *U.S. Special Envoy To Haiti Quits Over Deportations of Haitian Migrants*, NPR (Sept. 23, 2021, 1:35 PM ET), <https://www.npr.org/2021/09/23/1040055089/us-special-envoy-haiti-quits-deportations-refugees>.

<sup>55</sup> CBP closed the Del Rio International Bridge and immediately blockaded the surrounding areas overnight, on September 17th, 2021. In addition to CBP, the overwhelming law enforcement presence included units of Texas State Troopers, the Texas National Guard, the Texas Department of Public Safety (DPS), at the direction of Governor Greg Abbott. The National Guard blockaded two encampment entrances. These military and law enforcement agencies jointly maintained a shift schedule. Dozens of state trooper vans entered and exited the camp at different points in the day. Military-grade, armored Humvees and other vehicles waited poised at approximately every 100 feet along the US-Mexico border for at least two miles surrounding the encampment, reinforcing a razor

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wire-topped chain-linked fence along its perimeter. On Saturday, September 18th, construction workers added additional barriers on the roads surrounding the encampment. Likewise, droves of law enforcement vehicles patrolled the city of Del Rio down N Main Street and Veterans Boulevard. See Sarah Decker et al., *Beyond the Bridge: Documented Human Rights Abuses and Civil Rights Violations against Haitian Migrants in the Del Rio, Texas Encampment* (2022), <https://rfkhr.imgix.net/asset/Del-Rio-Report.pdf>.

<sup>56</sup> The US government has an affirmative duty to provide for an individual's basic human needs when they "take[] that person into [their] custody and hold[] him there against his will," thereby creating a "special relationship" with that individual. *DeShaney v. Winnebago Cnty. Svcs.*, 489 US 189, 199-200 (1989). When the government "so restrains an individual's liberty that it renders him unable to care for himself," it assumes responsibility for that individual's safety and well-being. *Id.* at 200. As one Haitian woman explained, "After a few days of us being there... [the water] became very dangerous to cross. There were soldiers on horses standing in front of the river telling people they were not allowed to go back and forth. I couldn't leave the camp, especially not with my son because he was only four years old. To try to get past the water and the soldiers was impossible." *Id.* (citing Telephone interview by RFK Human Rights lawyer with Haitian individual (March 18, 2022)).

<sup>57</sup> See CERD Concluding Observations, *supra* n. 17 at pp. 5-6.

<sup>58</sup> U.S. Immigration and Customs Enforcement, Office of Acquisition Management, *Justification for Other than Full and Fair Competition* (Sept. 28, 2021), <https://www.quixote.org/wp-content/uploads/2021/10/HaitianEmergencyFlightsJA-21-00378-Final9-27-2021.pdf> (This "emergency" contract was to provide 88 expulsion flights to Haiti for a total cost of \$15,758,960.00. That is approximately \$179,079.09 per flight. In 2015, the Department of Homeland Security's Office of the Inspector General reported that "ICE Air pays, on average, \$8,419 per flight hour for charter flights regardless of the number of passengers on the plane."); University of Washington Center for Human Rights, *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation* (Apr. 23, 2019), <https://jsis.washington.edu/humanrights/2019/04/23/ice-air/#:~:text=In%202015%2C%20the%20Department%20of,companies%20to%20run%20the%20flights> (Accounting for inflation, an average ICE Air flight would cost \$9,625.04 in 2021).

<sup>59</sup> *HBA v. Biden Complaint*, *supra* n. 3 at ¶ 62.

<sup>60</sup> *Id.* at ¶ 61.

<sup>61</sup> *Id.* at ¶ 4.

<sup>62</sup> E. Tendayi Achiume, Foreword in S. Priya Morely et al., *A Journey of Hope: Haitian Women's Migration to Tapachula, Mexico* (2021), <https://imumi.org/attachments/2020/A-Journey-of-Hope-Haitian-Womens-Migration-to%20-Tapachula.pdf>.

<sup>63</sup> U.S. Department of State, *U.S.-Colombia Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 3, 2023), <https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/>.

<sup>64</sup> U.S. Department of Homeland Security, *Readout of Secretary Mayorkas's Trip to Guatemala* (July 8, 2021), <https://www.dhs.gov/news/2021/07/08/readout-secretary-mayorkas-s-trip-guatemala> ("While in Guatemala City, [DHS] Secretary Mayorkas and President Giammattei discussed their strong bilateral partnership. Secretary Mayorkas thanked President Giammattei for his efforts to provide support for returned migrants, for opening a new refugee center to offer protection to those who qualify..."); Tim McDonnell, *Trump Froze Aid to Guatemala. Now Programs Are Shutting Down*, NPR (Sept. 17, 2019), <https://www.npr.org/sections/goatsandsoda/2019/09/17/761266169/trump-froze-aidto-guatemala-now-programs-are-shutting-down> (noting pressure from prior U.S. administration on Guatemala leading up to Asylum Cooperative Agreement).

<sup>65</sup> Nick Miroff, Karen DeYoung, & Kevin Sieff, *Biden will send Mexico surplus vaccine, as U.S. seeks help on immigration enforcement*, WASH. POST (Mar. 18, 2021), [https://www.washingtonpost.com/national-security/biden-mexico-immigration-coronavirus-vaccine/2021/03/18/a63a3426-8791-11eb-8a67-f314e5fcf88d\\_story.html](https://www.washingtonpost.com/national-security/biden-mexico-immigration-coronavirus-vaccine/2021/03/18/a63a3426-8791-11eb-8a67-f314e5fcf88d_story.html) (noting that, although Mexican authorities have denied quid pro quo, the Biden administration has secured pledge from Mexico to receive expelled asylum seekers from Central America after sending its southern neighbor large numbers of vaccine doses during the COVID-19).

<sup>66</sup> Kathia Martinez, *US, Panama and Colombia aim to stop Darien Gap migration*, THE HILL (Apr. 11, 2023), <https://thehill.com/homenews/ap/ap-top-headlines/us-panama-and-colombia-aim-to-stop-darien-gap-migration/>.

<sup>67</sup> See National Immigrant Justice Center & FWD.US, *How Offshoring and Externalization Policies Imperil the Right to Asylum* (Aug. 3, 2021), <https://www.fwd.us/news/new-report-how-offshoring-and-externalization-policies-imperil-the-right-to-asylum/> (referencing 2018 joint U.S. Department of Homeland Security and Panama task force

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on migration to ensure coordination to address migration in the region); Calah Schlabach & Cronkite Borderlands Project, *Torn between humanitarian ideals and U.S. pressure, Panama screens migrants from around the world*, CRONKITE NEWS (CN) (July 2, 2020), <https://cronkitenews.azpbs.org/2020/07/02/humanitarian-flow-panama-migrants/> (describing how “[f]or many migrants, Panama is their first encounter with the U.S. immigration system, which is working with Panama’s border patrol to track entrants.”).

<sup>68</sup> Arelis R. Hernández, *Immigration officials partner with Panama to boost screening of migrants passing through to U.S.*, WASH. POST (Aug. 27, 2019), [https://www.washingtonpost.com/immigration/immigration-officials-partner-with-panama-to-boost-screening-of-migrants-passing-through-to-us/2019/08/26/532f6150-c81d-11e9-a4f3-c081a126de70\\_story.html](https://www.washingtonpost.com/immigration/immigration-officials-partner-with-panama-to-boost-screening-of-migrants-passing-through-to-us/2019/08/26/532f6150-c81d-11e9-a4f3-c081a126de70_story.html) (describing that “at the Panamanian border in the Darien, U.S. officials supplied Panama’s border security force, SENAFRONT, with the devices that capture fingerprints, photographs and iris scans to process the influx of migrants showing up at the Peñitas camp”).

<sup>69</sup> Courtney Kube, Carol E. Lee, & Julia Ainsley, *Senior Biden officials are pushing to send U.S. troops to South American jungle to help curb human smuggling*, NBC NEWS, (May 23, 2023), <https://www.nbcnews.com/politics/immigration/senior-biden-officials-are-pushing-send-us-troops-south-american-jungle-rcna85574>; U.S. Southern Command Public Affairs, *SOUTHCOM Commander Visits Panama* (June 15, 2022), <https://www.southcom.mil/MEDIA/NEWS-ARTICLES/Article/3062872/southcom-commander-visits-panama/> (stating that “[t]he United States and Panama share a longstanding security partnership that dates back more than a century”).

<sup>70</sup> Anthony J. Blinken, U.S. Secretary of State, *The United States and Panama Advance Migration Cooperation* (Press Statement) (April 19, 2022), <https://www.state.gov/the-united-states-and-panama-advance-migration-cooperation/#:~:text=The%20United%20States%20and%20Panama%20have%20signed%20a%20Bilateral%20Arrangement,for%20those%20in%20the%20region; see also> U.S. Department of State, *Integrated Country Strategy: Panama* (Mar. 21, 2022), [https://www.state.gov/wp-content/uploads/2022/04/ICS\\_WHA\\_Panama\\_Public.pdf](https://www.state.gov/wp-content/uploads/2022/04/ICS_WHA_Panama_Public.pdf).

<sup>71</sup> Luke Taylor, *UN bodies call for urgent action over Panama’s Darién Gap migration route* (The Guardian (Aug. 3, 2023), <https://www.theguardian.com/world/2023/aug/03/darien-gap-migration-panama-un-crisis> (citing United Nations efforts in Panama “mainly by providing critical support in areas such as food, shelter and medical care”); UNICEF, *Darien jungle: child crossings in 2023 now exceed the whole of 2022* (Aug. 3, 2023), <https://www.unicef.org/lac/en/press-release/darien-jungle-child-crossing-2023-exceed-whole-2022-statement-garry-conille-unicef-regional-director>.

<sup>72</sup> See Luke Taylor, *‘Terrifying’: Critics decry US plan to stop migrants at Darién Gap*, THE GUARDIAN (Apr. 14, 2023), <https://www.theguardian.com/global-development/2023/apr/14/darien-gap-panama-colombia-us-agreement-migrants>; Juan Zamorano, *Panama launches U.S.-backed operation to stop flow of migrants*, L.A. TIMES (June 2, 2023), <https://www.latimes.com/world-nation/story/2023-06-02/panama-launches-darien-gap-operation-against-migrant-smugglers>.

<sup>73</sup> Rachel Schmidtke, Yael Schacher, & Ariana Sawyer, *Report: Deportation with a Layover: Failure of Protection under the U.S.-Guatemala Asylum Cooperative Agreement*, REFUGEES INTERNATIONAL (May 19, 2020), <https://www.refugeesinternational.org/reports/2020/5/8/deportation-with-a-layover-failure-of-protection-under-the-us-guatemala-asylum-cooperative-agreement>.

<sup>74</sup> Felipe González Morales (Special Rapporteur on the human rights of migrants), *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, ¶ 34, U.N. Doc A/HRC/47/30 (May 12, 2021), <https://undocs.org/Home/Mobile?FinalSymbol=A/HRC/47/30&Language=E&DeviceType=Desktop> (defining pushbacks as “various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border”).

<sup>75</sup> See Commander Michael Feltovic & Lieutenant Commander Robert O’Donnell, *Coast Guard Migrant Interdiction Operations are in a State of Emergency*, Proceedings-U.S. Naval Institute (Feb. 2023), <https://www.usni.org/magazines/proceedings/2023/february/coast-guard-migrant-interdiction-operations-are-state-emergency>.

<sup>76</sup> See Eleanor Acer, *A System Designed to Fail Haitians*, Human Rights First (Feb. 10, 2010), <https://humanrightsfirst.org/library/a-system-designed-to-fail-haitians/>.

<sup>77</sup> See Commander Michael Feltovic & Lieutenant Commander Robert O’Donnell, *Coast Guard Migrant Interdiction Operations are in a State of Emergency*, Proceedings-U.S. Naval Institute (Feb. 2023), <https://www.usni.org/magazines/proceedings/2023/february/coast-guard-migrant-interdiction-operations-are-state-emergency>.

emergency; see also, Press Release, *Coast Guard Repatriates 83 Haitians to Haiti* (Sep. 1, 2022), <https://content.govdelivery.com/accounts/USDHSCG/bulletins/32abc91?reqfrom=share>.

<sup>78</sup> United States Coast Guard, *supra* n. 38 at p. 6, (stating that “[t]he Coast Guard employs repatriation agreements with the Dominican Republic, Haiti, and Cuba; the three most frequent nationalities interdicted in the Caribbean region. The Coast Guard continues to seek partnerships and agreements with other nations to expand immigration enforcement capabilities. New and expanded bilateral agreements will allow the Coast Guard to increase its ability to conduct AMIO and to remain the lead federal agency for immigration enforcement in the maritime environment.”).

<sup>79</sup> See Americans for Immigrant Justice et al., *Re: Comment in Opposition to the Proposed Expanded Applicability of the Circumvention of Lawful Pathways Rule in the Maritime Context*, CIS No. 2744-23; Docket Number USCIS 2022- 0016; A.G. Order No. 5660-2023 (June 15, 2023), <https://aijustice.org/wp-content/uploads/2023/06/Final-Joint-Comment-in-Opposition-to-the-Expansion-of-the-CLP-Final-Rule-in-the-Maritime-Context-.pdf>; see also, “Circumvention of Lawful Pathways,” 88 Fed. Reg. 31314 (May 16, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf>.

<sup>80</sup> Memorandum, Peter E. Mina, *Maritime Interdiction, Protection Screening, and Custody of Migrants in the Caribbean* (Jan. 20, 2023), <https://www.dhs.gov/sites/default/files/2023-05/retention-memo-maritime-interdiction-01-20-23.pdf>

<sup>81</sup> Kino Border Initiative, *Pushback Practices at US/Mexico Border*, OHCHR, [https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/Franciscans\\_International\\_SubmissionI.pdf#:~:text=U.S.%20government%20data%20reflect%20over%20400%2C000%20migrant%20pushbacks,power%2C%20including%20physical%20cruelty%2C%20verbal%20harassment%2C%20and%20misrepresentation.](https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/Franciscans_International_SubmissionI.pdf#:~:text=U.S.%20government%20data%20reflect%20over%20400%2C000%20migrant%20pushbacks,power%2C%20including%20physical%20cruelty%2C%20verbal%20harassment%2C%20and%20misrepresentation.)

<sup>82</sup> 88 Fed. Reg. 31314 (May 16, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-05-16/pdf/2023-10146.pdf>.

<sup>83</sup> Black Immigrant Bail Fund et al., *Comment on Proposed Rule, “Circumvention of Lawful Pathways,”* 88 FR 11074 (Mar. 27, 2023), <https://www.regulations.gov/comment/USCIS-2022-0016-12543>.

<sup>84</sup> Melissa del Bosque, *Facial recognitions bias frustrates Black asylum applicants to US, advocates say*, THE GUARDIAN (Feb. 8, 2023), <https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias#:~:text=Non%2Dprofits%20that%20assist%20Black,request%20entry%20into%20the%20US.>

<sup>85</sup> Class Action Complaint for Vacatur, Declaratory Judgement, and Injunctive Relief, *AOL et. al v. Mayorkas*, (S.D. Cal.) (Case No. 3:23-cv-01367-AGS-BLM, *pending*) available at [https://www.americanimmigrationcouncil.org/sites/default/files/litigation\\_documents/challenging\\_cbp\\_one\\_turnback\\_policy\\_complaint\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_cbp_one_turnback_policy_complaint_0.pdf).

<sup>86</sup> Human Rights First et al., *Lives at Risk: Barriers and Harms As Biden Asylum Ban Takes Effect* (2023), <https://humanrightsfirst.org/wp-content/uploads/2023/05/Barriers-and-Harms-As-Biden-Asylum-Ban-Takes-Effect31.pdf>.

<sup>87</sup> See, e.g., University of Miami School of Law Human Rights Clinic et al., Letter to The White House and U.S. Department of Homeland Security (Jan. 12, 2023), <https://miami.app.box.com/s/y9rayyctjsudmeaffnxekijfs760zc55>; Press Release, *UNHCR calls on States to refrain from forced returns of Haitians*, UNHCR (Nov. 3, 2022), <https://www.unhcr.org/news/news-releases/unhcr-calls-states-refrain-forced-returns-haitians>; Amnesty International et al., *Stop US deportations and abuse against Haitians on the move: An urgent step towards creating just policies for Haitians* (Dec. 15, 2021), <https://www.amnesty.org/en/wp-content/uploads/2021/12/AMR3651012021ENGLISH.pdf>.

<sup>88</sup> Amnesty International, *supra* n. 2.

<sup>89</sup> U.S. Immigration and Customs Enforcement, *ICE Annual Report | Fiscal Year 2022*, at p. 71 (Dec. 30, 2022), <https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf>.

<sup>90</sup> The U.S. Government only compiles deportation data in the aggregate and does not provide disaggregated data by country of origin.

<sup>91</sup> University of Miami School of Law Human Rights Clinic, et. al., *An Urgent Call to Stop All U.S. Deportations to Haiti* (2023), [https://www.law.miami.edu/assets/files-exp/files-clinic-human-rights/urgent-call-to-stop-all-u-s-deportations-to-haiti\\_february-202312.pdf](https://www.law.miami.edu/assets/files-exp/files-clinic-human-rights/urgent-call-to-stop-all-u-s-deportations-to-haiti_february-202312.pdf).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

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

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<sup>95</sup> See IACHR, *186 Period of Sessions: Rights of Haitians in mobility in the United States* (March 9, 2023), <https://www.oas.org/en/iachr/sessions/?S=186>, recording of hearing available at <https://youtu.be/5AgrksRMpdY>.

<sup>96</sup> *Id.*

<sup>97</sup> Human Rights Committee, *Concluding Observations on the fourth periodic report of the United States of America*, ¶ 15, CCPR/C/USA/CO/4 (Apr. 23, 2014), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/426/73/PDF/G1442673.pdf> [hereinafter HRC 2014 Concluding Observations].

<sup>98</sup> *Id.* at ¶ 13.

<sup>99</sup> Article 2(1) of the ICCPR requires States to guarantee rights to all individuals within its territory and subject to its jurisdiction<sup>99</sup> and General Comment No. 15 establishes that “each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.” See Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, ¶ 2 (Apr. 11, 1986), [hereinafter HRC General Comment No. 15].

<sup>100</sup> See Eli Cahan, *The United States has failed Cameroonian asylum-seekers*, FOREIGN POLICY (Dec. 13, 2020), <https://foreignpolicy.com/2020/12/13/united-states-cameroon-asylum-seekers-ice-deportation/>.

<sup>101</sup> U.S. Immigration and Customs Enforcement, *supra* n. 89.

<sup>102</sup> ICE Detainees, Transactional Records Access Clearinghouse, (recording average monthly populations of U.S. immigration detention from May 2019 to August 2023); Eunice Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years Into the Biden Administration*, ACLU (Aug. 7, 2023), <https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration#:~:text=In%20the%20last%20two%20years,operated%20by%20private%20prison%20corporations> (noting that 90% of individuals in immigration detention are imprisoned in privately owned or managed facilities); TRAC Immigration, *ICE Detainees*, [https://trac.syr.edu/immigration/detentionstats/pop\\_agen\\_table.html](https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html) (last visited Sept. 6, 2023) (recording average monthly populations of U.S. immigration detention from May 2019 to August 2023).

<sup>103</sup> Tom Dreisbach, *Government’s Own Experts Found “Barbaric” and “Negligent” Conditions in ICE Detention*, NPR, <https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions> (last visited Sept. 7, 2023) (quoting investigative reports of immigration detention facilities made by the U.S. Department of Homeland Security).

<sup>104</sup> *Id.* (describing instances of deaths resulting from medical negligence).

<sup>105</sup> Human Rights Committee, ¶ 21, U.N. Doc. CCPR/C/USA/QPR/5 (Apr. 18, 2019).

<sup>106</sup> See, e.g., Rebekah Wolf, *A Closer Look at Deaths in ICE Detention Facilities*, IMMIGRATION IMPACT (Apr. 13, 2023), <https://immigrationimpact.com/2023/04/13/a-closer-look-at-deaths-in-ice-detention-facilities/> (noting that deaths in immigration detention hit a 15-year high in during U.S. fiscal year 2020); Human Rights Watch, *US: Poor Medical Care, Deaths in Immigrant Detention* (June 20, 2018), <https://www.hrw.org/news/2018/06/20/us-poor-medical-care-deaths-immigrant-detention> (examining public records that showed evidence of inadequate medical care contributing to 15 deaths); ACLU, Detention Watch Network, & National Immigrant Justice Center, *Fatal Neglect: How ICE Ignores Deaths in Detention* (Feb. 2016), [https://www.aclu.org/wp-content/uploads/legal-documents/fatal\\_neglect\\_acludwnnjjc.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/fatal_neglect_acludwnnjjc.pdf) (documenting how failure to provide adequate medical care has led to unnecessary deaths).

<sup>107</sup> See, e.g., Zeba Warsi, *Hundreds of immigrants have reported sexual abuse at ICE facilities. Most cases aren’t investigated*, PBS NEWS HOUR (June 21, 2023), <https://www.pbs.org/newshour/nation/hundreds-of-immigrants-have-reported-sexual-abuse-at-ice-facilities-most-cases-arent-investigated> (reporting 308 sexual assault and sexual abuse complaints filed by immigrants detained in ICE facilities nationwide between 2015 and 2021); Rafael Bernal, *ICE Unable to Stamp Out Abuse Allegations at Detention Centers*, THE HILL (Feb. 16, 2023), <https://thehill.com/latino/3860354-ice-unable-to-stamp-out-abuse-allegations-at-detention-centers/> (reporting complaints about living conditions, cruel treatment, food, and alleged overuse of solitary confinement and diminished or lack of access to the asylum process); Robert F. Kennedy Human Rights et al., Complaint to Dep’t. of Homeland Sec.’s Office of Civil Rights and Civil Liberties (June 21, 2021), <https://rfkhumanrights.org/assets/documents/RFK-Human-Rights-Pine-Prairie-DHS-Complaint.pdf> (documenting inhumane conditions, overtly hostile staff, and excessive, at times racially driven solitary confinement practices which were tantamount to torture).

<sup>108</sup> See, e.g., Lautaro Greenspan, *ICE Detainees Say They Were Forced Into Labor in Ga., File Lawsuit*, THE ATLANTA JOURNAL-CONSTITUTION (Aug. 26, 2022), <https://www.ajc.com/news/georgia-news/ice-detainees-say->



they-were-forced-into-labor-in-ga-file-lawsuit/ECLTIVQNMVE6LKOFKXQBWCCVUA/ (reporting that detained individuals were coerced into accepting work assignments by threats of punishment); Jonathan Booth, *Ending Forced Labor in ICE Detention Centers: A New Approach*, 34 Geo. Immigr. L.J. 573, 591, <https://www.law.georgetown.edu/immigration-law-journal/wp-content/uploads/sites/19/2020/08/ENDING-FORCED-LABOR-IN-ICE-DETENTION-CENTERS-A-NEW-APPROACH.pdf> (describing allegations of coerced labor including conditioning provision of basic sanitary products on work and the use of solitary confinement as retaliation for refusal to work); Azadeh Shahshahani, *Why Are For-Profit US Prisons Subjecting Detainees to Forced Labor?*, THE GUARDIAN (May 17, 2018), <https://www.theguardian.com/commentisfree/2018/may/17/us-private-prisons-forced-labour-detainees-modern-slavery> (reporting how a private prison corporation violates human trafficking laws and employs a deprivation scheme to force detained immigrants to work for sub-minimum wages).

<sup>109</sup> See, e.g., The Center for Victims of Torture, *Immigration Detention is Arbitrary* (July 21, 2023), <https://www.cvt.org/what-we-do/project-archive/immigration-detention-must-end/immigration-detention-is-arbitrary/> (describing how U.S. immigration detention is not proportionate, reasonable, or necessary); Human Rights Watch, *Dismantling Detention: International Alternatives to Detaining Immigrants* (Nov. 2021), <https://www.hrw.org/report/2021/11/03/dismantling-detention/international-alternatives-detaining-immigrants> (describing how lack of alternatives to detention leads to frequent unnecessary and disproportionate confinement of individuals).

<sup>110</sup> See, e.g., *supra* n. 103-109 and associated text (describing reports of sexual abuse, religious intolerance, and racial discrimination).

<sup>111</sup> See, e.g., Press Release, Americans for Immigrant Justice, *Formerly Detained Muslims Receive Damages for the Denial of Their Right to Observe Their Religion by Glades County Detention Center* (Aug. 12, 2021), <https://aijjustice.org/2021/08/12/formerly-detained-muslims-receive-damages/> (announcing a settlement with the Glades County Detention Center for discriminatory and abusive practices that systematically prevented Muslim detainees from practicing their faith); Yusuf Saei, *ICE Contract Facilities, Including Counties, Continue to Violate the Religious Exercise Rights of Muslim Detainees*, AMERICAN CONSTITUTION SOCIETY (Apr. 24, 2019), <https://www.acslaw.org/expertforum/ice-contract-facilities-including-counties-continue-to-violate-the-religious-exercise-rights-of-muslim-detainees/> (describing instances of anti-Muslim discrimination in detention centers in California, Texas, and Florida); Aleksandr Sverdlik, *Border Patrol and ICE Routinely Violate Immigrants' Religious Rights*, ACLU (Mar. 20, 2019), <https://www.aclu.org/news/immigrants-rights/border-patrol-and-ice-routinely-violate> (describing lawsuits against immigration detention authorities alleging denial of access to clergy, worship services, religious texts, religious diets, and an appropriate place to pray).

<sup>112</sup> See, e.g., American Immigration Council et. al, *Complaint to Dep't. of Homeland Sec. Re: Racial Discrimination, Excessive Use of Force at the Denver Contract Detention Facility* (Mar. 24, 2022), <https://www.americanimmigrationcouncil.org/research/council-files-complaint-against-ice-racial-discrimination-and-excessive-use-force-colorado> (reporting verbal abuse, racial animus, and disparate treatment because of race).

<sup>113</sup> U.S. State Party Report, *supra* n. 11 at ¶ 84.

<sup>114</sup> *Id.*

<sup>115</sup> Dep't. of Homeland Sec. Office of Inspector Gen., *Management Alert – Immediate Removal of All Detainees from the Torrance County Detention Facility* (Mar. 16, 2022), <https://www.oig.dhs.gov/sites/default/files/assets/2022-05/OIG-22-31-Mar22-mgmtalert.pdf> (recommending immediate closure of a detention center on March 16, 2022); Dep't. of Homeland Sec. Office of Inspector Gen., *Violations of ICE Detention Standards at Torrance County Detention Facility* (September 28, 2022), <https://www.oig.dhs.gov/sites/default/files/assets/2022-09/OIG-22-75-Sep22.pdf> (recommending immediate closure on September 28, 2022); Maria Sacchetti, *Inspector general, ICE clash over conditions at immigration detention facility in New Mexico*, WASH. POST (Mar. 18, 2022), <https://www.washingtonpost.com/national-security/2022/03/18/ice-detention-unsanitary-new-mexico/> (describing how an Inspector General's report and recommendation for closure drew "rebuke from U.S. Immigration and Customs Enforcement (ICE) and CoreCivic, the private company that runs the facility").

<sup>116</sup> Tom Dreisbach, *Government's Own Experts Found "Barbaric" and "Negligent" Conditions in ICE Detention*, NPR (Aug. 16, 2023) <https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions> (describing litigation undertaken to secure release of government reports).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

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<sup>119</sup> See *supra* n. 103-109. (referencing reports describing violations of human rights guarantees contained in the International Covenant on Civil and Political Rights).

<sup>120</sup> CERD Concluding Observations, *supra* n. 17 at ¶ 51(a)-(b).

<sup>121</sup> Konrad Franco, Caitlin Patler, & Keramet Reiter, *Punishing Status and the Punishment Status Quo: Solitary Confinement in US Immigration Prisons, 2013-2017*, SOCARXIV (Apr. 2020), <https://osf.io/preprints/socarxiv/zdy7f/>.

<sup>122</sup> See Black Alliance for Just Immigration, Haitian Bridge Alliance, RFK Human Rights et al., *Shadow Report to the Committee on the Elimination of Racial Discrimination (CERD) 107th Session*, ¶¶ 66-76, 82 (Aug. 2022), [https://rfkhr.imgix.net/asset/US-Coalition\\_anti-Black-Discrimination-in-Immigration\\_CERD-Report\\_072222.pdf](https://rfkhr.imgix.net/asset/US-Coalition_anti-Black-Discrimination-in-Immigration_CERD-Report_072222.pdf) (documenting racial disparities in custody length and conditions of release from immigration detention).

<sup>123</sup> See *id.* at ¶¶ 77-90 (detailing racial abuse and anti-Black animus against people held in detention).

<sup>124</sup> See, e.g., Daniella Silva, *Detainees and advocates decry 'horrific' conditions at Louisiana ICE detention center*, NBC NEWS (July 17, 2023), <https://www.nbcnews.com/news/detainees-advocates-decry-horrific-conditions-louisiana-ice-detention-rcna92339> (describing years of unresolved complaints about inadequate medical care, filthy accommodations and mistreatment of detainees); Philip Marcelo & Gerald Herbert, *Immigrant detentions soar despite Biden's campaign promises*, AP NEWS (Aug. 5, 2021), <https://apnews.com/article/joe-biden-health-immigration-coronavirus-pandemic-4d7427ff67d586a77487b7efec58e74d> (recounting the story of an asylum seeker at Winn Correctional Center that contracted COVID-19, faced racist taunts and abuse from guards, and was harassed by fellow detainees for being gay).

<sup>125</sup> U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties, Letter regarding ICE's Oversight of the New Orleans Field Office at p. 8 (Dec. 7, 2021), [https://www.dhs.gov/sites/default/files/2022-08/2021.12.07%20CRCL%20Retention%20Memo%20to%20ICE%20-%20Oversight%20of%20New%20Orleans%20AOR%20-%20Redacted\\_508.pdf](https://www.dhs.gov/sites/default/files/2022-08/2021.12.07%20CRCL%20Retention%20Memo%20to%20ICE%20-%20Oversight%20of%20New%20Orleans%20AOR%20-%20Redacted_508.pdf); Hamded Aziz, *Internal Investigators Told ICE To Stop Sending Immigrants To A Prison In Louisiana Because Of A Culture That Can Lead To Abuse*, BUZZFEED NEWS (Dec. 15, 2021), <https://www.buzzfeednews.com/article/hamedaleaziz/ice-private-prison-louisiana-conditions> (reporting on Winn's "culture of abuse").

<sup>126</sup> *Id.*

<sup>127</sup> Philip Marcelo & Gerald Herbert, *Immigrant detentions soar despite Biden's campaign promises*, AP News (Aug. 5, 2021), <https://apnews.com/article/joe-biden-health-immigration-coronavirus-pandemic-4d7427ff67d586a77487b7efec58e74d>.

<sup>128</sup> University of Miami & ACLU of Florida, Florida Immigrant Detention Database, <https://public.tableau.com/app/profile/aclu.fl/viz/FLDetentionDatabase/u> (last visited Sept. 7, 2023).

<sup>129</sup> *Jane Doe v. Baker County*, Case No. 3:23-cv-00609, M.D. Fla (May 19, 2023), complaint available at <https://s3.documentcloud.org/documents/23855473/doe-v-baker-county-md-fla-may-19-2023-sex-trafficking.pdf>.

<sup>130</sup> Associated Press, *The Latest: Mexican leader warns against 'coercive measures'* (May 30, 2019), <https://apnews.com/article/0e406b5b8a8c405491461188022a824c> (letter from Mexican President López Obrador to U.S. President Trump stating that "[t]he Statue of Liberty is not an empty symbol.").

<sup>131</sup> *Joint Declaration and Supplementary Agreement Between the UNITED STATES OF AMERICA and MEXICO*, (June 7, 2019), <https://www.state.gov/wp-content/uploads/2019/09/19-607-Mexico-Migration-and-Refugees.pdf>; see *International Organizations Denounce that Proposed National Guard Model in Mexico Violates International Law*, WOLA (February 21, 2019), <https://www.wola.org/2019/02/mexico-national-guard-violates-international-law/>; Maureen Meyer & Adan Isacson, *The "Wall" Before the Wall: Mexico's Crackdown on Migration at its Southern Border*, WOLA (Dec. 17, 2019), <https://www.wola.org/analysis/mexico-southern-border-report/>; Ribando Seelke, *Clare, Mexico's Immigration Control Efforts*, Congressional Research Service, (Jan. 3, 2022), <https://sgp.fas.org/crs/row/IF10215.pdf>.

<sup>132</sup> Human Rights First, *At Two Months, Biden's Asylum Ban Threatens Lives* (July 12, 2023), <https://humanrightsfirst.org/library/at-two-months-bidens-asylum-ban-threatens-lives/>.

<sup>133</sup> National Immigrant Justice Center & FWD.US, *How Offshoring and Externalization Policies Imperil the Right to Asylum*, *supra* n. 67, at, pp.46-48.

<sup>134</sup> Tyler Mattiace, *Mexico Cannot Solve the US Border Crisis*, Dallas Morning News (May 24, 2022), <https://www.dallasnews.com/opinion/commentary/2021/05/23/mexico-cannot-solve-the-us-border-crisis/>; *US Vice President Calls for Immigration Effort With Mexico*, VOA NEWS (May 7, 2021), <https://www.voanews.com/a/usa-us-vice-president-calls-immigration-effort-mexico/6205565.html>.

<sup>135</sup> Human Rights Watch, *Mexico: Asylum Seekers Face Abuses at Southern Border* (June 6, 2022), <https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border>; See S. Priya Morley et al., *supra* n. 62; S. Priya Morley et al., “*There is a Target on Us*” – *The Impact of Anti-Black Racism on African Migrants at Mexico’s Southern Border* (2021), <https://imumi.org/attachments/2020/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>; see also Caitlyn Yates, *A Case Study in the Outsourcing of US Border Control*, *Lawfare* (Apr. 11, 2019), <https://www.lawfareblog.com/case-study-outsourcing-us-border-control>.

<sup>136</sup> *Detuvieron a cuatro policías por la muerte de una migrante haitiana en Chiapas*, *InfoBae* (Nov. 26, 2021), <https://www.infobae.com/america/mexico/2021/11/26/detuvieron-a-cuatro-policias-por-la-muerte-de-una-migrante-haitiana-en-chiapas/>; See Refugees International, *Pushed into the Shadows: Mexico’s Reception of Haitian Migrants*, (Apr. 28, 2022), <https://www.refugeesinternational.org/reports/2022/4/25/pushed-into-the-shadows-mexicos-reception-of-haitian-migrants>; Tanya Duarte et al., “*Because of the Color of My Skin and the Way I Speak Spanish*”: *The INM’s Detention and Deportation of Indigenous and Afro-Descendant Mexicans* (July 2020), [https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/RES\\_43\\_1/NGOsAndOthers/coalicion-indigena-migrantes-chiapas-proyecto-afro-mexico-imumi.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/RES_43_1/NGOsAndOthers/coalicion-indigena-migrantes-chiapas-proyecto-afro-mexico-imumi.pdf).

<sup>137</sup> Human Rights First et al., *supra* n. 86.

<sup>138</sup> See Haitian Bridge Alliance, *Violence against Black Migrant Women in the Darién Gap (CEDAW Articles 1, 2, 3, 5, 6, 12, 15)* (January 12, 2022), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fPAN%2f47481&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fPAN%2f47481&Lang=en); see also Haitian Bridge Alliance, *Access to Justice for Victims of Violence in the Darién Gap (ICCPR Article 14)* (January 30, 2023), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fICCPR%2fCSS%2fPAN%2f51506&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fICCPR%2fCSS%2fPAN%2f51506&Lang=en).

<sup>139</sup> See S. Priya Morley et al., *supra* n. 62.

<sup>140</sup> The Committee states in General Comment 36 that the Covenant applies to “persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner” and that “States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.” See HRC General Comment No. 36, *supra* n. 10 at ¶ 63.

<sup>141</sup> U.S. Department of Homeland Security (DHS), *Implementation of a Parole Process for Cubans*, 88 Fed. Reg. 1266 <https://www.federalregister.gov/documents/2023/01/09/2023-00252/implementation-of-a-parole-process-for-cubans> (“Individuals are ineligible for [new parole] process if they have been ordered removed from the United States within the prior five years; have entered unauthorized into the United States between [ports of entry], Mexico, or Panama after the date of this notice’s publication”); DHS, *Implementation of a Parole Process for Haitians*, 88 Fed. Reg. 1243 <https://www.federalregister.gov/documents/2023/01/09/2023-00255/implementation-of-a-parole-process-for-haitians> (same); DHS, *Implementation of a Parole Process for Nicaraguans*, 88 Fed. Reg. 1255 <https://www.federalregister.gov/documents/2023/01/09/2023-00254/implementation-of-a-parole-process-for-nicaraguans> (same); DHS, *Implementation of Changes to the Parole Process for Venezuelans*, 88 Fed. Reg. 1279, <https://www.federalregister.gov/documents/2023/01/09/2023-00253/implementation-of-changes-to-the-parole-process-for-venezuelans> (same).

<sup>142</sup> General Comment 32 specifies that “[t]he right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.” HRC General Comment No. 32, *supra* n. 10 at ¶ 9. It further specifies that “[a] situation in which an individual’s attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence.”

<sup>143</sup> Human Rights Committee, Communication No. 692/1996 “A.R.J. v. Australia”, ¶ 6.9, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997); ICCPR, *supra* n. 10 at §§ 6, 7; HRC General Comment No. 31, *supra* n. 10 at ¶ 12.

<sup>144</sup> See HRC General Comment No. 31, *supra* n. 10 at ¶ 10 (“a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party”); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, 178-79 (July 9) (holding that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”); *Coard v. United States*, Case 10.951, Inter-Am. Comm’n

H.R., Report No. 109/99, PP51-61 (1999), *available at* <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm>; U.N. Economic and Social Council, Situation of Detainees at Guantánamo Bay, ¶¶ 10-11, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (prepared by Leila Zerrougui et al.); HRC 2006 Concluding Observations, *supra* n. 48 at ¶¶ 10, 16; HRC General Comment No. 31, *supra* n. 10 at ¶ 10 (concluding that the ICCPR requires states to apply the Covenant “to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party . . . [The ICCPR applies] to all individuals . . . who may find themselves in the territory or subject to the jurisdiction of a State Party . . . [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.”).

<sup>145</sup> See *J.H.A. v. Spain* (“Marine 1”), CAT/C/41/D/323/2007, UN Committee Against Torture (CAT) (Nov. 21 2008) (Committee against Torture affirmed that Spain exercised de facto control over the migrants on board and therefore they were subject to Spain's jurisdiction).

<sup>146</sup> See, e.g., *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights (Feb. 23, 2012) (obliging government authorities to abide by international human rights laws when intercepting individuals in international waters); *D.D. v. Spain*, CRC/C/80/D/4/2016, UN Committee on the Rights of the Child (CRC) (Feb. 1, 2019) (apprehension by authorities at the “border fence” renders individual within effective control of the state).

<sup>147</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

<sup>148</sup> See *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, \*23 (S.D. Cal. Sept. 2, 2021), *judgment entered*, No. 17-CV-02366-BAS-KSC, 2022 WL 3970755 (S.D. Cal. Aug. 23, 2022), (“given [] the controlling case law . . . the Court regrettably cannot find that [non-refoulement] is universally applied beyond borders”). See also, Martin Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, Am. U. Int'l L. Rev. (1996), <https://digitalcommons.wcl.american.edu/auilr/vol11/iss4/1>.

<sup>149</sup> Clarification on the scope of the norm began as early as 1967, during which the UN General Assembly pronounced in its Declaration on Territorial Asylum that: “No person [seeking in other countries asylum from persecution] shall be subjected to measures such as *rejection at the frontier* . . .” G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 31, U.N. Doc. A/6716 (1967). Ten years later, the Executive Committee of the UNHCR adopted a Conclusion that reaffirmed that “the principle of non-refoulement . . . [applied] both *at the border* and within the territory of a State,” a principle that, at that time, “was generally accepted by states.” UNHCR, *Non-refoulement No. 6* (XXVIII) - 1977, ¶ (c), U.N. DOC. A/32/12/Add.1 (Oct. 12, 1977). In 1981, the Executive Committee of the UNHCR reaffirmed that “in all cases the fundamental principle of non-refoulement *including non-rejection at the frontier* must be scrupulously observed.” UNHCR Executive Committee, *Conclusion No. 22* (XXXII)-1981-Protection of Asylum-Seekers in Situations of Large-Scale Influx, para. II.A.

<sup>150</sup> See Case 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1997), at para 156-157. (“The Commission does not agree with [*Sale*] . . . [instead sharing the] view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.”); see also *UNHCR Advisory Opinion* (“Article 33 encompasses “non-admission[s] at the border”); *id.* (“as a general rule, . . . [contracting] States [must] grant individuals seeking international protection *access to the territory*.”); Walter Kälin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond, in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 627 (“[Case law] acknowledges that, as part of States Parties' duty to cooperate with UNHCR and to accept its supervisory role under Article 35 of the 1951 Convention and article II of the 1967 Protocol, they have to take into account Executive Committee Conclusions, the UNHCR Handbook, UNHCR guidelines, and other UNHCR positions on matters of law (for example amicus curiae and similar submissions to courts . . . when applying the 1951 Convention and its Protocol”).

<sup>151</sup> UNHCR Executive Committee., *Note on International Protection*, ¶ 16, U.N. Doc. A/AC.96/951 (Sept. 13, 2001).

<sup>152</sup> See, e.g., *Dee M.A. and Others v. Lithuania* (no. 59793/17), Eur. Ct. H.R. (Dec. 11, 2018) (“States have a fundamental obligation to ‘ensure that no one shall be subjected to refusal of admission at the frontier’”); *Hirsi Jamaa v. Italy*, App. No. 27765/09 Eur. Ct. H.R. (Feb. 23, 2012); Austria - Administrative Court of the Province of Styria, LVwG 20.3-912/2016 (Sep. 9, 2016) (asylum seekers cannot be rejected at the border crossing without

having the possibility to state reasons for obtaining international protection); *D.D. v. Spain*, U.N. Doc. CRC/C/80/D/4/2016 (same); see also *R.R. and Others v Hungary* (App. No. 36037/17), Eur. Ct. H.R. (Mar. 2, 2021) (non-refoulement applies within the “transit zone” of a country); *Ilias and Ahmed v. Hungary* (App. No. 47287/15), Eur. Ct. H.R. (Mar. 14, 2017) (same).

<sup>153</sup> See, e.g., INT’L L. ASS’N, *Resolution 6/2002 on Refugee Procedures (Declaration on International Minimum Standards for Refugee Procedures)* (The International Law Association has stated that non-rejection at the border constitutes one of the “minimum standards of international [refugee] law for incorporation in all States.”) at preamble, ¶¶ 5, 8; European Union Agency for Fundamental Rights, *Scope of the principle of non-refoulement in contemporary border management* (2016) (explaining that non-refoulement obligations adhere at designated border crossing points). It is doubtful that *Sale* is good law in any court even when cabined to cases involving interdiction, particularly where European actors push back Black migrants into the Mediterranean Sea. The European Court of Human Rights recently denounced pushback operations off the coast of Greece and Turkey. See *Safi and Others v. Greece*, Application No. 5418/15 Eur. Ct. H.R. (Jul. 7, 2022). The jurisprudence on this issue from international tribunals is authoritative. See *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Eur. Ct. H.R. (Feb. 23, 2012) (“The Italian border control operation of ‘push-back’ on the high seas, coupled with the absence of an individual, fair and effective procedure to screen asylum seekers, constitutes a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of non-refoulement.”); *M.S.S. v. Belgium & Greece*, App. No. 30696/09, Eur. Ct. H.R. (Jan. 21, 2011); *M70/2011 v Minister for Immigration and Citizenship* 280 A.L.R. 18 (2011) (High Court of Australia ruled that asylum seekers interdicted off of Australia could not be sent to Malaysia for off-shore processing); *J.H.A. v. Spain (“Marine I”)*, U.N. Doc. CAT/C/41/D/323/2007, para. 8.2 (Nov. 21, 2008) (same); *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. (GC) (Mar. 29, 2010) (“the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships’ crews are covered by no legal system).

<sup>154</sup> See, e.g., *African Refugee Convention*, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45; *Cartagena Declaration*, Organization of American States, Cartagena Declaration on Refugees, *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, Nov. 22, 1984, OAS/Ser. L/V/II.66, doc. 10, rev. 1, at 190-93, <https://perma.cc/U7AA-GG39>; *San Jose Declaration*, San José Declaration on Refugees and Displaced Persons, Dec. 7, 1994, <https://perma.cc/W65K-SUFW>; *Mexico Declaration*, Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin American, Nov. 16, 2004, <https://perma.cc/Q33B-7A9F>; *Brasilia Declaration*, Brasilia Declaration on the Protection of Refugee and Stateless Persons in America, Nov. 11, 2010, <https://perma.cc/8U67-3RPX>; *Bangkok Principles*, Asian-African Legal Consultative Organization [AALCO] Bangkok Principles on the Status and Treatment of Refugees (Dec. 31, 1966), <https://perma.cc/LL2A-3VRT>.

<sup>155</sup> See, e.g., Guy S. Goodwin-Gill, *The Refugee in International Law* 117, 123-24 (Clarendon Press, 2d ed. 1996) (stating that “[c]ertain factual elements may be necessary ... before the principle [of non-refoulement] is triggered, but the concept now encompasses both non-return and non-rejection [of the asylum-seeker at the border]”); Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 208 (3d ed. 2007) (arguing even if non-refoulement was not originally conceived as prohibiting rejection at the frontier, “States in their practice and in their recorded views [] have recognized that non-refoulement applies to the moment at which asylum seekers present themselves for entry, either within a State or at its border”).

<sup>157</sup> See Human Rights Committee, *Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee*, at p. 9, U.N. Doc. CCPR/C/USA/CO/3/REV.1/ADD.1 (Feb. 12, 2008), (asserting that “the Covenant does not impose a non-refoulement obligation upon States Parties. The United States Government is familiar with the Committee’s statements in General Comments 20 and 31 regarding Article 7 .... The nonbinding opinions offered by the Committee in General Comments 20 and 31 have no firm legal basis in the text of the treaty or the intention of its States Parties at the time they negotiated or became party to the instrument. Moreover, as the United States explained during its July 2006 appearance, the States Parties under article 40 of the Covenant did not give the Human Rights Committee authority to issue legally binding or authoritative interpretations of the Covenant. Accordingly, the United States does not consider General Comments 20 and 31 to reflect the ‘legal obligation’ under the Covenant that is claimed by the Committee.”).

<sup>158</sup> Second Amended Complaint, *Al Otro Lado v. Mayorkas* available at <https://ccrjustice.org/sites/default/files/attach/2019/05/189>.

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<sup>159</sup> Summary Judgment Opinion, *Al Otro Lado v. Mayorkas* at 34, available at <https://ccrjustice.org/sites/default/files/attach/2021/09/742>.

<sup>160</sup> The *Al Otro Lado* court could still have remediated the injuries to the tens of thousands of individuals stranded on the U.S.-Mexico border had it not refused to declare that rejecting asylum seekers at the frontier violated the norm of non-refoulement (an issue currently on appeal to the Ninth Circuit).

<sup>161</sup> Government’s Third Brief, *Al Otro Lado v. Mayorkas*, 22-55988 (CA9) (“non-refoulement is not universally understood to extend obligations to migrants who are not within United States territory.”).

<sup>162</sup> See Summary Judgment Opinion, *Al Otro Lado v. Mayorkas* p. 40-42, available at <https://ccrjustice.org/sites/default/files/attach/2021/09/742>.

<sup>163</sup> Shalini Bhargava Ray, *Justices reverse lower court rulings that ordered bond hearings for noncitizens in lengthy immigration detention*, SCOTUSBLOG (June 13, 2022), <https://www.scotusblog.com/2022/06/justices-reverse-lower-court-rulings-that-ordered-bond-hearings-for-noncitizens-in-lengthy-immigration-detention/>.

<sup>164</sup> National Immigrant Justice Center, *Locked Away: The Urgent Need for Immigration Detention Bond Reform* (July 2023), <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2023-06/NIJC-Policy-Brief-ICE-Bond-Reform-May-2023.pdf>.

<sup>165</sup> See Black Alliance for Just Immigration et al., Shadow Report to the Committee on the Elimination of Racial Discrimination (CERD) 107th Session, ¶¶ 66-76, 82 (Aug. 2022), <https://rfkhr.imgix.net/asset/US-Coalition-anti-Black-Discrimination-in-Immigration-CERD-Report-072222.pdf> (documenting racial disparities in custody length and conditions of release from immigration detention).

<sup>166</sup> CERD Concluding Observations, *supra* n. 17 at ¶ 51(a).

<sup>167</sup> *Id.* at ¶ 51(c).

<sup>168</sup> *Id.* at ¶¶ 4-5.

<sup>169</sup> HRC General Comment No. 31, *supra* n. 10 at ¶ 15.

<sup>170</sup> *Id.* at ¶¶ 15-19

<sup>171</sup> *Id.* at ¶ 18.

<sup>172</sup> UN Permanent Forum on People of African Descent (PFPAD), *Preliminary Conclusions and Recommendations*, Second Session, 30 May – 2 June 2023, New York City, USA, available at <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/forums/forum-african-descent/sessions/session2/Preliminary-Conclusions-and-Recommendations-of-2nd-Session-en.pdf>.

<sup>173</sup> *Id.*

<sup>174</sup> A.C. Roberts, *A History of United States Policy to Haiti in Modern Latin America* (Providence, Rhode Island, Brown University), <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-14-the-united-states-and-latin-america/moments-in-u-s-latin-american-relations/a-history-of-united-states-policy-towards-haiti/>; RANDALL ROBINSON, AN UNBROKEN AGONY: HAITI, FROM REVOLUTION TO THE KIDNAPPING OF A PRESIDENT 8-9 (2007) (describing how “[Thomas] Jefferson had expressed his continued concern over black rebellion to Rufus King, lamenting that the ‘course of things in the neighboring islands of the West Indies appeared to have given a considerable impulse to the minds of the slaves’ in the United States and ‘a great disposition to the insurgency has manifested itself among them.’”); *id.* at 18 (quoting an unnamed senator: “Our policy regarding Haiti is plain. We can never acknowledge her independence . . . The peace and safety of a large portion of the union forbids us to ever discuss it.”); *id.* at 58.

<sup>175</sup> London Review of Books, *Who removed Aristide? Paul Farmer reports from Haiti* (Apr. 15, 2004), <https://www.lrb.co.uk/the-paper/v26/n08/paul-farmer/who-removed-aristide>; PETER HALLWARD, *DAMMING THE FLOOD: HAITI AND THE POLITICS OF CONTAINMENT* 1-38 (2007); *Statement of Mario Joseph of the Bureau des Avocats Internationaux (BAI) for the 2nd Session of the Permanent Forum on People of African Descent - Thematic Discussion: Global Reparatory Justice*, OHCHR, <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/forums/forum-african-descent/sessions/session2/statements/PFPAD-session2-grj-ngo-Bureau-des-Avocats-Internationaux.pdf> (last visited Sept. 11, 2023); ROBINSON, AN UNBROKEN AGONY, p. 16 (noting that “[e]ven before France leveraged the weak new state with crushing financial reparations in 1825, the United States and western Europe . . . moved . . . to cripple the fledgling nation socially, politically, and economically, just as France was fashioning new policies to favor Haiti’s minority community of French white ex-colonists and mulattoes . . .”); *id.* at 18-20 (describing how “the new Republic of Haiti was met with a global economic embargo imposed by the United States and Europe . . . strengthened by a further demand from France for financial reparations of roughly \$21 billion . . . as compensation from the newly freed slaves for denying France the further benefit of owning them.”).

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<sup>176</sup> Michael Harriott, *As Haiti Burns, Never Forget: White People Did That*, THE ROOT (July 9, 2018), <https://www.theroot.com/as-haiti-burns-never-forget-white-people-did-that-1827454590>; ROBINSON, AN UNBROKEN AGONY, pp. 22, 54.

<sup>177</sup> ROBINSON, AN UNBROKEN AGONY, pp. 18-19 (describing how “[the] United States, France, and western [sic] Europe would quickly join together in a program of measures designed to defeat the new black republic’s prospects for success. For the next two hundred years, Haiti would be faced with active hostility from the world’s most powerful community of nations . . . including military invasions, economic embargoes, gunboat blockades, reparations demands, trade barriers, diplomatic quarantines, subsidized armed subversions, media volleys of public traducement, and a string . . . of U.S.-armed black dictators . . .”); *id.* at 50-52 (quoting Frederick Douglass contemporaneously remarking that, “[i]t so happens that we have men in this country (the United States) who, to accomplish their personal and selfish ends, will fan the flames of passion between the factions in Haiti and will otherwise assist in setting revolutions afoot.”).

<sup>178</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance: Note by the Secretary General, ¶ 6, U.N. Doc. A/74/321 (Aug. 21, 2019).

<sup>179</sup> *Id.*

<sup>180</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance: Note by the Secretary General, ¶ 7, U.N. Doc. A/74/321 (Aug. 21, 2019).

<sup>181</sup> PFPAD, *Preliminary Conclusions and Recommendations*, *supra* n. 172, at ¶ 20, 22, 11-15.

<sup>182</sup> *Id.* at ¶ 22.

<sup>183</sup> *Id.* at ¶ 22.

<sup>184</sup> HRC General Comment No. 12, *supra* n. 10 at ¶ 6.

<sup>185</sup> American lawyers Ira J. Kurzban and Günther Handl assisted President Aristide with the restitution claim.

<sup>186</sup> In his book, *An Unbroken Agony*, Randall Robinson extensively explores the perceived threat Haiti’s democracy and self-determination posed to wealthy white nations through their associated financial interests in Haiti, as evidenced by the repeated economic and military interference against Haiti historically and in the modern day. *See generally* ROBINSON, AN UNBROKEN AGONY.

<sup>187</sup> London Review of Books, *supra* n. 175; *see also* ROBINSON, AN UNBROKEN AGONY, pp. 18-20, 48-49; *id.* at 53-54 (“Over the course of 2003 . . . in addition to arming Duvalierist insurgents and organizing Haiti’s tiny, splintered political opposition, the [Bush] administration moved apace to strangle Haiti, the poorest country in the Western Hemisphere, into a state of economic, social, and political collapse.”); Constant Méheut et al., *Demanding Reparations and Ending Up in Exile*, N.Y. TIMES (May 26, 2022), <https://www.nytimes.com/2022/05/20/world/americas/haiti-aristide-reparations-france.html>; Mario Joseph, Brian Concannon, & Irwin Stotzky, *France demanded crippling payments. Now Haiti has a legitimate claim for slavery reparations* | *Opinion*, MIAMI HERALD (Mar. 27, 2023), <https://www.miamiherald.com/opinion/op-ed/article273642735.html>; University of Miami School of Law, *Inter-American Law Review Symposium Haiti: Reparations & Restitution* (video) (Mar. 24, 2023), <https://echo360.org/media/df600a1f-2144-4ba5-a9b1-17f2b4694c5b/public>; *see also* ROBINSON, AN UNBROKEN AGONY, pp. 57-59 (describing the French foreign minister at the time sending a message to “democratically elected president [Aristide], that it was time for him to step down” one month after he had convened a conference of experts to “discuss Haiti’s restitution claim against France for repayment of the debt”); *id.* at 63 (“When the thugs who’d been collaborating with Haiti’s wealthy class finally entered Port-au-Prince in the days following the president’s mysterious disappearance, they destroyed first off the Museum of Restitution.”); *id.* at 254 (“In an early act of office, Latortue rescinded the application made the year before by the deposed democratic Haitian government for restitution from France.”).

<sup>188</sup> Democracy Now, *Ex-Ambassador Admits France & U.S. Orchestrated 2004 Coup in Haiti to Oust Aristide* (May 23, 2022),

[https://www.democracynow.org/2022/5/23/headlines/ex\\_ambassador\\_admits\\_france\\_us\\_orchestrated\\_2004\\_coup\\_in\\_haiti\\_to\\_oust\\_aristide](https://www.democracynow.org/2022/5/23/headlines/ex_ambassador_admits_france_us_orchestrated_2004_coup_in_haiti_to_oust_aristide); Yves Engler, *New York Times Admits Truth of Haitian Coup*, COUNTER PUNCH (June 2, 2022), <https://www.counterpunch.org/2022/06/02/new-york-times-admits-truth-of-haitian-coup/>; Constant Méheut et al., *supra* n. 187. The plane, flying out of Guantanamo Bay, Cuba with a false flight plan, and diverted from its usual activities of transferring prisoners – some to be tortured in the U.S.’ “war on terror” – deposited President Aristide and his wife in Bangui, Central African Republic, at an airport controlled by French troops.

<sup>189</sup> Ben Gutman, *A Brutal History of Foreign Meddling in Haiti is Responsible for its Ongoing Crises*, THE INTERNATIONAL AFFAIRS REVIEW, <https://www.iar-gwu.org/blog/iar-web/a-brutal-history> (last visited Sept. 11, 2023); ROBINSON, AN UNBROKEN AGONY, pp. 60, 145-46, 235; *id.* at 111 (“[T]he United States and the powerful

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Haitian insurrectionists . . . wished only to crush the reform-minded government of a democratically elected president, and, with him, all hope in the years ahead for constitutional democracy in Haiti . . . [The] ensuing hellish, bloody turmoil associated with its lawless interposition seemed . . . a fully intended outcome of the overall American strategy.”).

<sup>190</sup> See, e.g., Yves Engler, *Canada’s role in the ‘Core Group’ is weakening Haitian democracy*, CANADA DIMENSION (Oct. 21, 2021), <https://canadiandimension.com/articles/view/how-canadas-role-in-the-core-group-is-weakening-haitian-democracy>; Haiti Libre, *Haiti - FLASH: Ariel Henry Prime Minister of Haiti (official)* (July 20, 2021), <https://www.haitilibre.com/en/news-34274-haiti-flash-ariel-henry-prime-minister-of-haiti-official.html>; Jake Johnston, *Haiti’s Eroding Democracy*, JACOBIN (Feb. 13, 2017), <https://jacobin.com/2017/02/haiti-election-democracy-neoliberal-clinton-jovenel-moise-martelly-aristide-preval-duvalier/>; U.S. Department of State, Office of the Historian, *U.S. Invasion and Occupation of Haiti, 1915-1934*, <https://history.state.gov/milestones/1914-1920/haiti> (last visited Sept. 11, 2023); ROBINSON, AN UNBROKEN AGONY, pp. 18-19, 25, 48-49.

<sup>191</sup> See <http://www.ijdh.org/wp-content/uploads/2023/06/HRU-June-2023-FINAL.pdf>; ROBINSON, AN UNBROKEN AGONY, pp. 18-19. See generally RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (Penguin Books 2001) (2000) 183–89 (describing persisting patterns of extractive neocolonialism and policies perpetuating inequality directed at countries in Africa and the Caribbean that maintain subjugation and poverty for Black people); *id.* at 186-87 (“American policy, expressed bilaterally and multilaterally through institutions such as the IMF and the World Bank, is designed to keep Africa poor enough to supply [the United States] with cheap commodities and undemanding labor, viable enough to buy our manufactured exports, and unstable enough to provide a market for our guns.”).

<sup>192</sup> Institute for Justice and Democracy in Haiti, *Human Rights and the Rule of Law in Haiti: Key Recent Developments December 2022 through May 2023*, <http://www.ijdh.org/wp-content/uploads/2023/06/HRU-June-2023-FINAL.pdf> (last visited Sept. 11, 2023).

<sup>193</sup> HRC Concluding Observations, 2014, *supra* n. 97, at ¶ 4(a): “The Committee regrets that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee’s established jurisprudence, the jurisprudence of the International Court of Justice and State practice. The Committee further notes that the State party has only limited avenues to ensure that state and local governments respect and implement the Covenant, and that its provisions have been declared to be non-self-executing at the time of ratification. Taken together, these elements considerably limit the legal reach and practical relevance of the Covenant (art. 2).

The State party should:

(a) Interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extraterritorial application of the Covenant under certain circumstances, as outlined, *inter alia*, in the Committee’s general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant”

<sup>194</sup> *Id.* at ¶ 13: “While noting the measures taken to ensure compliance with the principle of non-refoulement in cases of extradition, expulsion, return and transfer of individuals to other countries, the Committee is concerned about the State party’s reliance on diplomatic assurances that do not provide sufficient safeguards. It is also concerned at the State party’s position that the principle of non-refoulement is not covered by the Covenant, despite the Committee’s established jurisprudence and subsequent State practice (arts. 6 and 7).

The State party should strictly apply the absolute prohibition against refoulement under articles 6 and 7 of the Covenant; continue exercising the utmost care in evaluating diplomatic assurances, and refrain from relying on such assurances where it is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries; and take appropriate remedial action when assurances are not fulfilled.”

<sup>195</sup> *Id.* at ¶ 15: “The Committee is concerned that under certain circumstances mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the Covenant. It is also concerned about the mandatory nature of the deportation of foreigners, without regard to elements such as the seriousness of crimes and misdemeanors committed, the length of lawful stay in the United States, health status, family ties and the fate of spouses and children staying behind, or the humanitarian situation in the country of destination. Finally, the Committee expresses concern about the exclusion of millions of undocumented immigrants and their children from coverage under the Affordable Care Act and the limited coverage of undocumented



immigrants and immigrants residing lawfully in the United States for less than five years by Medicare and Children Health Insurance, all resulting in difficulties for immigrants in accessing adequate health care (arts. 7, 9, 13, 17, 24 and 26).

The Committee recommends that the State party review its policies of mandatory detention and deportation of certain categories of immigrants in order to allow for individualized decisions; take measures to ensure that affected persons have access to legal representation; and identify ways to facilitate access to adequate health care, including reproductive health-care services, by undocumented immigrants and immigrants and their families who have been residing lawfully in the United States for less than five years.”

<sup>196</sup> *Id.* at ¶ 20: “The Committee is concerned about the continued practice of holding persons deprived of their liberty, including, under certain circumstances, juveniles and persons with mental disabilities, in prolonged solitary confinement and about detainees being held in solitary confinement in pretrial detention. The Committee is furthermore concerned about poor detention conditions in death-row facilities (arts. 7, 9, 10, 17 and 24).

The State party should monitor the conditions of detention in prisons, including private detention facilities, with a view to ensuring that persons deprived of their liberty are treated in accordance with the requirements of articles 7 and 10 of the Covenant and the Standard Minimum Rules for the Treatment of Prisoners. It should impose strict limits on the use of solitary confinement, both pretrial and following conviction, in the federal system as well as nationwide, and abolish the practice in respect of anyone under the age of 18 and prisoners with serious mental illness. It should also bring the detention conditions of prisoners on death row into line with international standards.”

<sup>197</sup> *Id.* at ¶ 11: “The Committee is concerned about the still high number of fatal shootings by certain police forces, including, for instance, in Chicago, and reports of excessive use of force by certain law enforcement officers, including the deadly use of tasers, which has a disparate impact on African Americans, and use of lethal force by Customs and Border Protection (CBP) officers at the United States-Mexico border (arts. 2, 6, 7 and 26).

The State Party should:

(a) Step up its efforts to prevent the excessive use of force by law enforcement officers by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;

(b) Ensure that the new CBP directive on the use of deadly force is applied and enforced in practice; and

(c) Improve reporting of violations involving the excessive use of force and ensure that reported cases of excessive use of force are effectively investigated; that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions; that investigations are re-opened when new evidence becomes available; and that victims or their families are provided with adequate compensation.”

<sup>198</sup> *Id.* at ¶ 12: “While noting that acts of torture may be prosecuted in a variety of ways at both the federal and state levels, the Committee is concerned about the lack of comprehensive legislation criminalizing all forms of torture, including mental torture, committed within the territory of the State party. The Committee is also concerned about the inability of torture victims to claim compensation from the State party and its officials due to the application of broad doctrines of legal privilege and immunity (arts. 2 and 7).

The State party should enact legislation to explicitly prohibit torture, including mental torture, wherever committed, and ensure that the law provides for penalties commensurate with the gravity of such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. The State party should ensure the availability of compensation to victims of torture.”

<sup>199</sup> CERD, *Situation of migrants, asylum seekers and refugees of Haitian origin in the Americas region* (Apr. 28, 2023), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FSWA%2F9755&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FSWA%2F9755&Lang=en).

<sup>200</sup> Felipe González Morales (Special Rapporteur on the human rights of migrants), *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, *supra* n. 74, at ¶ 107 (m).

<sup>201</sup> Human Rights Committee, *Concluding observations on the fourth periodic report of Panama*, UN Doc. CCPR/C/PAN/CO/4 (March 24, 2023), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FPAN%2FO%2F4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FPAN%2FO%2F4&Lang=en)

Recommendations include:

- Redouble efforts to prevent and combat all forms of violence against migrant women in the Darién Gap and provide adequate protection to victims; and, in this regard, is encouraged to implement the

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recommendations made in February 2022 by the Committee on the Elimination of Discrimination against Women. Para. 18 (e).

- Ensure that cases of violence against women, including against migrant women, are promptly and effectively investigated, that perpetrators are punished and that victims obtain comprehensive reparations, and have access to means of protection, including adequate shelters and counselling centers and to system. Para. 18 (b)
- Intensify its efforts to prevent, combat and punish trafficking in persons, and ensure that trafficking crimes are investigated, perpetrators prosecuted and punished, that victims are provided with comprehensive reparation and that they have access to adequate protection and assistance measures, including sufficient geographical coverage of shelters, particularly in border areas; and, in this regard, it is encouraged to implement the recommendations made in February 2022 by the Committee on the Elimination of Discrimination against Women; Para. 30 (a)
- Adopt the necessary protection measures to guarantee the life and safety of migrants who cross the Darién Gap and to effectively prevent and combat all forms of violence against these people; Para. 36 (a)
- Strengthen its efforts to investigate allegations of murders, disappearances, kidnappings, sexual violence, trafficking, assaults, robberies, intimidation and threats against migrants; prosecute and punish those responsible; and provide comprehensive reparation to victims and their families; Para. 36 (b)
- Fully respect the human rights of migrants housed in immigration reception stations, in particular the right not to be deprived of liberty, and guarantee them effective remedies against any violation of their rights; Para. 36 (c)
- Increase efforts to improve living conditions in migrant reception stations and ensure access to basic services; and, in this regard, the State party is encouraged to implement the recommendations made in February 2023 by the Committee on Economic, Social and Cultural Rights; Para. 36 (d)
- Guarantee in practice the protection of asylum seekers and refugees, in accordance with the Covenant and international standards, and strengthen the capacity of the National Office for the Care of Refugees, providing it with adequate financial and human resources, so that it can respond in a timely manner to requests for refuge. Para. 36 (e)

<sup>202</sup> See CEDAW, *Concluding observations on the eighth periodic report of Panama, UN Doc.*

CEDAW/C/PAN/CO/8, (February 24, 2022), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fPAN%2fCO%2f8&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fPAN%2fCO%2f8&Lang=en).

Recommendations include:

- Adopt an emergency plan to tackle and eliminate all forms of violence against migrant women in transit in the Darién Gap, based on a human rights approach to the crisis, ensuring victim-oriented and gender-sensitive policies and measures to address the situation, Para. 24 (a)
- Remove the requirement to file a complaint with the Office of the Public Prosecutor in order for women to have access to the National Institute for Women survivor assistance programmes, including shelters for victims of gender-based violence against women, Para. 24 (b)
- Reinforce cooperation and partnerships with the international community and civil society and women's organizations to ensure that migrant women have access to the State party's full range of services providing redress to survivors of gender-based violence against women, including in the areas of health care and psychosocial support, Para. 24 (c)
- Implement protection measures to guarantee the life and safety of women victims and witnesses of gender-based violence, including girls and family members, and increase the availability of shelters for high-risk victims of gender-based violence, allocating financial resources for them; Para. 24 (d)
- Guarantee access to justice for women in the border area of the Darién Gap regardless of their status, intensifying its efforts to investigate and punish the persons responsible for rape and other types of violence, and establish a mechanism within the criminal justice system to address complaints related to gender based-violence against migrant women in transit, ensuring recognition of protection measures for witnesses and survivors; Para. 24 (e)
- Collect data, disaggregated by sex, age and nationality, on women migrants and asylum seekers entering the State through the Darién Gap who have been victims of violence, including sexual violence, as well as information on the outcome of the investigation and prosecution of registered cases. Para. 24 (f)

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- Adopt measures to prevent and to provide specialized support to women victims of sexual violence in migrant reception stations, to improve referral systems of women and girl victims of trafficking to the appropriate social services, and to establish specialized shelters for women and girl victims of trafficking, including measures to guarantee the safety of women under protection. Para. 26 (f)

<sup>203</sup> See CESCR, *Concluding observations on the third periodic report of Panama*, UN Doc. E/C.12/PAN/CO/3 (March 31, 2023), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FPAN%2FCO%2F3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FPAN%2FCO%2F3&Lang=en).

Recommendations include:

- Increase reception capacity and continue to improve the living conditions of the migratory reception centres in Darién and Chiriquí, facilitating access to, inter alia, adequate food, drinking water, sanitation and hygiene, health services and access to education; Para. 43 (a)
- Design and implement a contingency plan, with a human rights approach, to respond comprehensively and comprehensively to the influx of migrants, refugees and asylum-seekers, ensuring access to fundamental rights and basic services in the border areas of Darién and Chiriquí, and integrating a gender approach and protection of all persons in vulnerable situations; Para. 43 (b)
- Take into account, in this regard, its Declaration on the Obligations of States with regard to Refugees and Migrants under the Covenant; Para. 43 (c)
- Take into account, in this regard, the recommendations of the Committee on the Elimination of Discrimination against Women, particularly with regard to gender-based violence against women in border areas. Para. 43 (d)