

## ZERO-TOLERANCE: THE TRUMP ADMINISTRATION'S HUMAN RIGHTS VIOLATIONS AGAINST MIGRANTS ON THE SOUTHERN BORDER

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### ABSTRACT

*In 2017, the Trump Administration imposed its policy of zero-tolerance immigration enforcement on the southern border. This policy resulted in the forcible separation of families and the prolonged detention of children in harsh conditions without due process or adequate resources. The Trump Administration unleashed these policies to deter people from immigrating and seeking asylum, consistent with President Trump's racist campaign rhetoric. This Article analyzes and critiques these policies based on international human rights law.*

*This Article begins with analysis of the Trump Administration's policies that divided families and detained children in violation of U.S. law. It proceeds to evaluate and criticize these policies under treaties ratified by the United States, conventions it has signed but not ratified, and customary international law. In the name of border enforcement, the Trump Administration's policies violated the fundamental human rights of migrants and people seeking asylum in the United States, including the right to family life, rights of the child, and rights to be free from ill-treatment and arbitrary detention. The abrupt and often permanent separation of families, indefinite*

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*detention of children without proper care, and failure of process in these policies are all stark violations of binding international human rights law.*

*The Article concludes with a recognition that international institutions and legal mechanisms may not be adequate to compel the Trump Administration to respect international law, so political and electoral responses are vital to ensure that human rights remain at the heart of the American enterprise. It suggests the accord between religious ethical perspectives and human rights principles is valuable to reinforcing popular support for these norms. As the world bears witness to these cruel abuses of human rights, Americans must decide whether and how to hold the government accountable for the inherent dignity of all people within the rule of law.*

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INTRODUCTION

In the first year of his administration, President Donald J. Trump imposed a “zero-tolerance” policy of immigration enforcement to deter migration and asylum, translating his vitriolic, racist campaign rhetoric into executive action. In the process, his administration perpetrated the deliberate and often permanent separation of migrant families and the prolonged detention of migrants, including asylum seekers and children, under harsh conditions. To date, an unknown number of children remain orphaned by the actions of an administration admittedly unequipped to reunify families in a timely manner;

many others suffer severe trauma.<sup>1</sup> At least eleven migrant children have died following their sojourns in camps and facilities on the southern border, the first such deaths in decades.<sup>2</sup> In the name of border enforcement and immigration deterrence, the Trump Administration's policies violated the fundamental human rights of migrants, including many fleeing violence and seeking asylum in the United States.

Human rights—those inherent, universal, and inalienable rights that the United States and other nations of the world have promised to uphold—have their foundation in human dignity and justice. The nation-state's right of territorial sovereignty has, since the dawn of modern human rights law in the post-war era, been constrained by respect for the inviolable human worth, liberty, and rights of the individual person. The community of nations declares that certain fundamental human rights supersede the base will of a sovereign to power.

The moral principles reflected in international human rights law resonate in conscience. Diverse civil society activists played pivotal roles in securing protection for human rights at the foundation of the United Nations.<sup>3</sup> Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, communities moved by their experiences of injustice or by religious or other ethical commitments have affirmed human rights under international law.<sup>4</sup> Deeper philosophical commitments to the extraordinary dignity and worth of the

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1. See *infra* notes 130–46 and accompanying text.

2. See *infra* notes 143–46 and accompanying text.

3. See generally CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003) (chronicling the role of Black freedom leaders in advocating for inclusion of human rights at the early United Nations); JOHN S. NURSER, FOR ALL PEOPLES AND ALL NATIONS: THE ECUMENICAL CHURCH AND HUMAN RIGHTS (2005) (detailing the history of Ecumenical Protestant support for human rights in the same period).

4. See, e.g., *A 21st Century Social Creed*, NAT'L COUNCIL OF CHURCHES (2007), <https://nationalcouncilofchurches.us/a-21st-century-social-creed/> (“In faith, responding to our Creator, we celebrate the full humanity of each woman, man, and child, all created in the divine image as individuals of infinite worth, by working for: [f]ull civil, political, and economic rights for women and men of all races . . . [and] strengthening of the United Nations and the rule of international law.”).

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human person, which entitle all people to certain safeguards in the form of human rights, are illumined by particular ethical and religious traditions, whose themes, narratives, and cultural resources can strengthen a society's commitment to human rights. This Article roots its human rights analysis in international law while acknowledging that the Trump Administration violated deeper precepts of respect for human dignity that resound in religious traditions, national conscience, and shared morality.

Under the Trump Administration, the United States government violated numerous, critical human rights norms, including children's rights, the right to family life, and the right to be free from ill treatment. It transgressed explicit treaty commitments and other widely accepted human rights norms. The Trump Administration articulated multiple, shifting, contradictory justifications for its actions, including an express intention to make the consequences of undocumented immigration so severe as to intimidate and deter other migrants and asylees from attempting to enter the United States. The President launched a harsh program to inflict such fear and pain on families and children that word would get out to others who might seek to immigrate or to apply for asylum.

The forcible and permanent separation of families, the prolonged detention of children in squalid conditions without proper care, and the absence of any process for considering individuals' human rights in these policies are stark violations of international laws binding on the United States.<sup>5</sup>

These policies likewise violate broader ethical principles rooted in moral conscience.<sup>6</sup> International human rights principles are more than positive law; they draw from diverse,

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5. The U.S. Constitution, Article VI, Clause 2, declares, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

6. The moral injunction to "welcome the stranger" abounds in the Hebrew Bible. The religious imperative to love and care for one's neighbor as oneself is central to the Christian New Testament. *See infra* notes 326–29 and accompanying text.

global moral consensus forged over centuries, cultures, and generations. Human rights are understood to be innate and universal, placing some standards for how humans should treat one another beyond dispute. Since the Trump Administration began its attack on migrants' human rights in early 2017, faith leaders have been among the many civil society advocates to sound the alarm and demand more compassionate, humane, and lawful treatment of people who are far from their homes.<sup>7</sup> Global communities of faith, many of whom ground human dignity in belief that each human person reflects the image of the divine, have been among those to call for respect for international rule of law and to express concern for migrants and children in particular.<sup>8</sup>

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7. See, for example, *A Statement from Daniel Cardinal DiNardo*, U.S. CONF. OF CATH. BISHOPS (June 13, 2018), <https://www.usccb.org/news/2018/18-098.cfm>:

Our government has the discretion in our laws to ensure that young children are not separated from their parents and exposed to irreparable harm and trauma. Families are the foundational element of our society and they must be able to stay together. While protecting our borders is important, we can and must do better as a government, and as a society, to find other ways to ensure that safety. Separating babies from their mothers is not the answer and is immoral.

(spacing added). See also Press Release, Religious Action Ctr. Reform Judaism, Reform Jewish Leadership Decries Missing Children, Family Separation, and Mistreatment of Minors (May 28, 2018), <https://rac.org/press-room/reform-jewish-leader-decries-missing-children-family-separation-and-mistreatment-minors>; *On Immigration*, S. BAPTIST CONVENTION (June 1, 2018), <https://www.sbc.net/resource-library/resolutions/on-immigration>; *Bishop Andy Doyle's Statement on Separating Children from Parents at the Border*, EPISCOPAL DIOCESE OF TEX. (June 18, 2018), <https://www.epicenter.org/article/bishop-andy-doyles-statement-on-separating-children-from-parents-at-border/>; Lynette Wilson, *Church, Interfaith Leaders Call for US Government To End Its Immigration Policy Separating Families*, EPISCOPAL NEWS SERV. (June 12, 2018), <https://www.episcopalnewsservice.org/2018/06/12/church-interfaith-leaders-call-for-us-government-to-end-its-immigration-policy-separating-families/>.

8. See, e.g., WCC Exec. Comm., *Statement on People on the Move: Migrants and Refugees*, WORLD COUNCIL CHURCHES (Nov. 7, 2018), <https://www.oikoumene.org/en/resources/documents/executive-committee/upsala-november-2018/statement-on-people-on-the-move-migrants-and-refugees> (issued following the joint "Conference on Xenophobia, Racism and Populist Nationalism in the Context of Global Migration" with the Roman Catholic Church, stressing "as a matter of first principle that all refugees and migrants, regular or irregular, are human beings each created in the image of God, children of God, sisters and brothers, with equal human dignity and rights regardless of their immigration status" and reaffirming support for international treaty law protecting the rights of migrants and of children in particular); *Evangelical Leaders Urge President Trump to Keep Families Together*, NAT'L ASSOC. OF EVANGELICALS (June 1, 2018), <https://www.nae.net/evangelical-leaders-urge-president-trump->

International law remains a powerful and persuasive expression of human dignity and human rights, resounding in the moral imagination of multitudes moved by concern for their fellow human beings. The global moral outcry over the Trump Administration's treatment of migrants reinforces the authority of human rights law to curb the cruel prerogative of a sovereign. It also offers a remarkable example of how shared religious ethical convictions and global human rights norms can align squarely.

This Article focuses on the human rights violations the Trump Administration perpetrated through zero-tolerance enforcement and its attendant practices of family separation and the detention of migrant children.<sup>9</sup> This Article provides a detailed legal analysis of gross violations of human rights under the Trump Administration's zero-tolerance policies. Part I explains the Trump Administration's policies and practices that separated families and detained children in prolonged, harsh, and harmful conditions. Part II analyzes these policies under international human rights law, including treaty obligations and related human rights norms, with a clear conclusion that

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keep-families-together/; *Inhumane Conditions for Migrant Children are Unacceptable*, NAT'L ASSOC. OF EVANGELICALS (June 27, 2019), <https://www.nae.net/inhumane-conditions-for-migrant-children-unacceptable/>.

9. These were not the only problematic, unlawful policies and practices the Trump Administration deployed to curtail and deter immigration and asylum seeking. Others included its so-called "Migrant Protection Protocols" that forced people seeking asylum to wait in dangerous camps in Mexico before having their claims adjudicated, and "refoulement" to countries and situations that were deadly and violent, without consideration of personal claims of immediate danger. These and other policies likely violated international human rights laws, but they are beyond the scope of this article. See, e.g., Jaya Ramji-Nogales, *Non-Refoulement Under the Trump Administration*, AM. SOC'Y INT'L L.: ASIL INSIGHTS (Dec. 3, 2019), <https://www.asil.org/insights/volume/23/issue/11/non-refoulement-under-trump-administration>; see also HUM. RTS. WATCH, *DEPORTED TO DANGER: U.S. DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE 105* (2020), <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and#290612> (publishing the results of an empirical study tracking migrants and asylum-seekers deported to El Salvador, finding 138 Salvadorans were murdered after refoulement between 2013 and 2020, more than seventy of whom were subjected to sexual violence, torture, and other harm, usually at the hands of gangs, or who went missing following their return, and finding clear links in most cases between the harms they suffered and the reasons they tried to immigrate in the first place).

the United States violated and continues to violate the human rights of people seeking to immigrate or seek asylum on the southern border. The Conclusion situates these legal issues within a broader and deeper context of moral, religious, and cultural conscience. Donald Trump and his administration violated more than domestic and international law; they committed gross, immoral abuses against human dignity.

I. THE TRUMP ADMINISTRATION'S EXECUTIVE POLICIES ON  
IMMIGRATION AND ASYLUM AND THEIR EFFECT ON CHILDREN  
AND FAMILIES

Beginning in 2017, the Trump Administration imposed its policy of zero-tolerance enforcement of immigration laws on the U.S. border with Mexico, arguing that it was necessary to secure the border and deter other immigrants from attempting to cross the southern border.<sup>10</sup> Under the zero-tolerance policy, the government would arrest all migrants—including asylum seekers—crossing the border without documentation but, instead of processing and releasing them pending adjudication of their cases as before, the government would incarcerate them indefinitely in camps and other facilities until their cases were resolved.<sup>11</sup> Because of existing judicial restrictions on the prolonged detention of children, especially the *Flores* agreement discussed below,<sup>12</sup> the government separated children from their families so that it could detain parents and adult relatives indefinitely, while processing their children separately.<sup>13</sup>

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10. See *infra* Section I.A.

11. See Q&A: *Trump Administration's "Zero-Tolerance" Immigration Policy*, HUM. RTS. WATCH (Aug. 16, 2018, 8:00 AM), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy>.

12. See *infra* note 18 and accompanying text.

13. The U.S. District Court for the Southern District of California described the program in a January 2020 order in the case of *Ms. L. v. U.S. Immigration and Customs Enforcement (ICE)*, discussed in detail throughout this article:

In practice, the policy resulted in the indiscriminate separation of thousands of migrant parents and children, most of whom were seeking asylum from countries in Central America and many of whom entered the United States lawfully at designated



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*A. Zero-Tolerance Enforcement: Justifications, Intent, Motives*

Within the first month of taking office, President Trump issued an executive order directing the Department of Homeland Security (DHS) to end the practice known as “catch and release.”<sup>14</sup> This practice, which had been the standard for years, called for arresting undocumented immigrants, booking them, then releasing them on bond or otherwise to await adjudication of their immigration or asylum claims in U.S. immigration courts.<sup>15</sup> “Catch and release” was a practical response to the volume of migrants crossing the border without documentation and the finite capacity of law enforcement, administrative agencies, detention facilities, support services, and administrative law courts.<sup>16</sup> Before the zero-tolerance policies, the vast majority of undocumented immigrants and asylum-seekers returned for all of their appearances in immigration court after being released from detention.<sup>17</sup>

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ports of entry. In addition, parents who were prosecuted for unlawful entry for entering between ports of entry were not reunified with their children after serving brief criminal sentences because DHS did not have adequate systems in place to keep track of the children, let alone any plan to reunify the families. As a result, migrant parents remained separated from their children for months while the parents pursued their asylum claims and other relief from removal. Many of the parents were deported back to Central America without their children after exhausting their challenges to removal.

415 F. Supp. 3d 980, 984 (S.D. Cal. 2020).

14. Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8,793, 8,795 (Jan. 25, 2017).

15. *Id.*

16. Detention in immigration proceedings was certainly not new to the Trump Administration, and it has been a fraught political and legal issue for decades. The Trump Administration’s zero-tolerance approach exacerbated many existing conditions and factors. See Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 19-17 ANN. REV. L. & SOC. SCI. 1, 25–26 (2019); see also Lara Yoder Nafziger, *Protection or Persecution?: The Detention of Unaccompanied Immigrant Children in the United States*, 28 HAMLIN J. PUB. L. & POL’Y 357, 402 (2006).

17. Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 847–48 (2018) (detailing a fifteen-year study on the experience of families in the immigration adjudication and deportation system, finding that families released from detention were more likely to have legal representation, that 86% of family members released from detention had attended all of their court hearings, and that 96% of asylum seekers had attended all their immigration court hearings).

President Trump criticized “catch and release” and sought to detain all immigrants without documentation while their cases were pending.<sup>18</sup> These new policies, dramatically aggressive extensions of executive authority calculated to deter migration and asylum-seeking at the border, differed in scope and quality from those of previous administrations.<sup>19</sup> Seeking asylum is not illegal; on the contrary, it is a human right protected under international law.<sup>20</sup> But with these policies, the Trump Administration set out to radically curtail immigration and asylum-seeking in the United States.<sup>21</sup>

Apparently dissatisfied with the pace of enforcement, on April 6, 2018, President Trump issued a memorandum to accelerate this program, ordering DHS to end the practice of “catch and release” within forty-five days.<sup>22</sup> The same day,

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18. Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. at 8,795. This was a piece of broader Trump Administration policy meant to stem immigration generally and to limit immigration of certain populations, like Mexicans, Muslims, and other groups President Trump targeted during his election campaign; these strategies fit a pattern of xenophobia and underpin a sense of preserving America as a predominantly white nation. See Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 580 (2019).

19. See Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 716 (2019) (addressing the Trump Administration’s executive interference with administrative adjudication and law enforcement. The Trump Administration’s zero-tolerance policies also imposed new and problematic consequences on migrants seeking asylum, creating profound barriers to lawful adjudication of asylum claims for migrants fleeing from violence and persecution at home); see also Cindy S. Woods, *Barriers to Due Process for Indigent Asylum Seekers in Immigration Detention*, 45 MITCHELL HAMLINE L. REV. 319, 325 (2019). While courts and lawmakers necessarily focus on immediate harms and violation of precise standards, these long-standing features of U.S. policy have catastrophic effects across generations of immigrant families. See Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2378 (2019).

20. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14(1) (Dec. 10, 1948) (“Everyone has the right to seek and enjoy in other countries asylum from persecution.”).

21. Compare Marouf, *supra* note 19 (addressing the Trump Administration’s executive interference with administrative adjudication and law enforcement. The Trump Administration’s zero-tolerance policies also imposed new and problematic consequences on migrants seeking asylum, creating profound barriers to lawful adjudication of asylum claims for migrants fleeing from violence and persecution at home), with 8 U.S.C. § 1158 (specifying lawful authority to apply for asylum and conditions for granting asylum).

22. Memorandum from Donald J. Trump, President of the U.S., to Sec’y of State, Att’y Gen., Sec’y of Health & Hum. Servs. & Sec’y of Homeland Sec. (Apr. 6, 2018), <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-united-states-government-supported-research-development-national-security-policy/>.

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Attorney General Jefferson Beauregard Sessions circulated a memorandum that directed federal prosecutors along the southern border to implement a “zero-tolerance policy.”<sup>23</sup> The zero-tolerance policy required law enforcement officers to detain and prosecute every individual who entered the United States irregularly.<sup>24</sup> The Administration instructed law enforcement agencies to arrest and charge all such individuals with misdemeanors and to institute civil removal proceedings, incarcerating them in detention until the government processed their cases and either permitted their immigration or deported them.<sup>25</sup> According to one study, immigration-related prosecutions in border districts increased from 7,604 prosecutions in March 2018 to 12,402 in June 2018, while the percentage of non-immigration criminal prosecutions decreased from 14% to 6% in the same period.<sup>26</sup>

The Trump Administration sought to justify family separation and child detention as a practical, unavoidable result of the zero-tolerance policy.<sup>27</sup> Since the Trump Administration aimed to detain migrants indefinitely after their arrest, it removed children from their parents and detained them

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23. Memorandum from Jeff Sessions, U.S. Att’y Gen., for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

24. Press Release, Dep’t of Just., Off. of Pub. Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>. The Trump Administration suggested that this is merely “enforcing the law,” but the law provides wide discretion for the adjudication and processing of undocumented immigrants that does not involve mass detention. See Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2155–70 (2017) (arguing that detention is not only unnecessary and subject to wide discretion but that other options are more effective, humane, and financially responsible).

25. Seeking asylum is not illegal. See 8 U.S.C. § 1325; see also AM. IMMIG. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 1 (May 1, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.

26. TRAC Immigration, *Stepped Up Illegal-Entry Prosecutions Reduce Those of Other Crimes*, TRANSACTIONAL RECS. ACT CLEARINGHOUSE (Aug. 6, 2018), <http://trac.syr.edu/immigration/reports/524/>.

27. See Jeff Sessions, U.S. Att’y Gen., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>).

separately, adjudicating their cases independently and under different time frames.<sup>28</sup> The policy change was abrupt, and the government's facilities, personnel, and policies were unable to accommodate the needs of thousands more children in its custody.<sup>29</sup>

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28. See *Fact Sheet: Zero Tolerance Immigration Prosecutions – Families*, U.S. DEP'T OF HOMELAND SEC. (June 15, 2018), <https://www.dhs.gov/news/2018/06/15/fact-sheet-zero-tolerance-immigration-prosecutions-families>.

29. Off. of the Inspector Gen., Dep't of Homeland Sec., OIG 18-84, Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy (2018) [hereinafter Special Review], <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>. In this report, the Department of Homeland Security (DHS) summarized its findings as follows:

DHS was not fully prepared to implement the Administration's Zero Tolerance Policy or to deal with some of its after-effects. Faced with resource limitations and other challenges, DHS restricted the number of asylum-seekers entering the country through ports of entry at the same time that it encouraged asylum-seekers to come to the ports. During Zero Tolerance, CBP also held alien children separated from their parents for extended periods in facilities intended solely for short-term detention. DHS also struggled to identify, track, and reunify families separated under Zero Tolerance due to limitations with its information technology systems, including a lack of integration between systems. Finally, DHS provided inconsistent information to aliens who arrived with children during Zero Tolerance, which resulted in some parents not understanding that they would be separated from their children, and being unable to communicate with their children after separation.

*Id.* Professor Lenni B. Benson offers a critical, detailed picture of the extreme administrative burdens that existed for the detention and adjudication of unaccompanied minors even before the Trump Administration's zero tolerance policies made this manifestly worse. See Lenni B. Benson, *Administrative Chaos: Responding to Child Refugees—U.S. Immigration Process in Crisis*, 75 WASH. & LEE L. REV. 1287 (2018). Benson writes,

As a result of the family separations more than 3,000 children were re-characterized as an "unaccompanied alien child" and custody of these children was transferred to Health and Human Services away from the Department of Homeland Security. It is beyond the scope of this Article to address all of the turmoil, heartbreak, and legal violations that resulted from this unfortunate practice of family separation. And as of the end of August 2018, there are still many children who have not been released nor reunited with family. What is clear, is that the administrative chaos described here became even more volatile, stressed, and confusing as thousands of additional children were suddenly transformed into "unaccompanied children."

*Id.* at 1289–90 (citations omitted); accord Natalie Lakosil, *The Flores Settlement: Ripping Families Apart Under the Law*, 48 GOLDEN GATE U. L. REV. 31 (2018) (arguing that it is unconstitutional to separate families because it deprives parents of the fundamental right to custody of their children and family unity, which is granted to them under the Fifth and Fourteenth Amendments of the U.S. Constitution).

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1. *Justifications*

Even before zero-tolerance enforcement, the immigration process was complicated for families entering the United States together, and was especially fraught for those with children.<sup>30</sup> Under domestic law, as enforced by a standing settlement agreement in the 1997 case of *Flores v. Reno*, discussed much more fully in section I.C, *infra*, the United States must comply with stricter rules governing the detention and care of immigrant children in its custody.<sup>31</sup> When the government takes a minor into custody, the *Flores* Agreement requires Immigration and Customs Enforcement (ICE) (formerly the Immigration and Naturalization Service) to move children to a licensed detention facility designated for minors in three to five days, unless special circumstances permit otherwise, then to place them with qualified relatives or others for foster custody.<sup>32</sup>

In 2015, in *Flores v. Johnson*, the Central District of California interpreted the *Flores* Agreement to require separate detention facilities for children and for parents, and because the settlement focused on the policy of ensuring the safety of the children, the court also ordered the release of detained parents with their accompanied minors.<sup>33</sup> The Ninth Circuit agreed with the first point but overturned part of the ruling that ordered the release of the parents.<sup>34</sup> The Trump Administration used this holding as a justification for its policies of separating children

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30. The United States had practiced family detention for some asylum seekers for years already. See Eagly et al., *supra* note 17, at 790–91 (observing an expanding system of detention facilities for families seeking asylum and documenting some of the serious challenges that families face in asylum proceedings while in family detention).

31. See Stipulated Settlement Agreement, *Flores v. Reno*, No. CV-85-4544-RJK (C.D. Cal. Jan. 17, 1997). The *Flores* Agreement governs U.S. practices for detaining migrant children. *Flores v. Reno* is an active case in the Central District of California before Judge Dolly Gee, and its settlement agreement is active and in effect throughout the nation. For a detailed history and description of the *Flores* Agreement and the Trump Administration's responses to it, see Sarah Collins, *Kids in Cages and the Regulations that Protect Them*, 97 DENV. L. REV. F. 230 (2019).

32. See Stipulated Settlement Agreement, *supra* note 31, at 7–12.

33. 212 F. Supp. 3d 864, 875 (C.D. Cal. 2015).

34. *Flores v. Lynch*, 828 F.3d 898, 908–09 (9th Cir. 2016).

and refusing to release parents and families.<sup>35</sup> Thus, when it imposed zero-tolerance enforcement, the Trump Administration began to separate children from their parents, sending children to separate detention centers, rather than detaining or releasing them together.<sup>36</sup> The Administration claimed that the *Flores* Agreement made its actions necessary, thereby invoking a ruling issued to protect migrant children as justification for the harm it caused them.<sup>37</sup> These actions resulted in catastrophic harm and trauma to children and their families.<sup>38</sup> Experts warned administration officials in advance of the severe, lasting physiological and psychological trauma that would result, but the government proceeded undeterred.<sup>39</sup>

## 2. Intent

President Trump and his administration imposed these harsh measures to deter—even coerce—other people from attempting to immigrate over the southern border or to seek asylum in the United States. “If they feel there will be separation, they don’t come,” President Trump explained when asked about separating children from migrant families.<sup>40</sup> White House Chief

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35. See Sessions, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, *supra* note 27; Linda Qiu, *Republicans Misplace Blame for Splitting Families at the Border*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/politics/fact-check-republicans-family-separations-border.html>.

36. Sessions, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, *supra* note 27.

37. See Michelle Mark, *Trump Keeps Falsely Blaming Democrats for His Administration’s Family Separation Policy—Here’s What’s Really Going On*, BUS. INSIDER (June 15, 2018, 1:57 PM), <https://www.businessinsider.com/trump-family-separation-zero-tolerance-democrats-immigration-loopoles-flores-tvpra-2018-6>; Linda Qiu, *Fact-Checking Trump’s Claim That He Didn’t Start Family Separations at Border*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/fact-check-trump-family-separation.html>.

38. See Alexander Miller, Julia Hess, Deborah Bybee & Jessica Goodkind, *Understanding the Mental Health Consequences of Family Separation for Refugees: Implications for Policy and Practice*, 88 AM. J. ORTHOPSYCHIATRY, no. 1, 2018, at 1, 1.

39. U.S. COMM’N ON C.R., TRAUMA AT THE BORDER: THE HUMAN COST OF INHUMANE IMMIGRATION POLICIES 3 (2019) [hereinafter TRAUMA AT THE BORDER].

40. David Shepardson, *Trump Says Family Separations Deter Illegal Immigration*, REUTERS (Oct. 13, 2018, 8:44 PM), <https://www.reuters.com/article/us-usa-immigration-trump/trump-says->

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of Staff John Kelly agreed in an interview that the policies of family separation were meant to deter migrants, “[b]ut a big name of the game is deterrence. . . . It could be a tough deterrent—would be a tough deterrent.”<sup>41</sup> Attorney General Sessions responded to a question asking whether zero-tolerance enforcement was a policy of deterrence:

I see that the fact that no one was being prosecuted for this was a factor in a fivefold increase in four years in this kind of illegal immigration . . . . So, yes, hopefully people will get the message and come through the border at the port of entry and not break across the border unlawfully.<sup>42</sup>

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family-separations-deter-illegal-immigration-idUSKCN1MO00C; Toluse Olorunnipa, Tamara Thueringer & Jennifer Epstein, *President Trump Says Family Separations May Deter Illegal Immigration*, TIME (Oct. 14, 2018, 9:49 AM), <https://time.com/5424225/trump-family-separation-illegal-immigration/>.

41. See *Transcript: White House Chief of Staff John Kelly’s Interview with NPR*, NPR (May 11, 2018, 11:36 AM), <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>. This was not the only instance in which Kelly made similar remarks:

When asked by CNN in March 2017 whether the Trump Administration was seriously considering separating migrant children from their parents, Kelly said, “Yes, I am considering in order to deter more movement along this terribly dangerous network . . . I am considering exactly that.” He added: “I would do almost anything to deter the people from Central America to getting on this very, very dangerous network that brings them up through Mexico into the United States.”

John Haltiwanger, *John Kelly Proposed Separating Children from Their Parents to Deter Illegal Immigration Last Year, and Now the Trump Administration Can’t Get Its Story Straight*, BUS. INSIDER (June 18, 2018, 1:04 PM), <https://www.businessinsider.com/kelly-proposed-family-separation-to-deter-illegal-immigration-in-2017-2018-6>; accord Daniella Diaz, *Last Year, John Kelly Said DHS May Separate Children from Their Parents To Deter Illegal Immigration*, CNN (June 18, 2018, 6:19 PM), [https://www.cnn.com/politics/live-news/immigration-border-children-separation/h\\_44f9b3d7d44378c063d267aa86e1c9ef](https://www.cnn.com/politics/live-news/immigration-border-children-separation/h_44f9b3d7d44378c063d267aa86e1c9ef).

42. Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018, 12:14 PM), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/> (including similar, consistent statements from leading officials at DHS and the Department of Health and Human Services). The New York Times reported on a May 2018 interaction between Attorney General Sessions and some reluctant U.S. Attorneys in which Sessions reportedly stated, “We need to take away children,” and advised the prosecutors to deny amnesty “to people with kids.” Michael D. Shear, Katie Benner & Michael S. Schmidt, *‘We Need to Take Away Children,’ No Matter How*

In August 2019, Ken Cuccinelli, acting director of U.S. Citizenship and Immigration Services, said that newer policies to detain families together with their children were meant to deter migration:

This is a deterrent, because they know that instead of rushing the border, which is what's been going on for a number of years now, by using the massive numbers coming to the border and overwhelming our facilities and our capacity to hold folks and our court rulings, which is what the *Flores* rule was, that now they can and will to the extent we're able to do so, hold them until those hearings happen.<sup>43</sup>

The U.S. Commission on Civil Rights (USCCR) wrote to the Trump Administration in June 2018 to urge the government to stop separating children from their families after crossing the southern border, noting that the policies “coerce parents into withdrawing what may be valid asylum applications or otherwise impairing their immigration proceedings, for fear of what may be happening to their children.”<sup>44</sup> The U.N. Special Rapporteur on Torture characterized this effort to discourage asylum seeking through forced family separation as “refoulement in disguise.”<sup>45</sup> This strategic use of fear as a

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*Young, Justice Dept. Officials Said*, N.Y. TIMES, <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html> (Oct. 21, 2020).

43. Veronica Stracqualursi, *Trump Immigration Official Says New Rule Detaining Families Indefinitely Is a 'Deterrent,'* CNN (Aug. 23, 2019, 10:27 AM), <https://www.cnn.com/2019/08/23/politics/ken-cuccinelli-flores-settlement-cnntv/index.html> (internal quotation marks omitted) (italization added).

44. Letter from U.S. Comm'n on C.R. to Jeff Sessions, U.S. Att'y Gen., & Kirstjen M. Nielsen, Sec'y of Homeland Sec. (June 15, 2018), <https://www.usccr.gov/press/2018/06-15-18-letter.pdf>.

45. Nils Melzer (Special Rapporteur), U.N. Hum. Rts. Council, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 13, U.N. Doc. A/HRC/37/50 (Feb. 26, 2018).



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deterrent to immigration is a consistent theme of the Trump Administration's immigration policies.<sup>46</sup>

### 3. *Motives*

The Trump Administration's motives, or at least the President's motives, were rooted in discrimination based on race, ethnicity, and national origin. When he announced his campaign for President in 2015, Donald Trump said of Mexican immigrants, "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."<sup>47</sup> In May 2018, he deployed a time-worn, racist trope: "We have people coming into the country or trying to come in, we're stopping a lot of them, but we're taking people out of the country. You wouldn't believe how bad these people are . . . . These aren't people. These are animals."<sup>48</sup> As

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46. See Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 254 (2018). In *United States v. Hoffman*, the District Court overturned the convictions of defendants prosecuted for leaving water and supplies in the remote desert, finding the prosecution had substantially burdened the defendants' sincerely held religious beliefs, and that the government failed to show that the prosecution was the least restrictive means of furthering a compelling government interest. Order, *United States v. Hoffman*, No. CR-19-00693-001 (D. Ariz. Jan. 31, 2020). The Court considered the government's "compelling interest" of deterring immigration through the death of migrants:

The Government seems to rely on a deterrence theory, reasoning that preventing clean water and food from being placed on the Refuge would increase the risk of death or extreme illness for those seeking to cross unlawfully, which in turn would discourage or deter people from attempting to enter without authorization. In other words, the Government claims a compelling interest in preventing Defendants from interfering with a border enforcement strategy of deterrence by death. This gruesome logic is profoundly disturbing.

*Id.* at 20.

47. *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015, 2:32 PM), <https://time.com/3923128/donald-trump-announcement-speech/> (including transcript with video).

48. Gregory Korte & Alan Gomez, *Trump Ramps Up Rhetoric on Undocumented Immigrants: 'These Aren't People. These Are Animals.'*, USA TODAY, <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/> (May 17, 2018, 10:03 AM).

USCCR Commissioner Michael Yaki noted, the administration's policies and rhetoric "targeted Latino immigrants [and] immigrants of color."<sup>49</sup>

In 2017, President Trump reportedly said, and never denied saying, that recent Haitian immigrants in the United States "all have AIDS" and that recent immigrants from Nigeria would never "go back their huts."<sup>50</sup> In discussing immigrants from Haiti, El Salvador, and African nations, President Trump asked, "Why are we having all these people from shithole countries come here?"<sup>51</sup> He then suggested that the United States should permit more immigrants from Norway and Asian countries whom he believed would better help the economy.<sup>52</sup> Taking the President at his word, his immigration enforcement policies were rooted in racist, discriminatory hierarchies and hostility to immigrants from Mexico, Central and South America, and other developing nations.

President Trump's crude characterization of immigrants as criminals (and animals) is not, however, born out by the evidence: conviction rates for illegal immigrants are in fact lower than those for native-born Americans.<sup>53</sup> The charges of

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49. See TRAUMA AT THE BORDER, *supra* note 39, at 3–5.

50. Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>. Without endorsing the "good immigrant" narrative, it is worth noting that President Trump's insult to Nigerians is rooted in prejudice and baseless stereotypes; between 2008 and 2012, 61.2% of Nigerian immigrants held bachelor's degrees or higher levels of attainment in formal higher education (far higher than the general U.S. population). See STELLA U. OGUNWOLE, KAREN R. BATTLE & DARRYL T. COHEN, CHARACTERISTICS OF SELECTED SUB-SAHARAN AFRICAN AND CARIBBEAN ANCESTRY GROUPS IN THE UNITED STATES: 2008–2012, at 13 (2017).

51. Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html).

52. See *id.*

53. Alex Nowrasteh, *Criminal Immigrants in Texas in 2017: Illegal Immigrant Conviction Rates and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, CATO INST., Aug. 27, 2019, at 1, 1 ("The conviction and arrest rates for illegal immigrants were lower than those for native-born Americans but higher than those for legal immigrants. This result holds in just about every case, including homicide, sex crimes, larceny, and most other crimes."); see also Robert

base criminality are even more far-fetched for asylum-seeking families and children. Moreover, irrespective of guilt or innocence, all migrants, whatever their status, continue to warrant respect for their basic human rights.

*B. The Effect of Zero-Tolerance Enforcement on the Southern Border*

In imposing its zero-tolerance policy, DHS detained immigrant parents at the border and placed their children in the care of the Department of Health and Human Services (HHS).<sup>54</sup> The *New York Times* reported that the government forcibly took the children—sometimes by deception—from their parents at the border and placed the children in shelters run by nongovernmental organizations.<sup>55</sup> Its initial report in early 2018 showed that the government had taken more than 700 children from adults claiming to be their parents since October 2017, including more than 100 children under the age of four.<sup>56</sup>

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Adelman, Lesley Williams Reid, Gail Markle, Saskia Weiss & Charles Jaret, *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. ETHNICITY CRIM. JUST. 52, 68–69 (2017) (finding a negative correlation between presence of foreign-born populations and rates of violent and property crimes); Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370, 388, 395–96 (2018); David Green, *The Trump Hypothesis: Testing Immigrant Populations as a Determinant of Violent and Drug-Related Crime in the United States*, 97 SOC. SCI. Q. 506, 513 (2016); Marc R. Rosenblum & William A. Kandel, CONG. RSCH. SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 9–11 (2012).

54. See *Fact Sheet: Zero Tolerance Immigration Prosecutions—Families*, *supra* note 28.

55. Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at the U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>. This Article necessarily relies on contemporary reporting from journalists investigating and reporting on the Trump Administration’s policies, largely because the government resisted full and consistent disclosure and transparency of its enforcement efforts and detention practices. The Trump Administration consistently avoided accountability and observation of its practices. The USCCR explained to President Trump in its transmittal letter for its report, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies*, that the “report does not rely on information provided directly by the relevant federal agencies as, regretfully, they did not respond to our discovery requests.” This was the first instance of such non-cooperation by federal agencies, despite the bipartisan commission’s statutory authority. TRAUMA AT THE BORDER, *supra* note 39, at Letter of Transmittal. Professor Ana Pottratz Acosta ably explains the indispensable role of journalists in illuminating federal immigration policies across several administrations in her article, *Sunlight Is the Best Disinfectant: The Role of the Media in Shaping Immigration Policy*, 44 MITCHELL HAMLINE L. REV. 803 (2018).

56. See Dickerson, *supra* note 55.

Further, the *Times* reported that once children were placed in a shelter system, there was no clear process for family reunification.<sup>57</sup>

In early 2018, migrant families sued the United States in *Ms. L. v. United States Immigration and Customs Enforcement*, seeking a class action and injunctive relief to prevent family separation and child detention. After recognizing the class, Judge Dana Sabraw issued class-wide injunctive relief on June 26, 2018.<sup>58</sup> In its order, the court found that the government had separated thousands of children from their families summarily, without a determination that a parent was unfit or presented a danger to a child.<sup>59</sup> The court also found that the government instituted this practice without any effective systems for “(1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents were returned to immigration custody following completion of their criminal sentence.”<sup>60</sup> The court found that these actions would cause irreparable harm and were the result of “reactive governance—responses to address a chaotic circumstance of the Government’s own making.”<sup>61</sup>

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57. *Id.*

58. *Ms. L. v. ICE*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

59. *See id.* at 1143. The court also found the following:

[A]lthough parents and children may lawfully be separated when the parent is placed in criminal custody, the same general rule does not apply when a parent and child present together lawfully at a port of entry seeking asylum. In that situation, the parent has committed no crime, and absent a finding the parent is unfit or presents a danger to the child, it is unclear why separation of Ms. L. or similarly situated class members would be necessary. Here, many of the family separations have been the result of the Executive Branch’s zero tolerance policy, but the record also reflects that the practice of family separation was occurring before the zero tolerance policy was announced, and that practice has resulted in the casual, if not deliberate, separation of families that lawfully present at the port of entry, not just those who cross into the country illegally.

*Id.*

60. *Id.* at 1144.

61. *Id.* at 1149.

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On June 20, 2018, following widespread public outcry, President Trump issued an executive order calling on Congress to address family separation and placed short-term limits on the practice.<sup>62</sup> By issuing this executive order, the administration appeared to abandon the zero-tolerance policy in favor of a policy “to maintain family unity.”<sup>63</sup> The order did not nullify or amend the previously issued memorandum by the administration, and it made no provision for the reunification of families already separated and provided no standards for future separations and detention.<sup>64</sup> Specifically, the order called for the Secretary of Homeland Security, to the extent permitted by law and subject to the availability of appropriations, to keep migrant families together after crossing the border.<sup>65</sup>

After President Trump issued this June 2018 Executive Order, HHS reported that there were nearly three thousand children who had been separated from their families at the border as a direct result of the zero-tolerance policy.<sup>66</sup> Press accounts estimated that the number of children separated was near 2,700.<sup>67</sup> A DHS report showed that 2,551 of those children were between the ages of five and seventeen, and 103 detained and separated children were under the age of five.<sup>68</sup>

Reviewing the June 2018 Executive Order, Judge Sabraw found the government’s responses insufficient and issued new injunctive relief with several stark orders to halt the worst effects of zero-tolerance, to begin to reunify children, and to

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62. Exec. Order No. 13,841, 83 C.F.R. 29,435 (June 20, 2018).

63. *Id.*

64. *See id.*

65. *Id.*

66. Joshua Barajas, *5 Numbers to Watch on Family Separations*, PBS: NEWS HOUR, <https://www.pbs.org/newshour/politics/5-numbers-to-watch-on-family-separations> (July 24, 2018, 5:51 PM) (reporting on a conference call with HHS Secretary Alex Azar, where he provided information on separated and detained children to journalists). He also indicated that HHS had custody of more than 11,000 children detained at the border, including unaccompanied minors and children separated from their families under zero-tolerance. *Id.*

67. Claire Hansen, *Audit Finds More Separated Migrant Children*, U.S. NEWS (Jan. 17, 2019, 1:16 PM), <https://www.usnews.com/news/national-news/articles/2019-01-17/thousands-more-children-taken-from-parents-at-the-border-than-previously-reported-investigation-finds>.

68. Barajas, *supra* note 66.

implement compliant processes and systems for the class members.<sup>69</sup> Even so, by September 1, 2018, more than 500 children remained separated from their parents, including twenty-two children under the age of five.<sup>70</sup> Of the children who remained in shelters, more than 300 were left behind when the government deported their parents while they remained incarcerated in the United States.<sup>71</sup> DHS and HHS claimed that it is very difficult to reunite children with parents who had been deported.<sup>72</sup> In litigation, the Trump Administration argued that the American Civil Liberties Union and other advocacy groups should have been charged with the responsibility of finding these children's parents.<sup>73</sup> However, Judge Sabraw rebuked the Trump Administration and declared that the government had complete and sole responsibility for locating and reuniting the families it separated: "Placing the burden on the parents to find and request reunification with their children under the circumstances presented here is backwards. When children are separated from their parents under these circumstances, the Government has an affirmative obligation to track and promptly reunify these family members."<sup>74</sup>

In *Ms. L. v. ICE*, Judge Sabraw reviewed the government's compliance again in early 2020 in light of its separation of about 1,000 more parents and found that its practices were not "systematic" but were largely compliant with the court's

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69. See *Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018) (order granting preliminary injunction). In a status report in September 2019, the government and plaintiffs reported that there were 2,814 children in the classes whom a joint steering committee were reuniting or attempting to reunite with the families from whom they were separated. Joint Status Report at 1, *Ms. L. v. ICE*, No. 18-cv-00428 (S.D. Cal. Sept. 11, 2019).

70. Kirk Semple & Miriam Jordan, *For Families Split at Border, an Anguished Wait for Children's Return*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/world/americas/immigrant-families-separation-border.html>; see also Order Granting in Part Plaintiffs' Motion for Class Certification at 7–8, 8 n.7, *Ms. L. v. ICE*, No. 18-cv-00428 (S.D. Cal. June 26, 2018).

71. Semple & Jordan, *supra* note 70.

72. *Id.*; Joel Rose, *Deported Parents Describe Agonizing Wait To Be Reunited with Their Children*, NPR (Aug. 14, 2018, 5:07 AM), <https://www.npr.org/2018/08/14/638442181/deported-parents-describe-agonizing-wait-to-be-reunited-with-their-children>.

73. See *Fact Sheet: Zero Tolerance Immigration Prosecutions—Families*, *supra* note 28.

74. *Id.*

previous injunctions that established guidance for determining parentage and other factors.<sup>75</sup> Despite continuing efforts to reunite children separated from deported families under zero-tolerance, in October 2020 the *Ms. L.* plaintiffs reported to Judge Sabraw that 545 children remained for whom the government and the steering committee could not locate a separated, deported parent.<sup>76</sup> The following month that number was revised upwards to 666, according to lawyers working to reunite families.<sup>77</sup>

*C. The Flores Agreement, and the Trump Administration's  
Attempts To Evade It*

With his June 2018 Executive Order, President Trump also called for the Attorney General to promptly file a request to modify the *Flores* Agreement to allow the government to detain migrant families together while their proceedings were pending.<sup>78</sup> As noted above, the *Flores* Agreement had long required the federal government to place unaccompanied children with a close relative or family friend “without unnecessary delay” and to keep immigrant children who are in custody in the “least restrictive conditions’ possible.”<sup>79</sup> Since that agreement, Congress has enacted laws that require DHS to place unaccompanied minors in the care of the Office of Refugee Resettlement (ORR), a division of HHS.<sup>80</sup>

In June 2017, Judge Dolly Gee held a hearing on several plaintiffs’ motions to enforce the agreement, following

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75. See *Ms. L. v. ICE*, 415 F. Supp. 3d 980, 997–98 (S.D. Cal. 2020).

76. See Joint Status Report at 7, *Ms. L. v. ICE*, No. 18-cv-0428 (S.D. Cal. Oct. 20, 2020).

77. Jacob Soboroff & Julia Ainsley, *Lawyers Can’t Find the Parents of 666 Migrant Kids, a Higher Number than Previously Reported*, NBC NEWS (Nov. 9, 2020, 4:32 PM), <https://www.nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144>.

78. See Exec. Order No. 13,841 83 C.F.R. 29,435, 29435–36 (June 20, 2018).

79. Stipulated Settlement Agreement, *supra* note 31, at 7–10. In 2016, the Ninth Circuit held that the *Flores* Agreement extends to accompanied minors as well. *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016). The Central District of California also held that the *Flores* Agreement remained in effect in January 2017, rejecting the government’s claims that subsequent statutes superseded it. *Flores v. Lynch*, 392 F. Supp. 3d 1144, 1151 (C.D. Cal. 2017).

80. See Homeland Security Act of 2002, § 462(a); 6 U.S.C. § 279.

proceedings that dated back in 2015 under the Obama Administration.<sup>81</sup> The June 2017 hearing, however, was the first opportunity for a court to review the conditions under which the Trump administration was detaining children whom it had separated from their families under its zero-tolerance policies. There the court reviewed conditions at several detention facilities and found profound violations of the *Flores* Agreement: The government failed to provide access to adequate food and adequate access to clean drinking water for children in detention; detained children in unsanitary conditions and failed to provide children with products necessary for sanitation and health, like toothbrushes, soap, towels, or dry clothes; kept children in excessively cold facilities and made facilities colder in retaliation when children complained or cried; and caused sleep deprivation for children in its custody through “cold temperatures, overcrowding, lack of proper bedding (i.e., blankets, mats), constant lighting.”<sup>82</sup>

Judge Gee also found that the government violated its obligations under *Flores* to detain children only in licensed, non-secure facilities. Instead, DHS was detaining children in secured facilities, behind closed doors without the freedom to move.<sup>83</sup> The government had been detaining children for much longer than the twenty-day limit provided in *Flores* during a period under the Obama Administration, even before the vastly greater volume under Trump’s zero-tolerance regime.<sup>84</sup>

In 2018, Judge Gee reviewed another claim challenging the government’s compliance with the *Flores* Agreement in *Flores v. Sessions*.<sup>85</sup> There she found persuasive evidence that the Trump Administration continued to violate its terms, specifically in the detention of children in “staff-secure” and “secure” detention

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81. *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1047 (C.D. Cal. 2017).

82. *Id.* at 1053–61.

83. *See id.* at 1069.

84. *Id.* at 1070 (citing Deposition of Philip T. Miller). The court found that the government was not out of compliance on some elements required for the class under the *Flores* Agreement. *Id.* at 1070–71. These are the egregious and persistent violations.

85. *Flores v. Sessions*, CV-85-4544-DMG, 2018 WL 10162328 (C.D. Cal. July 30, 2018).



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facilities that are more like jails and detention facilities for juveniles convicted of crimes.<sup>86</sup> The court also found that the government violated the *Flores* Agreement standards by detaining children for months without telling them why or providing due process.<sup>87</sup>

In August 2019, HHS reported that the average length of stay at its Homestead Shelter for unaccompanied minors was forty-five days, down from a high of ninety-three days in late 2018.<sup>88</sup> The USCCR reported extensive violations; the average length of stay for a child in the Homestead detention facility on a military base in Florida was sixty-seven days.<sup>89</sup> At another detention center in Texas, children, some as young as five years old, were being detained between forty-one to fifty-eight days “with no word from [ICE] about their release [to their parents].”<sup>90</sup>

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86. *See id.* at \*9–11. For example, the court noted these violations:

Plaintiffs have shown that the level of security at Shiloh RTC in Manvel, Texas violates the *Flores* Agreement because it is a locked facility with 24-hour surveillance and monitoring. Although it is possible that a Class Member who has been placed in an RTC possesses “a psychiatric or a psychological issue that cannot be addressed in an outpatient setting,” that does not necessarily mean that the aforementioned measures must be undertaken in order to protect the minor or others. Plaintiffs also present evidence showing that Shiloh RTC’s staff engages in practices that are not necessary for the protection of minors or others. For example, Julio Z. attests that a staff member at Shiloh RTC often refused to allow Julio and other Class Members to leave their living quarters to obtain drinking water. On one occasion, after that individual repeatedly denied Julio’s request to get water, Julio nonetheless insisted upon leaving his room for that purpose. The staff member responded by throwing Julio to the ground, injuring Julio’s elbow.

*Id.* at \*10 (internal citations omitted). The court ordered the government to “to transfer all Class Members out of Shiloh RTC unless a licensed psychologist or psychiatrist has determined or determines that a particular Class Member poses a risk of harm to self or others.” *Id.* at \*21.

87. *Id.* at \*12.

88. Press Release, Admin. for Child. & Fams., U.S. Dep’t of Health & Hum. Servs., Unaccompanied Alien Children Sheltered at Homestead Job Corps Site, Homestead, Florida (Aug. 6, 2019), <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/homestead-job-corps-site-fact-sheet/index.html>.

89. TRAUMA AT THE BORDER, *supra* note 39, at 70 (citing Mel Hinebauch, Written Statement for the Public Comment Session on Immigration Detention Before the U.S. Commission on Civil Rights 1 (May 12, 2019)).

90. *Id.* at 71 (quoting Letter from Refugee & Immigrant Ctr. for Educ. & Legal Servs. of Texas to Cameron Quinn, Officer for C.R. & C.L., Dep’t. of Homeland Sec., and John V. Kelly, Acting Inspector Gen., Dep’t. of Homeland Sec. (Mar. 13, 2019)).

Following President Trump's directive to propose new regulations to supersede *Flores*, DHS published its proposed rules on September 7, 2018.<sup>91</sup> These proposed rules would have modified the *Flores* Agreement to fit the Trump Administration's policies and goals.<sup>92</sup> These proposed rules contained changes to many areas, from definitions to the hearing processes.<sup>93</sup> The new regulations would have permitted families to be detained together and would have permitted the government to detain children indefinitely.<sup>94</sup> By changing of the definition of "license" in reference to facilities, the proposed rules would have allowed children to be held in facilities that do not meet current standards of safety.<sup>95</sup> Currently, a child held for more than seventy-two hours must be held in a state-licensed facility.<sup>96</sup> These children could have been incarcerated with their parents in facilities operating under a new self-licensing scheme.<sup>97</sup>

Judge Gee, however, enjoined implementation of the new regulations, finding that the proposed rules would have violated the *Flores* Agreement.<sup>98</sup> Notably, the court found that the proposed rules "abrogate[d] minors' protections against unnecessary prolonged detention and substandard placement . . . , and the New Regulations [would] replace the *Flores* Agreement's mandatory protections with aspirational statements of 'dubious' enforceability."<sup>99</sup> According to Anastasia Tonello, the president of the American Immigration Lawyers Association, "[t]hese regulations would [have]

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91. See Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,495 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. pts. 212, 236).

92. See *id.*; see also *supra* notes 31–36 and accompanying text.

93. Apprehension, Processing, Care, and Custody of Alien Minors and unaccompanied Alien Children, 60 Fed. Reg. at 45,495–98, 45,504–11.

94. *Id.* at 44,393.

95. *Id.* at 44,394.

96. *Id.* at 44,398.

97. *Flores v. Barr*, 407 F. Supp. 3d 909, 917 (C.D. Cal. 2019).

98. *Id.* at 918.

99. *Id.* at 916.

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eliminate[d] long-standing, court-mandated protections for minors, resulting in more families, including young children, being detained for longer periods of time.”<sup>100</sup>

The proposed rules would have given the government and its agencies the effective power to detain children with their families indefinitely.<sup>101</sup> Judge Gee rejected the proposed rules, and the *Flores* Agreement remains in effect.

*D. The Brutal Conditions and Consequences of Family Separation, Family Detention, and Child Detention*

After Judge Gee rejected the proposed new regulations as replacement standards for the *Flores* Agreement, conditions in detention facilities remained abysmal. Conditions for the detention of minors deteriorated between 2018 and 2019. The Office of Inspector General (OIG) reported in September 2018 that detention facilities holding unaccompanied alien children “appeared to be operating in compliance” with required standards.<sup>102</sup> The OIG found that children had adequate hygiene items, bedding, food, beverages, access to medical care, and supervision that satisfied the requirements, only calling out “the exception of inconsistent cleanliness of hold rooms” as an issue.<sup>103</sup>

Yet by July 2019, the OIG reported “serious overcrowding” at facilities detaining both unaccompanied minors and adults and substandard conditions, including lack of access to showers and inadequate food, at facilities for unaccompanied minors.<sup>104</sup> The

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100. Press Release, Am. Immigr. Laws. Ass’n, Trump Administration Lines Up End Run Around Protections for Detained Children (Sept. 6, 2018), <https://www.aila.org/advocacy/press-releases/2018/trump-administration-lines-up-end-run-around>.

101. *Id.*

102. OFF. OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-18-87, RESULTS OF UNANNOUNCED INSPECTIONS OF CONDITIONS FOR UNACCOMPANIED ALIEN CHILDREN IN CPB CUSTODY 4 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-87-Sep18.pdf>.

103. *Id.*

104. OFF. OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-19-51, MANAGEMENT ALERT—DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF

OIG quoted one manager describing the overcrowded conditions as “a ticking time bomb.”<sup>105</sup> In addition to observed overcrowding, DHS data indicated “that 826 (31 percent) of the 2,669 children at these facilities had been held longer than the 72 hours generally permitted under the . . . *Flores* Agreement.”<sup>106</sup> Further, the report found that some children, even when not separated from their families, did not receive the basic, humane care required by *Flores*.<sup>107</sup>

According to eyewitness testimony, “[t]housands of children have been held by Department of Homeland Security in cages in former warehouses, in buildings with little if any natural light, forced to sleep on cement floors in cold temperatures, with only aluminum blankets issued to cover them.”<sup>108</sup> The government continued to incarcerate migrant children in substandard conditions with limited access to sanitary products such as showers and toothbrushes.<sup>109</sup> While the federal government attempted to argue in June 2019 that soap,

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CHILD. AND ADULTS IN THE RIO GRANDE VALLEY (REDACTED) 2, 6 (2019) [hereinafter MANAGEMENT ALERT], [https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19\\_.pdf](https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf).

105. *Id.* at 8.

106. *Id.* at 5 (footnotes omitted).

107. *Id.* at 6. The OIG detailed several transgressions:

In addition to holding roughly 30 percent of minor detainees for longer than 72 hours, . . . children at three of the five Border Patrol facilities we visited had no access to showers, despite the TEDS standards requiring that “reasonable efforts” be made to provide showers to children approaching 48 hours in detention. At these facilities, children had limited access to a change of clothes; Border Patrol had few spare clothes and no laundry facilities. While all facilities had infant formula, diapers, baby wipes, and juice and snacks for children, we observed that two facilities had not provided children access to hot meals—as is required by the TEDS standards—until the week we arrived. Instead, the children were fed sandwiches and snacks for their meals. Additionally, while Border Patrol tried to provide the least restrictive setting available for children (e.g., by leaving holding room doors open), the limited space for medical isolation resulted in some [unaccompanied minors] and families being held in closed cells.

*Id.* (footnotes omitted).

108. TRAUMA AT THE BORDER, *supra* note 39, at 57.

109. Jim Sergent, Elizabeth Lawrence, Elinor Aspegren & Olivia Sanchez, *Chilling First-Hand Reports of Migrant Detention Centers Highlight Smell of ‘Urine, Feces,’ Overcrowded Conditions*, USA TODAY (Dec. 16, 2019, 8:05 PM), <https://www.usatoday.com/in-depth/news/politics/elections/2019/07/16/migrant-detention-centers-described-2019-us-government-accounts/1694638001/>.

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toothbrushes, bedding, and other basic products were not required to provide “safe and sanitary” conditions as required by the *Flores* Agreement, Senior U.S. Circuit Judge A. Wallace Tashima noted that “it’s within everybody’s common understanding: If you don’t have a toothbrush, if you don’t have soap, if you don’t have a blanket, it’s not safe and sanitary.”<sup>110</sup>

The American Medical Association wrote to DHS in July 2019 to call for humanitarian response to migration at the southern border:

We are writing to express our ongoing concerns that conditions in Customs and Border Protection (CBP) custody are inconsistent with evidence-based recommendations for appropriate care and treatment of children and pregnant women. Conditions in CBP facilities, which include open toilets, constant light exposure, insufficient food and water, extreme temperatures, and forcing pregnant women and children to sleep on cement floors, are traumatizing. Such facilities are simply not appropriate places for children or for pregnant women.<sup>111</sup>

In August 2019, despite the Center for Disease Control and Prevention’s recommendation that every child over six months old receive a flu vaccine, and its recommendation that the United States Customs and Border Protection (CBP) should vaccinate children in its custody, the CBP refused to administer

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110. United States Court of Appeals for the Ninth Circuit, 17-56297 *Jenny Flores v. William Barr*, YOUTUBE, at 30:00–30:53, (June 18, 2019), <https://www.youtube.com/watch?v=Z2GkDz9yEJA>.

111. Letter from James L. Madara, Exec. Vice President & CEO, Am. Med. Ass’n, to Hon. Kevin K. McAleenan, Acting U.S. Sec’y of Homeland Sec., and Mark A. Morgan, Acting Comm’r of U.S. Customs & Border Patrol (July 10, 2019) (on file with the *Drexel Law Review*) [hereinafter AMA Letter].

vaccines to the children detained in the border facilities.<sup>112</sup> At least three children held in detention centers died, in part from the flu, at a death rate ten times higher than the U.S. average.<sup>113</sup> The government argued that flu shots were not necessary because the detention is short-term, but DHS reported that “[d]etention centers routinely hold children for a week and a half or more . . . and the administration has said it favors indefinite detention.”<sup>114</sup>

While the CBP did not provide standard flu vaccines, ORR did administer psychotropic drugs to minors at several detention facilities without consent of the children, their parents, family members, or other potential legal sponsors.<sup>115</sup> In related litigation on this issue, plaintiffs alleged and Judge Gee agreed that the government regularly administered multiple psychotropic drugs regardless of the child’s concerns or wishes, without telling the children what they were taking or why.<sup>116</sup>

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112. Jessica Bursztynsky, *The US Won’t Provide Flu Vaccines to Migrant Families at Border Detention Camps*, CNBC (Aug. 20, 2019, 4:14 PM), <https://www.cnn.com/2019/08/20/the-us-wont-vaccinate-migrant-children-against-the-flu-at-border-camps.html>; Danielle Wallace, *Lack of Flu Shots for Migrants at CBP Detention Centers a Concern, Critics Say*, FOX NEWS (Aug. 21, 2019), <https://www.foxnews.com/health/border-patrol-immigration-officials-do-not-administer-flu-influenza-shots-detention-centers>; Robert Moore, *CDC Recommends That Migrants Receive Flu Vaccine, but CBP Rejected the Idea*, WASH. POST. (Nov. 25, 2019, 3:58 PM), [https://www.washingtonpost.com/immigration/cdc-recommended-that-migrants-receive-flu-vaccine-but-cbp-rejected-the-idea/2019/11/25/8aba198e-0fb8-11ea-b0fc-62cc38411ebb\\_story.html](https://www.washingtonpost.com/immigration/cdc-recommended-that-migrants-receive-flu-vaccine-but-cbp-rejected-the-idea/2019/11/25/8aba198e-0fb8-11ea-b0fc-62cc38411ebb_story.html); see also Press Release, House Comm. on Energy & Com., Pallone Calls on Public Health Officials to Urge CBP to Provide Flu Vaccine to Migrant Families (Aug. 26, 2019), <https://energycommerce.house.gov/newsroom/press-releases/pallone-calls-on-public-health-officials-to-urge-cbp-to-provide-flu-vaccine> (“CBP’s Refusal to Provide Vaccinations is Especially Concerning Since Reports Indicate At Least Three Children Have Already Died from Flu Complications in CBP Custody.”).

113. See Press Release, House Comm. on Energy & Com., *supra* note 112.

114. Editorial, *Migrant Children Need Their Flu Shots*, BLOOMBERG (Oct. 11, 2019, 6:30 AM), <https://www.bloomberg.com/opinion/articles/2019-10-11/migrant-children-detained-at-u-s-border-need-flu-vaccine> (citing MANAGEMENT ALERT, *supra* note 104).

115. *Flores v. Sessions*, No. CV 85-4544, 2018 WL 10162328, at \*44, \*47 (C.D. Cal. July 30, 2018). Judge Gee found that this practice violated the *Flores* Agreement because it violated Texas child welfare laws. *Id.* at \*25.

116. Memorandum in Support of Motion to Enforce Class Action Settlement at 12, *Flores v. Sessions*, No. 85-cv-04544, (C.D. Cal. Apr. 16, 2018). The memorandum, which was submitted by representatives of the Center for Human Rights & Constitutional Law, the National Center for Youth Law, and U.C. Davis School of Law, states:

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Physicians who treated and observed migrant children in detention reported that ORR did not administer these drugs for therapeutic reasons but as “tools of control.”<sup>117</sup> Judge Gee also observed the practice violated Texas state laws on child welfare and healthcare.<sup>118</sup>

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ORR gives class members no choice but to take whatever psychotropic medications it prescribes. Youth report being told that if they refuse drugs they will remain detained, be denied release or privileges, or be physically forced to take them. . . .

Nor does ORR allow children who object to being medicated any procedural recourse. . . .

. . . .

Psychotropic medications act on the central nervous system and affect cognition, emotions, and behavior, and serious, long-lasting adverse effects are common. In adults, psychotropic drugs can have serious and sometimes irreversible side effects, including psychosis, seizures, irreversible movement disorders, suicidal ideation, weight gain, and organ damage. . . . Comparatively little is known about the effects of psychotropic drugs on children and adolescents. . . .

. . . .

Not surprisingly, [Plaintiffs’ Motion also discussed the adverse effects on] children [who were] medicated in ORR custody, report negative side effects, including nausea, dizziness, somnolence, depression, and grotesque weight gain.

*Id.* at 12–16 (internal citations and footnotes omitted); *see also Flores*, 2018 WL 10162328, at \*44 (noting that medication was given, without permission of family, that caused “nausea and other side effects”).

117. Scott J. Schweikart, *April 2018 Flores Agreement Suit Challenges Unlawful Administration of Psychotropic Medication to Immigrant Children*, 21 AM. MED. ASS’N J. ETHICS 67, 70 (2019):

“Too often mental health care drugs have been used to make the job of caregivers easier rather than in the service of the patient’s best interest.” Indeed, if drugs, including psychotropic drugs, are administered improperly or for purposes other than the best health interests of the child, their capacity to injure is significant, and they may create serious lifelong health risks, such as possible long-term alterations in brain function and behavior, metabolic syndrome, or infertility.

(footnotes omitted) (quoting Jonathan D. Moreno & Arthur L. Caplan, *What Are the Rules for Ethical Medication of Migrant Kids?*, PSYCH. TODAY (June 29, 2018), <https://www.psychologytoday.com/us/blog/impromptu-man/201806/what-are-the-rules-ethical-medication-migrant-kids>) (citing Paul R. Albert, *Drugs for Kids: Good or Bad?*, 37 J. PSYCHIATRY NEUROSCI. 293–95 (2012)).

118. *Id.* at 69. Schweikart made these consistent conclusions in the *American Medical Association’s Journal of Ethics*: “The US government’s administration of psychotropic drugs to children—without parental consent or proper oversight and against the best interests of the child—constitute unethical, unlawful, and clinically inappropriate practices.” *Id.* at 70. This was particularly alarming to Dr. J. Wesley Boyd of the Center for Bioethics at Harvard Medical School: “We find the current child separation strategies by the Trump Administration to be fertile ground for significant human rights abuses and, among other concerns, we are deeply disturbed that separated children are forcibly being given psychotropic medications while in government detention centers.” *Forcing Psych Meds on Detained Immigrant Children*, HARV. MED.

In January 2020, a group of physicians and public health professionals identified continuing and purposeful practices by the government that induced chronic sleep-deprivation for children in detention centers.<sup>119</sup> The peer-review study identified practices that deprive children of necessary sleep, whether detained separately or with their families, including excessive and constant cold temperatures, twenty-four hour lighting, bed-checks every fifteen minutes in the night, overcrowding forcing children to sleep on concrete floors with aluminum blankets, and other inhumane conditions.<sup>120</sup> Families explained that children demonstrated symptoms associated with chronic sleep deprivation, such as withdrawal from family members, self-injurious behaviors, and suicidal ideation.<sup>121</sup> Human rights authorities like the U.N. Committee Against Torture and advocacy groups such as Physicians for Human Rights denounce sleep deprivation “as a form of torture or cruel, inhumane, and degrading treatment,” that starkly

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SCH. CTR. FOR BIOETHICS: NEWS (Aug. 7, 2018), <https://bioethics.hms.harvard.edu/news/forcing-psych-meds-detained-immigrant-children>.

119. See Katherine R. Peeler, Kathryn Hampton, Justin Lucero & Roya Ijadi-Maghsoodi, *Sleep Deprivation of Detained Children: Another Reason To End Child Detention*, HEALTH & HUM. RTS. J. (Jan. 20, 2020), <https://www.hhrjournal.org/2020/01/sleep-deprivation-of-detained-children-another-reason-to-end-child-detention/>.

120. *Id.*

121. *Id.* The authors explained the medical and mental health risks associated with chronic sleep deprivation observed from populations in detention contexts:

Mental health markers generally known to correlate positively with appropriate sleep include improved attention, behavior, learning, memory, and emotional regulation. As would follow, insufficient or poor quality sleep has negative impacts on normal cognitive and neurobehavioral function, such that children with sleep disruption commonly experience problems with memory recall, behavioral regulation, and attention-related disorders. Furthermore, while sleep deprivation has a known reciprocal association with depression and anxiety, sleep deprivation independently predicts an increased risk of suicidal behavior. . . . Chronic sleep deprivation also has significant physical health consequences. Observed associations between sleep disruptions and negative cardiometabolic health outcomes include the development of diabetes and obesity in children and adults, suggesting sleep’s important role in modulating insulin and hunger-related hormones. Sleep deprivation is additionally associated with endothelial dysfunction, hypertension, inflammatory states, changes in autonomic tone, and hormonal dysregulation, all known risk factors for the development of cardiovascular disease.

*Id.* (footnotes omitted).



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violates children's rights and their best interests, in US and international law.<sup>122</sup>

Despite the requirements of the *Flores* Agreement, there was "a lack of adequate pediatric care in detention facilities, including inadequate or inappropriate immunizations, delayed medical treatment, inadequate educational services and limited mental health services."<sup>123</sup> For example, the American Immigration Council reported that there were at least nine infants under one year of age detained by Department of Homeland Security in Dilley, Texas where there was an alleged lack of access to medical care.<sup>124</sup> Additionally, doctors were not regularly present, and wait times were often weeks long regardless of how emergent the situation.<sup>125</sup>

Mental health care has also been a pressing concern, made even more important by the trauma and stress of detention after treacherous travel from whatever grievous conditions the migrants fled as a first matter. In its 2019 letter to DHS and CBP, the American Medical Association explained the risk for life-long trauma among migrant children and families:

Families seeking refuge in the U.S. already endure emotional and physical stress, which is only exacerbated when they are separated from one another or held in family detention facilities

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122. *Id.* In an article addressing the inhumane elements of youth detention, human rights advocates state, "[o]ngoing effects of detention and sleep deprivation—such as insomnia and fear at night, worsening of post-traumatic stress disorder symptoms, poor concentration and performance in school, and irritability and depression—may continue to plague youth and affect functioning long after detention." *Id.*

123. TRAUMA AT THE BORDER, *supra* note 39, at 64 (quoting Manoj Govindaia, Litig. Dir., Refugee & Immigrant Ctr. for Ed. & Legal Servs., Testimony, *Public Comment Session*, at 120).

124. Letter from Susannah Sirkin, Dir. of Pol'y, Physicians for Hum. Rts., Katherine Ratzan Peeler, Asylum Network Member, Physicians for Hum. Rts., and Roya Ijadi-Maghsoodi, Asylum Network Member, Physicians for Hum. Rts., to Cameron Quinn, Officer for C.R. & C.L., U.S. Dep't of Homeland Sec., and John V. Kelly, Acting Inspector Gen., U.S. Dep't of Homeland Sec. (Feb. 28, 2019), [https://www.americanimmigrationcouncil.org/sites/default/files/general\\_litigation/complaint\\_urges\\_immediate\\_release\\_of\\_infants\\_from\\_immigration\\_detention.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_urges_immediate_release_of_infants_from_immigration_detention.pdf).

125. TRAUMA AT THE BORDER, *supra* note 39, at 64 (quoting Project South, *Written Statement for the Public Comment Session on Immigration Detention before the U.S. Commission on Civil Rights.*, at 6–7 (May 13, 2019)).

during the pendency of their immigration proceedings. It is well known that childhood trauma and adverse childhood experiences created by inhumane treatment often create negative health impacts that can last an individual's entire lifespan.<sup>126</sup>

The sheer number of individuals in custody may be a factor in the lack of adequate care for people in immigration detention facilities. Because mental health caseloads have been substantially larger than the required staffing ratio of one-to-twelve, clinicians have been unable to provide adequate and effective services to the children in their care.<sup>127</sup> Hiring qualified personnel was equally challenging, especially finding those who were fluent in the children's native languages, resulting in a lack of competent professionals to address the ever-increasing mental health needs of migrant children in detention.<sup>128</sup> HHS also explained challenges faced by facilities in "providing age-appropriate mental health services, especially when faced with an unexpected increase in children age twelve and younger."<sup>129</sup>

An investigation by HHS concluded that migrant children suffered severe trauma in their home countries both en route to and once they arrived in the United States.<sup>130</sup> The medical and mental health effects of prolonged immigration detention can be severe.<sup>131</sup> Even with the substantial research linking the

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126. AMA Letter, *supra* note 111.

127. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., OEI-09-18-00431, CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 14 (Sept. 2019) [hereinafter MENTAL HEALTH NEEDS], <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf> (explaining that some caseloads were more than 25 children per clinician).

128. *Id.* at 14–15.

129. *Id.* at 11.

130. *Id.* at 10; Grace Segers & Graham Kates, *Watchdog Details Psychological Trauma Among Migrant Children Separated from Families*, CBS NEWS (Sept. 4, 2019, 3:18 PM), <https://www.cbsnews.com/news/hhs-inspector-general-report-details-psychological-trauma-among-separated-migrant-children/>.

131. See Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. SOC. JUST. 693, 709–710 (2008)

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trauma of childhood detention with negative mental health outcomes, “[t]here is no initial screening at intake and no counseling provided for trauma” for detained children.<sup>132</sup> The clinicians involved with addressing the trauma of the children were ill-prepared and overworked, with “some facilities . . . allowed to waive background checks and fingerprinting requirements for the workers that were tasked with caring for these children.”<sup>133</sup> Additionally, “facilities reported that children with longer stays experienced more stress, anxiety, and behavioral issues, which staff had to manage.”<sup>134</sup> Consequently, the OIG explicitly recommended minimizing the amount of time children spent in custody after examining the detrimental effects on mental health.<sup>135</sup>

At least one federal court has found that the trauma inflicted by family separation in migrant detention merited immediate relief. In *Ms. J.P. v. Sessions*, filed in 2018, plaintiffs sought an injunction to enjoin the family separation policy and to issue interim relief in the form of providing “those who have been separated with individualized, evidence-based, and trauma-informed mental health screening and services” for parents detained and separated from their children.<sup>136</sup> Judge Kronstadt of the Central District of California found that plaintiffs’ extensive evidence “support[s] the conclusion that separating parents from children causes severe mental trauma that is aggravated if it is not timely treated” and that current mental health services provided by the government were insufficient.<sup>137</sup> Judge Kronstadt reasoned that relief was appropriate based on the “state-created danger doctrine,” and that relief applies to

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(finding instances of depression, anxiety, PTSD, and high suicide risk among other effects of prolonged detention).

132. TRAUMA AT THE BORDER, *supra* note 39, at 65.

133. Segers & Kates, *supra* note 130.

134. MENTAL HEALTH NEEDS, *supra* note 127, at 12.

135. *Id.* at 20–21.

136. *Ms. J.P. v. Sessions*, No. 18-cv-06081, 2019 WL 6723686, at \*29 (C.D. Cal. Nov. 5, 2019) (order granting, in part, motions for class certification and preliminary injunction, and dismissing motion to dismiss).

137. *Id.* at \*34.

both those currently in detention and those who have been released from detention.<sup>138</sup>

The court found that the U.S. government's "conduct caused severe mental trauma . . . [and] Plaintiffs also presented evidence that Defendants were aware of the risks associated with the family separation [policy] when they implemented it."<sup>139</sup> Judge Kronstadt granted plaintiffs' injunction in part, requiring mental health screenings to be conducted as soon as reasonably possible for persons currently subject to custodial detention or who have been released from detention due to the family separation policy.<sup>140</sup> The injunction also required appropriate medical treatment "sufficient to address their current mental health conditions caused by their prior and/or ongoing separation from their minor children" as well as transitional care once released.<sup>141</sup>

Compounding these state-inflicted injuries, children have experienced sexual assaults and abuse while in government custody.<sup>142</sup> One member of Congress from Mississippi said that children in government-run facilities were "receiving the best treatment of their lives," even after news that at least six migrant and refugee children had died in U.S. custody in

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138. *Id.* at \*41. Under the state-created danger doctrine, "government agents can be liable by taking affirmative steps that place a person in a position of danger or by exposing such 'an individual to danger which he or she would not have otherwise faced.'" *Id.* at \*40.

139. *Id.* at \*36.

140. *Id.* at \*40.

141. *Id.* at \*40–41.

142. One such allegation in August 2018 involved an HIV-positive employee of a government contractor who was convicted of molesting eight boys in a government facility over eleven months. The government contractor hired the worker without a background check. TRAUMA AT THE BORDER, *supra* note 39, at 68–69 (quoting Topher Sanders & Michael Grabell, "Humanitarian Crisis" Looms as Arizona Threatens to Revoke Immigrant Children Shelter Licenses, PROPUBLICA (Sept. 21, 2018, 6:40 PM), <https://www.propublica.org/article/southwest-key-arizona-threatens-to-revoke-immigrant-children-shelter-licenses>); see also David Garrick, *San Ysidro Rally Focuses on Treatment of Immigrant Women, Girls at Border*, SAN DIEGO TRIB. (Oct. 6, 2019, 4:37 PM), <https://www.sandiegouniontribune.com/communities/san-diego/story/2019-10-06/San-ysidro-rally-focuses-on-treatment-of-immigrant-women-girls-at-border> ("Women and girls . . . have experienced sexual assaults, harassment and limited access to feminine hygiene products. In addition . . . they are often not provided interpreters, reproductive health care or mental health care.").

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2019.<sup>143</sup> Two Guatemalan adolescents died in December 2018 after becoming violently ill despite being previously healthy; although Border Patrol transferred them to a hospital over thirty miles away, neither ultimately survived.<sup>144</sup> In early 2019, at least three other Guatemalan minors died in U.S. custody.<sup>145</sup> These poor conditions and lack of ready access to medical care have resulted in the death of these and other children, ending a period of over a decade in which no children died in federal immigration custody.<sup>146</sup>

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143. Ashton Pittman, *Rep. Palazzo: Caged Kids Getting 'Best Treatment of Their Lives,' Despite Deaths*, JACKSON FREE PRESS (Oct. 3, 2019, 1:02 PM), <http://www.jacksonfreepress.com/news/2019/oct/03/rep-palazzo-caged-kids-getting-best-treatment-thei>.

144. TRAUMA AT THE BORDER, *supra* note 39, at 59–60.

145. The USCRR published details of these deaths:

In April, a sixteen-year-old, Juan de León Gutiérrez, fell ill with a rare condition and died several days later after being transferred roughly 160 miles from the migrant shelter in which he was detained to a hospital. In May, a two-year-old (unnamed), detained with his mother, died after about a month of hospitalization, and another sixteen-year-old, Carlos Gregorio Hernández Vásquez, similarly passed away after becoming sick while in U.S. custody. Carlos was confined for twice as long as federal law ordinarily allows, and was moved to a different holding facility after a diagnosis of the flu. Though prescribed with the medicine Tamiflu, Carlos was never hospitalized. In May 2019, the death of an unnamed Salvadoran child in Department of Health and Human Services custody came to light. Though she died in September of 2018, her passing was not reported until eight months later. She entered the United States at an Office of Refugee Resettlement facility in Texas in a “medically fragile” state and was transferred by Department of Homeland Security between multiple medical facilities across multiple states for a number of months before she finally passed away.

*Id.* at 60–61 (footnotes omitted).

Additionally, a one-and-a-half-year-old migrant child died only a few weeks after being released from custody in 2018. Her mother reported that her daughter

became sick and was given only Tylenol and honey even though she was vomiting, had diarrhea, a fever, and stopped eating. [The child] lost 8 percent of her body fat in 10 days, and upon release, spent six weeks in hospitals with a respiratory infection, on a ventilator, before passing away just a few months before her second birthday.

*Id.* at 61 (footnotes omitted).

146. *Id.* at 59.

*E. The Status of Separated Children and Attempts at Reunification*

By June 2018, HHS still had no system to identify, track, or connect families separated by DHS.<sup>147</sup> In July, under judicial and administrative scrutiny, HHS began to initiate such a system, at least a year after the government began separating children from their families by the thousands.<sup>148</sup> Through various ad hoc efforts and improvised systems, HHS reviewed data and records for over 12,000 children in its custody, which resulted in an initial list of over 3,600 children whom the government had likely separated from their families, although the pace of zero-tolerance enforcement and the lack of systems made more precision difficult.<sup>149</sup> The government's submissions to courts continued to vary throughout 2018, but by December 2018, HHS reported that most of the separated children had been reunited:

On December 12, 2018, HHS reported to the Court that of the 2,816 possible children of potential *Ms. L v. ICE* class members (including 79 whom HHS ultimately determined not to have been separated), 2,131 children had been reunified with a separated parent, and 526 children had been released under other circumstances, typically to a sponsor. Another 159 children remained in ORR care. Of these 159 children in care, 8 were categorized as children of class members and proceeding towards reunification or other appropriate discharge. ORR determined that the other 151 children in care were either not, in fact, children of class members or were otherwise not eligible for reunification.<sup>150</sup>

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147. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., OEI-BL-18-00511, HHS OIG ISSUE BRIEF: SEPARATED CHILDREN PLACED IN OFFICE REFUGEE RESETTLEMENT CARE 5 (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

148. *See id.*

149. *See id.* at 7.

150. *Id.* at 10.

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Even with the closer accounting required in the *Ms. L. v. ICE* class action, these numbers still do not account for the total number of children separated from the families and detained.<sup>151</sup>

In January 2019, the Office of the Inspector General for HHS found that the government did not know—and could not know—under the circumstances—how many children it separated from families at the border, and that the number is likely much greater than the Trump Administration reported.<sup>152</sup> The OIG offered this key takeaway:

The total number of children separated from a parent or guardian by immigration authorities is unknown. Pursuant to a June 2018 Federal District Court order, HHS has thus far identified 2,737 children in its care at that time who were separated from their parents. However, thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court, and HHS has faced challenges in identifying separated children.<sup>153</sup>

Another challenge to knowing the status of the children separated from their parents is the likelihood that the practice of separating families at the border continued well into 2019 and may still be ongoing. The Texas Civil Rights Project (TCRP) reported that there were 272 separations at a single Texas courthouse between June 2018 and February 2019, after the

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151. According to the Inspector General:

The Court did not require HHS to determine the number, identity, or status of an estimated thousands of children whom DHS separated during an influx that began in 2017 and whom ORR released prior to *Ms. L v. ICE*. Additionally, efforts to identify and assess more recent separations may be hampered by incomplete information.

*Id.* at 13.

152. *Id.*

153. *Id.* at 1.

Administration stated that it had stopped family separation.<sup>154</sup> These instances of family separation included the separation of forty-six children from their families.<sup>155</sup> Twenty-five of those children were younger than ten years old, and one of them was an eight-month-old infant.<sup>156</sup> By the time of its report in February 2019, the TCRP reported that eighteen families had been reunited.<sup>157</sup> Ten had not been reunited, and the status of ten more families was unknown.<sup>158</sup>

The government was not ready for zero-tolerance enforcement and the detention of children, and it never caught up. In *Ms. L. v. ICE*, Jallyn Sualog, the then deputy director for children's programs for the Office of Refugee Resettlement (ORR) detailed the vast, complex, and costly efforts the agency took to identify the separated children in its custody in order to comply with the court's orders to identify and reunify children.<sup>159</sup> Sualog explained the government's efforts to identify children included in the class yielded 3,600 "potentially separated" children.<sup>160</sup> The Agency continued to refine its list and the disposition of the children's cases, and she declared "that confirming whether a child was separated from a parent by DHS at the border often requires a fact-intensive and time-consuming analysis that involves the reconciliation of data from multiple sources and the exercise of programmatic judgment to interpret data."<sup>161</sup> This can only be because DHS separated children from families without care, process, or systems to identify or track them, leading to thousands of children in

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154. LAURA PEÑA, TEX. C.R. PROJECT, *THE REAL NATIONAL EMERGENCY: ZERO-TOLERANCE & THE CONTINUING HORRORS OF FAMILY SEPARATION AT THE BORDER* 6 (2019), <https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-FINAL.pdf>.

155. *Id.* at 3.

156. *Id.*

157. *Id.* at 10.

158. *Id.*

159. *See* Declaration of Jallyn Sualog, Deputy Dir. for Child's Programs, Off. of Refugee Resettlement, Admin. for Children and Families, U.S. Dep't of Health and Hum. Servs. at 2–8, *Ms. L. v. ICE*, No. 18-cv-0428 (S.D. Cal. Feb. 1, 2019).

160. *See id.* ¶ 8.

161. *Id.* ¶ 12.



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government detention without judicial process or the basic means to know merely whether the government had pulled them from their families.<sup>162</sup>

Some of the children released from custody before June 26, 2018, may not have been reunited with their parents but placed in some other custody.<sup>163</sup> Sualog said that ORR does not have the authority or resources to reunify minors who are no longer in its custody.<sup>164</sup> Essentially, the government ripped children from their families, lost track of them, delivered them into the custody of others, and had no way to find and reunite them.

In January 2020, Judge Sabraw found that the government had separated another thousand families since the injunction of June 2018 and acknowledged the government's claims that these were based on fraudulent claims of parentage, evidence of child trafficking, or other dangers to the child or community.<sup>165</sup> He found, at last, that the federal agencies were "generally exercising their discretion to separate families at the border consistent with Plaintiffs' rights to family integrity and the Court's orders."<sup>166</sup>

Finding the deported parents of children who remain in ORR custody presents one of the largest hurdles to reunification. In some instances, advocates have searched in remote villages of

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162. *See id.* ¶ 14. From July 2017 through June 2018,

DHS did not consistently report potential separations to ORR using a specified data field that automated the tracking of potential separations by ORR. Rather, DHS reported anecdotal information regarding potential separations to ORR on an *ad hoc* basis by entering it into any one of the relevant fields in the [unaccompanied minors] case management record on the ORR online portal.

*Id.*

163. *See id.* ¶ 21

164. *See id.* ¶ 22. In response to this, ACLU lawyer Lee Gelernt said that the ORR had "no right to just give these kids away unless the parent was making an informed decision" because these are not cases "where the parents put the child up for adoption," but rather cases where the government forcibly separated children from their parents. Angelina Chapin, *Trump Admin Says It's Too Hard To Reunite Thousands of Separated Families: Court Filing*, HUFFPOST, [https://www.huffpost.com/entry/report-trump-admin-does-not-plan-to-reunite-families-separated-before-zero-tolerance\\_n\\_5c55c3c4e4b087104753e468](https://www.huffpost.com/entry/report-trump-admin-does-not-plan-to-reunite-families-separated-before-zero-tolerance_n_5c55c3c4e4b087104753e468) (Feb. 7, 2019).

165. *See Ms. L. v. ICE*, 415 F. Supp. 3d 980, 983–84 (S.D. Cal. 2020) (order granting in part and denying in part plaintiffs' motion to enforce preliminary injunction).

166. *Id.* at 984.

Guatemala, El Salvador, Honduras, and Mexico in an attempt to locate parents.<sup>167</sup> If these parents are hiding from life-threatening violence, it is even harder to find them. Advocates are also attempting to reach parents via the phone, but about 20% of deported parents have inoperable numbers, or no number listed at all.<sup>168</sup> If the government or advocates are unable to locate a child's parent, then that child could be permanently orphaned after the government separated the child from their parents by force at the border.

The Trump Administration's imposition of zero-tolerance enforcement and its attendant policies between 2017 and 2019 violated U.S. law, as several courts have found. The Trump Administration created a crisis in its abrupt attempt to deter immigration through intentionally harsh treatment of people seeking to migrate and seeking asylum. It detained tens of thousands of migrants, separating thousands of children from families, then detaining families together long term. It did all this without the capacity to house these people humanely, ensure basic nutrition or sanitation, provide legal process, or provide appropriate mental health care for the traumatic short- and long-term consequences of forcible family separation and the prolonged detention of children. In addition to the significant violations of U.S. law, these policies and their consequences are also stark violations of international human rights law.

## II. THE TRUMP ADMINISTRATION'S VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

Even before 2017, the U.S. system of detention and processing of immigrants was problematic and subject to criticism under

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167. Angelina Chapin, *Inside the Desperate Search for 343 Parents Deported Without Their Kids*, HUFFPOST (Sept. 2, 2018), [https://www.huffingtonpost.com/entry/search-for-immigrant-parents-deported-without-their-children\\_us\\_5b897eace4b0511db3d8264d](https://www.huffingtonpost.com/entry/search-for-immigrant-parents-deported-without-their-children_us_5b897eace4b0511db3d8264d).

168. *Id.*; see HUM. RTS. WATCH, *supra* note 9 (finding that hundreds of Salvadoran people who returned to or were deported to El Salvador were murdered, raped, and terrorized by the gangs and officials from whom they were fleeing in the first place).

human rights law.<sup>169</sup> The United States was, however, engaged in a promising global process to institute needed reforms. The Trump Administration withdrew from the international dialogue and made conditions for migrants at the southern U.S. border manifestly worse, resulting in clear violations of the nation's human rights commitments.

In September 2016, prior to President Trump's election, the United States joined all other member states of the United Nations General Assembly in unanimously adopting the New York Declaration for Refugees and Migrants (the New York Declaration).<sup>170</sup> It reaffirmed a commitment to protecting the human rights and fundamental freedoms of all migrants and refugees, regardless of their status, recognizing "all are rights holders."<sup>171</sup> It underscored a shared commitment to protect the rights of migrant and refugee children, with special attention to the vulnerability of unaccompanied children.<sup>172</sup> Reaffirming the protections of the Convention on the Rights of the Child (CRC), the New York Declaration specified that "the best interests of the child" shall be given "primary consideration."<sup>173</sup> In sweeping terms, this declaration committed every state to upholding the principles of the UN Charter and the UDHR, as well as international human rights law, humanitarian law, and refugee law more broadly.<sup>174</sup> Avowing "profound solidarity" with those displaced from their homes, the New York

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169. See Shani M. King, *Child Migrants and America's Evolving Immigration Mission*, 32 HARV. HUM. RTS. J. 59, 60 (2019); Ved P. Nanda, *Migrants and Refugees Are Routinely Denied the Protection of International Human Rights: What Does the Future Hold?*, 45 DENV. J. INT'L L. & POL'Y 303, 315 (2017); Maria Mendoza, Note, *A System in Need of Repair: The Inhumane Treatment of Detainees in the U.S. Immigration Detention System*, 41 N.C. J. INT'L L. 405, 406 (2016); Gwynne Skinner, *Bringing International Law To Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 270, 285 (2008); Jacqueline Bhabha, "Not a Sack of Potatoes": *Moving and Removing Children Across Borders*, 15 B.U. PUB. INT. L.J. 197, 205 (2006); Lori A. Nessel, *Forced To Choose: Torture, Family Reunification, and United States Immigration Policy*, 78 TEMP. L. REV. 897, 899 (2005).

170. See G.A. Res. 71/1 (Sept. 19, 2016); see also Elspeth Guild, *The UN's Search for a Global Compact on Safe, Orderly and Regular Migration*, 18 GERMAN L.J. 1779, 1780 (2017).

171. G.A. Res. 71/1, *supra* note 170, ¶¶ 5, 23.

172. *Id.* ¶¶ 23, 32, 52, 59.

173. *Id.* ¶ 32.

174. *Id.* ¶ 5.

Declaration pledged, “[w]e are determined to save lives. Our challenge is above all moral and humanitarian.”<sup>175</sup> The United States joined this vision for humane and lawful treatment of all migrants and children in particular. The World Council of Churches, a diverse coalition representing over half a billion Christians across hundreds of traditions in 120 countries worldwide, lauded the initiative and called on all “governments to make renewed commitments to relevant international human rights law a foundation for this new global compact.”<sup>176</sup>

In December 2017, as President Trump accelerated zero-tolerance immigration enforcement on the southern border, he withdrew the United States from the Global Compact on Migration, the United Nation’s legal framework for commitments and principles of the New York Declaration.<sup>177</sup> The Trump Administration prioritized an “America First” vision of border security, claiming the New York Declaration contained provisions “inconsistent with U.S. immigration policy and the Trump Administration’s immigration principles.”<sup>178</sup> Even as President Trump rejected the principles of the New York Declaration, the Trump Administration was well underway in its own violations of migrants’ human rights.<sup>179</sup>

The Administration’s imposition of zero-tolerance enforcement and prosecution of migrants on the southern border led the government to detain children and separate them

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175. *Id.* ¶¶ 8, 10.

176. Olav Fykse Tveit, Gen. Sec’y, World Council of Churches, Perspectives on Migration: Displacement and Marginalization, Inclusion and Justice. An Ecumenical Vision, Speech Before the 4th Annual Symposium on the Role of Religion and Faith-Based Organizations in International Affairs (Jan. 23, 2018), <https://www.oikoumene.org/en/resources/documents/perspectives-on-migration-displacement-and-marginalization-inclusion-and-justice-an-ecumenical-vision>.

177. *See Trump Administration Ends Participation in Global Compact on Migration, Citing Concerns Regarding U.S. Sovereignty*, 112 AM. J. INT’L L. 311, 311 (2018).

178. *Id.* (quoting Press Release, U.S. Mission to the United Nations, United States Ends Participation in Global Compact on Migration (Dec. 2, 2017), <https://perma.cc/AR46-EAKW>).

179. *See supra* Part I.

from their families. The U.S. government was not prepared to administer the Administration's policies legally, to adjudicate cases timely, to detain people humanely, or to care for the children in its custody.<sup>180</sup> This policy and its implementation violated international human rights law, including express treaty commitments concerning the detention and treatment of migrant families and children.<sup>181</sup> These human rights laws are necessary constraints on a sovereign's authority to regulate the "entry, residence, and departure of foreigners."<sup>182</sup> The Trump Administration's policies and practices on the southern border violated multiple treaties to which the United States is a party, including the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the 1967 Protocol Relating to the Status of Refugees (CSR Protocol).<sup>183</sup>

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180. See SPECIAL REVIEW *supra* note 29, at 4; TRAUMA AT THE BORDER, *supra* note 39, at 26–27.

181. See Carrie F. Cordero, Heidi Li Feldman & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 444, 454 (2020) (providing a thorough analysis of domestic, constitutional, and institutional law addressing family separation with clear conclusions that the Trump Administration's policies of family separation violate them all and discussing international law to demonstrate that the Trump Administration's family separation policies violate several international human rights regimes protecting children, requiring humane and non-punitive treatment, assuring the rights of family life, and protecting people from cruel, inhuman, and degrading treatment); see also Michael Garcia Bochenek & Warren Binford, *The U.S. Is Mistreating Children in Its Custody. Can International Law Help?*, AM.PROSPECT (Aug. 15, 2019), <https://prospect.org/power/u.s.-mistreating-children-custody.-can-international-law-help/>. See generally Lizbeth M. Chavez, Tammy V. Chavez, Adam G. Todd, Eleanor Brown & Camilo Pérez-Bustillo, *The Need to Open Doors and Hearts: The Detention of Unaccompanied Minors Seeking Asylum in the United States and Mexico*, 42 U. DAYTON L. REV. 359 (2017) (examining legal obligations under general international conventions, customary law, and domestic law governing practices of the United States in its treatment of unaccompanied minors seeking asylum in the United States).

182. WALTER KALIN & JORG KUNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 487, 489 (1st ed. 2009).

183. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT]; International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, S. TREATY DOC. No. 95-18, 660 U.N.T.S. 195; Protocol Relating to the Status of Refugees, *adopted* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

The Trump Administration also ran afoul of the American Convention on Human Rights (ACHR) and the CRC, both of which the United States has signed but not ratified.<sup>184</sup> As a signatory, the United States is obliged to refrain from acts which would “defeat the object and purpose” of these treaties.<sup>185</sup> The Trump Administration’s zero-tolerance policies and practices violated the purposes of these treaties to protect human rights and the best interests of children.

### A. *The Right to Family Life*

The right to protection of family life is articulated in the UDHR, which sets forth protection against arbitrary interference with privacy, family, home, or correspondence.<sup>186</sup> The UDHR, the foundation of modern human rights law, embraces the view that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>187</sup> The right to family life is elaborated in other human rights instruments, including the ICCPR. The Trump Administration’s zero-tolerance policies violated the

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184. See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

185. See the Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, which states:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty . . . .

See generally Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 443 (2004) (noting that the United States is a signatory to, but has not ratified, the Vienna Convention itself, observing that the Convention is well-established as customary international law, and highlighting the U.S. State Department’s reliance on it as a “primary source of reference . . . for determining the customary principles of treaty law”); Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT’L L. & ECON. 71 (1992) (providing a constructive understanding of the content and contours of the meaning of “defeat” as it is employed in article 18); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (examining the modern practice of ratifying multilateral human rights treaties with reservations, understandings, and declarations).

186. G.A. Res. 217 (III) A, *supra* note 20, art. 12.

187. *Id.* art. 16(3).

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right to family life and the integrity of families by forcibly and arbitrarily separating children from their parents.

1. *ICCPR Articles 17 and 23 on the right to family life*

The ICCPR, ratified by the United States in 1992, obligates parties to respect and protect rights well known in American constitutional law, including equality before the law; freedom of speech, religion, association, and assembly; right to life; freedom from torture; and the right to non-discrimination.<sup>188</sup> It also provides special protection for the right to family life and family unity, stating in Article 17 that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to protection of the law against such interference or attacks.<sup>189</sup>

Article 23(1) goes further and calls for affirmative protection of the family “by society and the State,” affirming the UDHR’s proclamation that the family is “the natural and fundamental unity of society.”<sup>190</sup>

The United Nations Human Rights Committee (HRC), the treaty-created body that provides authoritative interpretation and oversight of the ICCPR, has clarified that the safeguard against “arbitrary or unlawful interference” means that State intervention “can only take place on the basis of law” and that law must itself be in compliance with “the provisions, aims and objectives” of the ICCPR.<sup>191</sup> Even when authorized under

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188. The United States signed the ICCPR on October 5, 1977 and ratified it on June 8, 1992. International Covenant on Civil and Political Rights, *supra* note 183.

189. *Id.* at 177.

190. *Id.* at 179.

191. U.N. Hum. Rts. Comm., CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, ¶¶ 1–3, U.N. Doc. HRI/GEN/1/Rev.1 (1988).

domestic law, such intervention must be “reasonable in the particular circumstances.”<sup>192</sup> The HRC further clarified that State interference, such as removal, must be “based on law and necessary to achieve a legitimate aim,” in order to comply with the ICCPR’s safeguards of the right to family life.<sup>193</sup>

The HRC is clear that the right to family life applies regardless of nationality; it “must be guaranteed without discrimination between citizens and aliens” and available to aliens “even in relation to entry or residence.”<sup>194</sup> Migrants permitted to enter a state party’s territory are entitled to the rights set forth in the ICCPR, including the treaty’s safeguard against unlawful or arbitrary interference with family.<sup>195</sup> Children are also entitled to the rights guaranteed under the ICCPR, including special consideration of “the protection required by [the child’s] status as a minor.”<sup>196</sup>

During its most recent review of the United States in 2014, the HRC expressed concerns about U.S. immigration policy, including its assessment that mandatory immigration detention and deportation procedures did not adequately consider the relevance of “family ties and the fate of spouses and children staying behind,” among other factors, to individual immigrants’ cases.<sup>197</sup> Beginning in 2017, the Trump Administration exacerbated these concerns by committing

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192. *Id.* ¶ 4.

193. See KALIN & KUNZLI, *supra* note 182, at 401.

194. U.N. Hum. Rts. Comm., General Comment No. 15: The Position of Aliens Under the Covenant, ¶¶ 2, 5, U.N. Doc. HRI/GEN/1/ Rev.1 (1986).

195. *Id.* ¶¶ 6–7. The Committee on the Elimination of Racial Discrimination, the treaty body that provides authoritative interpretation on the Convention on the Elimination of Racial Discrimination, has similarly recognized the right to family life and its relevance to noncitizens. It instructs states to “[a]void expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life.” See The Comm. on the Elimination of Racial Discrimination, General Recommendation 30 on Discrimination Against Non-Citizens, ¶ 28, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (2005).

196. U.N. Hum. Rts. Comm., General Comment No. 17: Article 24 (Rights of the Child), ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (1989) [hereinafter Rights of the Child].

197. U.N. Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶15, U.N. Doc. CCPR/C/USA/CO/4 (2014).



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outright violations through its policies of family separation and prolonged child detention.<sup>198</sup>

2. *Unlawful and arbitrary interference with family life in violation of Article 17*

The Trump Administration perpetrated unlawful and arbitrary interference with family life prohibited under Article 17 by separating families without judicial process, failing to track the whereabouts of separated families and children, limiting communication among family members, imposing indefinite separation and detention, and deporting parents while their children remained incarcerated in the United States.<sup>199</sup> The United States separated thousands of families under its zero-tolerance enforcement practices and deported hundreds of parents, perhaps more, while their children remained in custody, often because the Administration processed children and parents separately and did not track who belonged to whom.<sup>200</sup>

The Trump Administration's interference with family life violated domestic law, and the Administration duly suffered admonishment and corrective orders from federal courts as a result.<sup>201</sup> The Administration's interference with family life was

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198. See Nick Cumming-Bruce, *Taking Migrant Children from Parents Is Illegal, U.N. Tells U.S.*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html>.

199. See generally Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003) (noting that the state practice of family separation may violate customary international law).

200. See *Chapin*, *supra* note 164. In September 2019, Judge Sabraw ordered that several families be reunited after migrant parents were deported without their separated children. See *Ms. L. v. ICE*, 403 F. Supp. 3d 853, 857 (S.D. Cal. 2019). In January 2020, the *Los Angeles Times* reported on families being reunited after two years of forced separation, including some of the at least 471 parents who were deported without their children after being separated by the U.S. government. These children were stranded in detention facilities or with other caregivers. See Brittny Mejia, *Families Reunite After Nearly Two Years Apart: 'Beginning of a Whole Other Journey'*, L.A. TIMES (Jan. 23, 2020, 1:16 PM), <https://www.latimes.com/california/story/2020-01-23/families-reunite-after-nearly-two-years-apart-beginning-of-a-whole-other-journey>.

201. See *supra* Sections I.B–C.

arbitrary because it did nothing to weigh how family separation and detention would burden the human right to family life.

The HRC's jurisprudence consistently finds that deportation interfering with a person's family is arbitrary if the state does not weigh the human rights costs against the state's interest in deporting the person.<sup>202</sup> In *Winata v. Australia*, the HRC found that a state's general interest in enforcing its immigration laws was insufficient to justify removal of two long-time Indonesian residents lacking immigration status, but otherwise not culpable of any wrongdoing, whose thirteen-year-old son had been born in the country.<sup>203</sup> In other words, Australia would have needed to demonstrate state interests and concerns "more compelling than the mere enforcement of immigration laws to justify deporting the child's parents."<sup>204</sup>

The Trump Administration privileged the goal of deterrence with wholesale disregard for the integrity of family life, the human rights of those affected, and the United States' express commitments under the ICCPR. It attempted to justify its abrupt imposition of zero-tolerance practices, family separation, and mass detention by claiming it was merely securing the border, enforcing the law, and sending a deterrence message to other migrants.<sup>205</sup> Although states commonly invoke "national security, public order, public health, or morals" to justify interference with family, these bare assertions do not justify interference with the right to family life.<sup>206</sup>

Although the Administration claimed the policy was in place to combat illegal immigration, many of the detained migrants

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202. HUM. RTS. WATCH, *supra* note 9.

203. See *Winata v. Australia*, U.N. Hum. Rts. Comm., Communication No. 930/2000, ¶¶ 7.1–7.3, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

204. HUM. RTS. WATCH, LIST OF ISSUES SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE DURING ITS PERIODIC REVIEW OF THE UNITED STATES OF AMERICA 11 (2019) (on file with the *Drexel Law Review*).

205. See *supra* Section I.A.2.

206. See, e.g., International Covenant on Civil and Political Rights, *supra* note 183, at 176 (internal translation omitted); KALIN & KUNZLI, *supra* note 182, at 399–400.

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were seeking asylum, which is not illegal.<sup>207</sup> It also sounded alarms of fraud and smugglers “posing as families to take advantage of a ‘get-out-of-jail-free card.’”<sup>208</sup> The actual instances of family fraud, however, represent a tiny portion of the families apprehended at the southern border: 0.06% of nearly 76,000 families in 2017 and 0.6% of the 31,000 families apprehended in the first five months of the 2018 fiscal year.<sup>209</sup> An April 2019 report reached a similar estimate of only about 0.5% of cases involving misrepresentations of age or familial status.<sup>210</sup>

Any decision by the State to interfere with family must be made “on a case-by-case basis,” not through sweeping decisions about entire groups.<sup>211</sup> The Trump Administration did not engage in case-by-case analysis weighing its actions against rights secured by the ICCPR. Instead, it implemented wholesale policies that disrupted family life for thousands, without a pretense of individual, case-by-case consideration.

When a spokesperson for the OHCHR said the United States’ zero-tolerance practices constituted arbitrary and unlawful interference and needed to cease, former U.S. Ambassador to the U.N. Nikki Haley said that “[n]either the United Nations nor anyone else will dictate how the United States upholds its borders.”<sup>212</sup> Ambassador Haley did not reply to specifics of the allegations.

The United States has a legal obligation to consider the right to family life, especially to determine whether separating

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207. 8 U.S.C. § 1158(a)(1).

208. Linda Qiu, *Kirstjen Nielsen Justifies Family Separation by Pointing to Increase in Fraud. But the Data Is Very Limited*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/nielsen-family-separation-factcheck.html>.

209. *Id.*

210. John Burnett, *More than 3,100 Migrants Found with Fake Documents in Past Year, Federal Agents Say*, NPR (April 10, 2019, 2:05 PM), <https://www.npr.org/2019/04/10/711850056/fake-documents-a-growing-problem-among-migrants-crossing-u-s-mexico-border>.

211. CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, *supra* note 191, ¶ 8.

212. Cumming-Bruce, *supra* note 198.

families, often permanently, is proportionate to the goal of regulating migration. The United States ignored and violated this obligation. The Trump Administration offered no evidence that it weighed the human rights impact against the interest in deportation, as required by the *Winata* analysis. The minimal justifications it offered for its actions are unsupported by the data. Because it failed to weigh the human rights impact, the blanket policies are arbitrary and unlawful under ICCPR Article 17.

### 3. Failure to protect the family in violation of Article 23

In view of its egregious policies of interference with family and wholesale disregard to the right to family under Article 17, it is plain that the Trump Administration gave no heed to the obligation under Article 23 to protect the family as a fundamental group unit of society. Addressing Article 23, the HRC has clarified that “[t]he right to found a family implies, in principle, the possibility to procreate and live together.”<sup>213</sup> Thus, a state party is obliged to take appropriate measures at both the domestic and international level “to ensure the unity or reunification of families, particularly when their members are separated for political, economic, or similar reasons.”<sup>214</sup> Such an obligation must carry additional weight if the separation was deliberately conducted by the State itself, in an unlawful and arbitrary manner. The government began its program without the means of tracking the children and the families from whom it separated them, often deported parents without their children, and placed children in strangers’ custody, eschewing responsibility to reunite them after the fact.<sup>215</sup> Untold numbers of families remain separated and may be permanently

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213. U.N. Hum. Rts. Comm., General Comment No.19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.6 (1990).

214. *Id.* (emphasis added); accord KALIN & KUNZLI, *supra* note 182, at 400 (asserting that states’ legal duty to fulfill the right to family life includes permitting reunification of families on their territory).

215. See *supra* notes 54–77 and accompanying text.

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estranged due to the Administration's utter disregard for the Article 23 principle of family protection.

*B. The Rights of the Child*

The rights of children receive special attention under international human rights law. The most widely ratified human rights treaty in the world is the CRC.<sup>216</sup> Notably, the United States remains the only state not to ratify it.<sup>217</sup> The United States is, however, bound by the rights of the child outlined in the ICCPR. Nations have agreed that all should promote and protect the best interests of children, especially children in state custody. The Trump Administration and the United States violated the human rights of the children separated from their families and detained in harsh, inhumane, prolonged detention, without communication or process, which led to the death of at least eight children and the permanent orphaning of others.<sup>218</sup>

*1. Rights of the child under ICCPR Article 24*

While every person possesses the fundamental rights afforded by the ICCPR, children require heightened safeguards of their rights, based on the vulnerability associated with their young age. The ICCPR protects children's rights under Article 24(1):

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as

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216. See *Children*, UNITED NATIONS, <https://www.un.org/en/sections/issues-depth/children/> (last visited Feb. 12, 2021) ("The Convention is the most rapidly and widely ratified international human rights treaty in history.").

217. *Ratification Status for CRC—Convention on the Rights of the Child*, UNITED NATIONS OFF. HIGH COMM'R: UN TREATY BODY DATABASE [hereinafter *CRC Ratification*], [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en) (last visited Apr. 25, 2021).

218. See discussion and sources cited *supra* Section I.D.

are required by his status as a minor, on the part of his family, society and the State.<sup>219</sup>

The United States has the responsibility for protecting the civil and political rights of children subject to its power, whatever their nationality or immigration status.<sup>220</sup>

The HRC has specified that ICCPR Article 24 requires “the adoption of special measures to protect children,” to ensure that they enjoy the other rights set forth in the ICCPR.<sup>221</sup> The HRC contemplates restriction of parental authority and removal of children from their parent only in “cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child.”<sup>222</sup> It names the state’s duty, when children are “deprived of their family environment,” to “enable them to develop in conditions that most closely resemble those characterizing the family environment.”<sup>223</sup>

## 2. *Violations of rights of the child under ICCPR Article 24*

The Trump Administration’s policy of separating children from their families at the Southern Border was directly antithetical to the rationale of Article 24 of the ICCPR. The United States separated children from their families arbitrarily and not on the bases of serious parental failure, neglect, or ill treatment.<sup>224</sup> A broad-based policy fashioned to deter would-be migrants and asylum seekers does not come close to meeting this standard. It shows callous disregard of its obligations under the law.<sup>225</sup>

The Trump Administration undertook zero-tolerance enforcement with an aim of deterrence, making conditions and

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219. International Covenant on Civil and Political Rights, *supra* note 183, at 179.

220. Rights of the Child, *supra* note 196, ¶ 5 (noting that the nondiscrimination provision in Article 24(1) pertains specifically to the special protection measures required in that article).

221. *Id.* ¶¶ 1, 3.

222. *Id.* ¶ 6.

223. *Id.*

224. *See id.*

225. *See id.*

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consequences of migration so harsh that migrants, including asylum seekers, would stay away.<sup>226</sup> The Attorney General, White House Chief of Staff, and Secretary of Homeland Security made express statements to this effect.<sup>227</sup> Later denials by DHS officials and others claiming to be concerned about fraud were neither credible nor supported by the evidence.<sup>228</sup>

Although the Trump Administration claimed that it was acting to protect children from trafficking and abuse, it did not make these findings case-by-case, but through sweeping, blanket action based solely and completely on immigration status.<sup>229</sup> This justification flies in the face of data showing that such dangers were exceptionally rare among the children it separated and detained.<sup>230</sup> The government did not seek judicial determination of the best interests of the children but separated them from their parents and incarcerated them summarily. These are facial violations of its treaty obligations.

The OHCHR underscored its concern that the zero-tolerance policy fueled separation of children, including very young children, from their families, along with its judgment that this practice runs afoul of human rights norms.<sup>231</sup> It stated, “[t]he practice of separating families amounts to arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child.”<sup>232</sup> The OHCHR went on to explain that the interest of the child should be prioritized ahead of migration policies:

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226. Cumming-Bruce, *supra* note 198.

227. See sources cited *supra* notes 40–43.

228. Dickerson, *supra* note 55.

229. See Qiu, *supra* note 208.

230. *Id.*

231. Press Release, Ravina Shamdasani, Spokesperson, U.N. High Comm’r for Hum. Rts., Press Briefing Note on Egypt, United States and Ethiopia (June 5, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E> (“We are deeply concerned that the zero tolerance policy recently put in place along the US southern border has led to people caught entering the country irregularly being subjected to criminal prosecution and having their children—including extremely young children—taken away from them as a result.”).

232. *Id.*

The use of immigration detention and family separation as a deterrent runs counter to human rights standards and principles. The child's best interest should always come first, including over migration management objectives or other administrative concerns. It is therefore of great concern that in the US migration control appears to have been prioritised over the effective care and protection of migrant children. Children should never be detained for reasons related to their own or their parents' migration status. Detention is never in the best interests of the child and always constitutes a human rights violation.<sup>233</sup>

The U.N. High Commissioner for Human Rights, Michelle Bachelet, explained that "even for short periods under good conditions," detention "can have a serious impact on [children's] health and development."<sup>234</sup> The High Commissioner further encouraged the United States to accede to the CRC and to respect the rights of all children.<sup>235</sup>

The conditions of detention likewise violate Article 24, which requires that if and when children are justifiably removed, they should be placed in "conditions that most closely resemble those characterizing the family environment."<sup>236</sup> Overcrowded, prison-like facilities, conditions causing chronic sleep deprivation, lack of adequate nutrition and basic medical care, rigid discipline, lengthy detention, and lack of opportunity to communicate with families mock the law's vision of a family-like environment for young people deprived of their parents'

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233. *Id.*; accord U.N. Hum. Rts. Comm., General Comment No. 35: Article 9 (Liberty and the Security of Person), ¶ 18, U.N. Doc. CCPR/C/GC/35 (2014) [hereinafter General Comment No. 35].

234. UN Rights Chief 'Appalled' by US Border Detention Conditions, Says Holding Migrant Children May Violate International Law, UN NEWS (July 8, 2019), <https://news.un.org/en/story/2019/07/1041991>.

235. *Id.*

236. Rights of the Child, *supra* note 196, ¶ 6.



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care. A number of children died in U.S. custody. The law requires special protection for children, but the U.S. government demonstrated, at best, a reckless indifference to the well-being of migrant children, whose intense vulnerability should heighten the special protection measures Article 24 requires.

### 3. *Convention on the Rights of the Child*

The United States is a signatory to the CRC, but is the only U.N. member state that has not ratified it.<sup>237</sup> As a signatory, the United States remains bound to “refrain from acts which would defeat the object and purpose of a treaty.”<sup>238</sup> The CRC’s status as the most ratified human rights treaty in the world signals that its principles represent international consensus on the rights of children, indicating these standards should be regarded as customary international law, which binds all states regardless of treaty commitments.<sup>239</sup>

The CRC expressly requires state parties to protect against the separation of a child from her family, unless such separation is “necessary for the best interest of the child,” such as a situation

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237. Convention on the Rights of the Child, *supra* note 184. The United States signed the CRC on Feb. 16, 1995. *CRC Ratification*, *supra* note 217.

238. Vienna Convention on the Law of Treaties art. 18, *supra* note 185. The United States is a signatory of the Vienna Convention, but has not ratified it. However, “[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.” *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm> (Jan. 20, 2017).

239. See, e.g., Eric Engle, *The Convention on the Rights of the Child*, 29 QUINNIPIAC L. REV. 793, 794 (2011) (“[T]he CRC is seen by U.S. courts as codifying customary international law, or at least as evidence of customary international law.”); Gregory W. Donaldson, Note, *How the United States’ Temporary Assistance for Needy Families Program Violates Its Customary International Law Obligations Founded in the Convention on the Rights of the Child*, 315 GA J. INT’L & COMP. L. 315, 332 (2017). While not binding as law, some customs become international norms when states uniformly accept them as law: “An international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law.” Recognition of customary international law depends on the acceptance and recognition of states. Daniel M. Bodansky, *The Concept of Customary International Law*, 16 MICH. J. INT’L L. 667, 671 (1995) (quoting KAROL WOLFKÉ, *CUSTOM IN PRESENT INTERNATIONAL LAW* xiv, at 53 (2d rev. ed. 1993)).

of abuse or neglect.<sup>240</sup> Article 9 of the CRC, which articulates these standards, also provides that “State Parties shall respect the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis,” unless contact would contravene the child’s well-being.<sup>241</sup> It further requires that if a state party initiated the separation, the State shall provide “essential information concerning the whereabouts of the absent member(s) of the family.”<sup>242</sup> The CRC provides that if a child or the child’s parents attempt to enter or leave a state for the purpose of family reunification, they shall be dealt with in a “positive, humane and expeditious manner.”<sup>243</sup>

The CRC Committee adopted General Comment 6 in 2005, which emphasizes that the best interest of the child standard controls the treatment of children who are unaccompanied and outside of their country of origin.<sup>244</sup> It also established that “unaccompanied or separated children should not, as a general rule, be detained.”<sup>245</sup> “Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”<sup>246</sup> The Committee acknowledged that detention might be necessary under exceptional circumstances but specified that detention must be lawful and “used as a measure of last resort and for the shortest period of time.”<sup>247</sup>

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240. Convention on the Rights of the Child, *supra* note 184, art. 9(1).

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

242. *Id.* art. 9(4).

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

244. See U.N. Comm. on the Rts. of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 9, U.N. Doc. CRC/GC/2005/6 (2005).

245. *Id.* ¶ 61.

246. *Id.*

247. *Id.*

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*4. Violations of the CRC*

The Trump Administration's zero-tolerance policies and actions violated all of these precepts of children's rights under the CRC. Whereas Article 9(1) calls on the state to serve as the child's protector against wrongful separation from her family, the United States stepped into the role of wrongdoer, inflicting the harm of family separation directly when separation was clearly not "necessary for the best interest of the child."<sup>248</sup>

The government made no viable argument that it considered the best interest of the children it separated and detained or that its actions were necessary for their best interest. The vague explanation of separation as a blanket means of preventing human trafficking was not supported by empirical evidence.<sup>249</sup> Law enforcement and border patrol officials made executive decisions quickly, on their own and without judicial process, to determine whether to separate children from their families and detain them in mass.<sup>250</sup> Rather than a measure in children's interest, the separation was meant to be a deterrent for immigration and a punishment for those who attempted to enter the country.<sup>251</sup>

The CRC guarantees the right of the child "to maintain personal relations and direct contact" with separated parents on a regular basis as long as it is not contrary to the best interests of the child.<sup>252</sup> Reliable accounts reported by the Commission on

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248. See Convention on the Rights of the Child, *supra* note 184, art. 9(1).

249. See Manuel Madrid, *DNA Testing at the Border Could Provide Cover for More Family Separations*, AM. PROSPECT (May 20, 2019), <https://prospect.org/power/dna-testing-border-provide-cover-family-separations/>.

250. See generally Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1 (2019) (offering a detailed examination and a legal, constitutional critique of expedited removal processes that deny full judicial processes for migrants and asylees, illuminating the long-lasting ramifications of erroneously issued expedited removal orders for asylum seekers and their families).

251. See *Ms. J.P. v. Sessions*, No. 18-cv-06081, 2019 WL 6723686, at \*41 (C.D. Cal. Nov. 5, 2019) (order granting, in part, motions for class certification and preliminary injunction, and dismissing motion to dismiss).

252. See Convention on the Rights of the Child, *supra* note 184, art. 9; Starr & Brilmayer, *supra* note 199, at 223.

Civil Rights show that “many children are not able to speak to their parents, hug their siblings who are also in custody, or know when they will be released.”<sup>253</sup> To this day, children are not only separated from their families but are denied communication and often left in the dark as their parents are deported or detained elsewhere.<sup>254</sup> The Trump Administration has not tracked the location of some deported family members or provided this information to the children, but it created immense bureaucratic barriers to reuniting separated children to their families.<sup>255</sup>

Article 37 of the CRC provides that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>256</sup> On this score, as explained in the *Flores* analysis, the Trump administration continued to violate domestic U.S. law by extended, even indefinite, periods of detention, which are certainly not the “shortest appropriate period of time” required by international human rights law.<sup>257</sup>

The former UN High Commissioner for Refugees, Antonio Guterres, declared in 2014 that “the practice of putting children

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253. TRAUMA AT THE BORDER, *supra* note 38, at 57 (citing Letter from Shaw Drake, Pol’y Couns., Border Rts. Ctr., ACLU of Texas and Bernardo Rafael Cruz, Immigrants’ Rts. Fellow, ACLU of Texas, to John V. Kelly, Acting Inspector Gen., Dep’t. of Homeland Sec., Cameron Quinn, Officer for C.R. & C.L., Dep’t. of Homeland Sec. & Matthew Klein, Assistant Comm’r for Off. of Pro. Resp., U.S. Customs & Border Prot. (Mar. 30, 2019), [https://www.aclutx.org/sites/default/files/pdn\\_border\\_patrol\\_abuse\\_oig\\_complaint.pdf](https://www.aclutx.org/sites/default/files/pdn_border_patrol_abuse_oig_complaint.pdf)).

254. *The Department of Homeland Security’s Family Separation Policy: Perspectives from the Border Before the H. Comm. on Homeland Sec.: Subcomm. on Border Sec., Facilitation & Operation*, 116th Cong. (2019) (statement of Michelle Brané, Director, Migrant Rts. & Justice Program, Women’s Refugee Comm’n), <https://www.womensrefugeecommission.org/press-releases/the-department-of-homeland-security-s-family-separation-policy-perspectives-from-the-border/>.

255. See *supra* notes 152–66 and accompanying text; see also Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html> (“Though attempts to find the separated parents have been going on for years, the number of parents who have been deemed ‘unreachable’ is much larger than was previously known.”).

256. Convention on the Rights of the Child, *supra* note 184, art. 37(b).

257. See discussion *supra* Section I.C.

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in immigration detention is in violation of the CRC in many respects and it should be stopped.”<sup>258</sup> He also stated that “an ethic of care, not enforcement” prioritizing the best interests of the child should govern treatment of migrant children.<sup>259</sup> As a signatory of the CRC, the United States must not contravene the purpose of the treaty, and yet it has violated multiple rights the treaty is designed to safeguard.

5. *Rights to family life and rights of the child in the American Convention on Human Rights*

The United States is a charter member of the Organization of American States (OAS) and a signatory to the American Convention on Human Rights (ACHR), which includes provisions for protection of the family and of children’s rights similar to those of the ICCPR.<sup>260</sup>

After receiving complaints from the governments of Mexico, Colombia, Ecuador, Guatemala, El Salvador, and Honduras, the OAS through its Inter-American Commission on Human Rights (IACHR) made findings and granted “precautionary measures” in favor of migrant children separated from their families under the Trump Administration’s zero-tolerance practices.<sup>261</sup> The Commission requested that the United States “protect the rights to a family life, personal integrity, and identity” of migrant children, [i]mmediately guarantee . . . regular communication” with their families, reunify them with

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258. Press Release, U.N. High Comm’r for Refugees, UN Refugee Agency Calls on States To End the Immigration Detention of Children on the 25th Anniversary of the Convention on the Rights of the Child (Nov. 20, 2014), <https://www.unhcr.org/en-us/news/press/2014/11/546de88d9/un-refugee-agency-calls-states-end-immigration-detention-children-25th.html>.

259. *Id.*

260. Organization of American States, American Convention on Human Rights, art. 17(1), 19, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”); *id.* art. 19 (“Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”).

261. Inter-Am. Comm’n H.R. Res. 64/2018, Precautionary Measure No. 731-18: Migrant Children Affected by the “Zero Tolerance” Policy Regarding the United States of America, ¶¶ 34, 39–41 (Aug. 16, 2018).

their biological families, “provide medical and psychological assistance” and interpreting services, and “[s]uspend any migration procedure that may result in the separation of the children from their parents.”<sup>262</sup>

In describing the United States’ answers to the complaints from its neighbors regarding their minor citizens, the IACHR noted that despite the expiration of a federal court-imposed time limit, the United States did not provide detailed information about all of the 2,551 separated children then awaiting reunification, whether reunification would be soon planned, or the health or detention conditions of the children in its custody.<sup>263</sup> It did report that 572 children remained in ORR custody, including 410 children whose adult family members had already been expelled from the United States.<sup>264</sup> In short, the United States dismissed the concerns of its neighbor nations with a faint response.

### C. *The Right to Non-Discrimination Under the ICCPR and CERD*

A foundational principle of human rights law is that fundamental rights and freedoms should be enjoyed by all people on a basis of equality and non-discrimination and that discriminatory treatment based on race, ethnicity, or national origin (among other factors) must be foresworn.<sup>265</sup> The racist rhetoric that President Trump invoked to promote his anti-immigrant policies violated this bedrock human rights norm, which the United States is duty-bound to respect under the ICCPR and CERD.

President Trump rooted his 2016 campaign and his policies in stark declarations that people who immigrate to the United States from Mexico are murderers and rapists.<sup>266</sup> Once elected,

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262. *Id.* ¶ 3.

263. Press Release, Inter-Am. Comm’n H.R., IACHR Grants Precautionary Measure To Protect Separated Migrant Children in the United States (Aug. 20, 2018).

264. *Id.*

265. G.A. Res. 217 (III) A, *supra* note 20, art. 2.

266. *See Here’s Donald Trump’s Presidential Announcement Speech*, *supra* note 47.

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he did not retract these statements, but rather escalated these sentiments in part by bemoaning the immigration of people from “shithole” countries.<sup>267</sup> While he hoped for more “good” immigrants from Europe and Asia, he slandered Haitian immigrants by saying that they all have AIDS and Nigerians by saying that they would never “go back to their huts” in Africa.<sup>268</sup> President Trump rooted his immigration rhetoric in derogatory language about the populations that his family separation and child detention policies harmed the most, and the nations from which they came.

Both the ICCPR and CERD, to which the United States is a party, prohibit such violations of human rights on the grounds of race, color, or national origin.<sup>269</sup> The CERD defines “racial discrimination” in broad terms:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has 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>270</sup>

Nations that have ratified the CERD are obliged not only to refrain from racial discrimination in their policy-making, but also to take affirmative steps toward eliminating racism from their systems and institutions. President Trump’s racialized approach to immigration policy—as it bears on young children—flouted and undermined this vital commitment.

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267. See Dawsey, *supra* note 51.

268. See Shear & Hirschfeld Davis, *supra* note 50.

269. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 183, arts. 2, 5; International Covenant on Civil and Political Rights, *supra* note 183, at 173.

270. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 183, art. 1.

Even if the language of the zero-tolerance executive orders were racially neutral, President Trump's discriminatory expressions and racist declarations are the inescapable bases of the policies. Denial or infringement of human rights on such discriminatory grounds transgresses principles of equality and non-discrimination that are central to human rights law.<sup>271</sup>

D. *The Right To Be Free from Torture or Cruel, Inhuman, or Degrading Treatment*

Human rights law establishes the right to be free from torture and cruel, inhuman, or degrading treatment or punishment. The ICCPR and the CAT, to which the United States is a party, protect against such ill treatment, as does the Inter-American Convention on Human Rights, which the U.S. has signed. The Trump Administration violated these rights when it separated children from their families and detained them in harsh, dangerous, and ultimately deadly conditions in order to deter other migrants from attempting to enter the country and to coerce people from seeking asylum.

Whether detained with or separated from their families, migrant children incarcerated under zero-tolerance enforcement policies suffered grievous harm.<sup>272</sup> The government traumatized them by detaining them in mass, secure facilities, and by denying them proper nutrition and proper medical care.<sup>273</sup> The government drugged them to control their behavior, forced them to live in artificially cold conditions, and used colder temperatures as retaliation for

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271. See G.A. Res. 217 (III) A, *supra* note 20, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."). This principle is reiterated throughout all human rights treaty agreements. See, e.g., International Covenant on Civil and Political Rights, *supra* note 183, at preamble; CAT, *supra* note 183, at preamble.

272. See Inter-Am. Comm'n H.R. Res. 64/2018, *supra* note 261, ¶¶ 1, 3, 5–6.

273. See Segers & Kates, *supra* note 130.



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complaints.<sup>274</sup> It created conditions that cause chronic sleep deprivation, and it kept them out of communication from their parents and families.<sup>275</sup> Government agents sexually assaulted children in their custody, and children died of preventable causes while incarcerated under Trump Administration policies.<sup>276</sup> Detention alone under these circumstances violates human rights, but this was much worse. It was abusive, cruel, intentional, unnecessary, and, as the reviewing courts found, illegal.<sup>277</sup>

*1. Violations of Article 7 of the ICCPR*

Article 7(1) of the ICCPR provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>278</sup> The HRC explains that, “[A]rticle 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim,” going on to emphasize that “[A]rticle 7 protects, in particular, children, pupils and patients in teaching and medical institutions.”<sup>279</sup> The right enumerated in this provision is absolute and not subject to limitation. The HRC specified that “no justification or extenuating circumstances may be invoked to excuse a violation of [A]rticle 7 for any reasons.”<sup>280</sup>

The HRC has deemed detention conditions like those the Trump Administration imposed on migrant children and families as violating Article 7 human rights guarantees. For example, when Pavel Barkovsky, a national of Belarus, was

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274. See *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1059 (C.D. Cal. 2017); *Flores v. Sessions*, No. CV 85-4544, 2018 WL 10162328, at \*16 (C.D. Cal. July 30, 2018).

275. See Peeler et. al, *supra* note 119.

276. See Garrick, *supra* note 142.

277. See *Flores*, 394 F. Supp. 3d at 1053–61 (finding detained children were being held in deplorable and unsanitary conditions in violation of *Flores* Agreement).

278. International Covenant on Civil and Political Rights, *supra* note 183, at 175.

279. Hum. Rts. Comm., General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 5 (1992) [hereinafter General Comment No. 20].

280. *Id.* ¶ 3.

forced to stand facing a wall for seven hours, was not given food or water during the first thirty hours following his arrest, and “spent 13 days in an overcrowded, but small cell without bedding, chairs, heating and proper ventilation, under extremely poor sanitary conditions,” the Committee found a violation of Article 7.<sup>281</sup> The HRC noted that “persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.”<sup>282</sup> The same holding was reached when an individual was detained in an “overcrowded but small cell without beds, chairs or heating, under extremely poor sanitary and hygienic [sic] conditions.”<sup>283</sup>

Migrant children in U.S. custody experienced harsh detention conditions, including overcrowding, very cold facilities, sleep deprivation, unsanitary conditions, and lack of adequate medical care.<sup>284</sup> The government forced them to sleep on concrete floors with scant bedding.<sup>285</sup> As the HRC determined that these substandard conditions were a violation of the rights of adults, they were certainly a violation of the rights of children, who are guaranteed heightened protections because of their status as minors.<sup>286</sup>

One human rights expert pointed out that the reported conditions of the child detention centers represented worse treatment “than the most basic standards required by international humanitarian law for enemy prisoners of

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281. Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2247/2013, U.N. Doc. CCPR/C/123/D/2247/2013, ¶ 6.2 (2018) (internal citation omitted).

282. *Id.* ¶ 6.2.

283. Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2181/2012, U.N. Doc. CCPR/C/122/D/2181/2012, ¶ 8.2 (2018).

284. Beth Van Schaack, *The Torture of Forcibly Separating Children from Their Parents*, JUST SEC. (Oct. 18, 2018), <https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents>.

285. See Peeler et. al, *supra* note 119.

286. See *supra* Section II.B.1.

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war.”<sup>287</sup> For example, detainees at Guantanamo Bay Detention Camp are guaranteed three meals a day, water, clothing and shoes, medical care, correspondence materials and means to send and receive mail and packages, soap, towels, washcloths, and showers.<sup>288</sup> The U.S. district courts examining these cases have found persuasive evidence that the U.S. government detained children in worse conditions than this.<sup>289</sup> U.S. Representative Raul Ruiz, a medical doctor, described the conditions as less humane than those he witnessed in Port-au-Prince, Haiti in the immediate aftermath of the magnitude 7.0 earthquake that struck the country in 2010.<sup>290</sup>

The HRC specifically addresses detention conditions, requiring that any officials involved in detention procedures be properly trained, that all names of detained persons be kept in organized registers, and that all detainees have “prompt and regular access” to doctors.<sup>291</sup> Notably, the U.S. government’s detention procedures lacked and may still lack the procedural safeguards required by the ICCPR, including systems to track children and their families, ready access to health care, and properly qualified personnel.<sup>292</sup>

Although President Trump sought to justify the zero-tolerance detention policies by declaring a national emergency at the southern border,<sup>293</sup> the HRC explicitly declared in General Comment No. 20 that there can be no justification for ill

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287. Felice D. Gaer, *Top Expert Backgrounder: Children in Immigration Detention – What are the International Norms?*, JUST SEC. (July 1, 2019), <https://www.justsecurity.org/64765/top-expert-backgrounder-children-in-immigration-detention-what-are-the-international-norms/>.

288. *Status of Detainees at Guantanamo*, U.S. DEP’T OF ST.: ARCHIVE (Feb. 7, 2002), <https://2001-2009.state.gov/p/sca/rls/fs/7910.htm>.

289. See discussion *supra* Sections I.C–I.E.

290. Jack Feuer, *Raul Ruiz’s Political Prescription*, UCLA MAG. (Jan. 1, 2014), <http://magazine.ucla.edu/depts/style/congressman-raul-ruizs-political-prescription/>.

291. General Comment No. 20, *supra* note 279, ¶ 11.

292. See discussion *supra* Section I.E.

293. *President Donald J. Trump Stands by His Declaration of a National Emergency on Our Southern Border*, WHITE HOUSE (Mar. 15, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-stands-declaration-national-emergency-southern-border/>.

treatment under Article 7.<sup>294</sup> Therefore, regardless of an arguable emergency, the detention of minors in these conditions violates ICCPR Article 7 by amounting to cruel, inhumane, or degrading treatment.<sup>295</sup>

## 2. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The United States ratified the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) in 1994.<sup>296</sup> The CAT obligates states to treat detained civilians humanely.<sup>297</sup> Article 2 requires governments to “take effective legislative, administrative, judicial or other measures to prevent acts of torture,”<sup>298</sup> which include

any act by which severe pain or suffering, *whether physical or mental*, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed . . . or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind . . . .<sup>299</sup>

State actions need not rise to the level of “torture” as understood in common vernacular, and individuals protected under the CAT need not be harmed through express violence.

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294. *Id.*; General Comment No. 20, *supra* note 279, ¶ 11.

295. *See USA: Policy of Separating Children from Parents Is Nothing Short of Torture*, AMNESTY INT’L (June 18, 2018), <https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture/>. Amnesty International analyzed these conditions and found that they do rise to the level of torture. *Id.*

296. U.N. Off. of Legal Affs., *Status of Treaties*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=\\_en](https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en) (choose “Chapter IV Human Rights”; then click “9.” on the list of treaties) (Jan. 5, 2021, 3:15 PM).

297. CAT, *supra* note 183, 1465 U.N.T.S. at 113.

298. *Id.* at 114.

299. *Id.* at 113–14 (emphasis added). The Inter-American Convention on Human Rights, to which the United States is a signatory, includes a similar provision prohibiting “torture or . . . cruel, inhuman, or degrading punishment or treatment” and ensuring that all persons in custody “shall be treated with respect for the inherent human dignity of the person.” American Convention on Human Rights, *supra* note 184, 1144 U.N.T.S. at 146.

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Rather, “[v]ictims are persons who have individually or collectively suffered harm, including physical or *mental injury, emotional suffering*, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention.”<sup>300</sup> States’ obligations to prevent torture are closely interrelated and overlap considerably with their obligations to prevent “ill treatment” (including “cruel, inhuman or degrading treatment or punishment”) under the CAT.<sup>301</sup> Basic guarantees required by CAT for all persons deprived of their liberty include the right to promptly contact relatives, to receive legal and medical assistance, and to access judicial and other remedies for rights violations.<sup>302</sup> These human rights obligations are absolute and non-derogable, and the duty to uphold them broad: States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment and to take positive, effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.<sup>303</sup>

Since 2014, the Committee has expressed concern about the United States’ border detention policies, particularly the detention of unaccompanied minors in prison-like facilities.<sup>304</sup> Addressing the United States’ response to an increase in unaccompanied minors on the southern border during the Obama Administration, the Committee directed the United States to reform the conditions of detention to avoid violating the treaty. It advised re-assessing the use of mandatory detention, halting the expansion of family detention,

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300. U.N. Comm. Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, ¶ 3, U.N. Doc. CAT/C/GC/3 (2012) (emphasis added). The Committee against Torture further noted, “[t]he term ‘victim’ also includes affected immediate family or dependents of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization.” *Id.*

301. U.N. Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 3, U.N. Doc. CAT/C/GC/2 (2008).

302. *Id.* ¶ 13.

303. *Id.* ¶ 4; *accord id.* ¶ 15.

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

developing alternatives to immigration detention for unaccompanied children, preventing sexual assault, and establishing independent oversight mechanisms.<sup>305</sup> The Committee also noted that mandatory detention of children is likely arbitrary because the procedures do not properly account for refugee status.<sup>306</sup>

The escalation of these practices under the Trump Administration has only intensified the human rights concerns the Committee voiced in 2014. The government intentionally separated children from families and detained them in prolonged, harsh, inadequate conditions, causing physical and mental injuries and in some cases death.<sup>307</sup> Dr. Jack Shonkoff, the director of the Center on the Developing Child at Harvard University said that “forcibly separating children from their parents is like setting a house on fire. Prolonging that separation is like preventing the first responders from doing their job.”<sup>308</sup> According to Michael Yaki of the U.S. Commission on Civil Rights, the Administration was advised of the trauma that would result to children from their family separation policies but proceeded, nonetheless. Yaki found the deliberate nature of the Administration’s violations to be most disturbing, tantamount to malice aforethought.<sup>309</sup>

The Trump administration shunned its obligations under this Convention in its heated attempts to discourage immigration and asylum at the southern border. It imposed harsh state action, intentionally inflicting serious harm on children and

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305. *Id.*

306. *Id.*

307. *See supra* Section I.D.

308. Anjali Mehta, Ashley Miller & Nikki Reisch, *Arbitrary Detention of Asylum Seekers Perpetuates the Torture of Family Separation*, JUST SEC. (Mar. 15, 2019), <https://www.justsecurity.org/63255/arbitrary-detention-asylum-seekers-prolongs-torture-family-separation/>.

309. Michael Yaki, Chair, USCCR Rep. Subcomm., Remarks made at Member-Level Panel Discussion on U.S.C.C.R., Trauma at the Border: The Human Cost of Inhumane Immigration Policies (Dec. 4, 2019).

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families in an attempt to intimidate others from migrating to the United States all in violation of the CAT.<sup>310</sup>

*E. The Right To Be Free from Arbitrary Arrest or Detention*

The Trump Administration did not address immigrant families on a case-by-case basis but instead instituted blanket practices based on immigration status and incarcerated migrants, separated families, and detained children without judicial processes.<sup>311</sup> Thus it violated the human right to be free from arbitrary arrest or detention.

*1. ICCPR Article 9*

ICCPR Article 9 guarantees each individual the right to liberty and security of person, including the right to be free from arbitrary arrest or detention.<sup>312</sup> In General Comment Number 35, the Human Rights Committee expressly requires that detention for immigration matters must be “justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.”<sup>313</sup> Further, the determination to detain immigrants

must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>314</sup>

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310. See Brendan Lokka, *Trump’s Torture Legacy: Isolating, Incarcerating, and Inflicting Harm Upon Migrant Children*, 35 AM. U. INT’L L. REV. 169, 196 (2019); see also Van Schaack, *supra* note 284.

311. See Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

312. International Covenant on Civil and Political Rights, *supra* note 180, at 175–76.

313. General Comment No. 35, *supra* note 229, ¶ 18.

314. *Id.* ¶ 18. As with ICCPR Article 17 on privacy and family life, failure to review cases individually renders decisions “arbitrary,” according to the Human Rights Commission. See *supra* Section II.A.2.

The Trump Administration's policies and practices may be subject to judicial review in litigation, but they failed every other component of this guidance. The Administration rejected less invasive means of achieving its policy goals, and it based detention and family separation on broad categories, not case-by-case analysis. The detention of children for prolonged periods in dangerous situations is abusive and certainly not proportional to the goals the government expressed. The Trump Administration's zero-tolerance practices amounted to the arbitrary detention that Article 9 forbids. Even if the detention had been necessary, the Committee also noted that "[a]ny necessary detention should take place in appropriate, sanitary, non-punitive facilities," which it did not.<sup>315</sup>

## 2. Protocol Relating to the Status of Refugees

A growing number of families apprehended at the border were in fact asylum-seekers, which exacerbated the arbitrary nature of the indefinite detention imposed on them. The United States is a party to the 1967 Protocol Relating to the Status of Refugees.<sup>316</sup> As discussed earlier in this Article, seeking asylum in the United States is not a crime; rather, it is a fundamental human right enumerated in the UDHR: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."<sup>317</sup>

Article 31 of the 1951 Convention Relating to the Status of Refugees<sup>318</sup> prohibits the imposition of "penalties, on account of their illegal entry or presence, on refugees who . . . enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show

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315. General Comment No. 35, *supra* note 229, ¶ 18.

316. *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (Apr. 2015).

317. G.A. Res. 217 (III) A, *supra* note 20, art.14(1).

318. Articles 2–34 of the 1951 Convention were incorporated into the 1967 Protocol. See Protocol Relating to the Status of Refugees, art. 1, ¶ 1, Jan. 31, 1967, 606 U.N.T.S. 267.



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good cause for their illegal entry or presence.”<sup>319</sup> Indefinite detention and separation of families who present themselves to authorities and follow processes for asylum-seekers violated Article 31, and therefore the 1967 Protocol, which incorporates this provision.

Under zero-tolerance prescriptions, the Trump Administration arrested and detained everyone who entered the country “irregularly,” including those who were seeking asylum.<sup>320</sup> This was a profound penalty—the separation of families, detention of children, and indefinite detention generally, whether the migrants applied for asylum at an official point of entry or the wilds of the border. Because this detention of asylum seekers was not legally justified, it offends human rights protection against arbitrary arrest or detention.

CONCLUSION: TRUMP’S LEGAL AND MORAL VIOLATIONS OF  
HUMAN RIGHTS

President Trump made a decision to sever families in an attempt to advance political ends by trying to deter migration and asylum. For a dark season, child abuse was the functioning policy of the United States. This violated U.S. domestic law, as well as international human rights law that the United States is obliged to uphold. It shocked the moral conscience of communities of faith and goodwill, whose ethical commitments demand the protection of children, families, and migrants that human rights law affords.

Legal human rights norms derive their authority from the diverse, global moral consensus they represent and from nation-states’ willingness to respect them. Yet these norms are more than mere positive law. An understanding of human rights as innate acknowledges a shared sense of moral

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319. Convention Relating to the Status of Refugees, art. 31, July 28, 1951, 189 U.N.T.S. 150.

320. Amnesty Int’l, USA: *‘You Don’t Have Any Rights Here’: Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States*, at 4, AI Index AMR 51/9101/2018 (October 2018), <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF>.

objectivity: Some standards for how humans are to treat one another are considered beyond dispute and universal, applicable across national and cultural boundaries. Deeper philosophical understanding of why human beings possess such extraordinary dignity and worth, entitling them to certain safeguards in the form of human rights, are illumined by particular ethical and religious traditions, whose themes, narratives, and cultural resources carry potential to strengthen a society's commitment to human rights.<sup>321</sup>

The consistent, rigorous respect for the visiting foreigner and the orphaned child found across the Abrahamic religious traditions is striking. Sacred texts and their authoritative interpretations in Judaism, Christianity, and Islam all resonate with a religious duty to treat the stranger and the orphan with care.

In Hebrew scriptures, God declares that all people, every man, woman, and child, bear the image of God.<sup>322</sup> All are entitled to just treatment, especially foreigners or migrants who, along with widows, orphans, prisoners, and the poor, warrant special concern because of their vulnerability. Hebrew scripture reminds the people that they were once dispossessed and vulnerable themselves, so that when they came into prosperity and power, they owed care, compassion, and charity to foreigners and children separated from their parents.<sup>323</sup> In sum, "Love your fellow as yourself."<sup>324</sup>

In the Christian Gospels, Jesus refers to this Hebrew Scripture when he invokes love for others as part of what he calls the

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321. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS*, at 73–77, 222 (2002) (recounting how a committee of philosophers who surveyed human rights from diverse cultural perspectives at the early United Nations concluded "that basic human rights rest on 'core convictions,' even though those convictions 'are stated in terms of different philosophic principles and on the background of divergent political and economic systems.'"); see also *id.* at 77 (quoting Catholic human rights proponent Jacques Maritain as famously saying, "we agree about the rights but on the condition no one asks us why").

322. *Genesis* 1:27.

323. *Deuteronomy* 24:14–15, 17–22.

324. *Leviticus* 19:18.

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greatest command: "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind[,]""<sup>325</sup> and, "You shall love your neighbor as yourself. On these two commandments hang all the Law and the Prophets."<sup>326</sup> Jesus summed up these commands with the Golden Rule, "In everything do to others as you would have them do to you; for this is the law and the prophets."<sup>327</sup> Challenged about who one's neighbors are, he responded with the parable of the Good Samaritan,<sup>328</sup> illustrating that the neighbor includes the religious rival, the cultural outcast, the poor, the weak and vulnerable, the foreign other.<sup>329</sup>

According to the Gospel of Matthew, Jesus and his family fled to a foreign land to avoid murderous oppression from its sovereign, a proxy king who would slaughter innocents, so his own escape as a child surely informed his compassion and care for children and an expansive view of neighbors.<sup>330</sup> He had this to say about people who harm children: "If any of you put a stumbling block before one of these little ones . . . it would be better for you if a great millstone were fastened around your neck and you were drowned in the depth of the sea."<sup>331</sup>

Islam likewise teaches concern for the neighbor, the stranger, and the orphan. The Qur'an includes many examples of communities made peaceful by generous welcome of strangers and migrants. The Prophet Muhammad taught, "You cannot be a real believer unless you want for your brother what you want for yourself."<sup>332</sup> Applying this to immigrants, Islam teaches

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325. *Matthew* 22:37.

326. *Matthew* 22:39–40.

327. *Matthew* 7:12.

328. *See Luke* 10: 25–36.

329. *Id.*

330. *Matthew* 2:13–23.

331. *Matthew* 18:6.

332. *See* Zeki Saritoprak, *The Qur'anic Perspective on Immigrants: Prophet Muhammad's Migration and Its Implications in Our Modern Society*, J. SCRIPTURAL REASONING (Aug. 2011), <https://jsr.shanti.virginia.edu/back-issues/vol-10-no-1-august-2011-people-and-places/the-quranic-perspective-on-immigrants/> (citing Sahih al-Bukhari, Vol. 1, Bk. 2, Hadith 13).

hospitality and generosity.<sup>333</sup> The Qur'an says, "Worship God, and ascribe not partners unto Him. And be virtuous toward parents and kinsfolk, toward orphans and the indigent, toward the neighbor who is of kin and the neighbor who is not of kin, toward the companion at your side and the traveler, and toward those whom your right hand possess."<sup>334</sup>

Regardless of religious confession or identity, these are piercing examples of shared ethical commitments that have risen across eras, civilizations, religions, and cultures, from empires to backwaters. Individual humans have inherent dignity, and that human dignity is inviolable, even in the face of transgressions that might seem to profit a nation at the expense of the foreigner. These moral precepts honor children and foreigners, who are the most vulnerable to great powers. The laws of the United States and the laws of nations that insist on the human rights of every migrant reflect moral ideals of human dignity and just treatment of all, which have roots in ancient religious thought.

The World Council of Churches and Roman Catholic Church—together representing billions of members worldwide—stand among the global religious communities that responded to the U.S. scandal of family separation by affirming the dignity and rights of migrants and condemning this U.S. practice as a violation of their moral values. In a statement following their 2018 joint "Conference on Xenophobia, Racism, and Populist Nationalism in the Context of Global Migration," the Council expressed this conviction in compelling theological terms:

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333. *See id.* ("What one can see and learn from historical events in Islam is that administrators can provide a warm and good environment for immigrants in order to integrate them with the regular citizens, as the Prophet did in the city of Medina. It is very important for the future of the world and in particular for the future of the United States to strengthen the relationships between citizens, who were also early immigrants, and newer immigrants . . .").

334. THE STUDY QURAN: A NEW TRANSLATION AND COMMENTARY 464 (Seyyed Hossein Nasr, Caner K. Dagli, Maria Massi Dakake, Joseph E.B. Lumbard & Mohammed Rustom eds., 2015).

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[S]tress[ing] as a matter of first principle that all refugees and migrants, regular and irregular, are human beings each created in the image of God, sisters and brothers, with equal human dignity and rights regardless of their immigration status. To raise national boundaries and the nation state to an order of value above the recognition of the image of God in every migrant and refugee is a kind of idolatry.<sup>335</sup>

Human rights are more than the codified consensus of treaties, institutions, and positive law of nations. They represent humanity's most sweeping collective effort to articulate what we owe to one another as fellow members of the human family. The UDHR was the attempt by the nations—after decades of global war—to capture the scope of rights sounding in the fundamental dignity of all people. In its preamble, it declares that “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” and it cautions, “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.”<sup>336</sup> The UDHR drew from earlier formulations of inherent, inalienable rights, including the U.S. Declaration of Independence and the U.S. Bill of Rights, both of which acknowledged the prospect of rights they did not expressly name.<sup>337</sup> The UDHR lays the philosophical, legal, and moral foundation for the many treaties and conventions adopted by

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335. WCC Exec. Comm., *supra* note 8.

336. G.A. Res. 217 (III) A, *supra* note 20, at preamble.

337. THE DECLARATION OF INDEPENDENCE para. 2 (1776) (acknowledging that “all men” are endowed with inalienable rights, among them “life, liberty, and the pursuit of happiness”); U.S. CONST. amend IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”); *see also* DECLARATION OF THE RIGHTS OF MAN (1789) (“The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.”).

the community of nations, including the United States, to protect and promote human rights.

The United States, under the Trump Administration, violated the legal obligations of multiple human rights treaties. The Trump Administration intentionally enacted policies and practices to separate children from families by force, often permanently, and to detain those migrant children in squalid, dangerous conditions without process or communication. The government inflicted these cruel physical, emotional, and social injuries for the express purpose of instilling fear and deterring others from attempting to migrate or seek asylum in the United States. It violated the inherent dignity of human beings and broke legal promises and obligations to respect their human rights. It affronted the moral convictions of diverse faith communities around the world concerned for the plight of people displaced from their homes.

Attorney General Jeff Sessions publicly invoked a text from the Christian New Testament, chapter 13 of an epistle by the Apostle Paul to the Romans, in an imprudent effort to justify the family separation policy.<sup>338</sup> Romans 13 is a well-known passage discussing the relationship between Christians and the governments under which they live:

Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad . . . . Pay all of them their dues, taxes to whom taxes are due, revenue to whom revenue is due, respect to

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338. Julia Jacobs, *Sessions's Use of Bible Passage to Defend Immigration Policy Draws Fire*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/sessions-bible-verse-romans.html>.

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whom respect is due, honor to whom honor is due.<sup>339</sup>

Attorney General Sessions's facile law-and-order reading of this text failed on multiple levels: It ignored the considerable weight of international law, to which the United States is bound, and which family separation violated. It also flouted any duty of ethical assessment of civil law, by implication of which that text is more thoughtfully and justly interpreted.<sup>340</sup>

Attorney General Sessions also ignored that in the United States the people themselves are the source of law and legitimacy, sovereign and subject, citizen and self-governor, not a divine right of kings; the law is subject to democratic accountability and criticism. Dr. Martin Luther King, Jr. treats this very idea in "Letter from Birmingham Jail" in which he discourses on the duty of a citizen to submit to an unjust law. Dr. King explains that a moral law is one that uplifts humanity, and an unjust law is a code that a majority inflicts on a minority that is not binding on itself: "I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for the law."<sup>341</sup> Attorney General Sessions's strained reading of Romans 13 to justify the imprisonment of children in violation of their human rights falls before any moral reckoning. If that is the law, then the law is unjust, and zero-tolerance enforcement finds itself on the side of a condemned empire and segregationist laws.

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339. *Romans* 13: 1–7.

340. See Lincoln Mullen, *The Fight To Define Romans 13*, ATLANTIC (June 15, 2018) (exploring how the verse has been invoked historically, on both sides of, for example, the American Revolution and struggle for abolition of chattel slavery in the U.S.); see also Jeffrey R. Baker, *Whom Would Jesus Cover: A Biblical, Ethical Lens for the Contemporary American Health Care Debate*, 23 J.L. & HEALTH 1, 24–26 (2010) (exploring Romans 13 in detail as a philosophy of government and religious community in a self-governing, constitutional republic, reaching very different conclusions and applications than Attorney General Sessions's apparent interpretation).

341. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289, 289–302 (James Melvin Washington ed., 1986).

The international institutions designed to protect human rights may have limited means to hold President Trump and the United States accountable for these violations and may lack recourse to force policy changes. In the wake of the zero-tolerance enforcement and its consequences, U.S. courts may be reticent to invoke international human rights law to offer relief to the children for their injuries, traumas, and separation from their families, even as the Trump Administration continues its aggressive and harsh means of immigration enforcement and border control. International human rights conventions may want for stronger enforcement mechanisms, particularly against the executive, but they are law, nonetheless.

Ultimately, Americans must decide whether these gross violations of human rights are tolerable in the United States. Enforcement of human rights norms lies principally with the nation-state; in the United States, this is a representative democracy answerable to the body politic. The United Nations may review U.S. abuses and criticize or condemn them, but for an administration that scorns international law and diplomatic institutions, one essential means of human rights accountability is political and electoral. Thus, the moral protest of religious communities matters profoundly, and the resonance of common ethical principles across human rights law and faith traditions holds valuable potential to foster the culture of human rights on which such citizen-led accountability depends.

This pernicious chapter in the American story calls the nation to deeper self-reflection: Will the United States respect the promises it has made to uphold human rights? Will it join the community of nations in affirming moral standards that have attained overwhelming consensus? Will it listen to the early warning signs from global human rights authorities, before problems escalate to more tragic crises, or will a narrow conception of national self-interest carry the day?

In time, the United States must reckon with the gravity and consequences of the Trump Administration's human rights



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abuses. The People and their representatives will decide whether human rights are more important than nationalist policy goals, whether a president may violate human rights to advance other ambitions. For human rights to remain at the heart of the American enterprise, the People must insist with constant vigilance that human rights are inalienable and inviolable and are not subject to an executive's political calculations.