

# HUMAN RIGHTS IN TEXAS: ANALYZING OPERATION LONE STAR THROUGH A HUMAN RIGHTS FRAMEWORK

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*In 2021, Texas Governor Greg Abbott launched Operation Lone Star (OLS) under the guise of border security. For over three years, OLS has threatened the lives of migrants and U.S. citizens alike. While advocates have primarily challenged OLS under U.S. state and federal law, this Note examines arguments based on the U.S.'s international treaty obligations, particularly emphasizing the importance of enforcing international mechanisms of accountability. This Note analyzes OLS under three international law treaties the U.S. has ratified: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the Convention Against Torture. This Note then evaluates the international mechanisms through which these treaties can be enforced in the U.S.: the Committee on the Elimination of Racial Discrimination Committee, the Human Rights Committee, and the Committee Against Torture. By understanding the extent to which OLS violates minimum human rights standards under international law, advocates can bolster their efforts to end OLS and protect migrants and U.S. citizens from future violations of basic human rights.*

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## I. INTRODUCTION

On March 6, 2021, Texas Governor Greg Abbott launched Operation Lone Star (OLS).<sup>1</sup> Condemning the “failures” of the Biden administration’s “open border policies,” Governor Abbott sought to deploy state law enforcement officials to combat drug and human trafficking at the Texas border.<sup>2</sup> In May 2021, Governor Abbott, invoking the Texas Disaster Act of 1975, issued a proclamation that declared “the ongoing surge of individuals unlawfully crossing the Texas-Mexico border” a disaster in 34 Texas counties.<sup>3</sup> Under the proclamation, Governor Abbott authorized the state government and local counties to use “state and local law enforcement to

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1. Press Release, Office of the Texas Governor, Governor Abbott, DPS Launch “Operation Lone Star” to Address Crisis at Southern Border (Mar. 6, 2021), <https://gov.texas.gov/news/post/governor-abbott-dps-launch-operation-lone-star-to-address-crisis-at-southern-border>. This Note analyzes OLS as it stood in January 2024.

2. Press Release, Office of the Texas Governor, Governor Abbott Provides Update on State Response to Humanitarian Crisis at Southern Border (Mar. 9, 2021), <https://gov.texas.gov/news/post/governor-abbott-provides-update-on-state-response-to-humanitarian-crisis-at-southern-border>.

3. Gov. Greg Abbott, Proclamation by the Governor of the State of Texas 2–3 (May 31, 2021), [https://gov.texas.gov/uploads/files/press/DISASTER\\_border\\_security\\_IMAGE\\_05-31-2021.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf).

assist and protect Texans from criminal activity and property damage;”<sup>4</sup> empowered the Texas Division of Emergency Management to respond to the “disaster;”<sup>5</sup> and directed Texas Department of Public Safety (DPS) troopers to enforce certain criminal offenses against migrants, including criminal trespass,<sup>6</sup> which had the previous penalty of a maximum of 180 days automatically increased to up to one year in jail.<sup>7</sup>

As of January 2024, at least ten thousand DPS troopers, Texas National Guard members, and local sheriffs have been deployed to communities along the border between Texas and Mexico to enforce the Governor’s initiative.<sup>8</sup> Under OLS, state troopers and participating local law enforcement agencies arrest migrants using migration-related offenses under Texas law;<sup>9</sup> send buses with migrant passengers from Texas border cities to Washington, D.C., New York City, Chicago, Philadelphia, Denver, and Los Angeles;<sup>10</sup> conduct traffic stops that result in arrests under Texas state law for “smuggling of persons;”<sup>11</sup> and engage in high-speed vehicle pursuits that unnecessarily risk migrant and United States (U.S.) citizen lives.<sup>12</sup> Most recently, in December 2023, Governor Abbott signed into law Senate Bill 4, which makes unauthorized entrance into Texas from Mexico a state crime.<sup>13</sup>

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4. *Id.* at 3.

5. *Id.* at 2.

6. *Id.* at 3.

7. *See id.* (“[T]he [Texas] Legislature has . . . , in Section 12.50 of the Texas Penal Code, increased the punishments available for certain criminal offenses committed in an area for which a disaster has been declared, including for criminal trespass, burglary, and theft.”); Perla Trevizo & Lomi Kriel, *Fact-Checking Texas Leaders’ Claims About Operation Lone Star*, TEX. TRIB. (Apr. 27, 2022, 6:00 AM), <https://www.texastribune.org/2022/04/27/texas-operation-lone-star-greg-abbott-border/> (explaining how the May 31 proclamation “automatically increased penalties for trespassing to up to a year in jail”).

8. Sandra Sanchez, *10,000 National Guard and Texas Troopers Deployed to Border for ‘Operation Lone Star,’* KXAN (Nov. 22, 2023, 3:48 PM), <https://www.kxan.com/border-report/10000-national-guard-and-texas-state-troopers-deployed-to-border-for-operation-lone-star>.

9. Emily Hernandez, *What Is Operation Lone Star? Gov. Greg Abbott’s Controversial Border Mission, Explained*, TEX. TRIB. (Jan. 30, 2024, 7:26 PM), <https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained/>.

10. Press Release, Office of the Texas Governor, *Operation Lone Star Bolsters Historic Border Security Mission In 2023* (Dec. 29, 2023), <https://gov.texas.gov/news/post/operation-lone-star-bolsters-historic-border-security-mission-in-2023>.

11. Letter from ACLU et al. to Merrick Garland et al., *Operation Lone Star: Racial Profiling in Texas Department of Public Safety (DPS) Traffic Stops and High Death Toll from DPS Vehicle Pursuits 7–8* (July 28, 2022), [https://www.aclutx.org/sites/default/files/ols\\_traffic\\_stops\\_title\\_vi\\_complaint.pdf](https://www.aclutx.org/sites/default/files/ols_traffic_stops_title_vi_complaint.pdf) [hereinafter *ACLU 2022 Complaint*].

12. HUM. RTS. WATCH, “SO MUCH BLOOD ON THE GROUND”: DANGEROUS AND DEADLY VEHICLE PURSUITS UNDER TEXAS’ OPERATION LONE STAR (2023) [hereinafter *HRW REPORT ON VEHICLE PURSUITS*], <https://www.hrw.org/report/2023/11/27/so-much-blood-ground/dangerous-and-deadly-vehicle-pursuits-under-texas-operation>.

13. Uriel J. Garcia, *Gov. Greg Abbott Signs Bill Making Illegal Immigration a State Crime*, TEX.

Yet, since its implementation, OLS has shown no indication that it actually deters migrants from entering the U.S. without authorization or citizens from transporting unauthorized migrants.<sup>14</sup> Governor Abbott has repeatedly touted the success of OLS in immigration enforcement.<sup>15</sup> However, in an investigation published by ProPublica, the Texas Tribune, and the Marshall Project in March 2022, OLS' claims of success were found to be "based on shifting metrics that included crimes with no connection to the border, work conducted by troopers stationed in targeted counties prior to the operation, and arrest and drug seizure efforts that do not clearly distinguish DPS's role from that of other agencies."<sup>16</sup> Further, "[t]he area of the border most heavily targeted by [OLS] has seen the most rapid increases in illegal border crossings in the state since the operation began."<sup>17</sup> Although state troopers have arrested thousands of individuals under OLS, the arrests have often been unrelated to any imminent threat to border security, and many courts found that the arrests were discriminatory and thus invalid.<sup>18</sup>

Advocates are primarily challenging OLS in domestic courts under state and federal law.<sup>19</sup> Within a few months of the start of OLS, defense attorneys challenged migrants' arrests under the OLS trespass arrest program as violations of state law and constitutional due process rights after arrested migrants were not assigned an attorney in a timely manner and were not released from jail after prosecutors failed to file charges quickly.<sup>20</sup> In December 2021, the ACLU of Texas, the Texas Civil Rights Project, and the Texas Fair Defense Project "jointly filed a Title VI discrimination complaint with the U.S. Department of Justice (DOJ) urging a formal investigation of

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TRIB. (Dec. 18, 2023, 6:00 PM), <https://www.texastribune.org/2023/12/18/texas-governor-abbott-bills-border-wall-illegal-entry-crime-sb3-sb4/>.

14. See Elizabeth Findell, *Texas Spent Billions on Border Security. It's Not Working.*, WALL ST. J. (July 21, 2023, 7:00 AM), <https://www.wsj.com/articles/texas-billion-dollar-border-security-migration-isn-t-paying-off-16ed598d> (questioning the efficacy of OLS); Lomi Kriel & Perla Trevizo, *Gov. Greg Abbott Brags About His Border Initiative. The Evidence Doesn't Back Him Up*, TEX. TRIB. (Mar. 21, 2022), <https://www.texastribune.org/2022/03/21/operation-lone-star-lacks-clear-metrics-measure-accomplishments/> (discussing an investigation by ProPublica, The Texas Tribune, and The Marshall Project that analyzed OLS's claims of success).

15. See Trevizo & Kriel, *supra* note 7 (recounting instances where Governor Abbott has lauded the success of OLS in fentanyl seizures, apprehending unauthorized migrants, and encounters with cartels and violent gangs).

16. Kriel & Trevizo, *supra* note 14.

17. Findell, *supra* note 14.

18. *Id.*

19. See, e.g., Jolie McCullough, *Migrants Arrested by Texas in Border Crackdown Are Being Imprisoned for Weeks Without Legal Help or Formal Charges*, TEX. TRIB. (Sept. 27, 2021, 6:00 AM), <https://www.texastribune.org/2021/09/27/texas-border-migrants-jail/> (discussing challenges to OLS on state constitutional due process grounds).

20. *Id.*

Texas' [OLS] migrant arrest program."<sup>21</sup> In August 2023, the ACLU of Texas and other advocates filed lawsuits against Texas state and county officials for detaining four migrants for 13 to 42 days after their charges for misdemeanor state criminal trespass were dropped or they had fully served their sentences.<sup>22</sup>

Advocates have also sounded alarms regarding the international human rights violations occurring under OLS.<sup>23</sup> For instance, the Human Rights Watch (HRW) has repeatedly called for an end to OLS as a violation of human rights.<sup>24</sup> In November 2023, HRW published a detailed report on the high-speed vehicle pursuits that have killed and endangered the lives of migrants and U.S. citizens.<sup>25</sup> On February 9, 2023, Bob Libal, a consultant for HRW, provided written testimony to the Texas Senate Finance Committee, requesting the Committee deny funding to OLS and significantly cut existing funding.<sup>26</sup> In his testimony, Libal details the deaths and physical injuries that resulted under OLS, arguing that OLS is racially discriminatory, violates the right to liberty, and impedes freedom of association and expression.<sup>27</sup>

This Note argues that, beyond state and federal law, advocates' strategic resistance to OLS may also benefit from arguments based on the U.S.'s international treaty obligations, particularly emphasizing the importance of enforcing international mechanisms of accountability. Following this Introduction, Part II of this Note provides an overview of OLS's operation since its inception in 2021. Part III covers the international human rights legal framework applicable to OLS. This discussion will focus on three international law treaties the U.S. has ratified: the International Convention on the Elimination of All Forms of Racial Discrimination, the International

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21. *Texas Migrant Arrest Program Under 'Operation Lone Star,'* ACLU OF TEX. (Dec. 15, 2021), <https://www.aclutx.org/en/cases/texas-migrant-arrest-program-under-operation-lone-star>.

22. Press Release, ACLU of Tex., Texas Fair Defense Project File Lawsuit for Civil Rights Abuses of Immigrants Arrested under Operation Lone Star (Aug. 21, 2023), <https://www.aclutx.org/en/press-releases/aclu-texas-texas-fair-defense-project-file-lawsuit-civil-rights-abuses-immigrants>.

23. See, e.g., *Appropriations for the Biennium Regarding Article V: Public Safety and Criminal Justice: Hearing before the Texas State Legislature Senate Finance Committee*, 2023 Leg., 88th Sess. (Tex. 2023) [Hereinafter *Hearing on Appropriations for the Biennium Regarding Article V*] (statement of Bob Libal, Consultant, Human Rights Watch), [https://www.hrw.org/sites/default/files/media\\_2023/02/HRW%20OLS%20Written%20Testimony%20-%20Bob%20Libal.pdf](https://www.hrw.org/sites/default/files/media_2023/02/HRW%20OLS%20Written%20Testimony%20-%20Bob%20Libal.pdf).

24. See, e.g., *US: Texas Officials Put Migrants in Danger*, HUM. RTS. WATCH (Jan. 30, 2024, 8:36 PM), <https://www.hrw.org/news/2023/07/20/us-texas-officials-put-migrants-danger>; *US: Extreme Anti-Immigrant Proposals in Texas*, HUM. RTS. WATCH (Jan. 30, 2024, 8:38 PM), <https://www.hrw.org/news/2023/10/06/us-extreme-anti-immigrant-proposals-texas>.

25. HRW REPORT ON VEHICLE PURSUITS, *supra* note 12.

26. *Hearing on Appropriations for the Biennium Regarding Article V*, *supra* note 23.

27. *Id.*

Covenant on Civil and Political Rights, and the Convention Against Torture. Finally, Part IV will evaluate the international mechanisms through which these treaties can be enforced in the U.S.: the Committee on the Elimination of Racial Discrimination Committee, the Human Rights Committee, and the Committee Against Torture.

## II. AN OVERVIEW OF OPERATION LONE STAR

Since 2005, Texas Governor Rick Perry and his successor, Governor Abbott, have regularly deployed state police to the border for what DPS terms “border security operations.”<sup>28</sup> First, there was Operation Linebacker in 2005.<sup>29</sup> Governor Perry claimed that his initiative to deploy state law enforcement was designed to combat terrorist groups that were seeking to infiltrate the U.S.-Mexico border, although he failed to cite any evidence supporting this claim.<sup>30</sup> Operation Rio Grande succeeded Operation Linebacker in 2006.<sup>31</sup> This was followed by Operations Wrangler<sup>32</sup> and Border Star in 2007,<sup>33</sup> Operation Drawbridge in 2012, Operations Strong Safety and Strong Safety II in 2013 and 2014, and Operation Secure Texas in 2015.<sup>34</sup>

The most recent iteration of state border security policy is OLS. Governor Abbott incorporated parts of older campaigns into OLS,<sup>35</sup> but

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28. See Findell, *supra* note 14. Oftentimes, these pronouncements would “coincide[] with [Governors Perry and Abbott’s] gubernatorial campaigns or times when they were considering bids for high office.” Lomi Kriel & Perla Trevizo, *Texas Has Spent Billions of Dollars on Border Security. But What Taxpayers Got in Return is a Mystery*, TEX. TRIB. (Apr. 18, 2022), <https://www.texastribune.org/2022/04/18/texas-border-security-spending/>.

29. Kriel & Trevizo, *supra* note 28.

30. *Id.*

31. *Id.* See also Elizabeth Pierson, *Opponents Knock Perry’s Border Security Plan*, BROWNSVILLE HERALD (Sept. 10, 2006), [https://www.documentcloud.org/documents/21474656-opponents\\_knock\\_perrys\\_border\\_security\\_plan\\_brownsville\\_herald\\_the\\_tx\\_september\\_10\\_2006](https://www.documentcloud.org/documents/21474656-opponents_knock_perrys_border_security_plan_brownsville_herald_the_tx_september_10_2006).

32. Kriel & Trevizo, *supra* note 28.

33. *Id.* See also LAURA MARTIN & REBECCA BERNHARDT, ACLU OF TEX., OPERATION BORDER STAR: WASTED MILLIONS AND MISSED OPPORTUNITIES (2009), [https://www.aclutx.org/sites/default/files/field\\_documents/2009OperationBorderStarReport.pdf](https://www.aclutx.org/sites/default/files/field_documents/2009OperationBorderStarReport.pdf) (analyzing the efficacy and impact of Operation Border Star on migration to Texas).

34. Kriel & Trevizo, *supra* note 28.

35. See OPERATION STRONG SAFETY: REPORT TO THE 84TH TEXAS LEGISLATURE AND OFFICE OF THE GOVERNOR 18 (2005), <https://www.dps.texas.gov/sites/default/files/documents/publicinformation/documents/operationstrongsafetyrpt20150201.pdf> (noting that under Operation Strong Safety, DPS officers conducted traffic stops within the Rio Grande Valley as part of their ground operations). See also BORDER NETWORK FOR HUM. RTS, RACE, TRAFFIC STOPS, & ENSURING PUBLIC SAFETY FOR A CHANGING TEXAS: A REVIEW OF WHITE VS. HISPANIC DISPARITIES IN TEXAS DPS TRAFFIC STOPS, 2009-2014, at 9 (Apr. 2016), <http://bnhr.org/wp-content/uploads/2016/04/DPS-Report.pdf> (reviewing DPS traffic stop data from 2009 to 2014).

some aspects are “entirely new,” such as the use of state criminal trespass law to arrest migrants at the border.<sup>36</sup> This Part details four facets of OLS: (1) Governor Abbott’s renewal of disaster declarations to justify OLS, (2) the deployment of physically harmful practices to deter migrants at the border, (3) the arrests and jailing of migrants under the guise of state criminal trespass law, traffic stops, and high-speed vehicle pursuits, and (4) the state’s investigation of civil society groups that provide legal services to migrants.

#### A. Renewing Disaster Declarations

Shortly after launching OLS, on May 31, 2021, Governor Abbott declared a state of disaster in Texas, asserting that the federal government’s inaction regarding immigration led to a “dramatic increase in the number of individuals unlawfully crossing the international border.”<sup>37</sup> Under Texas Government Code Ch. 418, “[t]he governor by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent.”<sup>38</sup> Invoking the Texas Disaster Act of 1975,<sup>39</sup> Governor Abbott’s disaster declaration presented OLS as a solution to the purported disaster that would “deter[] illegal border crossings.”<sup>40</sup> As justification for this declaration, Governor Abbott cited “escalating border crossings;” “numerous reports of farmers, ranchers, and other Texans suffering property damage as a result of the increase in unlawful crossings;” and increased human and drug trafficking statistics under the Biden administration.<sup>41</sup> Every month since the initial declaration, Governor Abbott has renewed a monthly “disaster” declaration.<sup>42</sup> Using his gubernatorial powers, Governor Abbott designates certain counties along the border—such as El Paso, Medina, and Uvalde<sup>43</sup>—under a threat of disaster.<sup>44</sup> In his original declaration, Governor Abbott

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36. Greg Abbott (@GregAbbott\_TX), TWITTER (X) (July 16, 2021, 3:46 PM), [https://twitter.com/GregAbbott\\_TX/status/1416137109602250764](https://twitter.com/GregAbbott_TX/status/1416137109602250764) (sharing a Fox News interview in which he describes the OLS “booking system” as “entirely new”).

37. Abbott, *supra* note 3, at 1–2.

38. TEX. GOV’T CODE § 418.014(a).

39. Abbott, *supra* note 37, at 3.

40. *Id.*

41. *Id.*

42. *E.g.*, Press Release, Office of the Texas Governor, Governor Abbott Renews Border Disaster Declaration in December 2023 (Dec. 20, 2023), <https://gov.texas.gov/news/post/governor-abbott-renews-border-disaster-declaration-in-december-2023>. *See* Tex. Exec. Order GA-37 (funding a border wall and barring ground transport of migrants who were previously detained or subject to expulsion from the U.S., including recently arrived asylum seekers).

43. Press Release (Dec. 20, 2023), *supra* note 42.

44. *Id.*

enumerated 34 counties under such a threat;<sup>45</sup> in December 2023, he included 58 counties.<sup>46</sup> In 2021, Texas counties themselves, even counties hundreds of miles from the border, followed in Governor Abbott's footsteps and issued their own local disaster declarations, citing the threats of human trafficking on the border and migrants crossing the border and spreading COVID-19.<sup>47</sup> However, some counties stood against Governor Abbott and refused to sign local disaster declarations.<sup>48</sup>

Critics have questioned the legality of Governor Abbott's disaster declarations.<sup>49</sup> David Donatti, an attorney for the American Civil Liberties Union (ACLU) of Texas, claims that "[t]he Texas disaster declaration legally cannot justify the State's deadly deployment on the Rio Grande, which is a river that supports two countries and has sustained life in our communities for millennia."<sup>50</sup> Further, in a lawsuit filed by a Texas kayaking company against Governor Abbott, the plaintiffs argue that "Governor Abbott misapplied the Disaster Act to implement OLS" under the plain reading of the statute.<sup>51</sup> Despite these challenges, Governor Abbott continues to renew the disaster declarations.

#### B. Deploying Dangerous and Deadly Tools and Practices to Deter Migrants at the Border

Under the umbrella policy of OLS, Governor Abbott has deployed a range of tools and practices designed to deter migrants from crossing the Texas border.<sup>52</sup> In September 2021, Texas lawmakers approved a nearly

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45. Gov. Greg Abbott, Proclamation by the Governor of the State of Texas 3 (May 31, 2023), <https://gov.texas.gov/news/post/governor-abbott-renews-border-disaster-declaration-in-december-2023>.

46. Press Release (Dec. 20, 2023), *supra* note 42.

47. See Pablo De La Rosa, *On the Texas-Mexico Border, Gov. Abbott's Disaster Declaration Rings Political*, TEX. PUB. RADIO (Feb. 1, 2024, 5:00 PM), <https://www.tpr.org/border-immigration/2021-06-04/abbott-border-disaster-declaration-election-politics> (explaining how leaders in border communities responded quickly to Governor Abbott's declaration and issued their own local disaster declarations over unauthorized migrants crossing into the state).

48. Sandra Sanchez, *Governor Removes 11 Texas Counties from Border Disaster Declaration*, BORDER REP. (June 28, 2021, 9:19 PM), <https://www.borderreport.com/immigration/governor-removes-11-texas-counties-from-border-disaster-declaration/>.

49. See generally Suzanne Cordeiro, *Greg Abbott's Disaster Declaration Against Migrants Raises Questions*, NEWSWEEK (July 24, 2023, 8:55 AM), <https://www.newsweek.com/greg-abbott-disaster-declaration-migrants-raises-questions-1814816> (revealing, among other comments, that the definition of "disaster" was not meant to include "unlawful immigration").

50. *Id.*

51. Complaint at 6, *Epi's Canoe & Kayak Team, LLC & Fuentes v. Texas et al.*, 1:230-cv-00836 (2023).

52. See, e.g., Gov. Greg Abbott, Governor Abbott Announces Border Wall Construction Strategy (June 16, 2021), [https://gov.texas.gov/uploads/files/press/DISASTER\\_border\\_security\\_IMAGE\\_05-31-](https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-)

two-billion-dollar budget to bolster border security as requested by Abbott.<sup>53</sup> \$750 million was allocated towards a state-funded border wall,<sup>54</sup> and as of December 8, 2023, private donors have contributed more than \$55 million for the wall.<sup>55</sup> Using these funds, Governor Abbott has constructed barriers along the Texas-Mexico and New Mexico-Texas borders.<sup>56</sup> In 2023, Governor Abbott deployed Texas National Guard members and DPS troopers to install 18 miles of concertina wire along the Rio Grande in El Paso and deployed military vehicles and boat blockades along the Rio Grande.<sup>57</sup> On January 22, 2024, the U.S. Supreme Court granted the Department of Homeland Security's emergency application to vacate the injunction pending appeal,<sup>58</sup> thereby allowing the U.S. Border Patrol to cut or remove the concertina wire along the Rio Grande.

In July 2023, Governor Abbott ordered the deployment of a 1,000-foot buoy barrier in the middle of the Rio Grande.<sup>59</sup> Concrete blocks weigh down interlocking four-foot orange buoys, which are supported by a submerged mesh nest.<sup>60</sup> On December 1, 2023, two of three judges on a panel for the U.S. Court of Appeals for the Fifth Circuit ordered Texas to remove the barrier as a violation of the federal Rivers and Harbors Appropriation Act of 1899.<sup>61</sup> However, as of January 2024, the Fifth Circuit granted an en banc

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2021.pdf (Governor Abbott announcing his plans for a wall at the Texas border); Press Release, Office of the Texas Governor, Gov. Greg Abbott, Operation Lone Star Boosts Border Response with New Marine Barriers (July 14, 2023), <https://gov.texas.gov/news/post/operation-lone-star-boosts-border-response-with-new-marine-barriers> (discussing efforts to deploy razor wire and buoys along and in the Rio Grande River as part of OLS).

53. Jasper Scherer, *Texas Lawmakers Approve \$1.8B for Border Security Requested by Abbott*, HOUS. CHRON. (Sept. 1, 2021, 8:38 PM), <https://www.houstonchronicle.com/politics/texas/article/Texas-lawmakers-approve-1-8B-for-border-security-16429380.php>; Olatunji Osho-Williams, *Timeline: Tracking Gov. Abbott's Texas Border Policy from His First Term to Operation Lone Star*, HOUS. CHRON. (Aug. 8, 2023, 2:00 PM), <https://www.houstonchronicle.com/projects/timeline/abbott-texas-border-policy-lone-star/>.

54. Hernandez, *supra* note 9.

55. *Operation Lone Star*, OFF. OF THE TEX. GOVERNOR, <https://gov.texas.gov/operationlonestar> (last visited Dec. 1, 2023).

56. See Uriel J. Garcia, *Texas Strings Concertina Wire Along New Mexico Border to Deter Migrants*, TEX. TRIB. (Oct. 17, 2023, 6:00 PM), <https://www.texastribune.org/2023/10/17/texas-border-new-mexico-concertina-wire-abbott/> (quoting Governor Abbott as stating that “not only are we building border barriers between the border of Texas and Mexico, we’re also having now to build border barriers between Texas and New Mexico”).

57. *Id.*

58. *Dep’t of Homeland Sec. v. Tex.*, No. 23A607, 2024 WL 222180 (U.S. Jan. 22, 2024).

59. *U.S. v. Abbott*, 87 F.4th 616, 620 (5th Cir. 2023), *vacated*, No. 23-50632, 2024 WL 174374 (5th Cir. 2024).

60. *Id.*

61. *Id.*

rehearing, allowing the buoys to stay in place until it reaches a decision.<sup>62</sup>

Further, in July 2023, a DPS trooper-medic, Nicholas Wingate, reported several covert DPS practices and unreported incidents to two independent newspapers.<sup>63</sup> Wingate shared several months' worth of email exchanges with his supervisors that contained reports of "inhumane" practices.<sup>64</sup> His emails describe migrants injured by barbed wire in Eagle Pass, a Texas city along the U.S. border with Mexico.<sup>65</sup> He reports a four-year-old girl passing out from heat exhaustion after attempting to pass through barbed wire fences,<sup>66</sup> subsequently forced by the Texas National Guard to return to Mexico without water or medical care.<sup>67</sup> That same day, a pregnant woman had a miscarriage as a result of being caught in the wire.<sup>68</sup> One teenager broke his leg trying to avoid the wire.<sup>69</sup> In another recent incident, border patrol agents witnessed a mother and her two children struggle to cross the Rio Grande into the U.S.<sup>70</sup> The agents extracted the mother and one child from the water, and the two were later pronounced dead at a hospital.<sup>71</sup> Wingate said the second child was never found.<sup>72</sup>

Finally, Wingate's emails reference an incident involving 120 people, including small children and infants, who were caught along a fence on the river.<sup>73</sup> The commanding officer ordered state troopers to "push the people back into the water to go to Mexico."<sup>74</sup> The troopers themselves struggled to follow these orders and some ultimately refused to do so, expressing concern

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62. U.S. v. Abbott, No. 23-50632, 2024 WL 174374 (5th Cir. 2024).

63. Gloria Oladipo et al., *Texas Trooper Says They Were Told to Push Children into Rio Grande and Deny Migrants Water*, THE GUARDIAN (July 18, 2023, 8:38 PM), <https://www.theguardian.com/us-news/2023/jul/18/texas-troopers-inhumane-migrants-greg-abbott-border-initiative>. See also Benjamin Wermund, *Read Texas DPS Medic's Full Email to Superiors on 'Inhumane' Treatment of People Crossing Rio Grande*, HOUS. CHRON. (July 19, 2023, 11:55 AM), <https://www.houstonchronicle.com/news/houston-texas/article/texas-department-public-safety-calls-treatment-18207289.php> (providing Wingate's full email to his supervisors). As of October 1, 2023, Wingate is still employed by DPS. See *Government Salaries Explorer*, TEX. TRIB., <https://salaries.texastribune.org/employees/nicholas-w-wingate-1000404/> (providing Wingate's DPS salary as of October 1, 2023).

64. Oladipo et al., *supra* note 63.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

for the physical well-being of the migrants crossing the border.<sup>75</sup> The troopers were worried, and for good cause, that migrants would drown in the river.<sup>76</sup>

Following media reporting on Wingate's emails, Governor Abbott denied that any such directives were given under OLS;<sup>77</sup> however, contemporary media reports corroborate Wingate's account.<sup>78</sup> On June 20, 2023, reporters from Hearst Newspapers "witnessed state troopers [in Eagle Pass] help some migrants while denying others water or assistance."<sup>79</sup> Troopers denied migrants a path through the razor wire and "directed them instead miles downstream, through deeper and more turbulent waters where the wire is laid so close to the banks that they can't continue on land."<sup>80</sup> Further, troopers refused to give several migrants water, "even though cases of bottled water were kept at many of the military-like outposts along the river."<sup>81</sup> Two pregnant migrant women from Honduras and El Salvador also reported that Texas National Guard members refused their requests for water in July 2023.<sup>82</sup> A DPS spokesperson told reporters that DPS state troopers are "told to use their judgment and discretion when deciding to distribute drinking water."<sup>83</sup> The spokesperson further explained, "[DPS troopers] can't just keep handing out water because what's going to happen is, you're going to continue to encourage them to come."<sup>84</sup> Thus, through his explicit policies and covert practices, Governor Abbott seeks to send a message to all migrants who attempt to cross the border: those who seek to cross the border do so at the risk of death.

### C. Using State Criminal Law, Traffic Stops, and Vehicle Pursuits to Arrest

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75. *See id.* (noting that troopers "refused their supervisors' orders given 'the very real potential of exhausted people drowning'").

76. *Id.*

77. Press Release, Office of the Texas Governor, Operation Lone Star Statement on Orders Addressing Illegal Crossings (July 18, 2023), <https://gov.texas.gov/news/post/operation-lone-star-statement-on-orders-addressing-illegal-crossings>.

78. *See* Adam Isacson, *Weekly U.S.-Mexico Border Update: Asylum Rule Struck Down, Mexico Record Migration, Texas Updates*, WOLA (July 28, 2023), <https://www.wola.org/2023/07/weekly-u-s-mexico-border-update-asylum-rule-struck-down-mexico-record-migration-texas-updates/>.

79. Benjamin Wermund & Jhair Romero, "Operation Lone Star 2.0": Abbott's Harsh New Border Tactics Are Upending a Small Texas City, *HOUS. CHRON.* (July 24, 2023, 1:44 PM), <https://www.houstonchronicle.com/politics/texas/article/eagle-pass-abbott-border-18210479.php>.

80. *Id.*

81. *Id.*

82. Rosa Flores & Sara Weisfeldt, *Two Pregnant Migrants Claim Texas National Guard Soldiers Denied Them Water*, *CNN* (July 21, 2023, 12:24 AM), <https://edition.cnn.com/2023/07/21/us/pregnant-migrants-denied-water-texas>.

83. Wermund & Romero, *supra* note 79.

84. *Id.*

## and Jail Migrants

OLS promulgates three modes of apprehending and arresting migrants: conducting traffic stops,<sup>85</sup> engaging in vehicle pursuits,<sup>86</sup> and using state criminal laws to arrest migrants for smuggling and for trespassing.<sup>87</sup>

### 1. Using Traffic Stops and Vehicle Pursuits to Target Migrants

DPS officers conduct traffic stops in border communities to facilitate arrests.<sup>88</sup> During past “border security operations,” officers increasingly stopped migrants’ vehicles for minor traffic violations, particularly in the Rio Grande Valley.<sup>89</sup> Specifically, DPS searched Latinx individuals at a higher rate than white individuals, especially in border communities with large deployments of DPS officers.<sup>90</sup> Further, DPS officers conducted a greater proportion of consent searches on Latinx individuals than on white individuals.<sup>91</sup> Additionally, DPS officers, when searching Latinx individuals, did not discover contraband 71% of the time, a higher rate of innocence than that for white individuals.<sup>92</sup> Compared to Texas’ overall rates of consent searches and searches resulting in contraband, DPS’ consent search rates of Latinx individuals were higher, and its contraband hit rates of Latinx individuals were far lower.<sup>93</sup>

Arrest affidavits by DPS officers from traffic stops indicate that the officers often engage in racial profiling by relying on an individual’s “perceived Latinx ethnicity . . . to justify reasonable suspicion for further investigation or probable cause for arrest.”<sup>94</sup> In an analysis of 18 traffic stops, the ACLU of Texas reported that four of the resulting affidavits cited solely

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85. *See, e.g.*, Press Release, Office of the Texas Governor, Operation Lone Star Stops Drug Smuggling Across Biden’s Open Border (Dec. 1, 2023) <https://gov.texas.gov/news/post/operation-lone-star-stops-drug-smuggling-across-bidens-open-border> (reporting a DPS trooper attempting to arrest a driver in Webb County after a traffic stop).

86. *See, e.g., id.* (reporting DPS troopers engaging in a high-speed vehicle pursuit of a driver suspected of smuggling of persons in Kinney County).

87. Press Release, Office of the Texas Governor, Operation Lone Star Cracks Down on Criminal Trespassing (July 30, 2023), <https://gov.texas.gov/news/post/operation-lone-star-cracks-down-on-criminal-trespassing>.

88. *See* ACLU 2022 Complaint, *supra* note 11, at 1.

89. *Id.* at 4.

90. ALEX DEL CARMEN, ET AL., ADDITIONAL ANALYSIS OF STATE OF TEXAS 2021 RACIAL PROFILING DATA: HISPANIC DATA ANALYSIS REPORT 18 (June 14, 2022), <https://www.tarleton.edu/ipac2/wp-content/uploads/sites/350/2022/12/IPAC2021AnnualReportHispanicFindings.pdf>.

91. DPS asked for and was granted consent to search by 32.1% of Latinx drivers, in comparison to 19.5% of white drivers. *Id.* at 17.

92. *Id.*

93. *Id.*

94. ACLU 2022 Complaint, *supra* note 11, at 8.

to passenger ethnicity as a reason to prolong the stop.<sup>95</sup> In analyzing 2021 DPS traffic stop data, Tarleton State University researchers concluded that there is “a reasonable probability that racial profiling is a significant contributor to the disparity” between stop outcomes for Latinx and white individuals.<sup>96</sup>

Traffic stops may also be accompanied by DPS vehicle pursuits.<sup>97</sup> High-speed vehicle pursuits under OLS have led to the injuries and deaths of dozens of migrants and U.S. citizens.<sup>98</sup> Under OLS, DPS troopers engage in high-speed chases in OLS counties to arrest migrants and U.S. citizens suspected of transporting unauthorized migrants.<sup>99</sup> DPS troopers may engage in these pursuits when they suspect a vehicle of transporting unauthorized migrants, even without a particular rationale, and the driver evades an attempted stop.<sup>100</sup> HRW found that “between the start of OLS in March 2021 and July 2023, at least 74 people were killed and another 189 injured as the result of 49 pursuits by Texas troopers or local law enforcement, or both, in [OLS] counties.”<sup>101</sup> HRW also reported that young people are often the victims of these pursuits, either as drivers or passengers.<sup>102</sup> Further, DPS high-speed vehicle pursuits run contrary to CBP policy.<sup>103</sup> CBP has the authority to pursue vehicles, but its policy enforces a higher standard to decide when a vehicle should be pursued and when the pursuit should end.<sup>104</sup>

## 2. Leveraging State Criminal Law to Unlawfully Detain Migrants

As a more widely used tactic, OLS deploys DPS troopers and National Guard troops to the border to detain migrants under state criminal law, typically by charging migrants with state misdemeanor criminal trespass or

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95. *Id.* at 9.

96. DEL CARMEN ET AL., *supra* note 90, at 18.

97. *See* HRW REPORT ON VEHICLE PURSUITS, *supra* note 12 (“Though it is unclear how many . . . traffic stops [under OLS] led to high-speed pursuits, the records reviewed by Human Rights Watch indicate at least six pursuits have led to [eight] fatalities and 11 injuries in Kinney County since [OLS] began, two of them with assistance from local sheriff’s deputies.”).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* Press Release, U.S. Customs and Border Protection, CBP Updates Emergency Driving and Vehicular Pursuits Directive (Jan. 11, 2023), <https://www.cbp.gov/newsroom/national-media-release/cbp-updates-emergency-driving-and-vehicular-pursuits-directive> (putting officers at risk is contrary to the CBP’s self-proclaimed value that “[t]he safety of officers, agents, and the public are paramount as we carry out our mission”).

104. *Id.*

state felony smuggling charges.<sup>105</sup> Under Texas Penal Code Section 20.05, individuals may be prosecuted for the smuggling of persons as a third-degree felony.<sup>106</sup> More often, however, migrants are charged with the misdemeanor of criminal trespass.<sup>107</sup> Under Texas Penal Code Section 30.05, “[a] person commits an offense if the person enters or remains on or in property of another, including residential land, agricultural land, a recreational vehicle park . . . without effective consent and the person (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so.”<sup>108</sup>

In analyzing Governor Abbott’s public statements, the ACLU of Texas found that the clear intent behind the OLS migrant trespass arrest program is to target and arrest recently arrived migrants using state criminal trespass law.<sup>109</sup> Governor Abbott has explicitly stated that OLS’s goal is to deter migrants from crossing the border by jailing them in South Texas.<sup>110</sup> To this end, he has created an entirely new criminal system to “catch and jail” migrants crossing the border, including a new booking system and separate judges and magistrates.<sup>111</sup> Governor Abbott has further claimed that OLS is designed to “put [migrants] behind bars, not catch [and] release.”<sup>112</sup>

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105. HRW REPORT ON VEHICLE PURSUITS, *supra* note 12.

106. Smuggling of persons under Texas law includes, among other acts, “knowingly . . . us[ing] a motor vehicle . . . to transport an individual with the intent to . . . conceal the individual from a peace officer or special investigator” and “knowingly . . . encourag[ing] or induc[ing] a person to enter or remain in this country in violation of federal law by concealing, harboring, or shielding that person from detection.” TEX. PENAL CODE § 20.05(a)(1)(A), (a)(2).

107. Jolie McCullough, *Texas’ Border Operation Is Meant to Stop Cartels and Smugglers. More Often, It Arrests Migrants for Misdemeanor Trespassing*, TEX. TRIB. (Apr. 4, 2022), <https://www.texastribune.org/2022/04/04/texas-border-operation-imprisons-thousands-accused-only-of-trespassing/>.

108. TEX. PENAL CODE § 30.05.

109. Letter from ACLU et al. to Merrick Garland et al., *Texas Migrant Arrest Program Under “Operation Lone Star”—Urgent Need for Investigation into Race and National Origin Discrimination by Texas Agencies* 13 (Dec. 15, 2021), [https://www.aclutx.org/sites/default/files/field\\_documents/ols\\_trespass\\_arrest\\_title\\_vi\\_complaint.pdf](https://www.aclutx.org/sites/default/files/field_documents/ols_trespass_arrest_title_vi_complaint.pdf) [hereinafter *ACLU 2021 Complaint*].

110. Greg Abbott (@GregAbbott\_TX), TWITTER (X) (Sept. 28, 2021, 10:51 AM), [https://twitter.com/GregAbbott\\_TX/status/1442879549692338191](https://twitter.com/GregAbbott_TX/status/1442879549692338191) (sharing an interview in which he says, “[W]hat we have done is we actually created additional jail cells and we created a court system down in South Texas. We are arresting people coming across the border illegally, and we are jailing them in jails in the state of Texas, sending the message that if they come across the border in the state of Texas, they’re not going to be caught and released like under the Biden administration, they’re going to be spending time behind bars.”).

111. Greg Abbott (@GregAbbott\_TX), TWITTER (X) (July 25, 2021, 1:50 PM), [https://twitter.com/GregAbbott\\_TX/status/1419369434414731266](https://twitter.com/GregAbbott_TX/status/1419369434414731266) (sharing a Fox News interview in which he says, “The Texas plan is ‘to catch and to jail.’ . . . We actually had to set up an entirely new booking system, we had to get judges involved in the process, magistrates too.”).

112. Greg Abbott (@GregAbbott\_TX), TWITTER (X) (Oct. 14, 2021, 1:30 PM),

The ACLU of Texas has also found that DPS officials have similarly made public statements indicating that the intent behind the trespass arrest program is to deter migrants, even asylum seekers, from crossing the border multiple times.<sup>113</sup> Although detainees may assume they will be processed by U.S. Border Patrol, returned to Mexico, and then free to attempt to cross the border again, DPS prioritizes state arrests.<sup>114</sup> “An email from a DPS official . . . recorded the agency’s policy of ‘arresting . . . in Val Verde County for Criminal Trespass . . . only . . . adult males not traveling as family units.’”<sup>115</sup> Another DPS official said that when migrants hear that they are under arrest, “their demeanor changes. They’re not expecting that. So the message is getting across. They know that now it’s a lot more challenging for them to get across because they will be arrested if they do encounter DPS.”<sup>116</sup> Arresting and jailing migrants for trespass is thus designed to deter migrants from crossing the border again, even to seek asylum.

While the federal government typically handles immigration enforcement, Governor Abbott has skirted this by activating state trespass law.<sup>117</sup> State and local police departments, partnering with owners of borderland ranches, entrap, arrest, and subsequently detain individuals based on trespassing charges.<sup>118</sup> To do this, state agencies exploit the frequent irregularities in arresting and charging decisions and the power dynamic inherent in their interactions with migrants.<sup>119</sup> For instance, law enforcement agents frequently direct migrants to private property or give them the impression that they have permission to be on the property, setting them up

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[https://twitter.com/GregAbbott\\_TX/status/1448702868568088581](https://twitter.com/GregAbbott_TX/status/1448702868568088581). “Catch and release” is a term used by critics to refer to the Biden administration’s alternatives to detention immigration policy. Daniel Wiessner, *Biden’s ‘Catch and Release’ Border Policy Struck Down by US Judge*, REUTERS (Mar. 8, 2023, 4:31 PM), <https://www.reuters.com/legal/bidens-catch-release-border-policy-struck-down-by-us-judge-2023-03-08/>.

113. ACLU 2021 Complaint, *supra* note 109, at 15–17.

114. *Id.* at 15.

115. *Id.* (quoting Jay Root (@byjayroot), TWITTER (X) (Aug. 24, 2021, 12:54 PM),

<https://twitter.com/byjayroot/status/1430227046928719879>).

116. *Id.* at 16.

117. J. David Goodman, *Helicopters and High-Speed Chases: Inside Texas’ Push to Arrest Migrants*, N.Y. TIMES (Dec. 11, 2021), <https://www.nytimes.com/2021/12/11/us/texas-migrant-arrests-police.html>. See also Complaint at 14, *Barcenas v. McCraw*, No. 22-CV-00397 (W.D. Tex. Apr. 27, 2022), 2022 WL 1261718 (quoting Governor Abbott as stating that “[w]e are employing state law, as opposed to federal law, because when we make an arrest under federal law we typically have to turn people over to federal authorities . . .”).

118. Goodman, *supra* note 117; Armando Garcia, *Migrant’s Arrest Under ‘Operation Lone Star’ Ruled Unconstitutional*, ABC NEWS (Jan. 14, 2022), [www.abcnews.go.com/US/migrants-arrest-operation-lone-star-ruled-unconstitutional/story?id=82266611](http://www.abcnews.go.com/US/migrants-arrest-operation-lone-star-ruled-unconstitutional/story?id=82266611).

119. ACLU 2021 Complaint, *supra* note 109, at 4.

for an arrest.<sup>120</sup> The ACLU of Texas reported that in one instance, Texas police arrested a Venezuelan migrant for criminal trespass after waving him through an open gate into private property.<sup>121</sup> While the trespass charge was eventually dismissed, the man was jailed for 63 days.<sup>122</sup> Similarly, two state officials reportedly urged another Venezuelan migrant to walk through an open gate, told him to “sit down here,” then immediately arrested him for the crime of trespass to private property, detaining him on trespass charges.<sup>123</sup>

### 3. OLS’s Separate Criminal Justice System

The ACLU of Texas also found that recent arrest statistics themselves demonstrate “stark racial disparities” in arrests for trespass.<sup>124</sup> In the first six months of OLS, 98% of arrests for criminal trespass were recorded as Hispanic male, and 2% were recorded as Black male.<sup>125</sup> The accompanying affidavits also strongly indicate racial profiling and profiling based on national origin are prominent in arrests and charging decisions.<sup>126</sup> In many arrest affidavits, DPS troopers noted the perceived ethnicity, national origin, and immigration status of the men arrested, suggesting that ethnicity and bias influenced their arresting decisions.<sup>127</sup> Several affidavits described either observing or receiving a tip that “undocumented migrants” or “undocumented persons” had crossed onto private property.<sup>128</sup> Notably, at the time of the arrests, DPS troopers did not confirm the arrested individuals’ immigration status; they assumed it based on the individuals’ perceived ethnicity.<sup>129</sup>

Arrestees have also challenged DPS on the basis of gender discrimination.<sup>130</sup> At OLS’s inception, DPS instructed its troopers to only arrest single men and to turn women and families over to the U.S. Border Patrol.<sup>131</sup> Attorneys brought forward equal protection challenges, arguing that the state was unconstitutionally discriminating against men by not

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120. *Id.*

121. *Id.* at 17.

122. *Id.*

123. *Id.* at 18.

124. *Id.* at 21. The ACLU of Texas obtained DPS trooper affidavits for more than 2,000 OLS trespass arrests from March through December 2021. *Id.* at 21 n.104.

125. *Id.*

126. *Id.* at 21–22.

127. *Id.*

128. *Id.* at 22–23.

129. *Id.*

130. Jolie McCullough, *Facing Sex Discrimination Claims, Texas Begins Jailing Migrant Women Under Border Crackdown*, TEX. TRIB. (July 26, 2023, 6:00 AM),

<https://www.texastribune.org/2023/07/26/women-arrests-texas-border-operation-lone-star/>.

131. *Id.*

arresting women or children.<sup>132</sup> Since then, DPS has reportedly told troopers to begin arresting single, female migrants, although women are reportedly still released to Border Patrol rather than detained, while men are immediately arrested.<sup>133</sup>

Once arrested, individuals are channeled into a separate criminal legal system that is designed for migrants.<sup>134</sup> This system is completely distinct from the ordinary legal process and pretrial detention system for state misdemeanor charges; it has separate dockets, public defender assignments, jails, and booking facilities.<sup>135</sup> In 2021, Texas repurposed two state prisons in Edinburg and Dilley, operated by the Texas Department of Criminal Justice (TDCJ),<sup>136</sup> and in 2021 and 2022, opened two new booking facilities to process the high amount of arrests under OLS.<sup>137</sup> Public defenders have reported that individuals arrested under OLS “who have been granted personal bond, paid bail, or had their cases dismissed have remained confined in the absence of any legal authority for their detention and, in at least one instance, in the face of a court order mandating release.”<sup>138</sup> In one ongoing lawsuit, four Mexican migrants assert that they were held in prison for up to six weeks after their sentences were served or their trespassing charges were dropped.<sup>139</sup>

Further, arrestees have reported being detained in trespass arrest jails under “inadequate” conditions.<sup>140</sup> Detained people have reported being served raw food, frozen food, and food contaminated with worms while being forced to use unwashed cutlery.<sup>141</sup> Additionally, they “have generally reported more than 14 hours between meals, with breakfast regularly being served between 3 and 4 AM, lunch sometimes skipped, and dinner provided

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132. *Id.*

133. *Id.*

134. ACLU 2021 Complaint, *supra* note 109, at 23.

135. *Id.* at 1.

136. TEXAS BOARD OF CRIMINAL JUSTICE, 224TH MEETING MINUTES 4 (Aug. 26, 2022), [https://www.tdcj.texas.gov/documents/tbcj/TBCJ\\_Summary\\_2022-08.pdf](https://www.tdcj.texas.gov/documents/tbcj/TBCJ_Summary_2022-08.pdf).

137. See Press Release, Office of the Texas Governor, Governor Abbott Opens Operation Lone Star Jail Booking Facility in Jim Hogg County (Feb. 8, 2022), <https://gov.texas.gov/news/post/governor-abbott-opens-operation-lone-star-jail-booking-facility-in-jim-hogg-county> (discussing the opening of booking facilities in Jim Hogg County and Val Verde County).

138. ACLU 2021 Complaint, *supra* note 11, at 33.

139. Uriel J. Garcia, *Texas Imprisoned Migrants After They Should Have Been Released, Lawsuit Claims*, TEX. TRIB. (Aug. 21, 2023), <https://www.texastribune.org/2023/08/21/texas-migrants-lawsuit-aclu-operation-lone-star-detention/>.

140. See ACLU 2021 Complaint, *supra* note 11, at 35 (noting inadequate “[f]ood, medical care, and telephone access”).

141. *Id.* at 35–36.

as late as 9 PM.”<sup>142</sup> Further, the Texas Jail Project, after reviewing intake reports, has reported that detainees have not had access to adequate medical care for injuries, infections, or illnesses.<sup>143</sup> Further exacerbating the inhumane conditions is the guards’ use of racist and xenophobic language in speaking to detained people.<sup>144</sup> Guards have called the detainees slurs in Spanish and have told detainees “to ‘go back to [their] country’ and that they were ‘invading’ the [U.S.]”<sup>145</sup> The guards have also reportedly called “Black immigrants . . . ‘monkeys’ and ‘pinche negros’ (f\*\*\*ing Black people).”<sup>146</sup> Thus, through OLS’s manipulation of state misdemeanor law and traffic stops, law enforcement officers are authorized to engage in racial profiling, unlawfully detain migrants, and endanger the lives of migrants and U.S. citizens alike.

#### D. Investigating Civil Society Groups

Lastly, under OLS, Texas has launched investigations into U.S.-based nongovernmental organizations (NGOs) that offer aid to migrants.<sup>147</sup> In a letter to Attorney General Ken Paxton, Governor Abbott requested that Attorney General Paxton investigate “the role of NGOs in planning and facilitating the illegal transportation of illegal immigrants across our borders.”<sup>148</sup> Migrant aid groups, like the Border Network for Human Rights and the South Texas Human Rights Center, heavily criticized this move as an “abuse of power,” since many of these NGOs only provide food, water, or medical care to migrants.<sup>149</sup> In a news release, Attorney General Paxton’s office said it was requesting information from three groups that provide legal aid to migrants as part of their work: the Equal Justice Center, the Tahirih Justice Center, and American Gateways.<sup>150</sup> The Equal Justice Center, the

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142. *Id.* at 36.

143. *Id.*

144. *Id.* at 38.

145. *Id.*

146. *Id.*

147. James Barragan, *Without Evidence, Gov. Greg Abbott Asks Whether Nonprofits Are Helping Migrants Enter Texas*, TEX. TRIB. (Dec. 15, 2022, 1:00 PM), <https://www.texastribune.org/2022/12/15/greg-abbott-texas-migrants-border-nonprofits/>.

148. Letter from Texas Governor Greg Abbott, to Texas Attorney General Ken Paxton (Dec. 14, 2022), [https://gov.texas.gov/uploads/files/press/Ken\\_Paxton\\_OAG\\_.pdf](https://gov.texas.gov/uploads/files/press/Ken_Paxton_OAG_.pdf).

149. Alfredo Corchado et al., *Migrant Aid Groups Slam Texas Gov. Greg Abbott for His Call for Investigation*, DALL. MORNING NEWS (Dec. 14, 2022, 6:49 PM), <https://www.dallasnews.com/news/2022/12/14/migrant-aid-groups-slam-texas-gov-greg-abbott-for-his-call-for-investigation/>.

150. Press Release, Texas Attorney General Kenneth Paxton, Paxton Investigates Texas Bar Foundation Fund Recipients for Aiding and Abetting the Invasion of Illegal Aliens (Dec. 14, 2022), <https://www.texasattorneygeneral.gov/news/releases/paxton-investigates-texas-bar-foundation-fund-recipients-aiding-and-abetting-invasion-illegal-aliens>.

Tahirih Justice Center, and American Gateways all provide legal services to migrants. The Equal Justice Center is an Austin-based nonprofit that supports low-income workers, regardless of their immigration status, in employment and labor disputes.<sup>151</sup> Tahirih Justice Center is a national nonprofit that provides free legal services to immigrant survivors fleeing gender-based violence.<sup>152</sup> American Gateways also serves low-income immigrant communities throughout Texas by providing free legal services.<sup>153</sup> Since the announcement, however, Attorney General Paxton has not provided any public updates regarding the investigation.<sup>154</sup>

### III. IDENTIFYING RATIFIED INTERNATIONAL HUMAN RIGHTS TREATIES APPLICABLE TO OPERATION LONE STAR

International human rights law primarily consists of formal international agreements, known as treaties,<sup>155</sup> and customary international practice.<sup>156</sup> Formal agreements are enforceable as U.S. law only once the U.S. has passed executing legislation, either through treaty ratification or an executive agreement.<sup>157</sup> Under Article II of the U.S. Constitution, the executive branch generally negotiates, signs, and ratifies treaties; however, the treaty cannot enter into force without the Senate's advice and consent.<sup>158</sup> To ratify a treaty and bind the U.S. under the treaty, two-thirds of the Senate

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151. *What We Do*, EQUAL JUST. CTR., <https://www.equaljusticecenter.org/> (last visited Nov. 12, 2023).

152. *About Us*, TAHIRIH JUST. CTR., <https://www.tahirih.org/about-us/> (last visited Nov. 12, 2023).

153. *About*, AM. GATEWAYS, <https://americangateways.org/about/> (last visited Nov. 12, 2023).

154. This may be, in part, because the Texas House of Representatives temporarily suspended Attorney General Paxton in March 2023. J. David Goodman et al., *Ken Paxton Is Temporarily Suspended After Texas House Vote*, N.Y. TIMES (Mar. 27, 2023), <https://www.nytimes.com/2023/05/27/us/politics/ken-paxton-texas-attorney-general-impeached.html>. However, in September 2023, the Texas Senate acquitted Attorney General Paxton on all charges. Brad Brooks, *Texas Senate Acquits AG Paxton in Impeachment Trial, Keeps Him in Office*, REUTERS (Sept. 18, 2023, 4:44 AM), <https://www.reuters.com/world/us/texas-senate-ends-deliberations-ag-paxtons-impeachment-trial-vote-imminent-2023-09-16/>.

155. Under international law, “international agreements” and “treaties” are “synonymous terms that refer to any binding agreement.” STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32538, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 5 (2023). However, “[i]n the context of domestic law, *treaty* generally refers to a narrower subcategory of binding international agreements that receives the Senate’s advice and consent.” *Id.*

156. *Id.* at 4. While these two instruments “form the backbone of international human rights law other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development.” *International Human Rights Law*, OHCHR, <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>.

157. See MULLIGAN, *supra* note 155, at 5–6 (describing the forms of international commitments).

158. U.S. CONST. art. II, § 2. See also *Zivotofsky v. Kerry*, 576 U.S. 1, 13 (2015) (“The President has the sole power to negotiate treaties, and the Senate may not conclude or ratify a treaty without Presidential action.”) (internal citation omitted).

must consent.<sup>159</sup> Further, “the Senate may condition its consent on proposed conditions known as reservations, declarations, understandings, and provisions (RUDs).”<sup>160</sup>

The U.S. has ratified at least three human rights treaties relevant to the policies and enforcement of OLS: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the Convention Against Torture.<sup>161</sup> This Part will explain the context of each treaty’s ratification and demarcate the provisions applicable to OLS operations.

Although each of these treaties is non-self-executing (NSE),<sup>162</sup> the U.S. nevertheless has an international obligation to protect human rights in its federal and state policies.<sup>163</sup> Self-executing treaties and NSE treaties hold different statuses in U.S. courts.<sup>164</sup> A treaty provision that is self-executing is enforceable as domestic law,<sup>165</sup> while a treaty provision that is NSE

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159. U.S. CONST. art. II, § 2.

160. MULLIGAN, *supra* note 155, at 7. A reservation is intended to alter or limit the effect of treaty obligations for the U.S., while an understanding clarifies or elaborates a provision in a manner the U.S. views as consistent with treaty requirements. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 416–23, 430–32 (2000) (“[S]tatement[] expressing the Senate’s position or opinion on matters relating to issues raised by the treaty rather than to specific provisions.”).

161. This analysis does not address other human rights treaties signed, but not ratified, by the U.S. government that are relevant, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC).

162. See 140 CONG. REC. S7634 (daily ed. June 24, 1994) [hereinafter CERD Ratification] (noting that the U.S. ratified CERD with a non-self-executing reservation). See also Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (noting the same for UNCAT); 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) (noting the same for ICCPR).

163. *Medellin v. Texas*, 552 U.S. 491, 522–23 (2008). See generally Timothy E. Lynch, *The ICCPR, Non-Self-Execution, and DACA Recipients’ Right to Remain in the United States*, 34 GEO. IMM. L. J. 2 (2020) (arguing that, despite the ICCPR’s NSE status, the executive branch still has an international legal obligation to implement the ICCPR); Ian M. Kysel & G. Alex Sinha, *Executing Racial Justice*, 71 UCLA L. REV. DISC. 2 (2023) (discussing how, even though CERD holds NSE status, the Biden administration can use it as a tool to advance racial equity); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 370–71 (2006) (“Even if a treaty is deemed non-self-executing, the United States and its constituent states are still bound by it. As such, a court considering the legality of government action must take such treaty obligations into account. Even on the federal level, the non-self-executing nature of a treaty simply precludes private enforcement action and use of the treaty to secure jurisdiction. It does not bar judicial consideration and enforcement of the treaty’s terms once a cause of action and jurisdiction is secured on some other basis.”) (internal citations omitted); Johanna Kalb, *Human Rights Treaties in State Courts: the International Prospects of State Constitutionalism After Medellin*, 115 PENN. ST. L. REV. 1051 (2011).

164. See *Medellin*, 552 U.S. at 505 n.2 (comparing U.S. obligations under self-executing and non-self-executing treaties).

165. See, e.g., *id.* (“What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification.”).

requires legislation to make it judicially enforceable.<sup>166</sup> Although Congress has implemented the Convention Against Torture through federal legislation,<sup>167</sup> both the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights have yet to be implemented through federal legislation.<sup>168</sup> Further, for each of these ratified treaties, the U.S. included “an understanding that state and local governments implement treaty obligations pertaining to matters within their jurisdiction.”<sup>169</sup> Thus, each of the aforementioned treaties is relevant to analyzing OLS under a human rights framework.

#### A. The International Convention on the Elimination of All Forms of Racial Discrimination

Through a unanimous vote by the United Nations (U.N.) General Assembly,<sup>170</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted by the U.N. on December 21, 1965.<sup>171</sup> Just one year later, the U.S. became a signatory party after President Johnson signed CERD,<sup>172</sup> and the treaty was entered into force on January 4, 1969.<sup>173</sup> However, the official ratification process did not commence until 1978,<sup>174</sup> when President Carter transmitted CERD to the U.S. Senate along

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166. *See, e.g., id.* (“[A] ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.”).

167. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1456 U.N.T.S. 85 (adopted at 18 U.S.C. §§ 2340-2340(B)).

168. *See* Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America, ¶ 4, U.N. Doc. CERD/C/USA/CO/10-12 (Aug. 30, 2022) (“The Committee remains concerned at the absence of specific legislation implementing the provisions of the Convention in the domestic legal order and at the absence of the Convention from the main and recent policies related to the elimination of racial discrimination and the resulting equity plans.”); *See* Human Rights Comm., Concluding Observations on the Fifth Periodic Report of the United States of America, ¶ 4, U.N. Doc. CCPR/C/USA/CO/5 (Dec. 7, 2023) (“The Committee remains concerned at the lack of measures to effectively incorporate the Covenant into the domestic legal order.”).

169. *See* Risa E. Kaufman, “By Some Other Means”: *Considering the Executive Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971, 1974 (2012).

170. CERD Ratification, *supra* note 162.

171. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

172. *Status of Ratifications of the Principal Human Rights Treaties*, OHCHR, <https://indicators.ohchr.org/> (last visited Nov. 12, 2023).

173. CERD, *supra* note 171.

174. *See* CERD Ratification, *supra* note 162.

with a list of RUDs.<sup>175</sup> For many years, the U.S. avoided CERD's adoption and ratification because of pressing domestic and international events and the Reagan administration's lack of interest.<sup>176</sup> The treaty was not ratified until the Clinton administration urged the Senate to consider CERD in 1994.<sup>177</sup> Thus, when the treaty took force in the U.S. in 1996, nearly thirty years had passed from CERD's adoption by the U.N. before the U.S. Senate gave its advice and consent to ratify CERD.<sup>178</sup>

CERD prohibits racial discrimination from influencing government action.<sup>179</sup> The treaty defines racial discrimination broadly as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin."<sup>180</sup> Further, to be prohibited, the racial discrimination must "ha[ve] the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."<sup>181</sup> If a State has ratified CERD, it must uphold its duties to condemn racial discrimination<sup>182</sup> and "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."<sup>183</sup>

The U.S. government ratified CERD with three reservations, an understanding, and a declaration that qualified the extent to which the U.S. would adhere to the treaty.<sup>184</sup> The reservations namely note that no obligation under CERD will restrict (1) the "individual freedom of speech, expression and association" and (2) the "[i]ndividual privacy and freedom from

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175. Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U. L. REV. 527, 569 (2009).

176. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 140 (1999) (identifying the Soviet invasion of Afghanistan and the hostage crisis in Iran as preventing the Senate Foreign Relations Committee from voting on the treaty). See also James Jennings, *The International Convention on the Elimination of All Forms of Racial Discrimination: Implications for Challenging Racial Hierarchy*, 40 HOW. L.J. 597, 598–600 (1997) (identifying factors that contributed to the U.S.'s resistance, including human rights as a polarizing issue between the U.S. and the Soviet Union during the Cold War).

177. Sloss, *supra* note 176, at 141.

178. CERD Ratification, *supra* note 162 (consenting to ratification of CERD).

179. See CERD, *supra* note 171, at art. 2(1)(a) ("States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.").

180. *Id.* art. 1(1).

181. *Id.*

182. *Id.* art. 2(1)(a).

183. *Id.* art. 2(1)(c).

184. See CERD Ratification, *supra* note 162 (listing the U.S. government's RUDs for CERD).

governmental interference in private conduct.”<sup>185</sup> The U.S. also ratified CERD with a “‘federalism understanding’[,] . . . which sets out the United States’ understanding of its treaty obligations in light of the tiered federal nature of the U.S. government.”<sup>186</sup> Finally, the U.S. ratified CERD with a declaration that the treaty is NSE.<sup>187</sup>

Nonetheless, CERD contains several articles relevant to addressing the racially discriminating practices promulgated by OLS.<sup>188</sup> First, CERD protects non-citizens against racial discrimination, “regardless of whether they are lawfully admitted to the territory of a State Party.”<sup>189</sup> Although the text of CERD explicitly says that it should not be interpreted as affecting a State Party’s citizenship laws, States Parties’ citizenship laws still must not “discriminate against any particular nationality.”<sup>190</sup> To that end, the CERD Committee issued a General Recommendation in 2004, clarifying that “[u]nder [CERD], differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation . . . are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”<sup>191</sup> As discussed in Part II, the ACLU of Texas, the Human Rights Watch, and Tarleton State University researchers have all identified ways in which DPS troopers target Latinx migrants as opposed to white individuals, such as by racial profiling evident in traffic stop data, arrest records, and arrest affidavits, and law enforcement’s racist harassment towards Black detainees.<sup>192</sup>

Further, OLS’s specialized court systems and disparate detention discussed in Part II implicate Article 5.<sup>193</sup> Article 5 of CERD binds States Parties to eliminate discrimination and guarantee equality before the law in relation to several rights fundamental to non-citizens, including “[t]he right

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185. *Id.* None of these clauses impact this Note’s later analysis.

186. Martha F. Davis, *The Upside of the Downside: Local Human Rights and the Federalism Clauses*, 62 ST. LOUIS U. L.J. 921, 922 (2018).

187. CERD Ratification, *supra* note 162.

188. *See id.* *See also Medellin*, 552 U.S. at 520 (2008) (holding that even non-self-executing treaties still constitute international obligations); Ian M. Kysel & G. Alex Sinha, *Executing Racial Justice*, 71 UCLA L. REV. DISC. 2, 13–18 (2023) (analyzing the ways in which the Biden administration could comply with CERD and recognize the treaty as a binding legal obligation to advance racial equity).

189. HUM. RTS. WATCH & ACLU, REPORT ON RACIAL DISCRIMINATION IN THE UNITED STATES (2022) <https://www.hrw.org/report/2022/08/08/racial-discrimination-united-states/human-rights-watch/aclu-joint-submission>.

190. CERD, *supra* note 171, at art. 1(3).

191. Comm. on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination Against Non-Citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004) [hereinafter CERD General Recommendation No. 30].

192. *See supra* Part II.C.

193. *See* HUM. RTS. WATCH & ACLU REPORT, *supra* note 189 (discussing the racially discriminatory treatment in detention conditions under OLS).

to equal treatment before the tribunals and all other organs administering justice,”<sup>194</sup> “[t]he right to freedom of movement . . . within the borders of the State,”<sup>195</sup> and “[t]he right to leave any country, including one’s own, and to return to one’s country.”<sup>196</sup> As discussed in Part II, OLS has created a separate criminal legal system for migrants arrested under OLS, and advocates have identified stark racial disparities in arrest and detention levels.<sup>197</sup>

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

The U.N. adopted the International Covenant on Civil and Political Rights (ICCPR) on December 16, 1966.<sup>198</sup> However, as with CERD, President Carter did not submit the ICCPR for ratification until February 23, 1978.<sup>199</sup> In 1991, President George H.W. Bush urged the Senate Foreign Relations Committee to consider the ICCPR to provide advice and consent for ratification.<sup>200</sup> After the Foreign Relations Committee conducted a one-day hearing, it “voted unanimously to report the ICCPR to the Senate with a recommendation favoring ratification.”<sup>201</sup> The U.S. finally ratified the ICCPR, along with RUDs, on June 8, 1992.<sup>202</sup> The U.S. and other signatory countries thus assumed both a negative and positive obligation<sup>203</sup> “to respect and to ensure” the rights of all individuals within the U.S. “without

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194. CERD, *supra* note 171, at art. 5(a).

195. *Id.* art. 5(d)(i).

196. *Id.* art. 5(d)(ii). The CERD Committee has noted that some of the rights enumerated in Article 5, like the right to participate in elections, are limited to citizens; however, the Committee has noted that “States [P]arties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.” CERD General Recommendation No. 30, *supra* note 191.

197. *See supra* Part II.C.

198. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. No. 95-102, 999 U.N.T.S. 171 [hereinafter ICCPR].

199. Sloss, *supra* note 176, at 139.

200. *Id.* at 140–41.

201. *Id.* at 141.

202. *United Nations Human Rights Treaty Body Database*, OHCHR, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en) (last visited Feb. 4, 2024).

203. *See* Human Rights Comm., General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) (“The legal obligation under article 2, paragraph 1 [of the ICCPR], is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”).

distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>204</sup>

The ICCPR contains several articles especially relevant for analyzing the apprehending, arresting, and jailing of migrants under OLS.<sup>205</sup> Although the U.S. government ratified the ICCPR with five reservations, five understandings, and four declarations,<sup>206</sup> the U.S., as a State Party to the ICCPR, nonetheless continues to have obligations and duties under the ICCPR.<sup>207</sup> First, Article 6 guarantees an individual’s right to not be arbitrarily deprived of life.<sup>208</sup> Further, Article 7 guarantees that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>209</sup> In its ratification of the Convention against Torture, the U.S. included a reservation restricting the interpretation of “cruel, inhuman, or degrading treatment or punishment” under Article 7 to conduct prohibited by the Fifth, Eighth, or Fourteenth Amendments of the U.S. Constitution.<sup>210</sup> The Human Rights Committee has urged the U.S. to fully comply with Article 7,<sup>211</sup> and from a normative perspective, scholars have argued that the U.S. is nonetheless obliged to abide by the human rights norms enshrined under Article 7.<sup>212</sup> As discussed in Part II, Texas’ inhuman treatment of migrants at the border and in jails violates this provision.<sup>213</sup>

Additionally, under Article 9(1), “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”<sup>214</sup> Article 9(3) goes on to say that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer

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204. ICCPR, *supra* note 198, at art. 2(1). In a reservation to the ratification, the U.S. limited the distinctions listed under Article 2(1) “to be permitted when such distinctions are, at a minimum, rationally related to a legitimate governmental objective.” 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).

205. *See generally* Lynch, *supra* note 163 (arguing that, despite the ICCPR’s NSE status, the executive branch still has an international legal obligation to implement the ICCPR).

206. *See* 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).

207. *See Medellín*, 552 U.S. at 520 (holding that even non-self-executing treaties still constitute international obligations).

208. ICCPR, *supra* note 198, at art. 6.

209. *Id.* art. 7.

210. Comm. Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, ¶ 302, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

211. Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, ¶ 279, U.N. Doc. CCPR/C/79/Add.50 (Apr. 6, 1995).

212. *See, e.g.,* Azadeh Shahshahani & Kyleen Burke, *Deploying International Law to Combat Forced Labor in Immigration Detention Centers*, 37 GEO. IMMIGR. L. J. 57, 64 (2022) (arguing that the U.S. has an obligation to prevent and punish the cruel, inhumane or degrading treatment or punishment of immigrants in its detention centers and to report its progress on such actions openly and appropriately under Article 7).

213. *See supra* Parts II.B and II.C.3.

214. ICCPR, *supra* note 198, at art. 9(1).

authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”<sup>215</sup> Further, under Article 10(1), “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>216</sup> Article 10(1) establishes a “positive obligation” on a State Party; a person deprived of their liberty may not “be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.”<sup>217</sup> Article 14 also guarantees the right of all persons to equality before courts and tribunals and to a fair trial.<sup>218</sup> As discussed in Part II, migrants are detained with inadequate food and medical care, are subjected to xenophobic and racist harassment by guards, and are not released from jail within a reasonable time.<sup>219</sup> Thus, the arrests and jailing of migrants under OLS violates each of these provisions.

Further, Article 19 guarantees the right to freedom of expression and association.<sup>220</sup> Under Article 19, “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>221</sup> Article 19 stipulates certain restrictions, such as for the protection of national security, public order, public health, or public morals, but notes that these restrictions shall be implemented “as are provided by law and are necessary.”<sup>222</sup> In Governor Abbott’s request to Attorney General Paxton to investigate NGOs, Governor Abbott invokes concerns regarding border security.<sup>223</sup> However, as discussed in Part II, investigations into OLS have questioned whether OLS actually deters unauthorized migration,<sup>224</sup> and advocates have criticized the investigation as a means of preventing NGOs from providing basic necessities and care to migrants.<sup>225</sup>

Lastly, Article 4 stipulates the following:

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215. *Id.* art. 9(3).

216. *Id.* art. 10(1).

217. Human Rights Comm., General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 33, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

218. ICCPR, *supra* note 198, at art. 14.

219. *See supra* Part II.C.

220. ICCPR, *supra* note 198, at art. 19.

221. *Id.*

222. *Id.*

223. Letter from Texas Governor Greg Abbott, *supra* note 148.

224. Findell, *supra* note 14.

225. *See supra*, Part II.D.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent *strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>226</sup>

To invoke Article 4, the purported emergency must threaten the life of a nation, and the State Party must have declared a state of emergency.<sup>227</sup> Arguably, Governor Abbott's continual disaster declarations are not based on an imminent threat to the life of the U.S. but rather are based on his discriminatory and exclusionary policies.<sup>228</sup>

### C. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment as Punishment

On December 10, 1984, the U.N. adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment as Punishment (UNCAT).<sup>229</sup> President Reagan signed UNCAT on April 18, 1988,<sup>230</sup> and just one month later, transmitted UNCAT to the Senate for its advice and consent with seventeen proposed RUDs,<sup>231</sup> noting that "it was not possible to negotiate a treaty that was acceptable to the United States in all respects."<sup>232</sup> In the next administration, President George H.W. Bush reduced and revised the proposed RUDs, and in 1990, the Senate provided

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226. ICCPR, *supra* note 198, at art. 4(1) (emphasis added).

227. Human Rights Comm., General Comment No. 29: Article 4: Derogations During a State Emergency, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

228. *See supra* Part II.C.2 (discussing the ACLU of Texas' analysis of Governor Abbott and other public officials' statements that indicate their clear intent to target and arrest migrants under state criminal trespass law).

229. United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, 113 [hereinafter UNCAT].

230. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (to be codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, 507).

231. *See* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-20, at 2-18 (May 23, 1988) (containing U.S. Dep't of State, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment) (May 10, 1988).

232. *Id.* at iii (May 23, 1988) (containing President Ronald Reagan, Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment (May 20, 1988)).

its advice and consent for the ratification of UNCAT.<sup>233</sup> Four years later, President Bush ratified the treaty.<sup>234</sup>

UNCAT establishes both negative and affirmative obligations<sup>235</sup> for states to prevent acts of torture or other “cruel, inhuman or degrading treatment or punishment” (hereinafter “ill-treatment”).<sup>236</sup> Article 16 requires that ill-treatment be “committed by,” “at the instigation of,” or “with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>237</sup> Further, the purpose of Article 16 is to protect victims who were “deprived of their liberty or . . . otherwise under the factual power or control of the person responsible for the treatment or punishment.”<sup>238</sup> Under Article 14, victims of torture and ill-treatment must be assured an effective remedy, including the possibility to pursue a monetary claim for damages, and States Parties must provide the means for “as full rehabilitation as possible.”<sup>239</sup> UNCAT further mandates that States Parties provide rehabilitative training to public officials and law enforcement personnel involved in the prohibited conduct;<sup>240</sup> conduct a system review of the conditions and treatment of persons subjected to arrest, detention, or imprisonment;<sup>241</sup> and ensure that “competent authorities proceed to a prompt and impartial investigation” of violations.<sup>242</sup> Further, although UNCAT is NSE, the U.S. has codified provisions to protect migrants at risk of torture in their countries of origin whose applications for asylum have been denied.<sup>243</sup>

Similar to the ICCPR, in its ratification of UNCAT, the U.S. included a reservation restricting the interpretation of “cruel, inhuman, or degrading treatment or punishment” to conduct prohibited by the Fifth, Eighth, or

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233. Trent Buatte, *The Convention Against Torture and Non-Refoulement in U.S. Courts*, 35 GEO. IMMIGR. L.J. 701, 707 (2021).

234. *Status of Treaties, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&clang=_en) (last visited Nov. 12, 2023).

235. *See generally* Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (explaining the essential principles of the Convention).

236. UNCAT, *supra* note 229, at arts. 2, 16(1).

237. *Id.* art. 16(1).

238. A. A. C. v. Sweden, Communication No. 227/2003, ¶ 4.2, U.N. Doc. CAT/C/37/D/227/2003 (2006).

239. *See* Comm. Against Torture, General Comment No. 3: Implementation of article 14 by States Parties, ¶ 1, U.N. Doc. CAT/C/GC/3 (2012) (discussing States parties’ obligations under art. 14).

240. UNCAT, *supra* note 229, at art. 10(1).

241. *Id.* art. 11.

242. *Id.* arts. 12–13.

243. *See, e.g.*, 8 C.F.R. §§ 208.16, 208.18 (1999).

Fourteenth Amendments of the U.S. Constitution.<sup>244</sup> Further, although the U.N. adopted the Optional Protocol to CAT (OPCAT) in 2002 and entered it into force four years later in 2006,<sup>245</sup> the U.S. has neither signed nor ratified OPCAT.<sup>246</sup> OPCAT arms UNCAT with important enforcement mechanisms, establishing “a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”<sup>247</sup> Human rights advocates have urged the U.S. to sign and ratify OPCAT as a necessary step to ensure adherence to treaties and national laws banning torture and abuse.<sup>248</sup>

Lastly, Article 3 explicitly prohibits refoulement.<sup>249</sup> Non-refoulement is “a fundamental principle of international human rights and refugee law prohibiting all forms of removal and transfer of any individual, regardless of their status, when there are substantial grounds for believing that the individual would be at risk of irreparable harm.”<sup>250</sup> Regarding its non-refoulement obligations, the U.S. submitted an understanding that “the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in Article 3 of [UNCAT], to mean ‘if it is more likely than not that he would be tortured.’”<sup>251</sup> The U.N. Special Rapporteur on the human rights of migrants has established that “pushbacks” in the context of migration violate UNCAT’s prohibition on refoulement.<sup>252</sup> “Pushbacks” are “various measures taken by States . . . which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection

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244. Comm. Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, ¶ 302, U.N. Doc CAT/C/28/Add.5 (Feb. 9, 2000).

245. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, 2375 U.N.T.S. 237 [hereinafter OPCAT].

246. See *Status of Treaties, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9-b&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4) (listing States Parties that have signed and/or ratified OPCAT) (last visited on Feb. 2, 2024).

247. OPCAT, *supra* note 245, at art. 1.

248. See, e.g., Nat’l Religious Campaign Against Torture, *Ensuing an End to Torture: The Importance of Signing and Ratifying OPCAT*, [http://www.nrcat.org/storage/documents/opcat\\_one\\_pager.pdf](http://www.nrcat.org/storage/documents/opcat_one_pager.pdf) (last visited Feb. 2, 2024) (describing the National Religious Campaign Against Torture’s advocacy for OPCAT as a means to end torture and abuse in U.S. detention facilities).

249. UNCAT, *supra* note 229, at art. 3.

250. Human Rights Council, Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea, ¶ 41, U.N. Doc. A/HRC/47/30 (May 12, 2021) [hereinafter Human Rights Council Report].

251. *Status of Treaties, supra* note 234.

252. Human Rights Council Report, *supra* note 250, at ¶ 34.

needs, to the country . . . from where they attempted to cross or crossed an international border.”<sup>253</sup> As discussed in Part II, DPS medic-trooper Wingate and contemporary media reports describe migrants, including women and children, getting caught in razor wires and injured by buoys in the Rio Grande, and detail DPS troopers telling migrants to return to Mexico.<sup>254</sup> Advocates have argued that these incidents constitute “pushback” in the context of migration,<sup>255</sup> and thus violate Article 3.

#### IV. EVALUATING MECHANISMS TO ENFORCE INTERNATIONAL HUMAN RIGHTS LAW CONVEYED BY RATIFIED TREATIES TO CHALLENGE OPERATION LONE STAR

Coupled with the preceding review of the international legal authorities that should restrain current OLS practices, the following analysis evaluates the viability of current mechanisms available to enforce these laws and protect the rights of migrants and U.S. citizens against state action under OLS. The CERD Committee, the Human Rights Committee, and the Committee Against Torture monitor U.S. compliance with the three aforementioned treaties: CERD, ICCPR, and UNCAT.

These three bodies are “committees of independent experts that monitor implementation of the core international human rights treaties,” including CERD, the ICCPR, and CAT.<sup>256</sup> Each applicable treaty defines the specific functions of each committee but generally allows for the committee to collect and consider regular state reports and individual complaints, investigate countries for compliance, and issue interpretive comments.<sup>257</sup>

##### A. The CERD Committee

Established under Article 8 of CERD, the CERD Committee is an independent body designed to monitor state implementation of human rights protection obligations under the CERD treaty.<sup>258</sup> The CERD Committee has

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253. *Id.*

254. *Supra* Part II.B.

255. *See, e.g., US: Texas Officials Put Migrants in Danger*, HUM. RTS. WATCH (July 20, 2023, 2:40PM), <https://www.hrw.org/news/2023/07/20/us-texas-officials-put-migrants-danger> (arguing that Texas law enforcement’s treatment of migrants at the Texas-Mexico border under OLS constitutes “pushbacks” and calling for an end to these practices).

256. *What Are the Treaty Bodies?*, OHCHR, <https://www.ohchr.org/en/treaty-bodies> (last visited Feb. 2, 2024).

257. *What the Treaty Bodies Do*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/what-treaty-bodies-do> (last visited Feb. 2, 2024).

258. DAISUKE SHIRANE, ICERD AND CERD: A GUIDE FOR CIVIL SOCIETY ACTORS 12 (2011).

four main monitoring functions,<sup>259</sup> which could address human rights violations under OLS in varying levels of effectiveness. First, the Committee examines States' reports, addressing any concerns and recommendations to the States Parties in the form of "concluding observations."<sup>260</sup> States Parties must "submit comprehensive reports to the Committee every four years, with brief updating reports at intervening two-year periods."<sup>261</sup> The U.S. agreed to submit its first report regarding its anti-discrimination efforts to the CERD Committee one year after ratification, and every two years thereafter, or whenever requested by the CERD Committee, in accordance with Article 9.<sup>262</sup> However, its first report, which was due in 1995, was not submitted until 2000.<sup>263</sup> Since then, the U.S. has submitted periodic reports in 2007, 2013, and 2021.<sup>264</sup> The CERD Committee has provided official guidelines for the periodic report submissions,<sup>265</sup> for which the U.S. Department of State is responsible for producing.<sup>266</sup> The Committee also invites NGOs "to submit 'shadow reports' to supplement the States [P]arty's official report by providing additional information—and particularly deficiencies, omissions, and inaccuracies—for the Committee to consider."<sup>267</sup> Upon reviewing the reports, the CERD Committee then, in the form of concluding observations, "determines whether adequate legal protections for groups that have experienced racial discrimination have been implemented."<sup>268</sup>

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259. *Introduction: Committee on the Elimination of Racial Discrimination*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cerd/introduction> (last visited Nov. 12, 2023).

260. *Id.*

261. Fact Sheet No. 12, *The Committee on the Elimination of Racial Discrimination*, OHCHR, at 4 (May 1, 1991).

262. CERD, *supra* note 171, at art. 9(1).

263. Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000).

264. *United States Reports*, U.N. HUM. RTS. TREATY BODIES DATABASE, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&CountryID=187&TreatyID=6&DocTypeCategoryID=4](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&CountryID=187&TreatyID=6&DocTypeCategoryID=4) (last visited Feb. 2, 2024).

265. Comm. on the Elimination of Racial Discrimination, Guidelines for the CERD-Specific Document to be Submitted by States Parties Under Article 9, Paragraph 1, of the Convention, U.N. Doc. CERD/C/2007/1 (June 13, 2008).

266. *See Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination: Fact Sheet*, U.S. DEP'T. OF STATE (June 4, 2021), <https://www.state.gov/periodic-report-of-the-united-states-of-america-to-the-united-nations-committee-on-the-elimination-of-racial-discrimination/> (publishing the U.S. combined tenth, eleventh, and twelfth periodic reports to CERD).

267. Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 347–48 (2008).

268. Vernellia R. Randall, *Racial Discrimination in Health Care in the United States as a Violation of the International Convention on the Elimination of All Forms of Racial Discrimination*, 14 U. FLA. J.L. & PUB. POL'Y 45, 49 (2002).

The Committee most recently reviewed the U.S.'s human rights obligations under CERD in August 2022.<sup>269</sup> Although the Committee's concluding observations did not specifically address Texas' OLS program, the Committee did express concerns regarding federal immigration policies very similar to those of OLS.<sup>270</sup> First, the Committee expressed concerns regarding racial profiling by CBP and ICE and the lack of legislation prohibiting this discrimination.<sup>271</sup> Further, it noted "the brutality and excessive or deadly use of force by law enforcement officials against members of racial and ethnic minorities," including Latinx individuals, Black individuals, and undocumented migrants.<sup>272</sup> Additionally, the CERD Committee protested the detention of non-citizens under inadequate conditions, which have a disparate impact on racial and ethnic minorities.<sup>273</sup> As described in Part II, traffic stop data, arrest records, and arrest affidavits have shown how DPS officials engage in racial profiling of migrants, high-speed vehicle pursuits by DPS troopers have resulted in the deaths of migrants and U.S. citizens, and migrants have had inadequate access to food and medical care in OLS jailing facilities.<sup>274</sup>

Under the second monitoring mechanism, the Committee recommends preventative measures aimed at addressing potential conflicts.<sup>275</sup> This includes both establishing early warning mechanisms, which aim to prevent existing situations from escalating into conflicts, and urgent procedures, which "respond to problems requiring immediate attention to prevent or limit the scale or number of serious" human rights violations under CERD.<sup>276</sup> Through this mechanism, the Committee adopts decisions, issues statements, and sends letters to States Parties.<sup>277</sup> The Committee can write decisions, statements, and letters as a means of "naming and shaming" the U.S. for its racist and exclusionary policies under OLS. For instance, the Committee adopted a decision in 2006 criticizing the U.S.'s opposition to Western

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269. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022).

270. *See id.* at 4.

271. *Id.*

272. *Id.* at 5.

273. *Id.* at 13.

274. *Supra* Part II.B–C.

275. *About Early Warning and Urgent Procedures*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cerd/about-early-warning-and-urgent-procedures> (last visited Nov. 12, 2023).

276. *Id.*

277. *Decisions, Statements and Letters*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cerd/decisions-statements-and-letters> (last visited Feb. 2, 2024).

Shoshone legal rights to their ancestral land<sup>278</sup> and adopted another in 2017 that criticized the white supremacist rally in Charlottesville, Virginia earlier that year.<sup>279</sup> The Committee issued a statement in 2020 after the killing of George Floyd in May 2020, noting its concerns regarding the killing of unarmed Black men by law enforcement officials and calling upon the U.S. to address systemic racism.<sup>280</sup> In addition, the Committee has sent 13 letters to the U.S. since 2006.<sup>281</sup> Among these letters, the Committee expressed its concerns regarding the harmful effects of a Texas-Mexico border wall in 2005 on the environment and indigenous communities,<sup>282</sup> the construction of a border wall in 2017 and its potential effect on indigenous communities living on the U.S.-Mexico border,<sup>283</sup> and the “zero tolerance policy” adopted by the U.S. in 2018.<sup>284</sup>

The Committee’s third and fourth mechanisms include examining both inter-state<sup>285</sup> and individual communications regarding human rights violations by States Parties.<sup>286</sup> First, under the inter-state complaint procedure, a State Party can formally communicate its grievances to another State Party that has allegedly violated CERD.<sup>287</sup> This practice was only

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278. Comm. on the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006).

279. Comm. on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures, (Aug. 18, 2017), [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=INT/CERD/EWU/USA/8285&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=INT/CERD/EWU/USA/8285&Lang=en).

280. Comm. on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, Including Warning and Urgent Action Procedures (June 12, 2020), <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/EarlyWarning/Statements/USA.pdf>.

281. *Decisions, Statements and Letters*, *supra* note 277.

282. Comm. on the Elimination of Racial Discrimination, Letter dated Mar. 1, 2013 from the Comm. on the Elimination of Racial Discrimination addressed to the United States Ambassador to the United Nations (Mar. 1, 2013), <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CERD/EarlyWarning/USA1March2013.pdf>.

283. Letter from the Comm. on the Elimination of Racial Discrimination to the Deputy Permanent Representative of the United States of America to the United Nations (May 17, 2017), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CERD/ALE/USA/8210&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CERD/ALE/USA/8210&Lang=en).

284. Letter from the Comm. on the Elimination of Racial Discrimination addressed to the Deputy Permanent Representative of the United States of America to the United Nations (Aug. 30, 2018), [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=INT/CERD/ALE/UKR/8762&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=INT/CERD/ALE/UKR/8762&Lang=en).

285. *Inter-State Communications*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications> (last visited Dec. 13, 2023).

286. *Individual Communications*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cerd/individual-communications> (last visited Dec. 13, 2023).

287. CERD, *supra* note 171, at arts. 11–13.

exercised for the first time in 2018 when three inter-state communications were submitted, and the CERD Committee has since adopted decisions concerning the communications.<sup>288</sup> Although no State Party has ever brought such a communication against the U.S.,<sup>289</sup> any State Party could submit an inter-state communication opposing Texas' handling of immigrant affairs through OLS. If the CERD Committee accepts the jurisdiction and admissibility,<sup>290</sup> an inter-state communication could be a viable option to hold the U.S. accountable for protecting human rights in its immigration affairs.

Under the individual communications mechanism, individuals can file a complaint against a State Party for violating CERD after all local remedies have been exhausted.<sup>291</sup> However, this is limited to States Parties that have ratified the ability of the Committee to hear such complaints;<sup>292</sup> the U.S. has not done so.<sup>293</sup> Advocates have called for the U.S. to recognize the Committee's authority to hear individual complaints,<sup>294</sup> which would, in turn, enable other states to challenge the U.S.'s treatment of migrants. Because CERD requires that local remedies be exhausted before an individual brings a complaint to the Committee, "[t]he [CERD] complaint mechanism will only be used where U.S. racial discrimination laws fall short."<sup>295</sup> This requirement places a burden on migrants and advocates, as "[e]xceptions to the obligation to exhaust local remedies have only been applied in exceptional cases by the [CERD] Committee."<sup>296</sup>

## B. The Human Rights Committee

Established under Article 28 of the ICCPR,<sup>297</sup> the Human Rights Committee (CCPR, or Committee on Civil and Political Rights) supervises

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288. *Inter-State Communications*, *supra* note 285.

289. *See id.* (listing all inter-state communications).

290. *See id.* (providing an overview of instances when CERD accepted the jurisdiction).

291. CERD, *supra* note 171, at art. 14.

292. *Id.*

293. Maya K. Watson, *The United States' Hollow Commitment to Eradicating Global Racial Discrimination*, A.B.A. HUM. RTS. MAG. (Jan. 6, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future-part-ii/the-united-states--hollow-commitment-to-eradicating-global-racial/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/the-united-states--hollow-commitment-to-eradicating-global-racial/).

294. *See, e.g., id.* ("[I]ndividual complaints will provide marginalized individuals with opportunities to voice how unaddressed racial and ethnic discrimination has affected them.").

295. *Id.*

296. Comm. on the Elimination of Racial Discrimination, Decision on the Admissibility of the Inter-State Communication Submitted by Qatar Against the United Arab Emirates, at 2, U.N. Doc. CERD/C/99/4 (Apr. 21, 2020).

297. ICCPR, *supra* note 198, at art. 28.

and monitors the implementation of ICCPR obligations by States Parties.<sup>298</sup> The CCPR has four monitoring functions that could hold the U.S. accountable to its obligations under the ICCPR.<sup>299</sup> First, the CCPR “receives and examines reports from the States [P]arties on the steps they have taken to give effect to the rights spelled out in the [ICCPR].”<sup>300</sup> In the U.S., the Department of State drafts periodic reports to the CCPR.<sup>301</sup> In accordance with Article 40, the U.S. agreed to submit its first periodic report one year after entering the ICCPR into force,<sup>302</sup> and “whenever the [CCPR] so requests.”<sup>303</sup> The U.S. submitted its initial report in 1994.<sup>304</sup> Seven years after the second report was due, the second and third reports were submitted jointly in 2005.<sup>305</sup> The U.S. submitted reports again in 2013<sup>306</sup> and 2021.<sup>307</sup> The CCPR provides official guidelines for its simplified reporting procedure, which was adopted in 2009, and its predictable review cycle, which was adopted in 2020.<sup>308</sup> Further, to encourage government truthfulness, civil liberties groups can submit a “shadow report,” which “reflect[s] the agreed views of a variety of groups or organizations.”<sup>309</sup> Upon receiving the reports, the CCPR “examine[s] each report in a public constructive dialogue with a delegation of the relevant State [P]arty”<sup>310</sup> and drafts “concluding observations,” which “set out the results of the dialogue with the [CCPR’s]

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298. Fact Sheet No. 15, Civil and Political Rights: The Human Rights Committee, OHCHR, at 14 (May 1, 2005) [hereinafter Fact Sheet No. 15].

299. *See generally id.* (providing an overview of the monitoring functions of the CCPR).

300. *Id.* at 14–15.

301. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU (July 11, 2013), <https://www.aclu.org/documents/faq-covenant-civil-political-rights-iccpr>.

302. ICCPR, *supra* note 198, at art. 40(1)(a).

303. *Id.* art. 40(1)(b). *See also Reporting Under the International Covenant on Civil and Political Rights*, U.N., OHCHR, <https://www.ohchr.org/sites/default/files/Reporting-ICCPR-Training-Guide.pdf> (last visited Feb. 2, 2024) [hereinafter *Reporting Under ICCPR*] (“According to the current practice of the Committee, the periodic reports should be submitted, in general, every three to six years, depending on the urgency of the situation in the State party, the time frame in which changes in practice are expected and the availability of other monitoring procedures for the State in question.”).

304. Reports Submitted by States Parties: United States of America, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994).

305. Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

306. Human Rights Comm., List of Issues in Relation to the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/Q/4/Add.1 (July 5, 2013).

307. Human Rights Comm., 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, U.N. Doc. CCPR/C/USA/5 (Jan. 15, 2021).

308. *Reporting Under ICCPR*, *supra* note 303, at 11–12.

309. Fact Sheet No. 15, *supra* note 298, at 17.

310. *Id.* at 18.

conclusions.”<sup>311</sup> The CCPR then engages in a follow-up procedure in which it “may request further information within one year or an additional report concerning action taken by the State [P]arty to implement the [CCPR’s] recommendations.”<sup>312</sup>

Although the CCPR’s resulting recommendations are not legally binding, they impose internationally visible expectations on the U.S. government, which has committed itself to complying with the ICCPR.<sup>313</sup> On November 3, 2023, for the first time in nine years,<sup>314</sup> the CCPR reviewed U.S. compliance with its obligations under the ICCPR.<sup>315</sup> While the CCPR did not directly address OLS, it discussed its concerns with “police brutality and the excessive and deadly use of force by law enforcement officials, including [CBP] officers,” and the lack of accountability or rehabilitation in many of these cases.<sup>316</sup> Second, the CCPR took issue with recent federal restrictions on the right of migrants to seek and enjoy asylum.<sup>317</sup> It criticized the U.S.’s detention of migrants, lack of adequate access to legal counsel, and ill-treatment and abuse in migrant detention facilities.<sup>318</sup> Lastly, the CCPR expressed concern regarding the federal government’s harassment and intimidation of American civil society groups, particularly journalists and media outlets.<sup>319</sup> As discussed in Part II, OLS practices align with the areas of concern within federal immigration policy, such as the high-speed vehicle pursuits that have killed migrants and U.S. citizens; the ill-treatment of migrants jailed under OLS, especially Latinx and Black detainees; and Attorney General Paxton’s investigation of NGOs that provide legal services to migrants.<sup>320</sup>

Under the second monitoring function, the CCPR issues general comments “designed to assist States [P]arties to give effect to the provisions of the [ICCPR] by providing greater detail regarding the substantive and

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311. *Id.* at 19.

312. *Follow up to Concluding Observations*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/follow-concluding-observations> (last visited Feb. 2, 2024).

313. See *FAQ: The Covenant on Civil & Political Rights*, *supra* note 301 (explaining the functions of the ICCPR and the commitments of the U.S. under the covenant).

314. Press Release, Center for Constitutional Rights, UN Human Rights Committee Calls for Moratorium on Life Without Parole in U.S. (Nov. 3, 2023), <https://ccrjustice.org/home/press-center/press-releases/un-human-rights-committee-calls-moratorium-life-without-parole-us>.

315. Human Rights Comm., *Concluding Observations on the Fifth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/5 (Dec. 7, 2023).

316. *Id.* ¶ 36.

317. *Id.* ¶ 54.

318. *Id.*

319. *Id.* ¶ 58.

320. *Supra* Part II.B–D.

procedural obligations of States [P]arties.”<sup>321</sup> Although the CCPR’s general comments do not focus on a particular State Party action, they can offer a detailed analysis of a specific article or general issue in the ICCPR that provides guidance to States Parties and removes ambiguity in the ICCPR’s application.<sup>322</sup> A general comment emphasizing the ICCPR’s disapproval of anti-immigrant legislation thus may not be useful in specifically addressing the legal validity of OLS, but it can reiterate international attitudes towards discriminatory and violent programs like OLS.

Under the third and fourth monitoring mechanisms, the CCPR considers individual and inter-state complaints under the Optional Protocol to the ICCPR.<sup>323</sup> In these “communications,” individuals claim a violation of their rights under the ICCPR or a State Party complains of another State Party’s human rights violation.<sup>324</sup> These communications are only authorized to be effective against States Parties that have signed and ratified the First Optional Protocol and after local remedies have been exhausted.<sup>325</sup> Currently, these two mechanisms are not viable options against the U.S. because the U.S. has not yet ratified the Optional Protocol.<sup>326</sup> Thus, the CCPR’s concluding observations and follow-up procedure, as well as its general comments regarding the general international framework that curbs policies like OLS, are the primary monitoring functions to challenge OLS.

### C. The Committee Against Torture

The Committee Against Torture was established as the monitoring body of the UNCAT pursuant to Article 17.<sup>327</sup> OLS’s strategies deterring migrants at the border may amount to cruel and unusual punishment under UNCAT, which is a prohibited activity by a State Party.<sup>328</sup> As mentioned in Part III, the U.S. restricts UNCAT’s definition of “cruel, inhuman, or degrading treatment or punishment” to conduct prohibited by the Fifth, Eighth, or

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321. Fact Sheet No. 15, *supra* note 298, at 15.

322. *Id.* at 24.

323. *Id.* at 15.

324. *Id.*

325. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

326. *Status of Ratification Interactive Dashboard*, OHCHR, <https://indicators.ohchr.org/> (last visited Nov. 12, 2023).

327. UNCAT, *supra* note 229, at art. 17.

328. *See id.*, art. 16 (“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).

Fourteenth Amendments of the U.S. Constitution.<sup>329</sup> However, according to the U.N.’s Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, “ill-treatment or grossly inadequate detention conditions can even amount to torture if they are intentionally imposed . . . for the purpose of deterring, intimidating, or punishing migrants or their families, [or] coercing them into withdrawing their requests for asylum.”<sup>330</sup> OLS, with the explicit goal of deterring and punishing migrants and reducing asylum requests,<sup>331</sup> could thus satisfy the international definition of torture under UNCAT.

As with the CCPR and CERD Committee, the Committee Against Torture has four main monitoring functions that could function to hold the U.S. accountable to its UNCAT responsibilities.<sup>332</sup> First, the U.S. and other States Parties agree to submit an initial report one year after entering UNCAT into force, and to submit periodic reports every four years thereafter “on any new measures taken and such other reports as the Committee may request.”<sup>333</sup> The U.S. submitted its initial report in 1999, four years after ratification.<sup>334</sup> The U.S. has since provided periodic reports in 2005,<sup>335</sup> 2013,<sup>336</sup> and 2021.<sup>337</sup> Further, the Committee encourages local and national NGOs to submit reports and participate in briefings so that they can contribute to the preparation and adoption of “lists of issues” and “lists of issues prior to reporting” to consider during the examination of a State Party’s report.<sup>338</sup> Through their reports and briefings, NGOs “provide direct country-specific information to the members of the Committee.”<sup>339</sup> After

329. Comm. Against Torture, Consideration of Repts. Submitted by State Parties Under Article 19 of the Convention, ¶ 302, U.N. Doc CAT/C/28/Add.5 (Feb. 9, 2000).

330. Human Rights Council, Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 20, U.N. Doc. A/HRC/37/50 (Feb. 26, 2018).

331. *Supra* Part II.C.2.

332. *Introduction, Committee Against Torture*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cat/introduction> (last visited Dec. 13, 2023).

333. UNCAT, *supra* note 229, at art. 19(1).

334. Comm. Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/28/Add.5 (Oct. 15, 1999).

335. Comm. Against Torture, Consideration of reports submitted by parties under Article 19 of the Convention, U.N. Doc. CAT/C/48/Add.3/Rev.1 (May 6, 2005).

336. *UN Comm. Against Torture, Convention Against Torture Periodic Report of the United States of America*, <https://2009-2017.state.gov/documents/organization/213267.pdf> (last visited Feb. 2, 2024).

337. *United States’ Sixth Periodic Report to the UN Committee Against Torture on Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ACLU (Sept. 24, 2021), <https://www.aclu.org/publications/united-states-sixth-periodic-report-un-committee-against-torture-compliance-convention>.

338. *Information for Civil Society, NGOs and NHRIs*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cat/information-civil-society-ngos-and-nhris> (last visited Feb. 2, 2024).

339. *Id.*

receiving the reports, the Committee then examines them and issues “concluding observations,” containing its concerns and recommendations to the State Party.<sup>340</sup> In its 2014 concluding observations, the Committee criticized the U.S.’s practice of holding migrants in mandatory detention for prolonged periods of time in inadequate conditions.<sup>341</sup> The Committee further noted that the U.S. did not adequately consider “the special circumstances of asylum seekers” in removing them from the U.S.<sup>342</sup> and recommended that the U.S. strictly apply the absolute prohibition against refoulement.<sup>343</sup> As discussed in Part II, the Committee’s concerns regarding federal immigration policies highlight OLS’s violations of UNCAT, such as holding migrants in jails without access to medical care or adequate food and DPS troopers pushing migrants back to their home country without considering their asylum status.<sup>344</sup>

After issuing its concluding observations, the Committee specifies issues on which it expects States Parties to regularly report.<sup>345</sup> The most recent list of issues for the U.S. was published in 2017, prior to the start of OLS.<sup>346</sup> The Committee asked the U.S. to clarify several federal policies regarding immigration and to provide information regarding “the adequacy of the refugee determination process and asylum procedures;”<sup>347</sup> “the current policy regarding the use of solitary confinement in prisons and within the immigration detention system;”<sup>348</sup> measures taken “to ensure that detention of asylum seekers and migrants is used only as a last resort” and to implement alternatives to detention;<sup>349</sup> and allegations regarding denial of medical care, sexual abuse and threats against detainees by CBP officials.<sup>350</sup> In its sixth periodic report to the Committee, the U.S. addressed each of these concerns in turn.<sup>351</sup> The U.S. repeatedly defended its position on each of

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340. *Introduction, Committee Against Torture, supra* note 332.

341. Comm. Against Torture, Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America, ¶ 18, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014).

342. *Id.* ¶ 18.

343. *See id.* (discussing measures the U.S. should take to “ensure full compliance with its obligations in respect of nonrefoulement”).

344. *Supra* Part II.B–C.

345. *Information for Civil Society, NGOs and NHRIs, supra* note 338.

346. Comm. Against Torture, List of Issues Prior to Submission of the Sixth Periodic Report of the United States of America, U.N. Doc. CAT/C/USA/QPR/6 (Jan. 26, 2017).

347. *Id.* ¶ 9.

348. *Id.* ¶ 23.

349. *Id.* ¶ 28.

350. *Id.* ¶ 29.

351. *See United States’ Sixth Periodic Report to the UN Committee Against Torture, supra* note 337, ¶¶ 35–58, 92–93, 114–19, 120–27 (addressing refugee, asylum processes, solitary confinement, detention

these concerns by providing broad overviews of the Biden administration's federal policies, failing to address state and local compliance with the Committee's concerns regarding immigration.<sup>352</sup>

The Committee has three other mechanisms through which it performs its monitoring functions.<sup>353</sup> First, the Committee may "consider individual complaints or communications from individuals claiming that their rights under the Convention have been violated."<sup>354</sup> Because individual complaints can only be brought against a State Party that has made the requisite declaration under Article 22 of UNCAT,<sup>355</sup> and the U.S. has not done so, individual complaints cannot be leveraged against the U.S.<sup>356</sup> Second, the Committee can undertake confidential inquiries, with state cooperation, upon receiving "reliable information which appears to it to contain well-founded indications that torture is being systematically practi[c]ed in a State [P]arty."<sup>357</sup> NGOs may provide information to the Committee to instigate such an inquiry and provide additional information after the start of such an inquiry.<sup>358</sup> However, no such inquiry has ever been brought against the U.S., and the Committee has only conducted ten inquiries since 1994.<sup>359</sup> Third, any State Party can complain to the Committee about the U.S.'s alleged violations, but the inter-state complaint process is only available against a State Party that has made a declaration under Article 21 of the UNCAT accepting the authority of the Committee to hear such a complaint.<sup>360</sup> While the U.S. has made this declaration,<sup>361</sup> no State Party has ever filed an inter-

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of asylum seekers and migrants, and denial of medical care, sexual abuse and threats against detainees, respectively).

352. See generally *id.* (providing the Biden administration's response to questions posed by the Committee).

353. See *Introduction, Committee Against Torture*, *supra* note 332 (listing the Committee Against Torture's four monitoring mechanisms).

354. *Id.*

355. UNCAT, *supra* note 229, at art. 22.

356. See *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. at 8479–80 (describing the U.S.'s RUDs for UNCAT).

357. *Confidential Inquiries Under Article 20 of the Convention Against Torture*, OHCHR, <https://www.ohchr.org/en/treaty-bodies/cat/confidential-inquiries-under-article-20-convention-against-torture> (last visited Dec. 13, 2023).

358. *A Handbook for Civil Society*, OHCHR, at 55, [https://www.ohchr.org/sites/default/files/AboutUs/CivilSociety/Documents/Handbook\\_en.pdf](https://www.ohchr.org/sites/default/files/AboutUs/CivilSociety/Documents/Handbook_en.pdf) (last visited Feb. 2, 2024).

359. See *Confidential Inquiries Under Article 20 of the Convention Against Torture*, U.N. HUM. RTS. TREATY BODIES, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Inquiries.aspx](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Inquiries.aspx) (last visited Feb. 2, 2024) (listing all Art. 20 inquiries into States Parties).

360. UNCAT, *supra* note 229, at art. 21.

361. See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. HUM. RTS. TREATY BODIES (Dec. 10, 1984),

state complaint against the U.S.<sup>362</sup> If a State Party would like to challenge the U.S.'s violations of UNCAT under OLS, it may bring the matter to the attention of the U.S. and subsequently refer the matter to the Committee.<sup>363</sup>

## V. CONCLUSION

OLS can no longer hide its human rights violations behind the justification of border security. For over three years, OLS has threatened the lives of migrants and U.S. citizens alike, violating international standards set by CERD, the ICCPR, and UNCAT. OLS explicitly breaches these obligations. CERD, the ICCPR, and UNCAT each provide multiple legal avenues to challenge OLS's human rights violations that advocates should use to hold the U.S. accountable to the requirements set by its ratified treaties. By understanding the extent to which OLS violates minimum human rights standards under international law, advocates can bolster their efforts to end OLS and protect migrants and U.S. citizens from future violations of basic human rights.

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[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec) (listing U.S. RUDs under UNCAT).

362. *Committee Against Torture*, INT'L JUST. RES. CTR., [https://ijrcenter.org/un-treaty-bodies/committee-against-torture/#Inter-State\\_Complaints](https://ijrcenter.org/un-treaty-bodies/committee-against-torture/#Inter-State_Complaints) (last visited Dec. 13, 2023).

363. UNCAT, *supra* note 229, at art. 21.