Zero Tolerance

Atrocity Crimes Against Migrant Children and Families in the United States: An Accountability Framework for Family Separation

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EXECUTIVE SUMMARY*

In the spring of 2018, United States citizens bore witness to the unfathomable: children, toddlers, and even breastfeeding infants were ripped screaming from their parents' arms by U.S. immigration officials and then disappeared into government detention. The events that took place shocked the collective conscience, moving American mothers to march with their children to government immigration offices across the country to demand a halt to the program.

The policy of family separations, or parent-child separations, was formally announced by the Trump Administration through a memo entitled "Zero Tolerance" and defended by the administration as not only permissible but required by U.S. law. The Biden Administration condemned the phenomenon as a "human tragedy that occurred when our immigration laws were used to intentionally separate children from their parent or legal guardians (families)." However, there have been no pronouncements by the Biden Administration that the Zero Tolerance policy was anything other than a legitimate, albeit unfortunate, immigration policy.

The global community cannot allow the Trump Administration's policy of family separation to be accepted as a legitimate government immigration policy. Instead, it is imperative to recognize that the policy of family separation, and the manner in which parent-child separations were carried out, constitute crimes against humanity.

*For the sake of brevity, the Executive Summary will not include citations. All sources, including quotations from specific government actors, are pulled from and can be located in the body of this report.

FINDINGS AND RECOMMENDATIONS

The following document synthesizes data gathered from litigation, the Freedom of Information Act (FOIA), and publicly available reports written by NGOs, government bodies, and international organizations alike to determine exactly how the Trump Administration's policy of parent-child separations via Zero Tolerance unfolded. The review uncovered the following key findings of fact explored extensively in the Findings of Fact section of this report:

- **Throughout the Trump Administration's four years in power, top government leaders deployed nativist, xenophobic and increasingly inflammatory rhetoric to describe Central American migration. This rhetoric stemmed from the top, emboldening its widespread use amongst rank-and-file officers at the southern border.** Trump himself disparaged Central American migration as a "violent invasion" or an "infestation"—at one point calling migrants "animals." Then-DHS Secretary John Kelly's rhetoric revealed an attitude of insidious structural racism toward Central American migrants in which he referred to them as "rural people with limited education who don't have skills nor integrate well." The rhetoric at the top was replicated by line officials, and Customs and Border Protection (CBP) was eventually described as having "a pervasive culture of cruelty aimed at immigrants."

- **The Trump Administration implemented the policy of family separation with the specific intent to deter migration from Central America (specifically, from Guatemala, Honduras, and El Salvador – referred to as the "Northern Triangle")**. Then-DHS Secretary John Kelly specifically indicated to the media that family separation was being considered to deter future migration to the southern border by Central American families. The policy was only implemented at the southern border and was never carried out along the northern border, coastal ports of entry, or ports of entry in the interior.

- **Family separation was first carried out in secret, away from the public eye, and denied by the Trump Administration.** In the spring of 2017, long before the formal implementation of Zero Tolerance, the government quietly launched family separation pilots in Yuma and El Paso. The Trump Administration denied the existence of the pilot programs even as immigration and child welfare advocates offered evidence of a sharp increase in the separation of infants and toddlers from their parents.

- **Terrorizing children and families was central to the government's policy, not merely an unfortunate byproduct**. From the beginning of the Trump Administration, the government openly stated that it was considering family separation as a tool of deterrence. While the Trump Administration repeatedly claimed that separation was merely incidental to a policy of prosecution, recently released government emails show an administration furiously working to enforce separation even when it was not necessary, when it could have been avoided, and even when other government agencies were trying to immediately reunify families. The secret pilot

programs demonstrated the inevitable harms to separated children (including losing children into detention systems, protracting separation, exacerbating harm) but these lessons were deliberately ignored by the Trump Administration.

- **The Trump Administration was at all times aware of the unthinkable and lasting harm that the family separation policy would cause to children.** Researchers have documented the harm of parent-child separation for decades. In the midst of the Trump Administration's separation of families, medical experts were unequivocal in their condemnation: family separation causes lasting and profoundly harmful physical and psychological effects on children. The American Academy of Pediatrics described the practice as "state-sanctioned child abuse." The medical community denounced the practice as a form of child torture. In fact, the government's own detention facilities recorded family separations as "abuse in DHS custody."

"Immigration officers threatened that if the mother did not sign the [deportation order], that they would never see their children again."

—AIC Report

- **The Trump Administration exploited harm to children to employ pervasive and illegal coercive practices to force deportations of separated families.** One report contains evidence that U.S. government officials used physical and verbal threats, deception and intimidation to coerce separated parents into signing forms to relinquish their right to request asylum and to opt instead for deportation. The trauma of being separated from their children, as well as the coercive environment created by government officials, made it extremely difficult for parents to participate meaningfully in the legal process. Thirty percent of mothers reported that immigration officers threatened that if the mother did not sign the deportation order, they would never see their children again.

- **As of the date of this publication, the Trump Administration separated over 5,500 children from their parents pursuant to the policy of family separations via Zero Tolerance; an accurate number will never be known.** According to government records, at least 5,569 children were separated from their parents by the Trump Administration as of January 20, 2021. However, these numbers do not paint the complete picture. In addition to the unreported numbers from Yuma, multiple agencies have reported parent-child separations that were not registered in HHS records.

FAMILY SEPARATION WAS A CRIME AGAINST HUMANITY

The factual findings in the report do not demonstrate merely an unfortunate abuse of the government's discretion in implementing immigration law. The policy of family separations pursuant to Zero Tolerance, as it was carried out, fits the definition of and is prosecutable as a crime against humanity.

The Acts Required to Effectuate Parent-Child Separations via Zero Tolerance Constitute Crimes Against Humanity including Persecution, Deportation or Forcible Transfer, Torture, and Other Inhumane Acts.

In order to be considered a crime against humanity, the acts must be committed as part of a widespread or systematic attack against a civilian population. These attacks do not require physical assault, and crimes against humanity can be carried out in the absence of war. Crimes against humanity are carried out by policy and as such can be either widespread or systematic, meaning that it can be either large in scale or an organized plan resulting in the continuous commission of criminal acts. **Our findings indicate that the acts carried out by the U.S. government were actions targeting the civilian population of Central American migrants and that the acts were systematically executed pursuant to formal policy, namely the policy of family separations via Zero Tolerance.**

In this report, we found that the Trump Administration engaged in the crimes of persecution, deportation or forcible transfer, torture, and other inhumane acts.

Persecution requires an intent to discriminate: to attack persons on account of belonging to a protected group such as a racial, national, ethnic or cultural collective identity." The Trump Administration repeatedly reported implementing family separation to deter Central American migration. Family separation took place only at the southern border. Persecution must be charged in connection with other crimes (*i.e.*, those crimes that are considered tantamount to the severe deprivation of a fundamental right).

Deportation or forcible transfer is "the forced displacement of persons by expulsion or *other coercive acts* from the area in which they are lawfully present." The definition of lawful presence is itself a legal term of art, and asylum-seekers are not considered "unlawfully present" under either domestic or international law. As the factual findings indicate, U.S. government officials pursuant to family separation coerced the deportation of separated families, including coercing the waiver of their asylum rights and the effectuation of self-deportation.

Torture is defined as the "intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody of the accused." The factual findings demonstrate that the infliction of pain and suffering to children was not simply an unfortunate side effect of Zero Tolerance. Instead, harm to children was an intentional, central component to the success of Zero Tolerance. The harm to separated children and parents was intentionally designed to deter third-party migration to the United States or—for those trapped in the system created by Zero Tolerance—into abandoning lawful claims for asylum. The

harm to separated children was and remains unquestionably severe, and in most cases the harm is ongoing and potentially permanent.

Other inhumane acts are offenses "of similar character intentionally causing great suffering, or serious injury to body or mental or physical health." This report argues that forced unlawful parent-child separation is an inhumane act, an assault on the human dignity of a child and parent, distinguishable in nature (rather than subsumed by) the crimes outlined above.

The Crimes Against Humanity Alleged in this Report Fall within the Jurisdiction of the International Criminal Court (ICC)

While the United States is not party to the Rome Statute (the statute of the ICC), there is precedent for international accountability for "transboundary" crimes against humanity. The ICC recognizes the unique nature of certain crimes against humanity as "transboundary," meaning that the elements of the crime take place across two or more territories. The ICC has taken the position that acts of unlawful deportation initiated in a state that is ***not*** party to the Rome Statute and completed in a state that ***is*** party to the statute fall within the jurisdiction of the Court. All countries of Central America's Northern Triangle are parties to the Rome Statute. The ICC also indicated that it may exercise jurisdiction over any other transboundary crimes pursuant to this analysis and cited two additional crimes for consideration: namely, persecution and other inhumane acts.

RECOMMENDATIONS FOR ALL FORMS OF ACCOUNTABILITY

Recommendations to the International Community

1. If the Biden Administration is Unwilling to Restore the Victims of Crimes Against Humanity Perpetrated at the Hands of the Trump Administration, Then International Accountability Mechanisms Must Be Invoked.

International accountability is a measure not taken lightly. It is a matter of last resort. As a principle of complementarity, the Rome Statute recognizes that "nation-states have the first responsibility and right to prosecute international crimes." When the state fails to do so, however, the ICC should be called upon to restore justice.

"There is a strong presumption that investigations and prosecutions of crimes against children are in the interests of justice."

— Office of the Prosecutor of the International Criminal Court

The Biden Administration does not recognize family separations pursuant to Zero Tolerance as a crime. The Biden Administration is not even amenable to civil accountability efforts. The scope of Biden's Task Force on Family Separation does not include a mandate related to criminal or civil accountability, and the Biden Administration has stopped negotiations to settle the thousands of tort claims pending in an administrative law setting.

The Office of the Prosecutor, however, has been unequivocal: "There is a strong presumption that investigations and prosecutions of crimes against children are in the interests of justice," and that "[w]herever the evidence permits, it will seek to include charges for crimes directed specifically against children."

To uphold the object and purpose of the Rome Statute, to demonstrate equality in the enforcement of international norms to all states, and to provide separated children and families with their only available mechanism to be heard in a court of law, this report formally recommends that the situation of family separation pursuant to Zero Tolerance be referred to the International Criminal Court.

2. Universal Jurisdiction Should Be Invoked in the Prosecution of those Accountable for Crimes against Humanity in the Context of Family Separation.

Some crimes are so exceptionally grave that they must be punished because the consequences of impunity are too great. In addition to helping close the impunity gap, universal jurisdiction can provide access to justice for victims of international crimes that may not have otherwise been prosecuted. Should the ICC Prosecutor or the U.S. government decline to prosecute the crimes against humanity detailed in this report, these offenses may still be prosecutable via universal jurisdiction. Those states that have implemented extraterritorial jurisdiction for individuals in their custody who have committed crimes against humanity should consider initiating investigations and, where appropriate, prosecutions of U.S. officials for crimes against humanity.

Recommendations to the Biden Administration

1. **The Biden Administration Should Appoint a Special Prosecutor with Expertise to Investigate Avenues for Domestic Criminal Accountability.**

   The Office of Global Criminal Justice (GCJ) provides "advice and expertise on transitional justice, including ways to ensure justice and accountability for genocide, crimes against humanity, and war crimes, as well as other grave human rights violations." The GCJ is well positioned to coordinate with a special prosecutor to investigate the allegations of crimes against humanity contained within this report. To that end, the Biden Administration, in connection with the U.S. Attorney General, should appoint special counsel to investigate allegations of crimes against humanity perpetrated by the Trump Administration.

2. **The Biden Administration Should Self-Refer the Situation of Parent-Child Separations Pursuant to Zero Tolerance or Explicitly Submit to the Jurisdiction of the International Criminal Court.**

   If the Biden Administration is unwilling to restore the victims of atrocity crimes committed by the Trump Administration—whether by civil or criminal accountability measures—then it should refer the matter for investigation by the Office of the Prosecutor of the ICC and/or submit to the jurisdiction of the ICC with respect to the crimes in question.

3. **The Biden Administration Must Restore Victims of Crimes Against Humanity Perpetrated by the Trump Administration.**

   The Biden Administration must make every effort, through any legal mechanisms available, to restore the victims of crimes against humanity, including reunifying families still suffering from separation and compensating separated families for the harm they suffered. To date, the Biden Administration has not agreed to financial compensation as part of any settlement with the victims of parent-child separations pursuant to the Trump Administration's policy of Zero Tolerance. Moreover, as of the writing of this report, separated parents attempting to reunify with their children in the United States are doing so under temporary grants of parole. These families have not been offered a grant of permanent protection. As a result, they may face deportation, and the possibility of another separation from their child, at any point in the future.

4. **The U.S. Congress Must Pass the Crimes Against Humanity Act.**

   In the absence of guidance for domestic prosecutions of perpetrators of crimes against humanity, whether the perpetrators be foreign or domestic, the U.S. government equivocates on its commitment to investigate and prosecute the full range of the *worst imaginable crimes* that might be committed against humankind. To that end, Congress must reconsider and pass the Crimes Against Humanity Act.

Findings of Fact: How Atrocity Crimes against Migrant Children and Families Unfolded in the United States

The following facts detail how United States government actors, through their policy of family separations via Zero Tolerance, perpetrated the crimes of deportation or forcible transfer, persecution, torture, and other inhumane acts. For purposes of this report, the terms Zero Tolerance policy, family separation, and parent-child separation may be used interchangeably. The policy definition referred to in this report is borrowed directly from the U.S. government's Interagency Task Force on the Reunification of Families. Pursuant to the Executive Order that established the Task Force, the Biden Administration defines the Zero Tolerance policy as "(b)…the policy discussed in the Attorney General's memorandum of April 6, 2018, entitled, 'Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a),' and *any other related policy, program, practice, or initiative resulting in the separation of children from their families at the United States-Mexico border.*"[1]

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1 *Executive Order on the Establishment of Interagency Task Force on the Reunification of Families*, The White House (Feb. 2, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/, emphasis

"The Problem": The Trump Administration's Xenophobic Characterization of Unauthorized Migration

In his September 2016 "immigration speech," Trump identified unauthorized migration as "one of the greatest challenges facing our country today."[2] In this speech, Trump made it clear that the solution to this challenge would be for the country to be able to choose "preferred" immigrants—those likeliest to "thrive and flourish" in American society:

> We also have to be honest about the fact that not everyone who seeks to join our country will be able to successfully assimilate. Sometimes it is just not going to work out. It's our right, as a sovereign nation, to choose immigrants that we think are the likeliest to thrive and flourish and love us…[3]

Yet, there is no unfettered right of a sovereign nation to choose "preferred" immigrants. There is the rule of law, international and domestic, that prohibits discrimination, unlawful deportation, non-refoulement, torture, and other inhumane acts. The rule of law exists to protect all people, whether citizens, refugees, migrants, or displaced persons, from the cruelty of tyranny permeated by an ethos of racial, ethnic, and religious superiority.

"These aren't people, these are animals..."

— Donald J. Trump

Over time, it became clear that the Trump Administration's characterization of the immigration "problem" was driven by racist and nativist animus. This was evidenced by the chosen rhetoric of his Administration. Trump himself queried: "Why are we having all these people from shithole countries come here?"[4] When describing the situation of southern border migration, Trump disparaged Mexican migrants as "drug dealers, criminals, and rapists."[5] He referred to the immigration problem as a "violent" "invasion,"[6] an "infestation"[7] of people he describes as sub-human: "These aren't people, these are animals, and we're taking them out of the country at a level and at a rate that's never happened before."[8]

To support its perception of the immigration problem, the Trump Administration sourced historical antecedents and white supremacist race theories to fuel its agenda. In a trove of emails to the Breitbart

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added.

2 *Transcript of Donald Trump's Immigration Speech*, The New York Times (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html.

3 *Id.*

4 Eugene Scott, *Trump's Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, The Washington Post (Oct. 2, 2019), https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/.

5 "*Drug Dealers, Criminals, Rapists": What Trump Thinks of Mexicans*, BBC News (Aug. 31, 2016), https://www.bbc.com/news/av/world-us-canada-37230916 (full quote: "When Mexico sends its people, they're not sending their best… 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").

6 Scott, *supra* note 4.

7 Abigail Simon, *People Are Angry President Trump Used This Word to Describe Undocumented Immigrants*, Time (June 19, 2018), https://time.com/5316087/donald-trump-immigration-infest/ (full quote: "They don't care about crime and want illegal immigrants, no matter how bad they may be, to pour into and infest our country…").

8 Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants "Animals" in Rant*, The New York Times (May 16, 2018), https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html.

news outlet, former Senior Advisor for Policy Stephen Miller—widely considered the primary architect of Trump's immigration policies[9]—sourced materials from white nationalist websites that supported extremist policies,[10] including a link from a group that "traffics in the 'white genocide' or 'great replacement' myth"[11] that disparaged Temporary Protected Status recipients from countries ravaged by war or natural disasters.[12]

In an effort to curb migration from Central America, Trump, Miller, and their allies within the administration prioritized various immigration strategies using dangerously racist rhetoric and policies modeled after an earlier era of U.S. immigration practice widely understood to be rooted in racial animus. Miller repeatedly cited President Coolidge's Immigration Act of 1924 as a model response to America's perceived immigration problem.[13] The 1924 Immigration Act was held out as an attempt to maintain the racial status quo in the United States:

> "AMERICA OF THE MELTING POT COMES TO END," the New York Times headline blared in late April 1924. The opinion piece that followed, penned by Senator David Reed of Pennsylvania, claimed recent immigrants from southern and Eastern European countries had failed to satisfactorily assimilate and championed his recently passed legislation to severely restrict immigration to the United States. He proudly proclaimed, "The racial composition of America at the present time thus is made permanent."[14]

The Immigration Act of 1924 was so widely associated with white supremacy that it was hailed by Adolf Hitler in *Mein Kampf* as a model for achieving racial purity.[15]

The rhetorical directive from the top ranks of the Trump Administration had a clear trickle-down effect, reinforcing "a pervasive culture of cruelty aimed at immigrants" throughout the entire department of Customs and Border Protection (CBP), not "just a few rogue agents or 'bad apples.'"[16] In 2019, a secret Facebook group of 9,500 CBP officials was discovered. The group was formed three years earlier during the Trump Administration, its members emboldened by Trump's rhetoric. This Facebook group of CBP

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9 Abigail Tracy, *"He Actually Prefers the Chaos": Stephen Miller, Immigration Warlord, Emerges from the Shadows*, Vanity Fair (Apr. 14, 2019), https://www.vanityfair.com/news/2019/04/stephen-miller-dhs-purge-kirstjen-nielsen-immigration.

10 Michael Edison Hayden, *Stephen Miller's Affinity for White Nationalism Revealed in Leaked Emails*, Southern Poverty Law Center (Nov. 12, 2019), https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails#policies.

11 *Id.*; *see also Stephen Miller and Other Nativists Seeking to Protect Trump-Era Anti-Immigrant Status Quo*, Southern Poverty Law Center (Mar. 29, 2021), ttps://www.splcenter.org/hatewatch/2021/03/29/stephen-miller-and-other-nativists-seeking-protect-trump-era-anti-immigrant-status-quo. In over 900 email correspondences with Breitbart, more than 80% of the emails touch upon race and migration.

12 Steve Sailer, *Never Let a Crisis Go to Waste: Mexico's Hurricane Patricia and "Temporary Protected Status"* (Oct. 23, 2015), archived at https://archive.li/dG96h.

13 Hayden, *supra* note 10 ("Miller brings up Coolidge on Aug. 4, 2015, in the context of halting all immigration to America. Garrett Murch, who also was an aide to [Attorney General Jeff] Sessions, starts the conversation by emailing McHugh, Miller and three other Breitbart employees, including Hahn, to note something he heard on a right-wing talk radio show: Murch, Aug. 4, 2015, 6:22 p.m. ET: '[Show host] Mark Levin just said there should be no immigration for several years. Not just cut the number down from the current 1 million green cards per year. For assimilation purposes.' Miller, Aug. 4, 2015, 6:23 p.m. ET: 'Like Coolidge did. Kellyanne Conway poll says that is exactly what most Americans want after 40 years of non-stop record arrivals'").

14 Anna Diamond, *The 1924 Law that Slammed the Door on Immigrants and the Politicians Who Pushed It Back Open*, Smithsonian Magazine (May 19, 2020), ttps://www.smithsonianmag.com/history/1924-law-slammed-door-immigrants-and-politicians-who-pushed-it-back-open-180974910/.

15 *See*, *for instance*, James Q. Whitman's Hitler's American Model: The United States and the Making of Nazi Race Law (2017), which places the U.S. Immigration Act of 1924 within the context of Nazi theory and practice.

16 A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke about Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019), https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes.

officials was known to CBP leadership throughout its existence.[17] These officers were described by public officials as "clearly agents who are desensitized to the point of being dangerous to migrants and their co-workers…[T]he comments made by Border Patrol agents towards immigrants, especially those that have lost their lives, are disgusting and show a complete disregard for human life and dignity."[18] The group persistently made racist comments, openly disparaging migrants from the Northern Triangle of Central America: "Non [*sic*] of these ignorant people can spell or write but somehow they think they deserve to be let in."[19]

Some officers were emboldened to act on their racist animus, such as in the 2018 case of a CBP official charged with running down a Guatemalan migrant with a Ford F-150 pickup truck.[20] The text chain amongst agents, revealed in a Tucson federal court filing after the attack, described migrants as "guats," "wild ass shitbags," "beaners" and "subhuman" and included repeated discussions about "burning the migrants up."[21] Many officers cited Trump's entreaty to use lethal force against migrants as permission to respond to rock throwing with rifle fire.[22]

"The Solution": Attrition

On the campaign trail, Donald Trump made a promise to make unauthorized migration a "memory of the past."[23] The success of this mission would be made possible only through a strategy of attrition. Over four years, the Trump Administration issued more than 400 executive actions to deter migration to the United States and keep "unwanted" immigrants out of the country.[24] The administration sought to "close asylum loopholes" by severely restricting access to asylum and building a wall across the southern border with Mexico.[25] The administration also sought to deter the arrival of unaccompanied children by attacking the few protections available to migrant children in the United States.[26] The race to shut down migration via attrition began a mere five days after taking office.

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17 Ryan Devereaux, *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them*, The Intercept (July 5, 2019), https://theintercept.com/2019/07/05/border-patrol-facebook-group/; Ted Hesson and Cristiano Lima, *Border Agency Knew about Secret Facebook Group for Years*, Politico (July 3, 2019), https://www.politico.com/story/2019/07/03/border-agency-secret-facebook-group-1569572.

18 Thompson, *supra* note 16.

19 Hesson and Lima, *supra* note 17.

20 Thompson, *supra* note 16.

21 *Id. See* direct evidence of texts in court filing, *Exhibit 1: Motion in Limine to Preclude Text Messages Pursuant to Evidence Rules 401 et seq.* (Apr. 4, 2019), https://s3.documentcloud.org/documents/6178150/BOWEN-TEXT-MESSAGE-EXHIBIT-DEF.pdf.

22 The Associated Press, *Equating Rocks with Rifles, Trump Proposes Radical New Rules of Engagement for Troops along Border*, Military Times (Nov. 1, 2018), https://www.militarytimes.com/news/your-military/2018/11/01/equating-rocks-with-rifles-trump-proposes-radical-new-rules-of-engagement-for-troops-along-border/; Hesson and Lima, *supra* note 17.

23 Jenna Johnson, *"I Will Give You Everything." Here Are 282 of Donald Trump's Campaign Promises*, The Washington Post (Nov. 24, 2016), https://www.washingtonpost.com/politics/i-will-give-you-everything-here-are-282-of-donald-trumps-campaign-promises/2016/11/24/01160678-b0f9-11e6-8616-52b15787add0_story.html?itid=lk_inline_manual_5.

24 *New MPI Report Catalogs the 400-Plus Immigration Executive Actions that Have Occurred during the Trump Presidency*, Migration Policy Institute (July 1, 2020), (https://www.migrationpolicy.org/news/mpi-report-catalogs-immigration-executive-actions-trump-presidency; *President Trump's Executive Orders on Immigration and Refugees*, The Center for Migration Studies of New York (Jan. 29, 2017), https://cmsny.org/trumps-executive-orders-immigration-refugees/.

25 Jill Colvin, *Trump Administration Seeks to Close Immigration "Loopholes,"* PBS News Hour (Apr. 3, 2018), https://www.pbs.org/newshour/politics/trump-administration-seeks-to-close-immigration-loopholes.

26 Zachary Mueller, *2019 Year Review: Three Years In, Trump's Assault on Immigrants Is Only Intensifying*, America's Voice (Dec. 18, 2019), https://americasvoice.org/blog/2019-mid-year-review/.

On January 25, 2017, President Trump issued an Executive Order directing the Department of Homeland Security (DHS), the federal agency tasked with immigration enforcement, to "immediately take all appropriate actions to ensure" the end of the practice of releasing apprehended noncitizens into the United States with an order to return for their immigration court date under their own recognizance.[27] President Trump's targeting of such "catch-and-release" practices—as they are pejoratively and inaccurately described—was the first step in a series of policies and practices that were crafted with the intent to make migration to the United States as difficult and painful as possible for Central American migrants, including families with young children.

Since the implementation of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Republican and Democratic administrations alike engaged in the practice of releasing immigrant families pending their immigration hearing.[28] The narrow use of this policy for parents with small children allowed families to remain intact, and children to remain free from detention, pending the resolution of their immigration cases.

Beginning around 2012, a shift could be seen in the demographics of migrants encountered at the U.S.—Mexico border "from a majority of adult males, often from Mexico, seeking employment, to families… fleeing together, seeking protection in the United States, coming mostly from Central America."[29] Children and families had begun fleeing extraordinary levels of violence in Central America amid organized criminal violence that their governments were unable to control.[30] Though this violence has deep roots in American foreign policy,[31] with the United States long playing a "defining role in Central America's history of inequality and violence,"[32] there are few domestic immigration protections created for Central Americans currently fleeing such conditions. With asylum as the only available vehicle for protection, U.S. Citizenship and Immigration Services (USCIS) reported that more individuals from the Northern Triangle countries sought asylum in the U.S. between 2013 to 2015 than in the previous 15 years combined.[33] The numbers keep rising, with the population growing younger: 2019 recorded a 68 percent increase in the number of unaccompanied children fleeing violence and persecution from these countries compared to 2018.[34]

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27 Katherine McIntire Peters, *Trump Orders Halt to "Catch and Release," but There's a Catch*, Government Executive (Jan. 25, 2017), https://www.govexec.com/federal-news/2017/01/trump-orders-halt-catch-and-release-theres-catch/134874/.

28 Greg Chen, *Immigration Policy Update—"Catch and Release,"* American Immigration Lawyers Association (Sept. 8, 2016), https://www.aila.org/File/DownloadEmbeddedFile/69108 (addressing that DHS Secretary Michael Chertoff publicly ended the policy of "catch-and-release" under the Bush Administration back in 2006; however, the narrow use of catch-and-release has generally remained in practice for vulnerable populations since that time).

29 Women's Refugee Commission, Lutheran Immigration and Refugee Service and Kids in Need of Defense, Betraying Family Values: How Immigration Policy at the United States Border Is Separating Families (Jan. 10, 2017), https://www.judiciary.senate.gov/imo/media/doc/KIND%20-%20Betraying%20Family%20Values.pdf.

30 *Refugee Statistics*, USA for UNHCR, https://www.unrefugees.org/refugee-facts/statistics/.

31 *See, for instance,* Julian Borger, *Fleeing a Hell the US Helped Create: Why Central Americans Journey North*, The Guardian (Dec. 19, 2018), https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy; Deirdre Shesgreen, *How US Foreign Policy in Central America May Have Fueled the Migrant Crisis*, USA Today (Dec. 25, 2018), https://www.usatoday.com/story/news/world/2018/12/21/has-united-states-foreign-policy-central-america-fueled-migrant-crisis-donald-trump/2338489002/; Caitlin Dickerson, *The Secret History of the U.S. Government's Family-Separation Policy*, The Atlantic (Aug. 7, 2022), https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/.

32 Borger, *supra* note 31.

33 Nadwa Mossaad, *Refugees and Asylees: 2015*, DHS Office of Immigration Statistics (Nov. 2016), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2015.pdf.

34 *Central American Refugee Crisis*, USA for UNHCR, https://www.unrefugees.org/emergencies/central-america/.

U.S. Rep. COMER: What can Congress do to fix this problem?

Mr. HOMAN: They need to close the loopholes in asylum to make them meaningful. They can change the TVPRA with children of Mexico—the children of Central America are treated the same way as children of Mexico, once it's ascertained they are not a victim of trafficking. They can be removed. They need to change the Flores Settlement Agreement.

— Testimony of Thomas Homan, Former Acting Director, U.S. Immigration and Customs Enforcement before a House Committee Hearing on "The Trump Administration's Child Separation Policy," July 2019

The few protections available for these children in the US immigration system came under serious scrutiny by the Trump Administration and their allies as the numbers of children arriving in the U.S increased.[35] Defying customary international law and practice,[36] children arriving alone in the United States are generally treated as adults in miniature; there is no best-interest analysis related to their immigration claims. There are no special immigration laws or separate legal procedures for children in the United States. Instead, migrant children receive their few protections solely from two legal sources: the Trafficking Victims Protection Reauthorization Act (TVPRA) and the Flores Settlement Agreement (FSA).

The TVPRA provides a few terse protections to children. Of particular import is that children from noncontiguous countries may not be summarily repatriated at a U.S. border.[37] Instead, they must be placed in judicial deportation proceedings, where they can ask for asylum and other protections, in an effort to ensure that they can be safely repatriated if they do not qualify for permanent protection under immigration law.[38] The FSA is a 25-year-old litigation settlement agreement that has never been codified under U.S. law and requires, by court order, that children not be detained with adults. It also provides certain standards for the care of detained migrant children commensurate with the unique needs of children.[39]

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35 Colvin, *supra* note 25.

36 UNICEF, Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries (2012), https://www.unicef.org.uk/publications/child-%20rights-convention-2012-report/ (recognizing that every country in the world, apart from the United States, has ratified the UN CRC, and that pursuant to a UNICEF study of the UN CRC,"[t]he right of the child to have their best interests considered is the single most universally adopted principle of the CRC," the right of a child to have their best interests considered has become a peremptory norm as recognized by treaty, custom and general principles of law recognized by civilized nations.)

37 Even this protective law discriminates against some children—Mexican children are often returned to Mexico despite viable protection claims. Young Center for Immigrant Children's Rights, *Border Screening for Children Has Failed* (Aug. 5, 2019), https://www.theyoungcenter.org/stories/2019/8/5/current-border-screening-of-unaccompanied-children-from-mexico-has-failed-and-should-not-be-a-model-for-reform.

38 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 (2008), https://www.congress.gov/110/plaws/publ457/PLAW-110publ457.pdf.

39 Flores v. Reno Settlement Agreement, Aug. 12, 1996, https://www.aclu.org/sites/

The influx of children and families from Central America to the U.S. since 2012 has been used to support the hardliner proposition that weak enforcement of immigration laws tends to invite migrants, while the harsh enforcement of immigration laws will deter migration. Rather than adapting detention and removal policies to facilitate the protection of these vulnerable populations, Trump, Miller, and their allies ramped up aggressive policies designed to exploit these already vulnerable populations to deter migration. The Trump Administration routinely asked Congress to "close asylum loopholes," to "repeal the TVPRA, and to "change the Flores Settlement Agreement.[40] When Congress failed to address immigration to the satisfaction of the administration, the Trump Administration unleashed the strategy of deterrence through attrition directly upon children and families. The administration alleged that the release of family units for the duration of immigration court proceedings "justifie[d] administrative separation of family units."[41]

default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf.

40 *Oral Testimony of Thomas D. Homan*, The Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment—Hearing before the Committee on Oversight and Reform 45 (July 12, 2019), https://docs.house.gov/meetings/GO/GO00/20190712/109772/HHRG-116-GO00-Transcript-20190712-U10.pdf.

41 U.S. Department of Justice Office of the Inspector General (OIG), Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (Jan. 2021), https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf.

TIMELINE OF PARENT-CHILD SEPARATION[1]

2017

February 2 –
USCIS Asylum Chief John Lafferty briefs asylum officers on a policy proposal to separate families apprehended at the border. A DHS official at the meeting states that DHS is "actively considering" separating parents from their children.

February 14 –
At a meeting in the office of Customs and Border Protection (CBP) Commissioner Kevin McAleenan, which includes representatives from EOIR, CBP, ICE, DHS, and ORR, officials discuss family separation as a potential policy option for ending "catch and release."

March –
Border Patrol in El Paso launches a local program to separate migrant children from their parents and prosecute the adults.

May –
Border Patrol in Yuma, Arizona begin separating parents and children under a separate initiative.

November –
Reports of a marked increase in family separations begin to appear in the media. DHS officials inaccurately claim that children are separated from adults only in rare cases, when it is necessary to protect them from harm.

1 Adapted from American Oversight, *supra* note 44, and Dickerson, *supra* note 31.

Maximizing Pain to Deter Migration: The Trump Administration's Policy of Parent-Child Separations Under "Zero Tolerance"

Separating children from their parents and guardians was considered as a mechanism to deter migration from the earliest days of the Trump Administration. On February 2, 2017, the U.S. Citizenship and Immigration Services (USCIS) Asylum Chief John Lafferty briefed asylum officers, who were tasked with screening arriving noncitizens for credible claims of fear of return, on a policy proposal to separate families apprehended while crossing the border.[42] A DHS official at the meeting informed the press that the DHS was "actively considering" separating parents from their children.[43]

> "We need to take away children… no matter how young."
>
> *— Deputy Attorney General Rod Rosenstein acting on the orders of Attorney General Jeff Sessions, May 2018*

Later that month, a meeting was held in the office of CBP Commissioner Kevin McAleenan to discuss parent-child separation as a potential policy option for ending catch-and-release. The meeting was attended by representatives from all of the major federal agencies tasked with the apprehension, detention, and processing of noncitizens at the border, including the Executive Office of Immigration Review (EOIR), CBP, Immigration and Customs Enforcement (ICE), the DHS

42 Julia Edwards Ainsley, *Exclusive: Trump Administration Considering Separating Women, Children at Mexico Border*, Reuters (Mar. 3, 2017), https://www.reuters.com/article/us-usa-immigration-children/exclusive-trump-administration-considering-separating-women-children-at-mexico-border-idUSKBN16A2ES.

43 *Id.*

November –
HHS official Jonathan White contacts his superiors to tell them that he's been noticing a "significant increase" in children separated from their families being put in ORR custody: "We had a shortage last night of beds for babies…Overall, infant placements seem to be climbing over recent weeks, and we think that's due to more separations from mothers by CBP."

December –
Homeland Security Secretary Kirstjen Nielsen rejects a proposal to separate migrant families. Acting heads of CBP and ICE then suggest prosecuting all adults crossing the border illegally, including those traveling with children, which would also result in family separations.

Numerous immigrant rights groups submit a complaint about "an alarming increase in cases of family separation while in custody at the U.S.-Mexico border." DHS civil rights office head Cameron Quinn suggests opening a "discussion w/a number of similar investigatory units at DHS & see if we can't streamline the process…as it's clear there's no coordinate."

2018

February 26 –
ACLU files suit on behalf of Ms. L, the Congolese woman separated from her daughter in San Diego.

March 19 –
Nielsen calls a meeting with top staff from throughout DHS, including leaders of CBP, ICE, and USCIS, "to discuss the issue of family separation as well as DNA and fingerprinting issues" ahead of a Senate meeting the following day.

policy office, and the Department of Health and Human Services Office of Refugee Resettlement (ORR).[44]

On March 6, 2017, then-DHS Secretary John Kelly—who later became President Trump's Chief of Staff in the White House—confirmed on CNN that the administration was considering parent-child separation to "deter" future migration to the border.[45] Kelly stated specifically that the Trump Administration was considering separating Central American families "in order to deter more movement"[46] to the Southern border. When the public backlash became clear, the pilot programs began in private; their existence denied by the Administration.

44 American Oversight, *A Timeline of the Trump Administration's Family Separation Policy*, https://www.americanoversight.org/a-timeline-of-the-trump-administrations-family-separation-policy; Jacob Soboroff, SEPARATED: INSIDE AN AMERICAN TRAGEDY (2020).

45 *Kelly: Separating Families under Consideration*, CNN (Mar. 6, 2017), https://www.cnn.com/videos/politics/2017/03/06/trump-travel-ban-separate-parents-children-kelly-tsr-bts.cnn.

46 *Kelly Says Considering Separating Women, Children at Mexico Border*, REUTERS (Mar. 6, 2017), https://www.reuters.com/article/us-usa-immigration-children/kelly-says-considering-separating-women-children-at-mexico-border-idUSKBN16D2OX ("Let me start by saying that I would do almost anything to deter the people from Central America from getting on this very dangerous network that brings them through Mexico to the United States").

March 20 –
DHS civil rights deputy Dana Salvano-Dunn sends an email stating that CRCL has been kept in the dark about plans for a family separation policy: "[N]one of us are clear about the Department's broader perspective on family separation and whether a formal change in policy is likely. Knowing if and how current policy will change is obviously very helpful information as we develop our recommendations, and as we continue to engage the public on this topic." Salvano-Dunn writes, "CRCL has received an enormous volume of matters involving family separation (1,063 separate allegations since Jan. 1, 2016)."

March 30 –
In response to concerns raised by USCIS Director Francis Cissna that Central American migrant "caravans" will be "let into the U.S. after claiming credible fear," Kaitlin Vogt Stoddard, an adviser to Cissna, responds with "points of concern" that she says have been laid out by USCIS officials Jennifer Higgins and John Lafferty. Potential solutions laid out in the points that Stoddard attributes to Higgins and Lafferty include "legislative or regulatory actions to terminate the Flores Settlement," which restricts the amount of time families can be held in immigration detention. "The other option, which I know is the subject of discussion, is that DHS may detain only the parents throughout the removal process, placing the child with HHS for placement as a now unaccompanied child under TVPRA [Victims of Trafficking and Violence Protection Act]."

April 3 –
According to a DOJ Inspector General report, Attorney General Jeff Sessions asks his counselor Gene Hamilton to draft a policy directive for the southwest border U.S. attorney offices "to work with DHS to increase the number of referrals from

The secret pilot programs in Yuma and El Paso: Testing the policy of parent-child separations

Secret pilot programs in the Yuma and El Paso CBP sectors constituted the first foray into parent-child separations at the southern border by Trump Administration immigration officials. In May 2017, Border Patrol agents in Yuma, Arizona, covertly implemented a program known as the Criminal Consequence Initiative, which appeared to trial the efficacy of separating children (as young as 10 months old) from parents being prosecuted for crossing the border without inspection for the first time.[47] These prosecutions took place regardless of whether these parents crossed the border in search of asylum protection. DHS reported that the CBP separated 234 families in Yuma between July 1 and December 31, 2017. The U.S. government separated additional unknown numbers of families in May and June 2017.[48]

> "We'd been tracking family separations for a couple of years. Typically, we only saw about three to 15 cases a year. Suddenly in August of 2017 we saw a massive, significant increase in how many cases we were seeing of kids who had been forcibly taken from their parents."
>
> *— Laura St. John, Legal Director of the Florence Immigrant & Refugee Rights Project, May 2018*

47 Kevin Sieff, *The Trump Administration Used an Early, Unreported Program to Separate Migrant Families along a Remote Stretch of the Border*, The Washington Post (Jul. 9, 2021), https://www.washingtonpost.com/world/2021/07/09/trump-separated-families-yuma-2017/. According to a report in the *Atlantic*, the Border Patrol chief in El Paso made the decision to direct agents to refer parents traveling with children for prosecution based on the message "that he and other sector chiefs had received after Trump's election—to work with their local counterparts at the Department of Justice to crack down on border crossings in service of the new president's agenda." Instructions sent to Border Patrol agents stated that "the US Attorney's office will be contacted to seek prosecution for the adults of *every* family unit arrested." Dickerson, *supra* note 31.

48 Sieff, *supra* note 47.

DHS and to accept as close to all of these referrals for prosecution as possible." According to the New York Times, President Trump meets with Sessions, Nielsen, and Hamilton. Hamilton later reports that Trump "ranted" and was on a "a tirade," demanding as many prosecutions of migrants as possible.

April 4 –
Counselor Hamilton circulates a draft of the Justice Department's "zero tolerance" policy. Hamilton and Deputy Attorney General Rod Rosenstein later tell the DOJ IG that Sessions knew the policy would lead to families being separated. DOJ and HHS inspectors general later find that DOJ and DHS did not inform HHS of the policy change, which would result in a large influx of children in HHS care, despite being in contact with the health agency about other immigration matters.

April 5 –
High-ranking DHS officials, including Undersecretary Claire Grady and Chief of Staff Chad Wolf, and top leadership from USCIS, ICE and CBP hold a "Conference Call Re: Alien Detention/Southern Border Discussion," which includes the topic "Eliminate Policy of Releasing Adults and Children Together."

April 6 –
A memo from the Attorney General's office announces a "zero-tolerance policy," in which U.S. attorneys would prosecute all illegal-entry cases referred to them by the Border Patrol "to the extent practicable."

April 19 –
USCIS Director Cissna sends his colleagues "a draft CBP memo regarding implementation of the POTUS 'catch and release' memo and DOJ's 'zero tolerance'

The Trump Administration never revealed the existence of the Yuma pilot program, which was subsequently uncovered in an investigation in 2021 by a Biden Administration task force.[49] Four years later, some parents separated under the Yuma program still remain separated from their children, in many cases deported and unable to be found.[50]

The Trump Administration also initiated a secret pilot program in El Paso, denying its existence to advocates and the press. In April 2017, Attorney General Jeff Sessions issued a memo directing federal prosecutors to begin prioritizing immigration enforcement, including prosecutions for illegal entry. That same month, the Border Patrol's El Paso sector began a secret family separation pilot project in coordination with the Justice Department.[51] The El Paso Border Patrol wrote the acting U.S. attorney that "it is the hope that this separation will act as a deterrent to parents bringing their children into the harsh circumstances that are present when trying to enter the United States illegally."[52] By the end of March, the number of children in ORR custody as a result of parent-child separation saw "an increase of almost 900 percent."[53]

On April 20, 2017, Attorney General Jeff Sessions flew to El Paso, Texas to assess the border and the enforcement of immigration laws by the U.S. Attorney's office. During this trip, Sessions announced that El Paso would become "ground zero" in the administration's push to deter migrants from coming to the border.[54] He then

49 *Id.*

50 *Id.*

51 Melissa del Bosque, *A Public Defender's Lonely Fight against Family Separation*, The Intercept (Nov. 1, 2020), https://theintercept.com/2020/11/01/el-paso-family-separation-border-patrol/. *See also Targeting El Paso*, Frontline PBS (Jan. 1, 2020), https://www.pbs.org/video/targeting-el-paso-ii9dex/.

52 OIG, *supra* note 41.

53 Committee on the Judiciary of the U.S. House of Representatives, The Trump Administration's Family Separation Policy: Trauma, Destruction, and Chaos (Oct. 2020), https://judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf?utm_campaign=4526-519 ("According to data provided to the Government Accountability Office (GAO), in November 2016, the percentage of children in ORR custody as a result of family separation was 0.3 percent. By March 2017, that number had jumped to 2.6 percent, an increase of almost 900 percent").

54 *Targeting El Paso*, *supra* note 51. According to the *Atlantic*, "The El Paso sector's practice of prosecuting parents and separating them from their children would later be called a 'pilot' program by federal officials and expanded nationwide by the Trump Administration." Dickerson, *supra* note 31.

memo," explaining that USCIS and ICE have been asked to sign on and asking the USCIS officials to provide comments.

April 20 –
The Department of Health and Human Services confirms the existence of an internal list tracking 700-plus separated children but inaccurately claims, at the request of DHS, that the administration is not separating families for the purposes of prosecution and deterrence.

April 23 –
CBP Commissioner Kevin McAleenan, USCIS Director Cissna, and ICE Director Thomas Homan issue a memo urging Secretary Nielsen to implement the "zero tolerance" policy by prosecuting parents crossing the border with their children. The memo, first reported by the Washington Post and obtained by Open the Government and the Project on Government Oversight, contained Nielsen's signature on the recommended option of family separation.

May 7 –
At a press conference in San Diego, Attorney General Jeff Sessions announces that Zero Tolerance is going into effect as a national policy.

May 11 –
Secretary Nielsen issues a memo directing "all DHS law enforcement officers at the border to refer all illegal border crossers to the Justice Department for criminal prosecution to the extent practicable."

White House Chief of Staff John Kelly tells NPR that children separated from their families will be "put into foster care or whatever."

The five U.S. attorneys from southwest border districts raise concerns to Hamilton

assigned an additional twelve federal prosecutors to the El Paso sector for the purpose of increasing prosecutions that would result in family separations.[55]

For months, the Trump Administration denied the existence of a formal policy in which parents and children were routinely separated. As the numbers of separated children grew, local organizations that provide care for unaccompanied children in the El Paso sector began to see an alarming rise in the cases of children separated from their parents. In December 2017, several of these groups filed a complaint with the DHS Inspector General about the rising number of forced separations of families.[56] Community stakeholders called a meeting with CBP and Department of Justice officials to discuss the troubling trends. When advocates asked whether there was a blanket policy to separate children from families, one CBP representative replied that there was no policy to separate children younger than 10 years of age from their parents. The head of the Federal Public Defender's office in El Paso immediately countered that she had a client who was separated from a 4-year-old.[57]

> Maureen Franco, the head of the Federal Public Defender's office in El Paso, told the group her office had received a striking number of family separation cases. What, she asked the federal officials, was the current policy involving the prosecution and separation of parents arriving with children?
>
> A Border Patrol agent fielded the question, according to Jessie Miles, who was there on behalf of the Borderland Immigration Council. "His response was, the new policy is that we can separate children as long as they are 10 or over," she recalled. "To which Maureen responded, 'What do you mean? I

55 *Id.*

56 Lisa Riordan Seville and Hannah Rappleye, *Trump Admin Ran "Pilot Program" for Separating Migrant Families in 2017*, NBC News (June 29, 2018), https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616.

57 *Id.*

and others at DOJ about the family separation policy, in particular what was to become of children once they were separated from their parents.

Sessions holds a call with the prosecutors telling them, according to a participant's notes, that "we need to take away children" to prevent granting "amnesty" to those traveling with children.

May 22 –
Deputy Attorney General Rosenstein instructs federal prosecutors that, per Sessions's orders, attorneys in their offices should not categorically decline to prosecute adults traveling with children under 5 years old, according to a summary of the call that is later provided to the DOJ IG.

June 1 –
CRCL head Quinn emails CBP Commissioner McAleenan: "We're being told that Operation Streamline is causing parents to lose their opportunity to have their credible fear claims heard. … And as a consequence, the children rendered UAC due to the separation are now not part of the parents asylum claim. They would have to affirmatively request asylum … which in some cases, given their tender age, is not likely."

June 4 –
Magistrate Judge Ronald Morgan orders the U.S. Attorney's Office for the Southern District of Texas to submit a list of all separated children, their whereabouts, and the plan for reuniting them with their parents. When the U.S. attorney asks that CBP begin regularly providing this information, CBP responds that they don't have the information because Border Patrol "does not keep track." HHS had set up a

> have a client with a four-year-old.'"
>
> "The whole room collectively gasped," said Miles.[58]

After the meeting, CBP officials sent a follow-up email to attendees that stated: "The Border Patrol does not a have a blanket policy requiring the separation of family units. Any increase in separated family units is due primarily to the increase in prosecutions of immigration related crimes."[59]

Despite their persistent misrepresentations, DHS officials would eventually confirm that the Trump Administration ran what officials called a "pilot program" for parent child separations under Zero Tolerance in El Paso from July to November 2017.[60] A policy memo circulated between high level officials at DHS and the Justice Department, dated December 16, 2017 and titled "Policy Options to Respond to Border Surge of Illegal Immigration," cited a "fairly good initiative over the summer" to prosecute those who "conspire or otherwise facilitate the illegal entry of unaccompanied children into the U.S."[61] By definition, children who enter with their parents are not unaccompanied children.[62] In order to be an unaccompanied child, that child must appear with "no parent of legal guardian."[63] The prosecution was a tool to render the child unaccompanied.

Court records and interviews with migrants confirmed that federal prosecutors criminally charged *all* adults—including parents with children who crossed the border in search of protection—with crossing the border unlawfully in the El Paso sector, a section of the border which spans

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58 *Id.*

59 *Id.*

60 *Id.*; *see also* Committee on the Judiciary, *supra* note 53.

61 Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding up Deportation of Children,* NBC News (Jan. 17, 2019), https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811.

62 6 U.S.C. § 279(g)(2). The term "unaccompanied alien child" means a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom— (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

63 *Id.*

hotline to reunite parents, but the CBP reports that the "hotline does not work."

June 13 –
An official in the U.S. Attorney's Office for the Southern District of Texas emails top DOJ officials that "we have two judges (maybe more) that are demanding from the prosecutors [in cases that involve] the separation of children … [that] the AUSA inform the court where the child is and how they are going to be reunited. We have advised verbally and in writing that there is no way for the AUSAs (and for that matter the BP agents) to know the answer to that."

June 18 –
ProPublica publishes audio of separated children crying for their parents, leaked from a government facility. As the recording gains traction, Nielsen is called to the White House to face reporters. She claims, falsely, that the administration has no separation policy.

June 20 –
The Trump administration releases an executive order calling for the Justice Department to continue exercising "zero tolerance" toward illegal border crossings but for the Department of Homeland Security to maintain the family unity of those prosecuted. By this time, more than 2,300 children have been separated from their parents under the policy.

June 25 –
A CRCL compliance staffer sends Quinn an email detailing the process for dealing with allegations of family separation, saying that the office had encountered "many examples" of CBP keeping incomplete records of separated family members.

from West Texas to New Mexico.[64] Along this corridor, parents of young children—primarily from Honduras, El Salvador, and Guatemala and including those seeking asylum—were then detained, often for weeks or months. The children were taken from their parents in order to reclassify them as "unaccompanied minors" to support the US government's disingenuous narrative that the government was prosecuting people (in this case parents) who "facilitate the illegal entry of unaccompanied children."[65] Their children then disappeared into a byzantine shelter system run by the Department of Health and Human Services' (HHS) Office of Refugee Resettlement (ORR).[66] On separate legal tracks from their parents, children (including pre-verbal children and infants) were detained by themselves and forced to pursue legal claims alone, scattered across ORR shelters throughout the country.[67]

Following the conclusion of the El Paso pilot program, immigration officials continued to separate children from their parents:

> Despite the termination of the El Paso Pilot Program around November 2017, the number of family separations continued to rise between December 2017 and March 2018. According to ORR data, as of March 2, 2018, at least 625 children were separated from their parents since the beginning of the fiscal year, more than one third of whom were under the age of eight. 48 internal emails during this time period show problems with CBP recordkeeping;

64 Ainsley, *supra* note 61.

65 Jeff Daniels, *Trump Administration's "Zero Tolerance" Border Enforcement Policy to Separate More Families,* CNBC (May 7, 2018), https://www.cnbc.com/2018/05/07/tougher-us-border-enforcement-policy-to-separate-more-families.html.

66 *Id. See also* Tal Kopan, *Government Never Had Specific Plan to Reunify Families, Court Testimony Shows*, CNN (June 29, 2018), https://www.cnn.com/2018/06/29/politics/family-separations-reunification-never-plan-court/index.html (reporting that according to court filings, an asylum-seeker named Ms. C. was apprehended crossing the border in August 2017 and prosecuted in El Paso; after she asked for asylum, the U.S. government took away her 14-year-old son and sent him to an ORR facility in Chicago over 1,500 miles away, keeping him separated from his mother for months).

67 *Id.*

June 26 –
U.S. District Judge Dana Sabraw issues a preliminary injunction requiring that the United States reunite children younger than 5 with their parents within two weeks and older children within 30 days.

July 3 –
NBC reports that the Trump administration is forcing migrants, even those awaiting asylum determinations, to sign a form agreeing either to be removed from the country with their children or to be removed on their own while their children stay and proceed with asylum claims. "The agents are instructed to read the form in a language the immigrant understands, which usually means Spanish, but it can be hard to find Americans who know the indigenous languages spoken by many migrants," NBC reports.

July 5 –
CRCL's Veronica Venture tells ICE officials Tae Johnson and Nathalie Asher that her office is receiving reports that "ICE doesn't seem to be providing effective language assistance" in "administering its new form on family reunification prior to removal," including "reports of Brazilians being given the form in Spanish without Portuguese interpretation." She also tells them that the office has received "allegations about children with disabilities being separated from their parents without proper care being in place to take care of them."

July 9 –
Two medical experts who have contracted with CRCL to inspect DHS family detention facilities send a letter to Quinn, saying that family separation is "an act of state sponsored child abuse." They note that they have already filed a complaint with the DHS Inspector General, and later send a version of their letter to Congress.

> more than 100 cases that were not initially recorded as separations by CBP were later corrected by HHS.[68]

Together with the Yuma separations, by the time the U.S. government was prepared to officially launch Zero Tolerance, it had already taken nearly a thousand children from their parents with no plans to reunite them. Despite civil rights complaints documenting the harm to families, the Trump Administration forged ahead with plans to take thousands more children from their parents.

The formalization of Zero Tolerance and the U.S. government's separation of all children from parents arriving at the southern border

Once the Trump Administration successfully practiced how to operationalize the separation of children from their parents, the U.S. government began efforts to scale up the policy to cover the entire southern border.[69] The formal internal effort began almost a year prior in August 2017, when DHS staff were directed to create proposals to deter illegal immigration that included a proposed policy of parent-child separation.[70] During the fall of 2017,

> [DHS official Gene] Hamilton distributed a document listing more than a dozen immigration policies that he said the White House wanted implemented, according to several people who were present. At the top were two proposed methods of achieving family separations: either administratively—by placing children and parents in separate detention centers—or via criminal prosecutions, which would place parents in

68 Committee on the Judiciary, *supra* note 53.

69 For a complete timeline of events, see American Oversight, *supra* note 44.

70 Jonathan Blitzer, *How the Trump Administration Got Comfortable Separating Immigrant Kids from Their Parents*, New Yorker (May 30, 2018), https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents.

July 26 –
The reunification deadline passes. Of the 2,551 children initially identified by HHS as potentially separated from their parents, more than 700 still remain in the custody of the Office of Refugee Resettlement.

September 6 –
The Trump administration proposes withdrawing from the Flores agreement, which limits the amount of time families can be held in immigration detention, and replacing it with a rule allowing the lengthier detentions of families.

September 27 –
The DHS Inspector General finds that DHS "was not fully prepared to implement" the zero-tolerance policy, detained children for lengthy periods of time, and "struggled to identify, track, and reunify families" separated under the policy because of a lack of integration among federal tracking systems.

2019

October 25 –
A new count of children separated from their families early in the Trump administration puts the total number of separated children above 5,400.

November 25 –
The DHS Inspector General reports: "DHS estimated that Border Patrol agents separated 3,014 children from their families." However, the IG finds hundreds more potential cases of family separation: "Without a reliable account of all family relationships, we could not validate the total number of separations, or reunifications."

> the Department of Justice's custody instead of the Department of Homeland Security's. In both cases, the children would be given to a division of the Department of Health and Human Services.[71]

In December, ICE Chief of Staff Thomas Blank emailed members of his team to report that ICE had been tasked with drafting memos for DHS on the subject of "separating Family Units and on vetting sponsors" for unaccompanied children.[72]

Throughout 2017 and early 2018, HHS official Jonathan White contacted his superiors on numerous occasions to express his concerns about the increased numbers of children, including infants, separated from their parents and placed into the increasingly overwhelmed HHS shelter system.[73] In mid-November 2017, White wrote to his supervisor Scott Lloyd, "We had a shortage last night of beds for babies. Overall, infant placements seem to be climbing over recent weeks, and we think that's due to more separations for mothers by CBP."[74] Lloyd arranged a phone call on November 16 for White to report this directly to acting CBP commissioner Kevin McAleenan. During the call, McAleenan insisted that a family separation policy had been considered but ultimately rejected.[75]

Increased media scrutiny of reports[76] of the traumatic separation of mothers and children, prompted various departments in the Trump Administration to coordinate

71 Dickerson, *supra* note 31.

72 *DHS Records Relating to Separation from 2017 to 2019 Part 6*, https://www.documentcloud.org/documents/6881831-DHS-ICE-18-0360-M-Processed-CLEAN.html#document/p386/a562539.

73 *Documents I Obtained (P1-P5),* The Atlantic, https://www.documentcloud.org/documents/22123292-documents-i-obtained.

74 Dickerson, *supra* note 31.

75 *Id.*

76 Including a complaint filed in December 2017 by immigration advocates to the DHS Inspector General's office detailing the experiences of more than a dozen separated families. American Immigration Council, *The Separation of Family Members Apprehended by or Found Inadmissible While in U.S. Customs and Border Protection (CBP) Custody at the U.S.-Mexico Border* (Dec. 11, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/family_separation_complaint.pdf.

2020

October 21 –
Court documents reveal that the government has still failed to find the parents of 545 children separated from their families under the Trump administration's policy, including 60 children who were under the age of 5 when they were separated. That number later rises to 666 children.

2021

February 2 – President Biden issues an executive order establishing the Interagency Task Force on the Reunification of Families.

December 16 – The Biden administration halts settlement negotiations with families separated by the Trump administration.

2022

January – Facing lawsuits from more than a dozen separated families, the Biden administration's DOJ resumes defending Zero Tolerance in court.

Summer – ACLU attorney Lee Gelernt believes that more than 1,000 families remain separated. As of July 27, the Interagency Task Force has been unable to locate the parents of 168 children.

their messaging and strategy.[77] On April 5, 2018, high-ranking officials and top leadership from DHS, USCIS, ICE, and CBP held a conference call that included the topic "Eliminate Policy of Releasing Adults and Children Together."[78]

After months of covert practices and with their policy ready for scale, President Trump issued an executive memo on April 6, 2018 that officially ended the practice of "catch-and-release" and directed the adoption of "other enhancements" to immigration enforcement efforts.[79] On the same day, Attorney General Sessions released the "Zero Tolerance" memo that directed all federal prosecutors to criminally prosecute every individual apprehended along the southern border, effective immediately.[80] The Zero Tolerance policy, by effect, required that even those adults who were traveling as a "family unit" with children of all ages would be criminally charged, their children taken, and held in detention pending the disposition of their criminal case. While being held in criminal custody, their children were recategorized as unaccompanied,[81] and disappeared into U.S. government custody. According to Sessions' deputy Rod Rosenstein, the Department of Justice and Sessions "understood what the consequences were" and that Sessions' goal was "to create a more effective deterrent so that everybody would believe that they had a risk of being prosecuted."[82]

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77 In response to reporters, DHS representatives "would continue to say that there had been no change in the agency's treatment of parents traveling with children." Dickerson, *supra* note 31.

78 *DHS Calendars for Senior Officials from 2018 Part 1*, https://www.documentcloud.org/documents/6256659-DHS-Calendars-for-Senior-Officials-from-2018.html#document/p480/a533688.

79 Julie Hirschfeld Davis, *Trump Signs Memo Ordering End to "Catch and Release" Immigration Policy*, The New York Times (Apr. 6, 2018), https://www.nytimes.com/2018/04/06/us/politics/trump-immigration-policy.html.

80 Elliot Spagat, *Sessions Orders "Zero Tolerance" Policy for Border Crossers*, AP News (Apr. 6, 2018), https://apnews.com/article/b4e1e0d48489462cafdcf7eeb35d3f38; Office of the Attorney General, *Memorandum for Federal Prosecutors Along the Southwest Border: Zero-Tolerance for Offenses under 8 U.S.C. 1325(a)* (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download.

81 6 U.S.C. § 279(g)(2). These children, of course, appeared with a legal guardian, but the forcible separation permitted the government an opportunity to recategorize the children as "unaccompanied" and send them into a divergent system of immigration detention with a completely different government agency, the Department of Health and Human Services' Office of Refugee Resettlement (ORR).

82 Chantal Da Silva, *Family Separation Rule Never Should Have Happened, Rod Rosenstein Says as Report Reveals How He and Jeff Sessions Pushed Policy*

With orders from the highest levels of the Trump Administration to carry out the Zero Tolerance policy, officials who directly oversaw immigration enforcement began the formal adoption of the policy of separating families. On April 23, 2018, CBP Commissioner Kevin McAleenan, USCIS Director Francis Cissna, and ICE Acting Director Thomas Homan issued a Joint Decisional Memo to DHS Secretary Kirstjen Nielsen explaining how to execute separation of family units along the southern border in order to meet the policy goals of President Trump's Executive Order ending "catch-and-release" and Attorney General Sessions's "Zero Tolerance" policy.[83]

On May 3, 2018, Policy Advisor Stephen Miller called a meeting in the White House Situation Room.[84] Those in attendance included Sessions, Nielsen, HHS Secretary Alex Azar, Secretary of State Mike Pompeo, White House Chief of Staff John Kelly, Deputy Chief of Staff Chris Liddell, White House Counsel Don McGahn, and Director of Legislative Affairs Marc Short. Reports indicate that Miller "saw the separation of families not as an unfortunate byproduct but as a tool to deter more immigration."[85] According to three former officials, Miller—with the support of Sessions—advocated for separating all immigrant families, even those who were going through civil court proceedings, potentially affecting tens of thousands of children.[86] At the meeting, Miller demanded a show of hands to indicate who supported the adoption of parent-child separation at the border in order to implement Zero Tolerance.[87] Only Nielsen declined to raise her hand, citing a lack of resources to implement the policy and concerns that children might get "lost in the system."[88] Despite the known risks, Nielsen signed a memo the very next day instructing DHS staff to implement the Zero Tolerance policy.[89]

Within one week of a meeting of the President's inner circle in the Situation room where the policy was assented to, the Trump Administration fully embraced parent-child separation under the Zero Tolerance policy. On May 7, 2018, in a speech announcing the Zero Tolerance policy, Sessions made the extraordinary assertion that parents seeking safety in the U.S. with their children were acting criminally and deserved to lose their child under the law. Sessions stated, "If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you. And that child may be separated from you as required by law."[90] To justify separating children from their families, the Trump Administration fabricated criminal narratives and exploited criminal law, drawing in a multiagency effort to implement family separations.

Forward, Forbes (Jan. 14, 2021), https://www.forbes.com/sites/chantaldasilva/2021/01/14/family-separation-rule-never-should-have-happened-rod-rosenstein-says-as-report-reveals-how-he-and-jeff-sessions-pushed-policy-forward/?sh=706baed0cbfb.

83 House Committee on Oversight and Reform, *The Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment*, https://oversight.house.gov/legislation/hearings/the-trump-administration-s-child-separation-policy-substantiated-allegations-of (6:07:15).

84 Julia Ainsley and Jacob Soboroff, *Trump Cabinet Officials Voted in 2018 White House Meeting to Separate Migrant Children, Say Officials*, NBC News (Aug. 20, 2020), https://www.nbcnews.com/politics/immigration/trump-cabinet-officials-voted-2018-white-house-meeting-separate-migrant-n1237416.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* ("At the meeting, Miller accused anyone opposing zero tolerance of being a lawbreaker and un-American, according to the two officials present. 'If we don't enforce this, it is the end of our country as we know it,' Miller said, according to the two officials. It was not unusual for Miller to make claims like that, but this time he was adamant that the policy move forward, regardless of arguments about resources and logistics").

89 *Id.*; *see also* Dickerson, *supra* note 31; Justine Coleman, *White House Officials Voted by Show of Hands on 2018 Family Separations*, The Hill (Aug. 20, 2020), https://thehill.com/homenews/administration/513025-white-house-officials-voted-by-show-of-hands-on-family-separations-in/.

90 Jeff Daniels, *Trump Administration's "Zero Tolerance" Border Enforcement Policy to Separate More Families*, CNBC (May 7, 2018), https://www.cnbc.com/2018/05/07/tougher-us-border-enforcement-policy-to-separate-more-families.html.

At the same event, Deputy Director and acting head of ICE Thomas Homan reiterated that there was no "blanket policy" of family separations, and that children would be separated from adults only in cases where there was trafficking, the inability to ascertain a parent-child relationship, or the parent was being criminally prosecuted.[91] This assertion was belied by the very terms of the Zero Tolerance policy, which required *all* adults apprehended at the border to be criminally prosecuted, and thus—critically—required that *all* children to be separated and removed from their parents for an indefinite length of time.

Later that week, Sessions and Rosenstein led a conference call with five U.S. Attorneys on the southern border. Sessions ordered his team to "take away children," and in a second call a week later Rosenstein went even further, informing the five prosecutors that they needed to take away children no matter how young.[92] Rosenstein said that prosecutors should not refuse to prosecute cases simply because the children were barely more than infants.[93] "Per the A.G.'s policy," wrote departing U.S. Attorney John Bash in western Texas to his staff, "we should NOT be categorically declining immigration prosecutions of adults in family units because of the age of the child."[94] The White House publicly defended the new policy in the media, with Chief of Staff Kelly stating that "zero tolerance" was a "tough deterrent" to migration.[95] As for what would happen to the children, Kelly replied that the children would be "put into foster care or whatever."[96] A year later, upon leaving the Trump Administration, Kelly would join the board of Caliburn International, a private company operating the largest shelters for unaccompanied migrant children, financially profiting from the very policy that he played a key role in implementing.[97]

The Mechanics of Parent-Child Separations under the Trump Zero Tolerance Policy

Ignoring the reality that most Central American families were fleeing violence and persecution and were entitled—by U.S. law—to access the asylum process, Trump Administration officials called for "any and all efforts [] to criminally prosecute those who smuggle their kids into the United States."[98] Further obscuring the reality that parents were fleeing persecution to protect their children, the administration manipulated a narrative that the parents had a criminal intent to support a legal and rhetorical theory for the policy of family separations.

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91 *Id.*

92 Michael D. Shear, Katie Benner, and Michael S. Schmidt, *"We Need to Take Away Children," No Matter How Young, Justice Dept. Officials Said*, The New York Times (Oct. 6, 2020, updated Oct. 28, 2021), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html.

93 *Id.*

94 *Id.*

95 William Cummings, *John Kelly Defends Separating Immigrant Families, Saying "Name of the Game Is Deterrence,"* USA Today (May 11, 2018), https://www.usatoday.com/story/news/politics/2018/05/11/john-kelly-splitting-migrant-families-laws-trump/602982002/.

96 *Id.*

97 Graham Kates, *John Kelly Joins Board of Company Operating Largest Shelter for Unaccompanied Migrant Children*, CBS News (May 3, 2019), https://www.cbsnews.com/news/john-kelly-joins-board-of-caliburn-international-company-operating-largest-unaccompanied-migrant-children-shelter/.

98 *Policy Options to Respond to Border Surge of Illegal Immigration*, https://immpolicytracking.org/media/documents/Policy_Option_to_Respond_to_Border_Surge_of_Illegal_Immigration_NXDPOKN.pdf (see red line edits by policymakers to policy memo circulated between high level officials at DHS and the Justice Department, dated December 16, 2017 and titled "Policy Options to Respond to Border Surge of Illegal Immigration," which cited a "fairly good initiative over the summer" to prosecute those who conspire or otherwise facilitate the illegal entry of unaccompanied children into the U.S.)

The Trump Administration manipulated a narrative to effectuate the separation of all parents and children arriving at the southern border, even those not amenable to prosecution

The Trump Administration then undertook to create a prosecutorial process that would procedurally require the separation of any parent, amenable to prosecution, from their minor children.[99] As laid out in the 2017 Memo "Policy Options to Respond to Border Surge of Illegal Immigration," Trump Administration officials conspired to create a policy that would "increase prosecution of family unit parents" and forcibly "separate family units."[100] This would render their children unaccompanied children by law requiring "close coordination with HHS" to ensure that children could be taken and detained separately from their parents.[101]

This plan became a formalized reality with the implementation of the policy of Zero Tolerance. After testing the effects of the program in secret, Zero Tolerance was formally launched on April 6, 2018 and called—generically, though the intent was clear—for prosecuting all offenses referred for prosecution under the statute 8 U.S.C. 1325(a), which states:

> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.[102]

Zero Tolerance referred for prosecution every single individual who "enter[ed] or attempt[ed] to enter the United States at any time or place other than as designated by an immigration officer." This marked a stark departure from more humane practices of traditional prosecutorial discretion, especially relating to families with children. According to the DOJ Office of the Inspector General review of the Zero Tolerance policy, the decision to prosecute adults entering the country with their children "represented a change in long-standing DOJ and DHS practice":

> Historically, when DHS apprehended adults with children illegally crossing the border, DHS…would place the family unit in administrative deportation proceedings without referring the family unit adult to DOJ for criminal prosecution.[103]

In November 2016, before Trump took office, only 0.3 percent of migrant children in the custody of the Office of Refugee Resettlement were known to be separated from their parents.[104]

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99 *Id*. *See also New Document Shows Nielsen Signed Off on Family Separation Policy*, POGO (Sept. 25, 2018), https://www.pogo.org/press/release/2018/new-documents-show-nielsen-signed-off-on-family-separation-policy.

100 *Id.*

101 *Id.*

102 8 U.S.C. § 1325(a), emphasis added.

103 OIG, *supra* note 41.

104 *Id.*; *see also* U.S. Government Accountability Office (GAO), Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border (Oct. 2018), https://www.gao.gov/assets/700/694963.pdf.

Separation was not necessary to accomplish the stated goal of prosecution; instead, the TVPRA was weaponized to facilitate separations

At all times the intention of Zero Tolerance was to "prosecute family unit parents" in order to "separate family units."[105] As described below, Trump officials did everything possible to separate and keep separated parents and children. Contrary to Trump officials' insistence that parent-child separation was merely incidental to the Zero Tolerance policy, parents and children were separated in *all* cases. Separation was the goal of the policy. As a result, parents were even separated from children in cases where there was no basis for prosecution, including cases in which the parent properly presented themselves for asylum at the border or port of entry, in cases where parents were not even referred for prosecution, and in cases where families could have been reunified subsequent to prosecution.[106]

> [T]he designation of "UAC" itself became a tool of separation by the Trump Administration...the mechanism to ensure the ability to "separate family units" is to "increase prosecution of family unit parents" and "place[] the minors under the age of 18 in the custody of HHS… because the minors will meet the definition of unaccompanied alien children."
>
> *— Draft DHS memo entitled "Policy Options to Respond to Border Surge of Illegal Immigration"*

According to the DOJ Inspector General review of the DOJ's implementation of the Zero Tolerance policy, every child who entered the country as part of a family unit was consequently separated from their parent. This was done by design with the expectation that the separated children could not remain in DHS custody while separated because federal law requires that a child without a parent or legal guardian be transferred out of DHS custody within 72 hours absent "exceptional circumstances."[107] To trigger this provision of law, however, Trump Administration officials were required to first designate the child as "unaccompanied." The term "unaccompanied alien child" (UAC) has a specific legal definition under U.S. immigration law and triggers certain protections. Specifically, UACs are supposed to be placed into the custody of the Department of Health and Human Services' Office of Refugee Resettlement within 72 hours of the designation.[108] Thus, the designation of "UAC" itself became a tool of separation by the Trump Administration. Internal memos indicate that the mechanism to ensure the ability to "separate family units" is to "increase prosecution of family unit parents" and "place[] the minors under the age of 18 in the custody of HHS… because the minors will meet the definition of unaccompanied alien children."[109]

The Trump Administration at the time alleged that because criminal prosecutions of parents can take

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105 *Policy Options*, *supra* note 98.

106 Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and "Zero Tolerance" at the Border*, NPR (June 19, 2018), https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border; American Immigration Council, *Separated Family Members Seek Monetary Damages from United States*, https://www.americanimmigrationcouncil.org/litigation/separated-family-members-seek-monetary-damages-united-states.

107 TVPRA, codified at 8 U.S.C. 1232(b)(3), states: "Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child."

108 OIG, *supra* note 41.

109 *Policy Options*, *supra* note 98.

more than 72 hours, even when the defendant pleads guilty, this meant that every separation for a parent's criminal prosecution should lead to a physical separation and UAC designation. However, a series of government emails released in a federal court filing in June 2022 indicates that there was concern that prosecutions would be too quick to justify placing UAC in HHS custody such that children needed to be placed in HHS custody "at an accelerated pace" or parents returned directly to ICE custody to prevent reunification of children with their parents.[110]

In email correspondence dated May 10, 2018, Matthew Albence, a high-ranking ICE official, wrote to Thomas Homan, then-acting ICE director:

> Bottom line, our concern is that the adults that were separated from their children due to the prosecution will be returned to USBP immediately after the guilty pleas is accepted by the Court, as the local District Court generally only imposes time-served. This will result in a situation in which the parents are back in the exact same facility as their children—possibly in a matter of hours—who have yet to be placed into ORR custody… CBP: They need to remain flexible and work with the FOD to prevent his from happening. This may mean transporting the UACs to an ORR facility themselves, at an accelerated pace, bringing the adults to ERO after the prosecution is completed, as opposed to back to the USBP Station… DHS: Probably a good idea just to give them the visibility that this issue exists, *and confirm that the expectation is that we are NOT to reunite the families*…[111]

On May 25, 2018, Brian Hastings, Associate Sector Chief, wrote to CBP leadership asking for clarification on the propriety of separation where the goal was supposed to prosecution:

> Chief, What is occurring in RGV is that the parents are being sent to their initial, they are pleading out immediately, and they are being sentenced to time served (sometimes within hours). They are then being remanded back to the CPC before HHS has placed the UAC's (Less than 72 hours)… The goal is to prosecute, not separate families.[112]

Acting Deputy Commission of CBP, Ronal Vitiello, sought "fidelity" on how to reply, and on May 26, 2018, in response to the clarification sought on the ground by Hastings, Albence wrote to DHS officials Kevin McAleenan, Thomas Homan, and Ronald Vitiello:

> Not sure if you are aware. It sounds like ORR is refusing to take children as UAC if the parent arrives back that the processing site and the child is still there. This is happening at the CPC as indicated below and have also heard in AZ. This obviously undermines the entire effort and the Dept is going to look completely ridiculous…[113]

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110 *See* page 55 of court filing, available at https://drive.google.com/file/d/1MOzMPwi-bFRhPydJKDhmPUaubFOuapJY/view; *see also* Maria Sacchetti, *Lawyers for Migrants Say U.S. Officials Slowed Family Reunifications*, The Washington Post (June 8, 2022), https://www.washingtonpost.com/nation/2022/06/08/migrant-families-reunifications-delayed/.

111 *See* page 55 of court filing above, *supra* note 110.

112 *See* page 60 of court filing above, *supra* note 110.

113 *See* page 79 of court filing above, *supra* note 110.

Despite their assertions that the goal was prosecution, Trump Administration officials were doing everything possible to separate children and prevent reunification with their parents. When parents and children were reunified, Trump Administration officials were calling upon agents to "cease the reunification process" at border stations and indicating that HHS needed their "arm twisted" to make room for the separated children.[114] It comes as no surprise then, that the Office of the Inspector General found no evidence that the DOJ leadership engaged in discussions with U.S. Attorneys, the U.S. Marshals Service, or DHS before implementing the Zero Tolerance policy to find a way to expedite prosecutions of adults so that parent-child separations would not occur.[115]

There were no coordination efforts between the agencies to mitigate the devastation of family separations

Even though the human cost was known, the Trump Administration actively avoided making plans to mitigate the harm to children.[116] According to Rosenstein, Sessions was well aware at the time he announced the Zero Tolerance policy that the consequences included the separation of children from their parents. In fact, this was considered as a singular advantage, since the Attorney General's goal was "to create a more effective deterrent so that everybody would believe that they had a risk of being prosecuted if they were to violate the law."[117]

"Let me start by saying that I would do almost anything to deter the people from Central America from getting on this very dangerous network that brings them through Mexico to the United States."

— Former Secretary of Homeland Security, John Kelly, March 2017

Report after report by government agencies and non-government advocates demonstrate the flagrant disregard of the Trump Administration and its officials for the consequences of parent-child separation. The DOJ Office of the Inspector General reported that the DOJ "did not effectively plan for or coordinate with" numerous governmental agencies "about the impact that family unit adult prosecutions under the Zero Tolerance Policy would have on children, despite senior leaders' awareness that it would result in the separation of children."[118] The DOJ never prepared the Office of Refugee Resettlement

114 Sacchetti, *supra* note 110.

115 *Id.*

116 The *Atlantic* reports: "In January 2018, warning of potential 'permanent family separation' and 'new populations of U.S. Orphans,' documents…show that the DHS Office for Civil Rights and Civil Liberties recommend that criteria be established to prevent the separation of very young or especially vulnerable children. They also recommended that an online database be created that family members could use to find one another in the detention system. This tool, *if it had been created*, would have proved immeasurably valuable the following year, when thousands of parents were searching for their children," emphasis added. Dickerson, *supra* note 31. Instead, the Trump Administration moved forward with family separations without installing any safeguard measures towards reuniting families in the future, despite such internal recommendations. Similarly, in November 2017, CBP's own internal summary of the pilot program highlighted potential issues such as children getting lost or ending up in long-term foster care. *El Paso Sector Family Unit Assessment*, The Atlantic, https://www.documentcloud.org/documents/22124198-el-paso-sector-family-unit-assessment. However, CBP leaders "said they were not made aware of any problems that came up during the program." Dickerson, *supra* note 31.

117 OIG, *supra* note 41.

118 *Id.*

to be overwhelmed by separated children.[119] According to the Office of the Inspector General for the Department of Health and Human Services:

> We did not find evidence that DOJ leadership had discussions about the zero tolerance policy or family separations with HHS prior to the announcement. We further determined that this lack of communication occurred even though the OAG was coordinating with HHS leadership on other immigration-related issues at the very same time the Department was drafting and issuing the zero tolerance policy.[120]

As a result, ORR was woefully unprepared for the sudden influx of traumatized children that would overwhelm its limited resources. The Office of Civil Rights and Civil Liberties (CRCL) received allegations that children with disabilities were being separated from their parents without proper care in place.[121] The CRCL Deputy Officer Dana Salvano-Dunn wrote a memo to CRCL Officer Cameron Quinn making recommendations for a family separation work group based on an internal investigation of 27 of 950 parent-child separation complaints that the CRCL office had received since 2016.[122] The memo cited several concerns, including the lack of "clear, formalized family separation decision-making criteria or separation procedures"; inconsistent or no record-keeping on separations; "prolonged separations" of parents and minor children, including that of nursing mothers and infants; "no contact or awareness of other family members' locations" and "no established process to coordinate communication among separated family members."[123] The memo also cited multiple instances of parent-child separations that included permanent separation, a "4 year old returned alone to Central America," and, chillingly, "new populations of U.S. orphans."[124]

Amidst these CRCL warnings of potential "permanent family separation" and "new populations of U.S. Orphans," documents show that recommendations were made to the Trump Administration to protect the safety of children.

> The DHS Office for Civil Rights and Civil Liberties recommend[ed] that criteria be established to prevent the separation of very young or especially vulnerable children. They also recommended that an online database be created that family members could use to find one another in the detention system. This tool, if it had been created, would have proved immeasurably valuable the following year, when thousands of parents were searching for their children.[125]

Agencies failed to keep complete records, or create any records at all, and could not coordinate the

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119 GAO, *supra* note 104.

120 OIG, *supra* note 41.

121 *DHS Records Regarding Family Separation and Communications with Anti-Immigration Activists: Email from Veronica Venture Regarding Translations* (July 5, 2018), https://www.documentcloud.org/documents/6206216-Records-relating-to-family-separation-at-ports.html#document/p724/a522554.

122 *DHS Records Regarding Communications with Outside Anti-Immigrant Groups: Dana Salvano-Dunn Sends Cameron Quinn a "Brief Write-up Regarding the Forthcoming CRCL Recommendation for a DHS/HHS Family Separation Work Group"* (Jan. 24, 2018), https://www.documentcloud.org/documents/6821391-DHS-18-0694-K.html#document/p15/a562425.

123 *DHS Records Regarding Communications with Outside Anti-Immigrant Groups Part I: January 2018 Memo from CRCL* (Jan. 2018), https://www.documentcloud.org/documents/6257038-DHS-Records-Regarding-Communications-with.html#document/p230/a562352.

124 Kopan, *supra* note 66.

125 Dickerson, *supra* note 31.

locations of parents and children. Parents and children were invariably lost to one another, often for months—in many cases, permanently. The DOJ's own attorney admitted in court proceedings that the Trump Administration never had any plan to reunite these parents with their children:

> "The way I understand the process…is the person gets out of custody for the conviction they are serving, they then go into ICE detention to pursue immigration- and asylum-related matters, but their child is somewhere else….And there is no procedure or mechanism for that parent to reunite with their child, absent hiring lawyers or pursuing it on their own," Judge Dana Sabraw asked the attorney, according to the hearing transcript. "Is that correct?"
>
> "I think that is correct," Justice Department attorney Sarah Fabian replied.[126]

Ignoring the known dysfunction in the detention system, the U.S. government knowingly subjected thousands of children, including infants and toddlers, to protracted, in some cases permanent, separation from their parents.[127]

Country of Citizenship of Children Ages 5-17

NOTE: These numbers are from the ACLU report of the 2,654 children they encountered pursuant to their litigation. Total number of separated children is unknown.

Source: ACLU, Family Separation: By the Numbers (Oct. 2, 2018), https://www.aclu.org/issues/family-separation

Parent-child separations only took place at the southern border—directly targeting migrants from Mexico and Central America

Parent-child separations pursuant to the Zero Tolerance policy took place solely along the southern border between the U.S. and Mexico, where the flow of migration was predominantly from Central American countries, compared to migration patterns across the border from Canada or at airports and other ports of entry. By 2016, the Latinx population in the United States had reached nearly 58 million and was described as "the principal driver of U.S. demographic growth, accounting for half of national population growth since 2000."[128]

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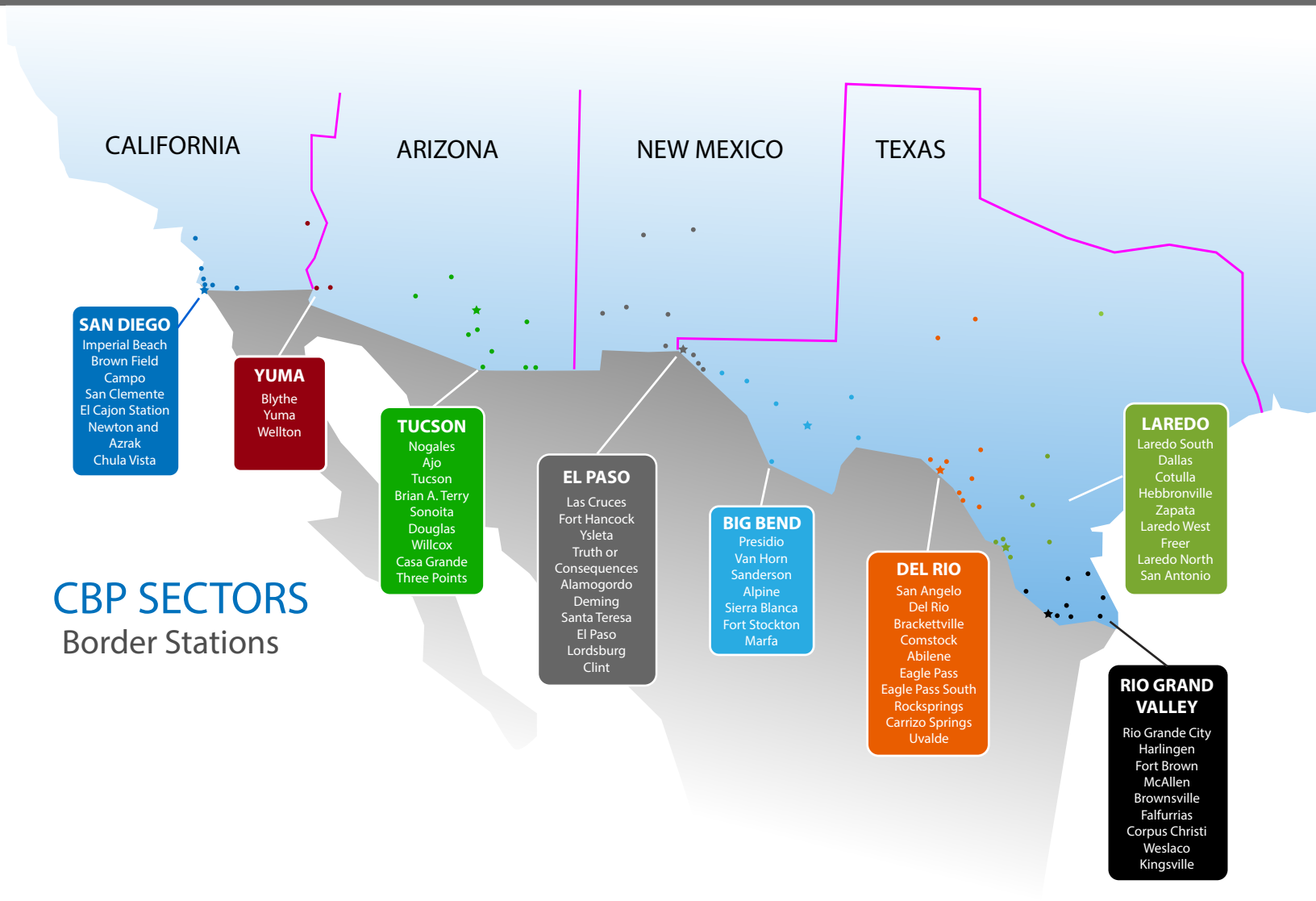
126 *Id.*

127 *Id.*; *see also Biden Appears Unaware of Possible Separated Family Payments, Says It Won't Happen*, MSN News (Nov. 4, 2021), https://www.msn.com/en-us/news/politics/biden-appears-unaware-of-possible-separated-family-payments-says-it-won-t-happen/ar-AAQiiWU?li=BBorjTa&ocid=mailsignout.

128 Antonio Flores, *How the U.S. Hispanic Population Is Changing*, Pew Research Center (Sept. 18, 2017), https://www.pewresearch.org/fact-tank/2017/09/18/how-the-u-s-hispanic-



The strategic implementation of Zero Tolerance exclusively at the southern border was a deliberate consequence of the Trump Administration's efforts to repel the flow of migration from Central America and Mexico. Then-Secretary of DHS John Kelly described from the Administration's perspective the composition of immigrants at the southern border who were subject to Zero Tolerance:

> …[T]hey're also not people that would easily assimilate into the United States into our modern society. They're overwhelmingly rural people in the countries they come from – fourth, fifth, sixth grade educations are kind of the norm. They don't speak English, obviously that's a big thing. They don't speak English. They don't integrate well, they don't have skills. They're not bad people. They're coming here for a reason. And I sympathize with the reason. But the laws are the laws. But a big name of the game is deterrence.[129]

U.S. government records consistently show that the overwhelming majority of detained children in ORR custody were from Mexico and Central America. Pursuant to one estimate, all but 11 of the 366

population-is-changing/.

129 *Transcript: White House Chief of Staff John Kelly's Interview with NPR*, NPR (May 11, 2018), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr.

separated children placed in ORR-run detention facilities from April 2017 to December 2018 were from Central American countries.[130] A later FOIA request covering the period from February 2018 to March 2019 also showed that the majority of the 3,109 children separated from their parents came from Central America.[131] The data demonstrates the extent of the success of the administration's will to detain children and separate families from Central America in the name of Zero Tolerance.[132]

Separated parents and children were coerced into deportations

In all instances of parent-child separation, the Trump Administration used coercive measures to secure deportation orders from separated parents and children, abandoning their legal right to seek protection from persecution. At the height of Zero Tolerance, the media reported that the Trump Administration instructed immigration agents to give parents two options: leave the U.S. with your kids or leave the U.S. without them.[133]

These instructions, provided on a government form, would not permit parents separated from their children to reunite with them while they applied for and awaited their asylum decision. Even parents who had passed their initial asylum screenings were given this form as a means of coercing deportation.[134] Furthermore, officials reportedly over-emphasized the length of time parents would spend in detention if they chose to fight their cases and failed to tell parents that they could secure release from detention on bond or even win the right to remain in the U.S.[135] Forcing parents to leave the country immediately—with or without their children—meant that they were "effectively prevented from asking for asylum."[136] It is also unclear whether many parents understood the government form due to language barriers. ICE agents were instructed to interpret the form using a language that the parents could understand; however, many parents spoke indigenous languages for which there was often no interpreter available.[137] CRCL reported that "ICE doesn't seem to be providing effective language assistance" in administering its new form, including "reports of Brazilians being given the form in Spanish without Portuguese interpretation."[138]

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130 U.S. Department of Health and Human Services, *Email Re: ACF FOIA 19-F-0034* (May 15, 2019), https://s3.documentcloud.org/documents/6881752/HHS-ACF-18-0697-A.pdf.

131 American Immigration Council, *Family Separation FOIA Response from HHS Key Documents: Instances of Family Separation*, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_hhs_production_instances_of_family_separation.pdf.

132 *Id.*

133 Julia Ainsley and Jacob Soboroff, *New Trump Admin Order for Separated Parents: Leave U.S. with Kids or without Them* (July 3, 2018), https://www.nbcnews.com/politics/immigration/new-trump-admin-order-separated-parents-leave-u-s-kids-n888631. ICE agents were directed to read the form to detained parents and direct them to sign next to one of two lines: 1) "I am requesting to reunite with my child(ren) for the purpose of repatriation to my country of citizenship," or 2) "I am affirmatively, knowingly, and voluntarily requesting to return to my country of citizenship without my minor child(ren) who I understand will remain in the United States to pursue available claims of relief."

134 *Id.*

135 Jennifer Lee Koh, Jayashri Srikantiah, and Karen C. Tumlin, Deportation without Due Process (Sept. 2011), https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf.

136 Ainsley and Soboroff, *supra* note 133.

137 *Id.*

138 *Email from Veronica Venture, supra* note 121.

On August 23, 2018, the American Immigration Council filed a complaint with the DHS Office of the Inspector General and CRCL on the "pervasive and illegal practice" by DHS officials of coercing parents separated from their children into signing documents they may not have understood, including the form that directed parents to self-deport.[139] The complaint contained extensive testimony from 13 parents who were separated from their children and survey results from 76 mothers who were separated from their children, presenting a case that their due process rights were violated under domestic law. The complaint stated that the trauma of separation and detention created a fundamentally coercive environment that forced parents to waive their legal rights, including their right to be reunified with their children, and to render them unable to answer questions or comprehend the purpose of the removal process itself.[140]

The key findings of the complaint include the following coercive measures to secure deportations from parents who were separated from their children:

- ICE officers used both physical and verbal threats, deception, and intimidation to coerce separated parents into signing forms relinquishing their rights.
- ICE officers reunified multiple parents with their children, then presented them with pre-completed forms affecting their rights to reunification, and re-separated parents who refused to sign the forms.
- CBP officers subjected separated parents to extreme duress during the separation process, including verbal and physical abuse.
- Detention officers put separated parents in solitary confinement, deprived them of food and water for days, and subjected them to other forms of retaliatory punishment.
- U.S. government officials and detention facility staff treated parents so cruelly and inhumanely as to compromise their ability to access asylum and other legal relief.

The trauma of being separated from their children, as well as the coercive environment created by CBP and ICE officers, made it extremely difficult for parents to participate meaningfully during the asylum process. Almost 90% of mothers surveyed reported that they were not allowed to ask ICE officers about the consequences of signing the form. Fewer than 25% of mothers understood what they signed. 67% of mothers reported that ICE intimidated or coerced them prior to signing the form, and 30% of mothers reported that ICE officers threatened that if the mother did not sign, they would never see their children again.[141]

A review of a Federal Tort Claims Act Complaint filed on behalf of five separated mothers indicates that officers threated to take children while forcing women to sign documents that went untranslated.[142] CBP officers laughed at the women who expressed shocked reactions to the news that their children would be

139 American Immigration Council, *The Use of Coercion by U.S. Department of Homeland Security (DHS) Officials against Parents Who Were Forcibly Separated from Their Children* (Aug. 3, 2018), https://www.aila.org/infonet/the-use-of-coercion-by-us-department-of-homeland.

140 *Id.*

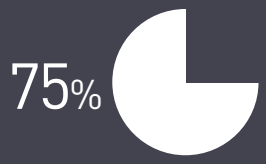
141 *Id.*

142 Complaint, C.M. v. United States, No. 2:19-cv-05217-SRB (D. Ariz. Sept. 19, 2019), ECF No. 1.

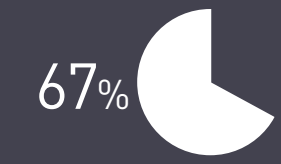
taken, in one instance saying "Happy Mother's Day."[143] Women begged to be immediately repatriated with their children rather than separated; this too was met with laughter from CBP officers.[144] Women reported being placed in holding cells with other women whose children had been taken, and that these women cried inconsolably and were ignored by immigration officers as they pleaded for information about their children.[145] These women watched as other children were forcibly ripped from their mother's arms, waiting for their own children to be taken.[146] Officers screamed at mothers, "Why did you bring your children here?" then yelled that they would take their children and "mothers would not know where to find them."[147] Against this backdrop is a purported legal process to seek protection from persecution. It should be noted that none of the mothers in this lawsuit were ever prosecuted by the government; their children were taken from them nonetheless.[148]

30% of mothers reported that ICE officers threatened that if the mother did not sign, they would never see their children again

Almost **90%** of mothers surveyed reported that they were NOT allowed to question ICE officers about the consequences of signing the form



75% of mothers did NOT understand what they signed



67% of mothers reported that ICE intimidated or coerced them prior to signing the form

143 *Id.* at para. 71-72.
144 *Id.* at para. 80.
145 *Id.* at para. 125.
146 *Id.* at para. 129.
147 *Id.* at para. 183.
148 *Id.* (No record of prosecution can be found for any of the named plaintiffs.)

Separations continued throughout the duration of the Trump Administration even after being deemed unconstitutional violations of the right of both parent and child to family integrity

Faced with public uproar, President Trump issued an executive order on June 20, 2018, entitled "Affording Congress an Opportunity to Address Family Separation." In the order, Trump blamed Congress for its "failure to act" and insisted that it was "the policy of the Administration to maintain family unity." However, the order failed to rescind the Zero Tolerance policy, which Trump verbally reaffirmed while signing the order.[149]

Six days later, acknowledging that the President's Executive Order did not go far enough, a federal district court ordered that "defendants, and their officers, agents, servants, employees, attorneys, and all those who are in active concert of participation with them, are preliminarily enjoined from detaining Class Members in DHS custody without and apart from their minor children, absent a determination that the parent is unfit or presents a danger to the child."[150] This injunction was issued in response to a federal lawsuit brought by the ACLU.[151] To reach this decision, the court indicated that the practice of parent-child separation "was applied indiscriminately, and separated even those families with small children and infants—many of whom were seeking asylum."[152] Notably, the court observed that recent events confirmed that the practice of separating families had become "national policy."[153]

In an earlier ruling, the same court had observed that the practice, if true, would "shock the conscience" and violate the constitutional right to family integrity:

> These allegations sufficiently describe government conduct that arbitrarily tears at the sacred bond between parent and child and is emblematic of the "exercise of power without any reasonable justification in the service of an otherwise legitimate governmental objective[.]" Such conduct, if true, as it is assumed to be on the present motion, is brutal, offensive, and fails to comport with traditional notions of fair play and decency. At a minimum, the facts alleged are sufficient to show the government conduct at issue "shocks the conscience" and violates Plaintiffs' constitutional right to family integrity.[154]

By the time the court ordered the injunction, the government reported that 1,556 children were separated from their parents from July 1, 2017 to June 26, 2018. Of these 1,556 children, 207 children were younger than five years old.[155] Other reports indicate that as of September 2022, the total number

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149 Erica R. Hendry, *Read Trump's Full Executive Order on Family Separation*, PBS Newshour (June 20, 2018), https://www.pbs.org/newshour/politics/read-trumps-full-executive-order-on-family-separation.

150 Ms. L v. U.S. Immigration and Customs Enf't Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction, https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-plaintiffs-motion-classwide-preliminary-injunction.

151 *Id.*

152 *Id.*

153 *Id.*

154 Ms. L v. U.S. Immigration and Customs Enf't Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-part-and-denying-part-defendants-motion-dismiss.

155 Associated Press, *More than 5,400 Children Split at Border, According to New Count*, NBC News (Oct. 25, 2019), https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791.

of known separations between January 2017 and June 2018 was over 4,000.[156] After the federal court injunction, the U.S. government stopped *officially* separating children from parents who had merely entered the United States without inspection. The Administration proceeded, however, to separate over a thousand more children by exploiting an ambiguity in the court order. A full year after the federal court enjoined the practice, a Motion to Enforce the Order was filed because 1,090 more children had been separated from their parents, including around 200 more children who were under five years old. The Trump Administration chose to interpret the class certification order that made an exception for "all parents with any criminal history"[157] as including any type of criminal activity—whether actual, alleged, or unsubstantiated—citing "the safety of the child" to be the basis for their discretionary decision to separate children from their parents.

However, the Trump Administration's assertion was unequivocally refuted as baseless by the government's own appointed guardians *ad litem* for unaccompanied children, who stated to the court:

> …[S]ince this court issued its order halting family separation on June 26, 2018, the Young Center has been appointed to 121 children who were separated from their biological parents and who appear on the protected list of cases provided by the government to the parties in this litigation. The average age of these 121 children is 6.87 years old. Fifty-five of the 121 children (approximately 46 percent) were five years old or younger at the time they were separated from their parents. In nearly all of the 121 cases the separated child could have safely remained in the parent's care while concerns about the child's long-term safety (based on allegations of criminal conduct by the parent, or possible abuse or neglect by the parent) were investigated to determine if separation was actually necessary and would be consistent with domestic child welfare laws. Of the 121 cases, we did not identify any situations in which a biological parent was determined to pose a risk of trafficking to his or her child. We have been appointed to children who were allegedly separated because of the parent's criminal history; *in nearly every case, we found that the parent's alleged or actual criminal history would not have been enough to justify separating the parent and child under our state child welfare laws, the parent did not pose a threat to the child's safety, and separation was contrary to the child's best interests*.[158]

When the Trump Administration left office in January 2021, thousands of children were reported to have been separated from their parents, with hundreds still unaccounted for by the U.S. government. By October 2019, the media reported that the Trump Administration had separated more than 5,400 children from their parents.[159] According to government records, at least 5,569 children were separated from their parents by the Trump Administration as of January 20, 2021.[160]

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156 Dickerson, *supra* note 31.

157 Ms. L v. U.S. Immigration and Customs Enf't Plaintiffs' Reply Supporting Motion to Enforce Preliminary Injunction, https://www.aclu.org/legal-documentms-l-v-ice-plaintiffs-reply-supporting-motion-enforce-pi.

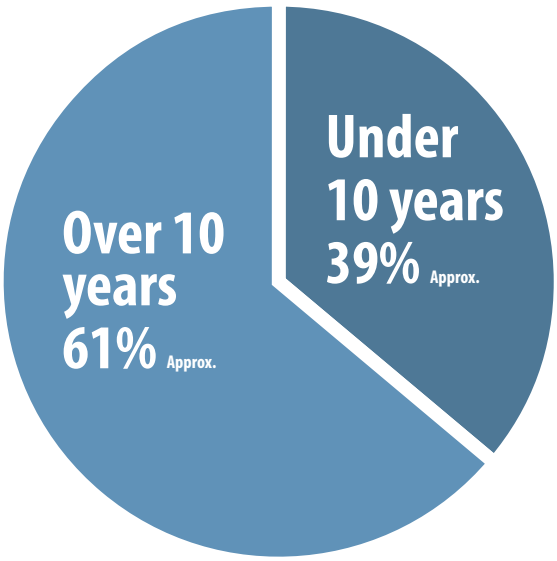
158 Declaration of Jennifer Nagda, Ms. L v. U.S. Immigration and Customs Enf't Memorandum in Support of Motion to Enforce Preliminary Injunction, https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi, emphasis added.

159 Associated Press, *supra* note 155.

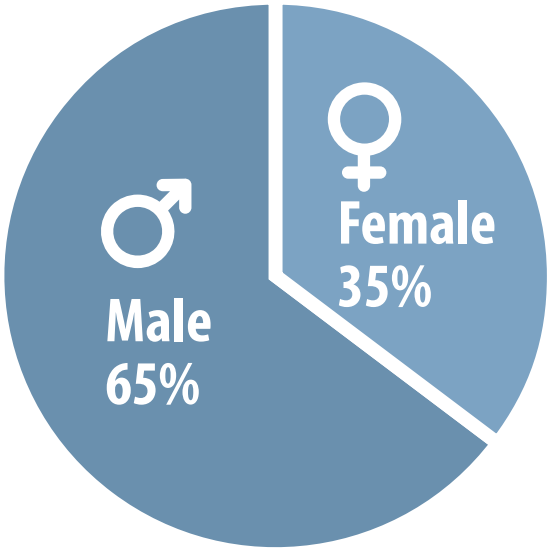
160 Dickerson, *supra* note 31.

ACLU's 2,654 Children

Age



Gender



NOTE: These numbers are from the ACLU report of the 2,654 children they encountered pursuant to their litigation. Total number of separated children is unknown.

Yet even these numbers may not paint the complete picture. There may have been many more cases of parent-child separations that were not documented or shared by the Trump Administration. In addition to the unreported numbers from Yuma, the National Immigrant Justice Center observed firsthand cases on a fact-finding trip to the McAllen, Texas federal courthouse on June 6, 2019 of parent-child separations that were not registered in HHS records.[161] A Texas Civil Rights Project report also documented cases of separations that were not reported to the courts or to Congress.[162] As of September 2021, at least 1,727 children still had not been reunited with their parents, lost in the system, and permanently deprived of their right to family integrity.[163] As of September 2022, approximately 700 families still have not been officially reunited.[164]

The Harm Inflicted Upon Children and Families Was Intentional

The stated purpose of the policy of parent-child separation was to deter migrants from coming to the U.S. by causing them harm through separating families. The Trump Administration enacted and continued its policy of separation knowing and intending the harm the policy would cause.

> The idea for parent-child separation may have originated [] from Tom Homan, an ICE official who would become Trump's acting ICE director throughout the implementation of Zero Tolerance.

161 Jesse Franzblau, *Records Contradict DHS Acting Secretary McAleenan's Claims on Ongoing Separations*, National Immigrant Justice Center (June 22, 2019), https://immigrantjustice.org/staff/blog/family-separation-policy-continues-new-documents-show.

162 *Id.*

163 U.S. Department of Homeland Security Interagency Task Force on the Reunification of Families, *Interim Progress Report*, DHS (Sept. 30, 2021), https://www.dhs.gov/sites/default/files/publications/21_0930_s1_interim-progress-report-family-reunification-task-force.pdf.

164 Dickerson, *supra* note 31.

> In 2014, Jeh Johnson, President Obama's then-Secretary of Homeland Security, convened a meeting with top border-enforcement officials including Homan to discuss the crisis of mass migration from Central America. At the meeting, Homan reportedly promoted the idea of criminally prosecuting all parents who crossed the border illegally with their children, including those seeking asylum. Homan explained that when parents were taken into federal criminal custody, the process would trigger an automatic parent-child separation—a consequence that Homan suggested would be effective as deterrence. *Homan stated to a reporter, "Most parents don't want to be separated [from their children]. I'd be lying to you if I didn't think that would have an effect."*[165]

The deterrent effect could only be relied upon if it was known to cause sufficient harm to discourage the unwanted action. While protecting children at home from the known effects of family separation, the Trump Administration simultaneously and gratuitously imposed that very trauma on children from Central America. In February of 2018, President Trump signed into law the Family First Act, hailed as "the most dramatic change to the child welfare system in nearly forty years" because it prioritized "keeping children with their families" in an attempt to reduce domestic family separation.[166] Recognizing the importance of family integrity and the harm of family separation, the President facilitated the codification of the protection of American families while "simultaneously inflicting trauma on migrant children through the unnecessary separation from parents and caregivers, and for reasons not based on the best interests of the child."[167]

The harm of parent-child separation has, of course, been well-documented in the public health sector for decades. Medical experts "have long known and communicated to the U.S. administration: family separation causes lasting and profound psychological trauma."[168] In fact, the Obama Administration, facing the same migration issues as the Trump Administration, explicitly refused to implement such a policy because of the known harm to children.[169] In other words, the Trump Administration was fully aware of the consequences of parent-child separation at all times. Despite these known consequences, President Trump reportedly pushed to relaunch family separations throughout the remainder of his presidency.[170]

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165 *Id.*

166 Susan Schmidt, *Trauma Inflicting, Not Trauma Informed: The US Federal Government's Double Standard Toward Migrant Children*, Social Work 64:1 (Aug. 2018), https://www.researchgate.net/publication/327537398_Trauma_Inflicting_Not_Trauma_Informed_The_US_Federal_Government's_Double_Standard_toward_Migrant_Children/link/5b944221299bf147392ae581/download.

167 *Id.* at 2.

168 Physicians for Human Rights, *U.S. Government Confirms Migrant Children Experienced Severe Mental Health Issues Following "Family Separation*" (Sept. 4, 2019), https://phr.org/news/u-s-government-confirms-migrant-children-experienced-severe-mental-health-issues-following-family-separation/.

169 "The Obama administration faced a surge of unaccompanied children from Central America trying to cross the border in 2014. Cecilia Muñoz, director of the Obama administration's Domestic Policy Council, told the New York Times this month that a multi-agency team was considering 'every possible idea' at the time, including separating families. 'I do remember looking at each other like, "We're not going to do this, are we?" We spent five minutes thinking it through and concluded that it was a bad idea,' the Times quoted Muñoz saying. 'The morality of it was clear — that's not who we are.'" Lori Robertson, *Did the Obama Administration Separate Families?*, FactCheck.org (June 20, 2018), https://www.factcheck.org/2018/06/did-the-obama-administration-separate-families/.

170 Dickerson, *supra* note 31.

Previously known research on the significant effects of traumatic separation

Parent-child separation, clinically referred to as "traumatic separation," is a form of childhood trauma and has lasting developmental effects.[171] According to attachment theory, "a secure attachment is derived from the child's appraisal of the mother's (or other attachment figure's) availability."[172] Such availability "implies that the [parent] is physically accessible to the child… the lack of accessibility [is perceived as] either separation or loss, depending on whether it was temporary or permanent in nature."[173] As a result, "early separation has also been explicitly linked to insecure/disorganized attachment and subsequent mental health problems."[174]

The length of separation bears directly upon the extent of harm: "Extended separations of a month or more prior to age 5 have been linked to increased symptoms of borderline personality disorder in adolescence and adulthood."[175] In addition, the effects of separation are amplified for children under the age of two.[176] In general, rending the parent-child bond has extraordinarily harmful consequences for children of all ages:

> Decades of psychological research show that children separated from their parents can suffer severe psychological distress, resulting in anxiety, loss of appetite, sleep disturbances, withdrawal, aggressive behavior and decline in educational achievement. The longer the parent and child are separated, the greater the child's symptoms of anxiety and depression become.[177]

> Separation from parents is linked with higher rates of PTSD and chronic mental health conditions like depression among children. The negative impact on the cognitive and emotional functioning of children can continue into adulthood, and contribute to lower academic achievement, attachment difficulties, and poor mental health. Extreme and repetitive stress is also correlated with increased risk of physical health conditions such as cancer, stroke, diabetes, and heart disease.[178]

Parent-child separation is also associated with an increased risk of psychotic episodes.[179] The risks of short- and long-term consequences from parent-child separation increase for children with compound trauma. Children seeking refuge in the U.S. are widely known to have extensive pre-existing trauma, both from their journey to the U.S. and the conditions in their home country that triggered their escape.[180]

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171 *See generally*, The National Child Traumatic Stress Network, Children with Traumatic Separation: Information for Professionals (2016), http://www.nctsn.org/sites/default/files/assets/pdfs/children_with_traumatic_separation_professionals.pdf.

172 Kimberly Howard, Anne Martin, Lisa J. Berlin, and Jeanne Brooks-Gunn, *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, Attach Hum Dev. 13:1, 5-26 (Jan. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3115616/.

173 *Id*.

174 *Id.*

175 *Id.*

176 *Id.* ("We focus on separation between birth and age two because during that period children rely on physical proximity as the primary indicator of their mother's availability. Mothers who have left the home environment, even if available by phone, are perceived as unavailable. Maternal availability is particularly important within the first two years of life because of the infant's limited understanding of the reasons for maternal absence and the timing of her return. As a result, experiences of separation may be particularly salient").

177 American Psychological Association, *Statement of APA President Regarding Executive Order Rescinding Immigrant Family Separation Policy* (June 20, 2018), https://www.apa.org/news/press/releases/2018/06/family-separation-policy.

178 Physicians for Human Rights, *supra* note 168.

179 Luis Ayerbe, María Pérez-Piñar, Quintí Foguet-Boreu, and Salma Ayis, *Psychosis in Children of Separated Parents: A Systematic Review and Meta-Analysis*, Eur. Psychiatry 63:1 (Jan. 31, 2020), https://pubmed.ncbi.nlm.nih.gov/32093793/.

180 Physicians for Human Rights, "There Is No One Here to Protect You": Trauma among Children Fleeing Violence in Central America (June 2019), https://

A recent study of the parents subjected to Zero Tolerance found the following related to their sample:

> Due to targeted acts of violence in their home countries, all parents arrived at the U.S. border having already been exposed to significant trauma. Many were victims of gang-based persecution including death threats, physical assault, murder of relatives, extortion, sexual assault, and/or robbery. All parents expressed fear that their child would be harmed or killed if they stayed within their home country. In almost all cases, their children also had experienced severe harm before fleeing; gang members drugged, kidnapped, poisoned, and threatened children, including threats of death, violence, and/or kidnapping if they or their parents did not comply with the gang's demands. Parents were confident that the journey to the United States would ensure protection for their children after failed attempts to evade gang-based persecution in their home country.[181]

Instead of receiving the opportunity to seek protection in the United States, parents and children were met with state violence in the form of family separations which were decried by medical experts as state-sanctioned child abuse and torture.

As it unfolded, parent-child separations were decried by the medical community as state-sanctioned child abuse and a form of torture

In May 2018, shortly after the U.S. government engaged in parent-child separations pursuant to the Zero Tolerance policy, the medical and public health community decried the practice, noting the extensive harm that the policy of unjustified family separation was causing to children and families. The American Psychological Association released a statement condemning the practice's deleterious impact on the health and well-being of separated children and families:

> The administration's policy of separating children from their families as they attempt to cross into the United States without documentation is not only needless and cruel, it threatens the mental and physical health of both the children and their caregivers. Psychological research shows that immigrants experience unique stressors related to the conditions that led them to flee their home countries in the first place. The longer that children and parents are separated, the greater the reported symptoms of anxiety and depression for the children. Negative outcomes for children include psychological distress, academic difficulties and disruptions in their development…This is not an acceptable policy to counter unlawful immigration.[182]

phr.org/wp-content/uploads/2019/06/PHR-Child-Trauma-Report-June-2019.pdf.

181 Kathryn Hampton, Elsa Raker, Hajar Habbach, Linda Camaj Deda, Michele Heisler, and Ranit Mishori, *The Psychological Effects of Forced Family Separation on Asylum-Seeking Children and Parents at the US-Mexico Border: A Qualitative Analysis of Medico-Legal Documents*, PLoS One 16:11 (Nov. 24, 2021), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0259576.

182 American Psychological Association, *supra* note 177.

The medical community repeatedly highlighted the needless and punitive nature of the policy. Physicians for Human Rights implored the Trump Administration to halt the policy in a June 14, 2018 letter to DHS Secretary Nielsen and Attorney General Sessions:

> The Trump administration has stated that its goal in separating children from their parents is to deter people from crossing the border between ports of entry. According to statements by Attorney General Jeff Sessions, this policy is intended to be punitive, to serve as such deterrence.
>
> Using children as leverage to punish their parents is unconscionable, both with respect to the health and well-being of children and as treatment of migrants and asylum seekers. The right to family unity is enshrined in U.S. and international law, which recognize that families are the foundation of society. The relationship of children and parents is the strongest social tie most people experience, and a threat to that tie is among the most traumatic events people can experience…
>
> Among refugees, one research study shows that individuals separated from their families had worse mental health outcomes in terms of depression, PTSD, and psychological quality of life than those who remained with their families, after controlling for trauma. *After testing the contribution of 26 types of trauma to these outcomes, only the experience of being beaten and tortured had a similar impact on all three mental health measures as family separation.*[183]

"Only the experience of being beaten and tortured had a similar impact on all three mental health measures as family separation"

— Physicians for Human Rights

The letter, signed by thousands of licensed medical health practitioners, urged the Trump Administration to stop harming children and families.

In June 2018, representatives from the American Academy of Pediatrics (AAP) demanded that the Trump Administration end the practice of parent-child separations, describing the practice as state-sanctioned child abuse:

> …[T]he emotional strain the children in these facilities are under produces a condition called "toxic stress" that it inhibits the development of their brains.
>
> It disrupts their brain architecture and keeps them from developing language and social, emotional bonds, and gross motor skills, and the development that they could possibly have…[The policy amounts to] government-sanctioned child abuse.[184]

In a letter to the Trump Administration, the American Academy of Pediatrics (AAP) declared that "separating children from their parents contradicts everything we stand for as pediatricians—protecting and promoting children's health":[185]

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183 Physicians for Human Rights, *Letter to Secretary Kirstjen Nielsen and Attorney General Jeff Sessions* (June 14, 2018), https://s3.amazonaws.com/PHR_other/Separation_Letter_FINAL.pdf, emphasis added.

184 Justin Wise, *American Academy of Pediatrics President: Trump Family Separation Policy Is "Child Abuse,"* The Hill (June 18, 2018), https://thehill.com/latino/392790-american-academy-of-pediatrics-president-trumps-family-separation-policy-is-child.

185 Devin Miller, *AAP a Leading Voice against Separating Children, Parents at Border*, AAP News (June 14, 2018), https://www.aappublications.org/

> The Academy's opposition to family separation stems from the serious health consequences this practice has on children. Its 2017 policy statement Detention of Immigrant Children urges that separation of a parent or primary caregiver from his or her children should never occur unless there are concerns for the child's safety at the hand of the parent.
>
> Highly stressful experiences, including family separation, can cause irreparable harm to lifelong development by disrupting a child's brain architecture. Toxic stress, which is caused by prolonged exposure to heightened stress, has detrimental short- and long-term health effects.
>
> When children are separated from their parents, it removes the buffer of a supportive adult or caregiver to help mitigate stress and protect against substantial impacts on their health that can contribute to chronic conditions like depression, post-traumatic stress disorder and heart disease.[186]

On July 9, 2018, two medical and mental health experts contracted with the Office for Civil Rights and Civil Liberties to inspect DHS family detention facilities sent a letter to Department Head Cameron Quinn, decrying parent-child separation as "an act of state sponsored child abuse."[187] The experts stated that they had contacted the DHS Office of the Inspector General with their concerns but had not heard anything Thus, they were notifying CRCL based on their duty "to do, as we see fit, whatever is necessary to prevent further harm to children and their families."[188] The experts stated:

> It is our professional opinion that the over two thousand innocent children traumatized by [the Zero Tolerance] policy now face a lifetime of increased risk of significant physical and mental health consequences including, anxiety, depression, post-traumatic stress disorder and poor physical health.[189]

In January 2019, the AAP renewed its call to the Trump Administration to stop the practice of family separation after learning that the Trump Administration secretly continued the widespread practice using the pretextual "criminal history" loophole discussed above.[190]

By January 2021, after observing the details of the policy in action, the medical community unequivocally denounced the practice of family separation as a form of torture in the AAP Journal *Pediatrics Perspective*: "To deter migration, the current administration has implemented punitive policies toward children that have affected their physical and mental health, including separation from their families. The treatment of children at the border constitutes cruel, inhuman, or degrading treatment that rises to the level of torture."[191]

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news/2018/06/14/washington061418.

186 *Id.*

187 *DHS Records Regarding Communications with Outside Anti-Immigrant Groups Part 1: Whistleblowers' Letter to Cameron Quinn* (July 9, 2018), https://www.documentcloud.org/documents/6257038-DHS-Records-Regarding-Communications-with.html#document/p111/a562419.

188 *Id.*

189 *Id.* The medical experts later sent a version of the letter to Congress. *See* Scott Allen and Pamela McPherson, *Letter to Chairman Charles E. Grassley and Vice Chairman Ron Wyden* (July 17, 2018), https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf.

190 Melissa Jenco, *AAP Renews Call for an End to Family Separation at the Border*, AAP News (Jan. 18, 2019), https://www.aappublications.org/news/2019/01/18/immigration011819.

191 Charles Oberg, et al., *Treatment of Migrant Children on the US Southern Border Is Consistent with Torture*, 147 Pediatrics 1 (Jan. 2021), https://pediatrics.

The Trump Administration continued its policy of separation despite being informed of the harm it was having on children

Separated children and parents exhibited the devastating effects of traumatic stress while in U.S. government custody; these effects of separation were known to and ignored by the Trump Administration. The U.S. government's own internal reports demonstrated the abject harm children were experiencing as a result of separation. One report by ORR documented the following:

> According to program directors and mental health clinicians, separated children exhibited more fear, feelings of abandonment, and post-traumatic stress than did children who were not separated. Separated children experienced heightened feelings of anxiety and loss as a result of their unexpected separation from their parents after arrival in the United States. For example, some separated children expressed acute grief that caused them to cry inconsolably.
>
> Children who did not understand why they were separated from their parents suffered elevated levels of mental distress. For example, program directors and mental health clinicians reported that children who believed their parents had abandoned them were angry and confused. Other children expressed feelings of fear and guilt and became concerned for their parents' welfare.[192]

Immigration practitioners, mental health experts, and other stakeholders bearing witness to the separations also painted a stark picture of the level of harm suffered by separated parents and children. According to one summary of psychological evaluations:

> …[N]early everyone [separated parents and children] interviewed exhibited symptoms and behaviors consistent with trauma and its effects: being confused and upset, constantly worried, crying a lot, having sleeping difficulties, not eating well, having nightmares, being preoccupied, having severely depressed moods, overwhelming symptoms of anxiety, and physiological manifestations of panic and despair (racing heart, shortness of breath, and headaches), feeling "pure agony" and hopelessness, feeling emotional and mental anguish, and being "incredibly despondent." The evaluating clinicians noted that the children exhibited reactions that included regression in age-appropriate behaviors, crying, not eating, having nightmares and other sleeping difficulties [bedwetting], loss of developmental milestones, as well as clinging to parents and feeling scared following reunification with their parents.[193]

As stated above, the ongoing traumatic harm suffered by separated children was also well-documented by HHS officials responsible for caring for the traumatized children.[194]

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aappublications.org/content/pediatrics/147/1/e2020012930.full.pdf.

192 U.S. Department of Health and Human Services Office of the Inspector General (OIG), Care Provider Facilities Described Challenges Addressing Mental Health Needs of Children in HHS Custody (Sept. 2019), https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf. See also OIG, supra note 41, and GAO, supra note 104.

193 Physicians for Human Rights, "You Will Never See Your Child Again": The Persistent Psychological Effects of Family Separation (Feb. 2020), https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf.

194 OIG, *supra* note 192.

The Office of Refugee Resettlement recorded parent-child separations as "abuse in DHS custody"

The Trump Administration also subjected separated children to inhumane and squalid conditions while in detention, including abusive behavior by immigration authorities. One nine-year-old boy told his mother that while he was in detention, detention officials "yelled at him and forced him to eat" and "hit him with his shoes to wake him up."[195] Other children reported sleeping on the floor, poor quality of food, overcrowding, and being deprived of fresh air and sunlight.[196]

Pursuant to agency protocol, the Office of Refugee Resettlement "requires that care providers and ORR staff report incidents affecting an unaccompanied child's (UC) safety and well-being."[197] Significant incident reports (SIR) are filed for situations that affect the safety and well-being of a child.[198] ORR records an SIR for every separated child ushered into its care. Notably, until the protocols were revised in July 2021, every SIR that an ORR caseworker filed documented a significant incident of "abuse while in DHS custody."[199] These SIRs were filed on behalf of thousands of children, chronicling the acute trauma suffered by children immediately following separation from their parents.[200]

Medical and public health research documented parent-child separations caused severe trauma in children

Despite the known consequences of family separation and the accounts of ongoing trauma amidst family separation, the U.S. government aggressively pursued a policy of parent-child separation—the direct effects of which are now being observed by the social science community. Multiple studies have been recently published demonstrating the devastating effects of this policy on populations subjected to the Trump Administration's policy of family separation.[201]

Emerging reports indicate that children who faced forced separation under Zero Tolerance are "at heightened risk of developing mental health disorders, including depression, post-traumatic stress disorder (PTSD), and anxiety disorders."[202] Studies indicate that separated children had elevated scores for emotional problems, peer problems, and total difficulties: "Male children demonstrated significantly higher rates of abnormal peer problems compared to females. Younger children (age 5–11 years) also demonstrated significantly higher rates of abnormal conduct problems, hyperactivity, and total

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195 Physicians for Human Rights, *supra* note 193.

196 *Id*.

197 Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 5.8.2 Significant Incidents* (June 7, 2021), https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-5.

198 *Id.*

199 *Abuse in DHS Custody—Separated from Mother* (Dec. 17, 2018), https://www.documentcloud.org/documents/6681851-12-17-18-HHS-ACF-Prod2-Pt2#document/p1/a546766.

200 Office of Refugee Resettlement, *supra* note 197.

201 *See, for instance,* Physicians for Human Rights, *supra* note 193; Joanna Dreby, *U.S. Immigration Policy and Family Separation: The Consequences for Children's Well-Being*, Soc. Sci. Med. 132, 245-51 (May 2015), https://pubmed.ncbi.nlm.nih.gov/25228438/; Sarah A. MacLean, Priscilla O. Agyeman, Joshua Walther, Elizabeth K. Singer, Kim A. Baranowski, and Craig L. Katz, *Characterization of the Mental Health of Immigrant Children Separated from Their Mothers at the U.S.-Mexico Border*, Psychiatry Res. 285:112555 (Apr. 2020), https://pubmed.ncbi.nlm.nih.gov/31522891/; Hampton, et al., *supra* note 181.

202 MacLean, et al., *supra* note 201.

"To deter migration, the current administration has implemented punitive policies toward children that have affected their physical and mental health, including separation from their families. The treatment of children at the border constitutes cruel, inhuman, or degrading treatment that rises to the level of torture."

difficulties."[203] Other studies reveal that "[t]hough the exact outcome of the [Zero Tolerance policy] on the well-being of children and parents may not be accurately predicted, the research and direct clinical evidence presented… renders little doubt that severe traumatic impact occur[ed] with likely enduring consequences."[204]

Other studies indicated that the harm suffered in detention did not abate upon reunification:

> In children, exposure to trauma can have persistent effects. Such childhood exposures are also known as Adverse Childhood Events, or ACEs. Whether a one-time event or multiple events, trauma can cause helplessness, general fear, worries about safety, and difficulty describing emotions or events. These can manifest as a loss of previously attained developmental or age-appropriate behavioral skills, or through more vague somatic complaints such as headaches, stomach aches, and generalized pain. Children who experienced trauma often have sleeping difficulties and exhibit heightened responses to perceived threats – such as a separation from a family member or trusted adult – in the form of crying, being fearful, or clinging to a trusted adult. Aggressive behaviors are also common, as is regression – bed wetting, loss of language, return to thumb sucking, and inability to control bowel movements and urination. Such symptoms were consistently described by the evaluators following family separation, and, in many cases, as not resolving even after reunification. It may take several years and may require rigorous psychological and social support for children to overcome such trauma.[205]

Advocates report that children continue to experience harm either via persistent effects of trauma including regression or the untold, irreparable harm to the parent-child relationship.[206] The extent of the long-term and permanent damage to children and parents remains unknown. Studies will continue to monitor these children into adulthood in an effort to assess the full extent of the harm.

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203 *Id.*

204 Cristina Muñiz de la Peña, Lisa Pineda, and Brenda Punsky, *Working with Parents and Children Separated at the Border: Examining the Impact of the Zero Tolerance Policy and Beyond,* J. Child Adolesc. Trauma 12:2, 153-164 (May 30, 2019).

205 Physicians for Human Rights, *supra* note 193.

206 "Although the Young Center successfully reunified many children with parents—in the United States or in their home countries—the harm perpetrated against these children and families was extraordinary. Some children regressed. Some were angry at their parents. Family relationships were damaged in untold ways." Young Center for Immigrant Children's Rights, Family Separation Is Not Over: How the Trump Administration Continues to Separate Children from Their Parents to Serve Its Political Ends (June 25, 2020), https://static1.squarespace.com/static/597ab5f3bebafb0a625aaf45/t/5f032e87ff32c80f99c7fee5/1594044048699/Young+Center-Family+Separation+Report-Final+PDF.pdf.

Anywhere between 500—2,000 children have been permanently deprived of their parents

An October 2020 court filing by the ACLU reported that the deported parents of more than 500 children in government custody were unable to be located by the U.S. government.[207] However, the numbers may be far higher. A progress report on family separation published by the Biden Administration in June 2021 indicated that at least 2,127 children are still believed to be separated from parents, having been released to non-parent family members in the United States. Even after a protracted government search, the Interagency Task Force on the Reunification of Families reported that 1,727 children had still not been reunited with their parents as of September 2021.[208]

The Biden Administration Will Not Seek Accountability

On February 2, 2021, President Biden issued the "Executive Order on the Establishment of Interagency Task Force on the Reunification of Families." The key mandates of the task force included the following:

- Identify all children who were separated by DHS from their families at the United States-Mexico border between January 20, 2017 and January 20, 2021 as a result of Zero Tolerance policies or related initiatives.
- Facilitate and enable the reunification of those children with their families; and
- Provide recommendations regarding the provision of additional services and support for the children and their families, including behavioral health services with a focus on trauma-informed care.[209]

In its initial June 2021 Progress Report, the Task Force indicated that it is relying on data from the NGO community and litigation, further reinforcing that the U.S. government does not know the full scope of children taken from their parents.

The Task Force is currently conducting efforts to bring back deported parents to reunify with their children. However, the reparations that will be provided to families intentionally harmed by the Trump Administration's policies remain unclear. Notably, neither civil nor criminal accountability is listed as a function of the Biden Administration's Task Force on the Reunification of Families.

While the Biden Administration is making efforts to reunify separated families, in many cases parents who are returning to reunify with their children are doing so under grants of parole which are temporary in nature.[210] Families have received no grant of permanent protection and may face deportation—and the possibility of another separation—at some point in the future.

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207 Ms. L v. U.S. Immigration and Customs Enf't Joint Status Report, https://cdn.cnn.com/cnn/2020/images/10/20/ms_l_v_us_immigration_and_customs_enforcement__casdce-18-00428__0556.0.pdf.

208 Interagency Task Force, *supra* note 163.

209 U.S. Department of Homeland Security Interagency Task Force on the Reunification of Families, *Initial Progress Report* (June 2, 2021) at 5, https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf (citing Exec. Order No. 14011).

210 Interagency Task Force, *supra* note 163.

Recent reports confirm that the Biden Administration will not agree to financial compensation as part of any settlement.[211] As of January 2022, the Biden Administration is fighting civil accountability efforts for families separated at the border:[212] "…the Justice Department abruptly broke off negotiations aimed at a financial settlement with hundreds of affected families. Having condemned a policy that traumatized children and their parents, Mr. Biden now leads an administration fighting in court to deny recompense to those same families."[213] As of the date of this writing, the U.S. government attorneys are demanding that separated families relive their trauma through court-mandated psychological examinations, a tactic described as "very aggressive" in light of the extraordinary amount of documentary evidence and research in support of their claims.[214] The failure to address accountability for family separation in any context indicates that the U.S. government continues to perceive forced parent-child separations and coerced deportations under Zero Tolerance as a legitimate government immigration policy.

Parent-Child Separations via Zero Tolerance Amount to Crimes against Humanity Prosecutable before the International Criminal Court

Crimes against humanity are among "the most serious crimes of concern to the international community as a whole."[215] U.S. courts have regarded crimes against humanity as "universally condemned behavior that is subject to prosecution."[216] The Rome Statute of the International Criminal Court (ICC) established a mechanism by which to hold individuals accountable for the most serious human rights violations, including crimes against humanity, in cases where national legal systems have failed.

a. Crimes against Humanity under the Rome Statute of the International Criminal Court: Widespread or Systematic Attack Directed against a Civilian Population, with Knowledge of the Attack

Article 7 of the Rome Statute defines a crime against humanity as an act committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack.[217] Thus, what

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211 Camilo Montoya-Galvez, *U.S. Ends Talks over Compensation for Families Separated under Trump*, CBS News (Dec. 16, 2021), https://www.cbsnews.com/news/immigration-family-separations-compensation-us-ends-talks/.

212 Sam Lew, *Biden Administration Makes Cruel Decision to Fight California Families Separated at the Border in Court*, LCCRSF (Jan. 6, 2022), https://lccrsf.org/pressroom_posts/biden-administration-makes-cruel-decision-to-fight-california-families-separated-at-the-border-in-court/.

213 Editorial Board, *President Biden Broke His Promise to Separated Migrant Families*, The Washington Post (Jan. 5, 2022), https://www.washingtonpost.com/opinions/2022/01/05/president-biden-broke-his-promise-separated-migrant-families/.

214 Priscilla Alvarez, *Justice Department Wants Psychological Examinations of Parents Suing after Being Separated from Children at US-Mexico Border*, CNN (Sept. 27, 2022), https://www.cnn.com/2022/09/27/politics/family-separation-lawsuit-psychological-exams.

215 Art. 7, Elements of Crimes, International Criminal Court, https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

216 *Doe v. Rafael Saravia*, 348 F. Supp. 2d 111 (E.D. Cal 2004).

217 Art. 7, Rome Statute of the International Criminal Court (Rome Statute), in force on 1 July 2002, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

distinguishes the severity of a crime against humanity from other crimes is the fact that the crime was committed pursuant to or in furtherance of a state or organizational policy.[218] Crimes against humanity, unlike their war crimes counterparts, do not require armed conflict. Instead, crimes against humanity can be carried out by government policy in the absence of war.

The Trump Administration's systematic separation of parents and children at the U.S.-Mexico border was an attack against a civilian population—namely, Central American migrants, including children, along the U.S.-Mexico border who were seeking safety through the asylum process. While the attack took place outside of the context of armed conflict, the attack was nonetheless widespread and systematic and in furtherance of a state policy to punish and deter migrants. Specifically, parent-child separations pursuant to Zero Tolerance constituted widespread and systematic crimes against humanity including the crimes of persecution, deportation, torture and other inhumane acts. In accordance with the spirit of the Rome Statute, this report urges an investigation into the actions of individuals who bear the greatest responsibility for the commission and execution of the atrocity crimes that took place pursuant to Zero Tolerance.[219]

The practice of parent-child separations pursuant to the Trump Administration's Zero Tolerance policy constituted a widespread and systematic attack

A crime against humanity is defined as an act committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack.[220]

1. Parent-child separations constituted "an attack"

Article 7(1) of the Rome Statute defines an "attack" as a "course of conduct involving the multiple commission of acts… pursuant to or in furtherance of a State or organizational policy to commit such attack."[221] The Elements of Crimes further clarifies that the acts "need not constitute a military attack"[222] nor does it necessarily entail the commission of a violent act.[223] In *Kunarac*, an Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded that "the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population."[224] The commission of the acts in Article 7(1) of the Statute is sufficient to constitute an attack.[225]

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218 Art. 7(2)(a), Rome Statute.

219 Understanding the International Criminal Court, International Criminal Court, https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf.

220 Art. 7, Rome Statute.

221 Art. 7(2)(a), Rome Statute.

222 Art. 7(3), Elements of Crimes.

223 Art. 7(3), Elements of Crimes; Gerald L. Neuman, *What Counts As a Crime against Humanity?*, Harv. Int'l L. J. (2019), https://harvardilj.org/2019/01/what-counts-as-a-crime-against-humanity.

224 *Prosecutor v. Kunarac et al.*, Judgment, Case No. IT-96-23 and IT-96-23/1-A, 12 June 2002, at para. 86. See also *Prosecutor v Blagojević,* Judgment, Case No. IT-02-60-T, 17 Jan. 2005 at para. 543; UN Human Rights Council, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (7 February 2014), UN Doc A/HRC/25crp.1 at para. 1030.

225 *Prosecutor v. Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, PTC II, Case No. ICC-01/05-01/08-424, P.T.Ch. II, 15 June 2009*; Prosecutor v. Bosco Ntaganda*, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against

The Trump Administration wrested children away from their parents, causing untold physical and psychological harm to adolescents, children, infants and their parents, in an effort to pursue a discriminatory immigration agenda. In some cases, the separation continues. In all cases, the psychological harm continues. To further its discriminatory agenda, the Administration attempted to deter migration, to punish migrants, and to coerce or force deportations. The acts carried out under Zero Tolerance are consistent with violations of Article 7(1)—specifically, unlawful deportation, torture, and other inhuman acts—and meet the definition of an attack under the Rome Statute.

2. The Trump Administration's attack on migrants, including children, was both widespread and systematic

The Trump administration's attack fits the definition of a crime against humanity, because it is both "widespread" and "systematic." "Widespread" refers to the "large scale nature of the attack," which is "massive, frequent, carried out collectively…and directed against a multiplicity of victims."[226] A widespread attack, therefore, is expansive in both scale and in the number of victims. The widespread nature of an attack can be inferred by the "cumulative effect of a series of inhumane acts" or by the effect of a single "inhumane act of extraordinary magnitude."[227] An attack may also be "systematic," which has been construed by the ICC as an organized plan in furtherance of a common policy, following a regular pattern and resulting in "a continuous commission of acts or patterns of crimes such that the crimes constitute a non-accidental repetition of similar criminal conduct on a regular basis."[228] The administration's intentional policy of family separation pursuant to Zero Tolerance was both widespread and systematic.

Widespread.
The Trump Administration's attack against migrant children and their families was devastating in both scale and the number of victims and shocking in its deliberate and repeated cruelty. U.S. government officials tore thousands of children away from their parents along the 2,000-mile U.S.-Mexico border, the tenth largest border in the world. In 2017, when the Trump Administration was carrying out its covert pilot programs, U.S. border agents separated at least 200 families in Yuma and nearly 300 individuals appearing as part of a family unit in El Paso.[229] The Trump Administration then systematically deployed parent-child separation openly across the southern border, ultimately impacting the lives of several thousand children and families. HHS figures revealed that the U.S. government separated over 3,000 children from their parents from January 2018 to March 2018, with nearly 300 children—a third under the age of 5—taken after the "official" end to parent-child separations via Zero Tolerance in June 2018.[230] Even after the federal court injunction, the Trump Administration persisted in separating as many as five children per day.[231] By October 2019, the Trump Administration had torn over 5,000 children from

the decision of Trial Chamber VI of 8 July 2019, Judgment, Case No. ICC-01/04-02/06-2666-Red, App. Ch., 30 Mar. 2021 at para. 418.

226 *Id.; Prosecutor v. Katanga and Chui*, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07-717, P.T.Ch. I, 30 Sept. 2008.

227 *Bemba, supra* note 225.

228 *Katanga and Chui, supra* note 226.

229 Sieff, *supra* note 47; Committee on the Judiciary, *supra* note 53.

230 American Immigration Council, *supra* note 131.

231 *Id.*

their parents.[232] The U.S. government ultimately deported more than 1,400 parents without their children, many of whom were coerced into signing deportation agreements under extreme physical, mental, and emotional duress and without due process.[233] Due to the Trump Administration's deliberate negligence in record-keeping and reunification efforts, thousands of children were disappeared into the byzantine child detention system.[234]

Systematic.

The Trump Administration's attack against migrant children and families was meticulously systematic. From the very start, parent-child separation—and the known harm to children it would cause—was the bedrock of the Zero Tolerance policy intended to deter migration from Central America. President Trump and high-ranking officials in DHS began to strategize parent-child separations from the earliest days of the administration. Less than two weeks after Trump was sworn in as President, DHS officials met to begin planning the separation of migrant children from their mothers at the U.S.-Mexico border.[235] High-level Trump officials made no secret that they were planning a deliberate attack on asylum-seekers, openly and unapologetically informing the media that they were considering parent-child separations in order to deter Central American family migration to the U.S.[236] At the same time, the administration began testing secret pilot programs in the Yuma and El Paso sectors along the border, ripping children—including infants—from their parents, who were then summarily prosecuted for the heretofore unprosecuted offense of unlawful entry and, in many cases, coercively deported without their children.[237] Based on the perceived "success" of the pilot program, and with actual knowledge of the untold harms to children, the Trump Administration quickly scaled up the policy of parent-child separation and deportation via Zero Tolerance across the entire U.S.-Mexico border.[238] Even after a federal court enjoined parent-child separations, the Trump Administration continued to separate parents and children at the border for the duration of its tenure.[239]

At no point did the Trump Administration have any plan to reunite children with their parents, nor did it have a plan to scale up resources to provide basic, humane care for the sudden influx of traumatized, parentless children overwhelming the ORR shelter system.[240] In its investigation of complaints related to family separation, the Office of Civil Rights and Civil Liberties cited the lack of clear, formalized decision-making criteria or procedures, inconsistent or no record-keeping on family separations, no contact or awareness of other family members' locations, and no established process to coordinate communication among separated family members.[241] Meanwhile, internal concerns about lack of capacity

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232 Associated Press, *supra* note 155.

233 American Immigration Council, *supra* note 139.

234 Daniels, *supra* note 65; Kopan, *supra* note 66.

235 Ainsley, *supra* note 42.

236 *Kelly*, *supra* note 45; *Kelly*, *supra* note 46.

237 Ainsley, *supra* note 61.

238 American Oversight, *supra* note 44.

239 Ms. L, *supra* note 157.

240 Anne Flaherty, *Government Official Says He Warned Trump Administration against Family Separations* (Feb. 7, 2019), https://abcnews.go.com/Politics/government-official-warned-family-separations/story?id=60910531; Dickerson, *supra* note 31.

241 *DHS Records*, *supra* note 121.

and resources for detained children were dismissed by Trump Administration officials as "unlawful and un-American."[242] The lack of such planning by the Trump Administration was strategic: to deliberately and systematically maximize state-sanctioned violence against children to accomplish its objective of deterrence, punishment and removal of Central American migrants and asylum-seekers.

The Trump Administration actively promoted and encouraged the attack as a matter of state policy

To qualify as a crime against humanity, the State or organization must have an established policy to commit an attack; the state must "actively promote or encourage such an attack" against civilians.[243] A policy does not need to be formalized,[244] nor need to be "conceived at the highest level of the State machinery."[245] An attack that is planned, directed, or organized, including by regional or local state bodies, will satisfy this element.[246]

Zero Tolerance was an explicit policy of the Trump Administration. Family separation was integral to accomplishing the objectives of Zero Tolerance.[247] Family separation pursuant to policy was actively planned, directed, and organized by the highest level of State machinery and organized by numerous members and departments of the Trump Administration. Parent-child separation was the rallying point for members of the Trump Administration in private meetings, who eagerly regarded and advocated separation as a necessary tool of deterrence.[248] Weeks after issuing his Zero Tolerance memo to federal prosecutors, Sessions reiterated to the prosecutors that "we need to take away children" in order to fully implement the Zero Tolerance policy.[249] Both public and private labor and resources, including private for-profit detention facilities that personally enriched a key advocate of the policy, were deployed to carry out parent-child separations, with the explicated stated motive of deterring Central American families from migrating to the southern border.[250]

The attack was directed against a civilian population

Customary international law gives broad meaning to the term "civilian population," since the protection of civilian populations serves as "the object and purpose of the general principles and rules of humanitarian law…[which] are intended to safeguard basic human values by banning atrocities directed against human dignity."[251] A crime against humanity must target a civilian population as "the primary object of the attack," though it is not required that the whole population of a state or territory be the object

242 Ainsley and Soboroff, *supra* note 84.

243 Art. 7(3), Elements of Crimes.

244 *Prosecutor v. Katanga*, Judgment pursuant to Art. 74 of the Rome Statute, Case No. ICC-01/04-01/07, 7 Mar. 2014.

245 Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09-19-Corr, P.T.Ch. II, 31 Mar. 2010.

246 *Bemba, supra* note 225.

247 *Executive Order*, *supra* note 1.

248 Dickerson, *supra* note 31.

249 Shear, Benner, and Schmidt, *supra* note 92.

250 Kates, *supra* note 97.

251 *Prosecutor v. Kupreskic et al.*, Judgment, Case No. IT-95-16-T, 14 Jan. 2000.

of the attack.[252] As noted by the Appeals Chamber in the *Ntaganda* case, "it does not establish a legal requirement that the *main* aim or object of the relevant acts was to attack civilians."[253] The "population" element is "intended to imply crimes of collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes… do not rise to the level of crimes against humanity."[254] The ICC has noted that "the qualifier 'any civilian population' has been previously interpreted to mean 'groups distinguishable by nationality, ethnicity or other distinguishing features.'"[255]

The Trump Administration directed its attack against a civilian population, targeting those fleeing violence from countries in Central America and seeking refuge at the U.S.-Mexico border. The Trump Administration's Zero Tolerance and parent-child separation policies were explicitly designed to stem the migration of civilians from Central America. Nothing in the record indicates that any of the separated and displaced family members are alleged to be armed combatants. Instead, the Administration knew them to all be civilians in the truest sense, as the victims were children and their parents. The Administration acknowledged to the press that the Zero Tolerance policy was specifically intended to target ordinary families from Central America, disparagingly referred to as "overwhelmingly rural people" who "don't speak English," "don't integrate well," and "don't have skills."[256] Whatever the Administration's motives might have been does not negate the civilian character of the victims or that the attack was directed against them. As noted by the ICC Appeals Chamber, "[a]n attack directed against a civilian population may also serve other objectives or motives."[257]

Members of the Trump Administration knowingly engaged in conduct envisaged by the Zero Tolerance policy

A person is criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC if the material elements are committed "with intent and knowledge."[258] Article 30 of the Rome Statute defines knowledge as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." Intent is signaled by the fact that a person "means to engage in" a particular conduct, or "means to cause…or is aware" of a particular consequence.[259] The element may be satisfied "by a perpetrator engaging in conduct envisaged by the policy, and with knowledge thereof."[260]

Members of the Trump Administration carried out parent-child separations pursuant to the Zero Tolerance policy with knowledge of the harm the policy would cause and with the intention of causing said harm. High-ranking officials in the Trump Administration knew about the insidious plan of parent-child separations and were instrumental in conceiving and carrying out the attack against migrant children

252 *Ntaganda, supra* note 225 at para. 422-424; *Prosecutor v. Mrksic and Sljivancanin,* Judgment, Case No. IT-95-13/l-A, A.Ch., 12 Nov. 2009; *Prosecutor v. Kunarac, Kovac, and Vukovic,* Judgment, Case No. IT-96-23-7 & IT-96-23/1-T, 22 Feb. 2001.

253 *Ntaganda*, *supra* note 225 at para. 424.

254 *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-T, 7 May 1997.

255 *Prosecutor v. Muthaura, Kenyatta and Ali*, Decision on the Confirmation of Charges, Case No. ICC-01/09-02/11-382-Red, 23 Jan. 2012.

256 *Transcript*, *supra* note 129.

257 *Ntaganda*, *supra* note 225.

258 Art. 30(1), Rome Statute.

259 Art. 30(2)(a)-(b), Rome Statute.

260 *Bemba, supra* note 225.

and their families, as outlined in the above section "Maximizing Pain to Deter Migration." Exploiting the vulnerability of migrant children was the key to deterrence.

The Trump Administration hid the purpose of the policy—to tear children from their parents—from the public eye. While the Administration stated the purpose was enforced prosecutions, behind the scenes Administration officials were making every possible effort to ensure prompt reunification was avoided. The goal was separation because separation was the most painful thing the Administration could inflict upon migrants coming from Central America.

With the contextual elements established, the specific crimes against humanity of persecution, deportation, torture, and other inhumane acts are discussed below.

b. Parent-Child Separation under the Zero Tolerance Policy Constitutes the Crime against Humanity of Persecution (via All of the Crimes Alleged in This Section)

Article 7(2)(g) of the Rome Statute defines persecution as the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[261] The Elements of Crimes elaborates that persecution requires that 1) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; 2) the perpetrator targeted the person or persons because of their group or collective identity based on political, racial, national, ethnic, cultural, religious, gender, or any other ground universally recognized as impermissible under international law, and 3) the act of persecution was committed in connection with another act referenced in Article 7 or otherwise within the jurisdiction of the ICC.[262]

In the course of carrying out parent-child separations and deportations under the Zero Tolerance policy, the Trump Administration committed persecution in conjunction with deportation, torture, and other inhumane acts against asylum-seeking migrants from Central America who were targeted on the basis of their racial, national, and ethnic identity. The following analysis identifies how family separation pursuant to Zero Tolerance was conducted in a manner consistent with the definition of persecution. Specifically, there was 1) an intentional and severe deprivation of fundamental rights contrary to international law, and 2) the deprivation was carried out by reason of the identity of the group or collectivity.

The Trump Administration intentionally and severely deprived migrant children and their parents of their fundamental rights

In order to rise to the level of persecution, there must be a severe deprivation of a fundamental rights; not every denial of a human right may constitute persecution.[263] "[T]o identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards…such as those laid down in the [UDHR], the two United Nations

261 Art. (2)(g), Rome Statute.

262 Art. 7(1)(h), Elements of Crimes.

263 *Kupreskic*, *supra* note 251.

Covenants…and other international instruments on human rights or on humanitarian law."[264] The ICC avoids this analysis by requiring that prosecution of persecution be tied to another crime under the statute. Specifically, persecution may only be charged "in connection with any act referred to in this section or any crime within the jurisdiction of the Court,"[265] meaning any listed crimes against humanity, war crimes, genocide or acts of aggression. The sections below demonstrate how family separation constitutes the crimes of unlawful deportation, torture, and other inhumane acts. The result is the clear nexus of the policy to the deprivation of multiple fundamental rights.

The Zero Tolerance policy constitutes a *severe* deprivation of fundamental rights. "In applying the criterion of severity, the acts of persecution must be evaluated in context and not in isolation, taking into consideration their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed 'inhumane.'"[266] The acts defined as crimes against humanity are universally accepted as violations of international norms. The inhumanity of stripping children and infants from their parents' arms—with knowledge of the wholescale damage that would be wrought upon both—can leave no question as to the severity of the deprivation of fundamental rights.

The summary manner in which the separations were carried out, with no regard for the safety or well-being of the child, defied both customary international law as well as normative U.S. practices related to child welfare and best interests.[267] The U.S. upholds the norm that family unity can be subject to disruption only through due process of law. The U.S. Supreme Court has consistently recognized the importance of the family unit and the right of parents to care for their children[268] explaining that "[t]he liberty interest []—the interest of parents in the care, custody, and control of their children—eis perhaps the oldest of the fundamental liberty interests recognized by this Court.[269] Each state in the United States maintains a statute governing the process through which government actors may proceed with an involuntarily separation of a child from his or her parent. All states require a legal proceeding that demonstrates the separation is due to abuse, abandonment or neglect of the child.[270] Many states require an assessment of whether the separation is in the best interests of the child.[271] Under both international and domestic law, the key to depriving one of the fundamental right of family integrity lies in the requirement of due process. It cannot be done arbitrarily.

Zero Tolerance employed the summary, arbitrary removal of children from their parents at the border. The separations were carried out without due process, without regard for the rights of the parents or the

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264 *Id.*

265 Art. 7(1)(h)(4), Elements of Crimes.

266 *Prosecutor v. Kordic and Cerkez*, Judgment, Case No. IT-95-14/2-T, 26 Feb. 2001, https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e-2.htm.

267 Recognizing that every country in the world, apart from the United States, has ratified the UN Convention on the Right of the Child, and that "[t]he right of the child to have their best interests considered is the single most universally adopted principle of the CRC," the right of a child to have their best interests considered has become a peremptory norm as recognized by treaty, custom and general principles of law recognized by civilized nations.

268 *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (a state "registers no gain toward its declared goals when it separates children from the custody of fit parents," quoting *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

269 *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

270 Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights* (Dec. 2016), https://www.childwelfare.gov/pubPDFs/groundtermin.pdf#page=5&view=Summaries%20of%20State%20laws.

271 Child Welfare Information Gateway, *Determining the Best Interests of the Child* (Mar. 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

rights, welfare or best interests of the children. The separated constituted a severe deprivation of a long recognized, fundamental right. As a U.S. court identified, the practice of family separation pursuant to Zero Tolerance was "brutal, offensive, and fails to comport with traditional notions of fair play and decency"[272] that "[a]t a minimum, the facts alleged [government conduct that arbitrarily tears at the sacred bond between parent and child] are sufficient to show the government conduct at issue "shocks the conscience."[273]

Zero Tolerance was carried out with discriminatory intent to target the collectivity or group identifiable by their racial, national, and ethnic identity

Persecution is distinct from other crimes under the Rome Statute in that the *mens rea* is higher than other crimes: "Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics."[274]

The Trump Administration's parent-child separation policy under Zero Tolerance clearly targeted civilians, including asylum-seekers, from Central American countries. Separations took place only along the border between the U.S. and Mexico, following from Trump's long-standing animus towards migrants crossing the southern border. Trump repeatedly referred to southern border migration as a "violent" "invasion" and "infestation" of sub-human individuals: "These aren't people, these are animals."[275] Through a strategy of attrition, the Trump Administration issued hundreds of executive actions, severely restricted access to asylum, attacked the few protections available to migrant children, and sought to build a wall across the U.S.-Mexico border to keep these so-called "unwanted" immigrants out of the country.[276]

Echoing the rhetoric of Trump and the CBP officials, Chief of Staff John Kelly explicitly stated to the press that the Zero Tolerance policy and its concomitant practice of separating parents from children was intended to target "overwhelmingly rural people" from Central America who "don't speak English," "don't integrate well," and "don't have skills."[277] The racist and nativist rhetoric from the top ranks of the Trump Administration had a clear trickle-down effect. CBP officials who worked directly with migrants were emboldened by Trump's rhetoric and unleashed a "pervasive culture of cruelty aimed at immigrants,"[278] demonstrating, according to public officials who reviewed their conduct, "a complete disregard for human life and dignity."[279] The secret Facebook group consisting of 9,500 CBP officials openly disparaged Central American migrants in their posts ("Non [*sic*] of these ignorant people can spell or write but somehow they think they deserve to be let in"[280]). In the 2018 case of a CBP official who was charged with running

272 Ms. L Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *supra* note 154.

273 *Id.*

274 *Kupreskic*, *supra* note 251.

275 Davis, *supra* note 8.

276 *New MPI Report*, *supra* note 24; Colvin, *supra* note 25; Mueller, *supra* note 26.

277 *Transcript*, *supra* note 129.

278 Thompson, *supra* note 16.

279 *Id.*

280 Hesson and Lima, *supra* note 17.

down a Guatemalan migrant with a truck, text messages among agents were revealed in federal court as describing migrants in racist and derogatory terms such as "guats," "wild ass shitbags," "beaners" and "subhuman," and included repeated discussions about "burning the migrants up."[281]

The Trump Administration's Zero Tolerance policy targeted civilian populations distinguishable by their racial, national, and ethnic identity as the primary object of their attack. In light of the nexus to the clear intention to deprive a collective group of migrants from Central America of a fundamental right because of their racial, national and ethnic identity, persecution can be charged under the Rome Statute in connection with any of the following crimes.

c. Parent-Child Separation under the Zero Tolerance Policy Constitutes the Crime of Deportation or Forcible Transfer

Deportation has long been acknowledged as both a war crime and a crime against humanity in international instruments.[282] Indeed, unlawful deportation or transfer of persons is named as a grave breach of the Geneva Conventions in the context of international armed conflict.[283] The Rome Statute defines deportation as both a war crime and a crime against humanity. Under Article 7, deportation or forcible transfer is defined as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."[284] Pursuant to this definition, there is a three-part analysis to demonstrate that deportation is unlawful: 1) the deportation or displacement must be forcible (by expulsion or other coercive acts), 2) from an area in which they are "lawfully present," and 3) without grounds permitted under international law.

The Trump Administration forcibly displaced separated migrants through coercion and expulsion

The Elements of Crimes describes forced displacement of persons across an international border or other location as unlawful deportation if the transfer is conducted "by expulsion or other coercive acts."[285] The forcible nature of deportation "is not restricted to physical force" but may also include "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."[286] The forced character of the displacement is determined by the absence of genuine choice by the victim in his or her displacement.[287] Indeed, "apparent consent induced by force or threat of force should not be considered to be real consent."[288]

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281 Thompson, *supra* note 16; *Exhibit 1*, *supra* note 21.

282 E.g., the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute (Art. 5(d)); the ICTR Statute (Art. 3(d)); the Statute of the Special Court of Sierra Leone (Art. 2(d)); and the UNTAET Regulation 2000/15 on the establishment of the Cambodian Extraordinary Courts (section 5.1(d)).

283 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), 75 UNTS 287; Art. 8(2)(b)(viii), Rome Statute.

284 Art. 7(2)(d), Rome Statute.

285 Art. 7(1)(d)(1), Elements of Crimes.

286 *Id*., fn 12.

287 Trial Judgement Summary for Radovan Karadžić (24 Mar. 2016), https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement_summary.pdf.

288 *Prosecutor v. Simic, Tadic, and Zaric´*, Judgment, Case No. IT-95-9-T, T.Ch. II, 17 Oct. 2003.

Exploiting parent-child separation, the government employed coercive measures and expelled migrant parents, including those who had passed their initial asylum screenings and credible fear interviews.[289] In other words, the government coerced bona fide asylum seekers into taking orders of deportation under the guise that this was the only, or the most efficient, way to reunify with their children who had been taken by the government. ICE officers wielded both physical and psychological force, including verbal threats, deception, and systematic intimidation, to coerce parents into signing forms relinquishing their rights to their children and "consenting" to deportation to secure expedited reunification.[290] The government form given to separated parents contained only two options: to leave the country with their children or to leave without them.[291]

Deportees were never given a choice to pursue their claims for asylum *and* be reunified with their children. The deliberate construction of these false options served to compel parents into abandoning their bona fide requests for protection and accepting expulsion. Officials over-emphasized the length of time individuals would spend in detention if they chose to fight their cases and failed to tell individuals that they could secure release from detention on bond or even win the right to remain in the U.S. permanently.[292] Reports indicate a consistent pattern of abuse of power and the imposition of psychological duress by government agents, in which parents would be reunited with their children, presented with pre-completed forms, then re-separated if they refused to sign; detained in solitary confinement and deprived of food and water for days; intimidated and harassed into signing their deportation orders; and presented with the threat of never seeing their children again if they questioned the form.[293] There are additional reports indicating that indigenous migrants were not even provided with interpreters when forced to undertake the decision of whether or not to relinquish rights in removal proceedings.[294]

The Trump Administration displaced asylum-seekers who were lawfully present in the U.S.

"Lawful presence" is a legal term of art which must be assessed in relation to both domestic and international law.[295] Deportations that conform with domestic law can still be unlawful under international law; "[a]ny other reading would make the definition of deportation meaningless as it would permit a government to declare that the people to be deported were not 'lawfully present' in the territory of a State…and escape international criminal responsibility."[296] The term "lawfully present" is intended to be "given common meaning and should not be equated to the legal concept of lawful residence."[297]

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289 Ainsley and Soboroff, *supra* note 133.

290 American Immigration Council, *supra* note 139.

291 Ainsley and Soboroff, *supra* note 133.

292 Koh, et al., *supra* note 135.

293 *Id.* at 17-18.

294 *Id.* at 17.

295 Robert Cryer et al., An Introduction to International Criminal Law and Procedure (2010), 250 at fn. 129; Kriangsiak Kittichaisaree, International Criminal Law (2001), 109; Y. Jurovics, *Article 7 – Crimes contre l'humanite,'* in J. Fernandez and X. Pacreau, eds., Statut de Rome de la Cour penale internationale. Commentaire Article Par Article (2012), 430; K. Ambos and S. Wirth, *The Current Law of Crimes against Humanity. An Analysis of UNTAET Regulation 15/2000* (2002), 13 Criminal Law Forum, 60. 143 states, including the U.S., have ratified at least one convention that explicitly prohibits collective expulsion.

296 C.K. Hall, *Crimes against Humanity* at para. 1(d), in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (1999), 248.

297 *Prosecutor v. Vujadin Popovic, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf.

Lawful presence under international law. Under international law, refugees must not be subject to penalty for being present without inspection in another state. The Refugee Convention, and by adoption the Refugee Protocol to which the United States is a party, strictly forbids imposing penalties on refugees on account of their unauthorized status when coming from a territory where their life or freedom was threatened.[298]

Asylum seekers are not generally considered unlawfully present under international law. The jus cogens imperative of *non-refoulement* prohibits deportation to a state where there is real risk of persecution. The ICC characterizes *non-refoulement* as a long-standing customary rule, which has been cited in a wide range of legal instruments.[299] The principle of *non-refoulement* remains absolute from which there can be no derogation when there is a risk of torture, inhumane or degrading treatment.[300]

Lawful presence under domestic law. Similarly, under domestic law, once an application for asylum has been made, "no period of time in which a [migrant has a bona fide application for asylum pending] shall be taken into account in determining the period of unlawful presence in the United States."[301]

Under non-Zero Tolerance circumstances, migrants who seek asylum at the port of entry are not considered unlawfully present in the United States. Indeed, individuals designated as "arriving aliens"[302]—whether detained at a port of entry or subsequent to an unauthorized entry—have long been subject to the legal fiction that they are not present in the United States at all and are therefore less eligible for Constitutional protections.[303] Thus, the paradox of a detained "arriving alien" is that they are not unlawfully present in the United States because they are not considered legally present in the United States at all.

Migrants separated under Zero Tolerance, whether appearing to seek asylum at ports of entry or desiring to apply for asylum after unauthorized entry, were legally designated as "arriving aliens." All were coerced into accepting expulsion either in the middle of their request for asylum or before their point of access to the asylum process. Asylum-seekers should not be deemed unlawfully present in this context by merely foreclosing access to the asylum process. This reading would create a loophole that threatens to swallow the rule—to avoid criminal liability for unlawful deportation, simply prevent the asylum-seeker from asking for asylum and avoid deporting someone considered "lawfully present."

Reports demonstrate that the Trump Administration separated and subjected to coerced deportation both migrants who could have asked for asylum (but were coerced into deportation before a formal application could be submitted) as well as migrants who properly presented themselves for asylum at the

298 Art. 31(1), 1951 Convention Relating to the Status of Refugees, 189 UNTS 150.

299 *Prosecutor v. Katanga and Chui,* Decision on an Amicus Curiae Application and on the Requete tendant a obtenir presentations des temoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorites neerlandaises aux fins d'asile, Case No. ICC-01/04-01/07-3003, T Ch. II, 9 June 2011. Although the ICC did not discuss the content of such principle under general international law, it primarily referred to "persons who are at risk of persecution or torture." For universal and regional legal instruments, *see, for instance,* Refugee Convention, supra note 237, Art. 33; 1957 Agreement Relating to Refugee Seamen, 506 UNTS 125; 1975 Protocol to the Agreement Relating to Refugee Seamen, 965 UNTS445, Art. 10; 1984 Convention against Torture, 1465 UNTS 85, Art. 3; 2006 International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/61/488 (2006), Art. 16.

300 *Chahal v. United Kingdom,* Decision of 15 Nov. 1996, [1997] 23 EHRR 413; CAT, Paez v. Sweden, UN Doc. CAT/C/18/D/39/1996, (1996).

301 INA § 212(a)(9)(B).

302 8 C.F.R. § 1001.1(q).

303 *Schaughnessy v. Mezei*, 345 U.S. 206 (1953).

border or port of entry and sought asylum through the credible fear process—lawful presence under both international and domestic law.

Deportations took place without grounds permitted under international law

International law recognizes grounds permitting forced displacement or evacuation. Customary international law dictates that the act of displacement in only permitted under international law when "the security of the civilians involved or the imperative military reasons" demand deportation or forcible transfer.[304] For example, Article 19 of Geneva Convention III the evacuation of prisoners of war out of a combat zone and into internment facilities.[305]Article 49(2) of Geneva Convention IV and Article 17(1) of Additional Protocol II allow forced displacements of populations under limited circumstances, namely if they are carried out "for the security of the persons involved or for imperative military reasons."[306] Commentary on Article 17 of Additional Protocol II suggests that displacement for humanitarian reasons, such as epidemics or natural disasters, may also be justifiable.[307] None of the grounds under international law that give rise to the permissible, forcible transfer of populations are contemplated in the context of the deportation and forcible transfer of separated families pursuant to Zero Tolerance.

d. Parent-Child Separation under the Zero Tolerance Policy Constitutes the Crime against Humanity of Torture

Parent-child separation under the Zero Tolerance Policy constituted the crime against humanity of torture. Echoing the language of the Convention against Torture, the Rome Statute defines torture as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.[308] The prohibition of torture and ill-treatment is absolute and non-derogable under international law, and states have both a positive duty to prevent such acts via proactive measures and a negative duty to refrain from engaging in or knowingly contributing to acts of torture or ill-treatment.

The Rome Statute, borrowing from the *jus cogens* norms set out in conventional law, defined torture in the context of crimes against humanity more inclusively than CAT. Namely, the Rome Statute does not require that torture be inflicted for an illicit purpose. Notably missing from the definition of the crime of torture as a *crime against humanity* (though not as a war crime), the Rome Statute does not require that "[t]he perpetrator inflicted the pain or suffering *for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind*."[309] Neither the Statute nor the Elements of Crimes includes a requirement that the perpetrator engage in the intentional

304 *See* ICC Statute, Article 8(2)(e)(viii) (ibid., § 19); *see also* ICRC Database of Customary International Law, Rule 129. The Act of Displacement, Volume II, Chapter 28, Section A, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule129.

305 *Popovic*, *supra* note 297 at para. 901.

306 *Id.*

307 *Id.*

308 Article 7(2)(e), Rome Statute, emphasis added.

309 Art. 8(2)(a)(ii), Elements of Crimes.

infliction of severe physical or mental pain or suffering for an illicit purpose to prosecute torture as a crime against humanity. Nonetheless, this illicit purpose is present in the context of family separation pursuant to Zero Tolerance. The public record reflects, via the statements of U.S. government officials themselves, that the U.S. government took children from their parents in an effort to punish migrants arriving in the United States and "send a message" of intimidation or coercion to would-be migrants from Central America from making the journey to the United States.

In violation of international norms and the U.S.'s own directive under the Torture Victims Protection Act, the Trump Administration targeted and exploited the unique vulnerabilities of migrant children to achieve its unlawful policy goal of deterrence and engaged in state-sanctioned torture against migrant children and their parents with long-lasting, and in many cases permanent, impact on their physical, mental, emotional, and developmental well-being. The Office of the Prosecutor has offered guidance related to the crime of torture against children. Specifically,

> The Office recognises that, owing to their physical and emotional development and their specific needs, treatment, potentially amounting to torture and related crimes, may cause greater pain and suffering to children than to adults. It will bear this in mind when considering whether such treatment against children may amount to a crime under the Statute.[310]

The infliction of this mental pain was intentional and must not be considered incident to lawful sanctions but rather an abject abuse of power. The following sections demonstrate that the US government engaged in 1) the intentional infliction of severe physical and mental pain or suffering, 2) perpetrated against children and parents in the custody of and under the control of the United States government, and that 3) the acts were not arising only from, inherent in or incidental to, lawful sanctions.

The Trump Administration intentionally inflicted severe physical and mental pain and suffering upon migrant children

Infliction of physical or mental pain or suffering. In assessing whether there is an infliction of physical or mental suffering, damage to physical or mental health will be taken into account. To qualify as torture, there is no requirement that there be physical abuse: "abuse amounting to torture need not…involve physical injury, as mental harm is a prevalent form of inflicting torture."[311] Indeed, "the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture."[312]

The UN Special Rapporteur on Torture has reiterated the prevailing view among the human rights community that "the deprivation of liberty of migrant children based solely on their own or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, is grossly disproportionate and, even in case of short-term detention, may amount to cruel, inhuman or degrading treatment."[313]

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310 The Office of the Prosecutor, *Policy on Children* (Nov. 2016), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF at para. 50.

311 *Prosecutor v. Kvočka et al.,* Judgment, Case No. IT-98-30/1-T, 2 Nov. 2001.

312 *Id.*

313 Nils Melzer, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/37/50, 4 (Nov. 23,

The U.S. government's own internal reports of children in government custody documented the ongoing traumatic harm suffered by separated children who exhibited heightened levels of acute grief, feelings of abandonment, and post-traumatic stress.[314] Separated children demonstrated symptoms of trauma such as "severely depressed moods, overwhelming symptoms of anxiety, and physiological manifestations of panic and despair (racing heart, shortness of breath, and headaches), feeling 'pure agony' and hopelessness, feeling emotional and mental anguish, and being 'incredibly despondent.'"[315] Evaluating clinicians noted that children regressed in age-appropriate behaviors, including "crying, not eating, having nightmares and other sleeping difficulties, loss of developmental milestones, as well as clinging to parents and feeling scared following reunification with their parents."[316]

Intentionality of the infliction of severe physical or mental pain. To constitute a violation of international criminal law, the perpetrator must "intentionally act in such a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to the victim(s), in pursuance of one of the purposes prohibited by the definition of the crime of torture."[317] For the purposes of a crime against humanity under the Rome Statute, no illicit purpose is required.

The infliction of pain and suffering to children was not simply an unfortunate side effect of stricter immigration policies under the Trump Administration. Instead, harm to children was central to the success of the Zero Tolerance policy to deter migration and coerce families from coming to the United States or—for those trapped in Zero Tolerance—into abandoning lawful claims for asylum.[318] It was intentional. Attorney General Jeff Sessions told prosecutors at a meeting in May 2018, "We need to take away children." A week later, Deputy Attorney General Rod J. Rosenstein told prosecutors in a phone call that it "didn't matter how young" were the children.[319]

The US government secretly tested parent-child separations in Yuma and El Paso by piloting parent-child separations before unleashing Zero Tolerance across the entire U.S-Mexico border. Parents of young children, including those seeking asylum, were then detained, often for weeks or months. Their children, including pre-verbal children and infants, were torn from their parents' side, reclassified as "unaccompanied minors," dispersed throughout the country, and forced to pursue their legal claims alone, with the government making no plans to reunite them with their parents.[320] Civil Rights complaints filed with the government and discussed broadly in the media, highlighted the harm caused directly to children as a result of the separation. Nonetheless, the government deemed the pilot programs a success and made plans to take away thousands more by vastly expanding the scope of Zero Tolerance.

2018), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/347/27/PDF/G1834727.pdf?OpenElement.

314 OIG, *supra* note 192.

315 Physicians for Human Rights, *supra* note 193.

316 *Id.*

317 *Prosecutor v. Radovan Karadžić*, Public Redacted Version of Judgement Issued on 24 March 2016—Volume I of IV (TC), Case No. IT-95-5/18-T, 24 Mar. 2016.

318 *See* American Immigration Council, *Letter to John V. Kelly, Acting Inspector Gen., Dep't of Homeland Sec., Re: The Use of Coercion by U.S. Department of Homeland Security (DHS) Officials against Parents Who Were Forcibly Separated from Their Children* (Aug. 23, 2018), https://www.aila.org/advo-media/press-releases/2018/complaint-re-coercive-tactics-on-separated-parents/the-use-of-coercion-by-us-department-of-homeland.

319 Shear, Benner, and Schmidt, *supra* note 92.

320 Kopan, *supra* note 66.

Despite a federal court injunction and repeated warnings and ongoing studies from the medical community of the severe short-term and long-term trauma to children caused by parent-child separations, the Trump Administration continued to carry out parent-child separations with gross impunity.[321] The Trump Administration knew—and wholly intended—the traumatic effects of separation to children, as discussed below.

Severity of physical and mental pain or suffering. Neither the statue nor case law provides more specific requirements "which allow an exhaustive classification and enumeration of acts which may constitute torture… Existing case-law has not determined the absolute degree of pain required for an act to amount to torture."[322] There are variables that aid in determining whether the mental suffering is severe enough to rise to the level of torture: "[s]ubjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health will also be relevant in assessing the gravity of the harm."[323] In evaluating the perpetrator's acts, circumstantial considerations may also be relevant such as "the absence of any medical care after abuse, and the repetitive, systematic character of the mistreatment of detainee."[324]

The effects of rending the parent-child bond have been known for decades. The medical and public health community's response to parent-child separations is unequivocal: separating children from their parents to deter migration is a form of state-sanctioned torture against children.[325] At the height of Zero Tolerance, Physicians for Human Rights implored the Trump Administration to put an end to parent-child separations, citing a research study that showed that out of 26 types of trauma, only the experience of being beaten and tortured had a similarly harmful impact as family separation on levels of depression, PTSD, and psychological quality of life.[326] The group concluded that "the relationship of children and parents is the strongest social tie most people experience, and a threat to that tie is among the most traumatic events people can experience."[327]

The American Academy of Pediatrics and the American Medical Association called on the U.S. government halt parent-child separations due to the incalculable emotional and physical harm they caused to children.[328] Representatives from the American Academy of Pediatrics decried the Zero Tolerance policy as "government-sanctioned child abuse" based on their observation of migrant children detained in facilities who were showing signs of "toxic stress" caused by severe emotional strain from their separation from their parents.[329] Such stress, the pediatricians stated, would inhibit children's brain development, impeding their linguistic, social, emotional, and motor skills and substantially impacting their long-term health.[330]

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321 Young Center, *supra* note 206.

322 *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeals Judgement, Case No. IT-96-23-T and IT-96-23/1-A, 12 June 2001 at para. 149.

323 *Prosecutor v. Kvočka* et al., Judgment, Case No. IT-98-30/1-T, 2 Nov. 2001.

324 *Id.*

325 Oberg**,** *supra* note 191. *See also* MacLean, et al., *supra* note 201. Trauma resulting from family separation can severely harm a child's development and create harmful consequences that last into adulthood. Research shows that children who experience more adverse experiences during childhood, such as separation from family and detention, are statistically more likely to experience negative behavioral and physical health outcomes as adults.

326 Physicians for Human Rights, *supra* note 183.

327 *Id.*

328 *Biggest U.S. Doctors Group Condemns Family Separation Polic*y, Politico (June 20, 2018), https://www.politico.com/story/2018/06/20/american-medical-association-family-separation-policy-655677.

329 Wise, *supra* note 184; Miller, *supra* note 185.

330 Miller, *supra* note 185.

Similarly, medical and mental health experts contracted with the Office for Civil Rights and Civil Liberties to inspect DHS family detention facilities decried parent-child separation as "an act of state sponsored child abuse," observing that the "over two thousand innocent children traumatized by [the Zero Tolerance] policy now face a lifetime of increased risk of significant physical and mental health consequences including, anxiety, depression, post-traumatic stress disorder and poor physical health."[331] The US government's own staff filed significant incident reports for thousands of separated children under their care that documented "abuse while in DHS custody."[332]

At no point during the conception or implementation of Zero Tolerance did the Trump Administration have any plan to reunite children with their parents, nor did they have a plan to scale up resources to provide basic, humane care for the sudden influx of traumatized, separated children, toddlers and infants overwhelming the U.S. migrant detention system.[333]

Even after the Trump Administration understood the impact that family separation would create via its pilot projects in Yuma and El Paso, the Administration never developed a plan to mitigate harm or provide basic care for forcibly separated children. The abject absence of such planning by the Trump Administration, when it knew about the harms and the psychological impact of family separation, constitutes evidence that the resulting harm on children was intentional and strategic: to maximize the impact of state-sanctioned violence against children to accomplish its objective of deterrence, punishment and removal.

Torture was perpetrated against children and parents in the custody of and under the control of the United States government

Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose.[334] While the Rome Statute does not require an illicit purpose or perpetration by a government actor, it does require that such acts be perpetrated "upon a person in the custody or under the control of the accused." International law recognizes actual custody as well as doctrines concerning state agent authority that results in "effective control."[335]

Under the pretext of adhering to U.S. law and policy, parents and children were taken into government custody to execute the separation of the family unit while under government control. The act of torture, the physical separation, took place in CBP processing facilities. After the separation, parents and children remained in government custody. Children separated from their parents, no matter how young the child, were forcibly rendered "unaccompanied" and scattered across the country into a byzantine system of government-run child detention facilities intended only for short-term care.[336] Parents were shuttled to

331 *Whistleblowers' Letter to Cameron Quinn*, *supra* note 187.

332 *Abuse in DHS Custody*, *supra* note 199.

333 Flaherty, *supra* note 240; Dickerson, *supra* note 31.

334 *Prosecutor v. Krnojelac,* Judgment, Case No. IT-97-25-T, 15 Mar. 2002 at para. 180 and 186.

335 *Al-Skeini et al. v. UK European Court of Human Rights*, Application No. 55721/07 (Grand Chamber), 7 July 2011.

336 Ainsley, *supra* note 61.

ICE facilities where many were coerced into signing deportation orders. At all times during the acts of alleged torture, families were in the custody and under the control of the U.S. government.

Family separations were not arising only from, inherent in, or incidental to lawful sanctions

The Trump Administration defended parent-child separation by articulating that the measure was either required by law or a lawful exercise of the government's prosecutorial discretion. However, state-sanctioned torture of children should never be deemed incident to a lawful sanction, lest governments be permitted to avoid criminal liability and subvert the prohibition by implementing laws or discretionary policies that on their face require the use of torture.

The Trump Administration argued that the separation of parents and children was required by law. However, immigration law experts understand that parent-child separation was, in fact, a discretionary prerogative available only via executive decision-making. Despite the insistence of the Administration, there is no requirement—let alone precedent—for prosecuting all cases of unauthorize entry into the United States including those involving parents arriving with children. Moreover, there was nothing foreclosing the Administration from creating a system whereby parents were prosecuted, convicted, sentenced to time served (these cases took minutes and were handled in group settings), then returned to their children. To the contrary, the evidence supports the plain observation that the Trump Administration abused its authority to inflict torture upon children in an effort to punish migrants and asylum seekers and to deter migration.

e. Parent-Child Separation under the Zero Tolerance Policy Constitutes the Crime against Humanity of Other Inhumane Acts: Forcible, Unlawful Parent-Child Separation

Children have not been systematically taken from their parents by a government acting with malice and with no objective to reunify the family unit since Nazi Germany. To the contrary, children and families have received explicit, special protection under international law since the Fourth Geneva Convention—a document that, even during times of war, forbid the separation of families,[337] required that children "benefit from any preferential treatment to the same extent as the nationals of the State concerned,"[338] and be reunified with family if found separated or unaccompanied.[339] The Geneva Convention even required the repatriation of the intact family to a neutral or safe country.[340]

The special protection of children and families has only been strengthened over time. The Protocol Additional (Protocol I) to the Geneva Conventions identifies that "children shall be the object of special respect and shall be protected against any form of indecent assault."[341] Protocol I again identifies the need not to separate children from their families even when "arrested, detained or interned for reasons related

337 "Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment." Art. 82, *Geneva Convention Relative to the Protection of Civilian Persons in Times of War* (Geneva IV), 6 UST 3516, Aug. 12, 1949.

338 Art. 38(5), Geneva IV.

339 Art. 24, 38, 50, Geneva IV.

340 Art. 132, Geneva IV.

341 Art. 77(1), *Protocol Additions to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 1125 UNTS. 3, June 8, 1977.

to the armed conflict."[342] Even during wartime, children of occupied territories "evacuated" to foreign locations can only be done so "whenever it involves no risk of harm to the child" and where a robust set of procedures are followed to ensure the child can be easily identified and reunified with their family.[343]

Outside of the context of armed conflict, protection of children and families has also developed into a customary international law. The International Covenant on Civil & Political Rights, recognizing that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State,"[344] forbids state parties from the unlawful or arbitrary interference with the family.[345] The Convention on the Rights of the Child (CRC), ratified by every nation on earth except the U.S., directs that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection."[346] The CRC requires that no child be "separated from his or her parents against their will,"[347] and instructs governments to direct contact with the parents of separated children on a regular basis.[348] The CRC directs that all children and parents seeking "to enter…a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."[349] There can be no question that, under international law, States are forbidden from engaging in indecent assaults upon children and families.

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342 Art. 77(4), citing Art. 75(5), Protocol I ("Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units").

343 "With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:

a) surname(s) of the child;

b) the child's first name(s);

c) the child's sex;

d) the place and date of birth (or, if that date is not known, the approximate age);

e) the father's full name;

f) the mother's full name and her maiden name;

g) the child's next of kin;

h) the child's nationality;

i) the child's native language, and any other languages he speaks;

j) the address of the child's family;

k) any identification number for the child;

l) the child's state of health;

m) the child's blood group;

n) any distinguishing features;

o) the date on which and the place where the child was found;

p) the date on which and the place from which the child left the country;

q) the child's religion, if any;

r) the child's present address in the receiving country;

s) should the child die before his return, the date, place and circumstances of death and place of interment." Art. 78(3), Protocol I.

344 Art. 23(1), *International Covenant on Civil and Political Rights*, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 Mar. 1976) (ICCPR).

345 Art. 17, ICCPR.

346 Preamble, Convention on the Rights of the Child.

347 Art. 9(1), Convention on the Rights of the Child.

348 Art. 9(3), Convention on the Rights of the Child.

349 Art. 10(1), Convention on the Rights of the Child.

Since the London Charter,[350] international law has recognized "a residual category of crimes against humanity which includes serious criminal acts that are not exhaustively enumerated [by statute]."[351] This category of crimes contemplates a "serious attack on human dignity,"[352] and the ICC only considers acts "of a character similar to any other act referred to in [the crimes against humanity section] of the Statute."[353]

Parent-child separation pursuant to the Zero Tolerance policy constituted the crime against humanity of inhumane acts, namely the act of forcible, unlawful parent-child separation. The Rome Statute provides for the prosecution of "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[354]

The Office of the Prosecutor has been unequivocal: "Wherever the evidence permits, it will seek to include charges for crimes directed specifically against children, as well as crimes that acutely or disproportionately affect children."[355]

Other inhumane acts of a similar character

Forced, unlawful parent-child separation is an inhumane act, an assault on the human dignity of a child and their parent, distinguishable from—rather than subsumed by—the crimes outlined above. This crime employed the intentional exploitation of the vulnerability of childhood and the sacred relationship between parent and child. While forced, unlawful parent-child separation could be prosecuted merely as the crime against humanity of torture (intentional infliction of severe physical or mental pain or suffering upon one or more persons in the custody or under the control of the perpetrator), the special nature of the targeted relationship places the criminal conduct in a class of its own. Like torture, forced, unlawful parent-child separation involves the intentional infliction of severe physical or mental pain or suffering of individuals by rending the bond of families under the control of the perpetrator. However, unlike generic torture, forced, unlawful parent-child separation involves exploitation of the vulnerabilities of youth and contemplates ongoing harm (through the duration of the separation). In many cases of parent-child separation pursuant to Zero Tolerance, the added element of separation via unlawful deportation rendered the violation of dignity a continuing event. The ongoing nature of the harm continues as research indicates that the harm to children has not ameliorated even after reunification.

Intent to cause great suffering or serious injury to the body or to mental or physical health

As discussed above, the Trump Administration fully intended to inflict severe suffering and serious physical and mental injury upon children. The direct harm caused by parent-child separation was deemed

350 Nuremberg Charter at Section (c): Crimes against Humanity ("namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated").

351 Karadžić, *supra* note 317.

352 *Id.*

353 Art. 7(1)(k), Elements of Crimes.

354 *Id.*

355 *Policy on Children*, *supra* note 310.

by the Administration to be critical to the success of the Zero Tolerance policy.[356] Despite a federal court injunction and a sustained outcry from the medical community of the severe trauma to children caused by their prolonged separation from their parents, the Trump Administration continued to carry out family separations with gross impunity.[357]

Prosecuting Parent-Child Separation via Zero Tolerance & the Political Context for Domestic Accountability

The facts laid out above give rise to crimes that fall within the jurisdiction of the international criminal court pursuant to the theory of "transboundary crimes." As a matter of complementarity, there will be no domestic criminal inquiries into the crimes committed. The manner in which the crimes were carried out, including the fact that these were crimes against children and executed against thousands of children and parents, indicate that the situation is both sufficiently grave and would serve the interests of justice to investigate.

a. Jurisdiction of the International Criminal Court

As a precondition to jurisdiction under 12(a) of the Rome Statute, the ICC may only preside over cases in which crimes—including crimes against humanity—were committed by a State Party's national, in the territory of a State Party, or in a state that has accepted the jurisdiction of the Court.[358] On its face, it would appear that the Statute requires State Party status or state acceptance of jurisdiction in order to prosecute. While the U.S. participated in negotiations leading to the drafting of the Rome Statute, the U.S. voted against the Statute in 1998, signed it in 2000, and formally withdrew its signature in May 2002. Categorically, the U.S. is *not* a State Party to the Rome Statute. As a result, the most obvious conclusion is that the ICC has no jurisdiction over the United States as a sovereign, non-party state.

Deportation, however, is a unique crime in that its essential elements take place on the territory of more than one state. The distinct consideration for jurisdiction pursuant to the crime of deportation was the subject of a recent decision related to the situation in Myanmar. In that decision, the ICC followed both international treaty law and the general principles of national law[359] in holding:

> [T]he Chamber considers that the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled *if at least one legal element of*

356 *Letter to John V. Kelly, supra* note 318.

357 Young Center, *supra* note 206.

358 Understanding the International Criminal Court, *supra* note 219.

359 "The territoriality of criminal law […] is not an absolute principle of international law and by no means coincides with territorial sovereignty." Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," 6 Sept. 2018, ICC-RoC46(3)-01/18-37. More specifically, a number of national jurisdictions have adopted legislation to the effect that the exercise of criminal jurisdiction requires the commission of at least one legal element of the crime on the territory of a State. By the same token, numerous States have adopted legislative frameworks based on the principle that criminal jurisdiction may be asserted if part of a crime takes place on the territory of a State. Such a notion of criminal jurisdiction has also been set forth in different international instruments.

> *a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party*.[360]
>
> In addition, and more specifically, the *inherently transboundary nature of the crime of deportation* further confirms this interpretation of article 12(2)(a) of the Statute… an element of the crime of deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States. What is more, the drafters of the Statute did not limit the crime of deportation from one State Party to another State Party. Article 7(2)(d) of the Statute only speaks of displacement from "the area in which they were lawfully present" and the elements of crimes generally refer to deportation to "another State." Therefore, the inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding the destination reflects the intentions of the drafters to, inter alia, allow for the exercise of the Court's jurisdiction when one element of this crime or part of it is committed on the territory of a State Party.[361]
>
> In the light of the foregoing, the Chamber is of the view that acts of deportation initiated in a State not Party to the Statute (*through expulsion or other coercive acts*) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute.[362]

In other words, when the U.S. commits the crime against humanity of deportation, jurisdiction vests with the ICC if the victims are repatriated to countries that are States Parties to the Rome Statute. All countries of Central America, with the exception of Nicaragua, are party to the Rome Statute.[363] The Pre-Trial Chamber also found that the ICC may exercise jurisdiction over any other crimes in Article 5 of the Rome Statute pursuant to this analysis and cited two particular crimes for consideration.[364]

With respect to the crime of persecution, the trial court held that it will find jurisdiction where the crime of persecution is brought in connection with an act of which any element takes place in a State Party:

> [P]ersecution against any identifiable group collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, *in connection with any act referred to in this paragraph* […]. The reference to "any act referred to in this paragraph" signifies that persecution must be "committed in connection with any other crime within the jurisdiction of the Court," which includes the crime against humanity of deportation, provided that such acts are committed pursuant to any of the grounds mentioned in article 7(1)(h) of the Statute.[365]

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360 *Id.*, emphasis added.

361 *Id.*, emphasis added.

362 *Id.*, emphasis added.

363 See state parties including Guatemala, Honduras, and El Salvador, *State Parties to the Rome Statute: Latin American and Caribbean States*, International Criminal Court, https://asp.icc-cpi.int/en_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/latin%20american%20and%20caribbean%20states.aspx.

364 Decision on the Prosecution's Request, *supra* note 359.

365 *Id.*, emphasis added.

Thus, persecution through deportation can fall under the jurisdiction of the ICC where it is demonstrated that the United States acted with the requisite intent to deprive a group or collectivity of a fundamental right.

With respect to the crime of "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health," such crimes may also come under the jurisdiction of the court if part of the crime takes place in a State Party. The ICC will take jurisdiction over particularly serious inhumane acts of a transboundary character (for example, in such cases where children are tortured to compel their parents to leave the country). In this case, under the Zero Tolerance policy, the Trump Administration persecuted and tortured children in order to compel their parents to abandon their asylum claims and leave the U.S. and to deter third parties from migrating from Central America. The Administration's illicit purpose was accomplished upon the parents' return to their country of origin, rendering these acts transboundary in nature and thus within the jurisdiction of the ICC.

b. Complementarity and Admissibility

International accountability is designed as a measure of last resort, as the Statute recognizes that "States have the first responsibility and right to prosecute international crimes."[366] The ICC's role is to "complement pre-existing domestic criminal justice processes and [to] assert jurisdiction only when those processes have failed or are inoperative."[367] The ICC only intervenes to "investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole."[368] Taken together, in order to be admissible to the Court, the case for parent-child separation under the policy of Zero Tolerance must 1) meet the complementarity principle, 2) be a case of sufficient gravity as to be brought before the Court, and 3) must serve the interests of justice. These principles serve to limit the potential risk for politicized prosecutions.[369] To reach this analysis, the ICC has laid out a two-step inquiry: "[F]irst, as to whether the relevant States are conducting or have conducted national proceedings in the same matter (complementarity); second, if the conclusion is in the negative, as to whether the gravity threshold is met (gravity)."[370] Where the case is admissible, the Court must still determine whether prosecution would serve the interests of justice.

Complementarity

The Rome Statute allows for international jurisdiction where a State fails in its responsibility to pursue accountability on behalf of victims of international crimes. The complementarity principle implemented at the ICC "is a two-step assessment, addressing first whether there is a national investigation or prosecution

366 Rome Statute Preamble Clause 2 ("Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity…"), Preamble Clause 6 ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes…"), Preamble Clause 10 ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions…"); see also, ICC Report, Understanding the Rome Statute, (International Criminal Court 2020), available online https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

367 Beth Van Shaack and Ronald C. Slye, International Criminal Law and Its Enforcement, 3rd ed. (2014).

368 Understanding the International Criminal Court, *supra* note 219.

369 Harold Hongju Koh, *International Justice 5.0*, U.S. Department of State (Nov. 8, 2012), https://2009-2017.state.gov/s/l/releases/remarks/200957.htm.

370 Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan (12 Apr. 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF.

in relation to the same case as the one before the ICC, and where such proceedings exist, whether they are vitiated by unwillingness or inability."[371] Where a State simply fails to investigate or prosecute, the Court need not even reach the question of whether the State is "unwilling or unable genuinely to carry out the investigation or prosecution."[372] Instead, the Court may immediately entertain proceedings.

The United States has not launched a criminal investigation into family separations under Zero Tolerance. Nor has the U.S. government indicated any intention of pursuing a criminal investigation into the crimes committed under the policy of Zero Tolerance. The U.S. government has not even acknowledged that the acts carried out under Zero Tolerance were, in fact, criminal. Instead, the current Administration describes parent-child separation as a "human tragedy that occurred when our immigration laws were used to intentionally separate children from their parents and legal guardians (families)" without acknowledging that the human tragedy was the deliberate consequence of systematic criminal acts committed by the Trump Administration.[373] The failure of the U.S. government to identify parent-child separation pursuant to Zero Tolerance as a crime reinforces the use of family separation as a legitimate exercise of government policy—virtually guaranteeing that it can be undertaken again in the future.

Many may characterize any attempt to criminalize family separation as a politicized prosecution.[374] This is a red herring. Where the elements of a crime are met, the global community must not allow the politicization of an issue to interfere with the pursuit of justice. "Seeking accountability for torture is decidedly not a political vendetta,"[375] especially when the torture victims include children, toddlers and infants. While the current administration lacks the political will to hold members of the Trump Administration accountable for their crimes against migrant children and their families, government inaction does not constitute a legitimate exercise of sovereignty where it enables impunity for crimes against humanity.

Gravity

Whether a case meets the gravity threshold is a determination left to the Prosecutor "both as a threshold [matter] and as a relative consideration in the exercise of discretion[.]"[376] The gravity requirement is meant to be read in harmony with the entire Statute, and the construction of gravity is designed so as not to undermine or prioritize the types of crimes contemplated by the Statute itself (*i.e.,* crimes against humanity). The Office of the Prosecutor has acknowledged that "[i]n general, the Office will regard crimes against or affecting children as particularly grave, given the commitment made to children in the Statute, and the fact that children enjoy special recognition and protection under international law."[377]

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371 Mark Klamberg, ed., Commentary on the Law of the International Criminal Court (2017), fn 215.

372 *Katanga*, *supra* note 244 ("Therefore, in considering whether a case is inadmissible under Article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the persons concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second-halves of subparagraphs (a) and (b) and to examine the question of unwillingness and inability").

373 Exec. Order No. 14011, *supra* note 209.

374 Harold Hongju Koh, *supra* note 369.

375 David Luban, *The "Interests of Justice" at the ICC: A Continuing Mystery*, Just Security (Mar. 17, 2020), https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/.

376 *Prosecutor v. Ntaganda*, Judgment on the Prosecutor's Appeal, ICC-01/04-02/06, 30 Mar. 2021; *see also* Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 Fordham Int'l L. J. 5 (2008), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2162&context=ilj.

377 *Policy on Children*, *supra* note 310 at para. 57.

Pursuant to the Prosecutor's discretion, gravity has been designed to assess "the scale, nature, and manner of commission of the crimes, and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation."[378] The scale of crimes is calculated by contemplating "the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period)."[379]

Over 5,000 children were separated from their parents at the height of the Trump Administration's assault on migrant families.[380] As of September 2021, the Interagency Task Force on the Reunification of Families under the Biden Administration reported that 1,727 children had still not been reunited with their parents.[381] These numbers, while shocking, do not include the total number of family members, including the children's parents, who were separated, detained, and forced into deportation pursuant to Zero Tolerance. Furthermore, as detailed in numerous reports by physicians, social workers, and mental health experts, the long-term effects of bodily and psychological harm to children caused by the trauma of family separation will likely impact them for the rest of their lives. The policy of Zero Tolerance took place on a massive scale.

While being careful not to prioritize crimes, the Prosecutor is directed to consider the nature of the crimes.[382] For example, certain types of offenses or offenses involving vulnerable groups are elevated for consideration. Indeed, crimes against children are specifically listed as integral to considering the "nature of the crime": the Prosecutor is directed to consider crimes "such as killings, rapes and other crimes involving sexual or gender violence *and crimes committed against children*."[383] Indeed, the Office of the Prosecutor has explained:

> The experience of suffering or witnessing serious crimes is horrific, and the impact on children is especially devastating. Such experiences impede their development and ability to reach their true potential, as, for example, in the case of killings, mutilation, child recruitment or use, torture, enslavement, forcible transfer, attacks against buildings dedicated to education and health care, pillaging and sexual and gender-based crimes affecting children. There is also serious harm caused to children's families and communities, extending to future generations. The effect of the loss of parents, caregivers or other family members on children is also extremely severe. The Office will ensure that an assessment of the impact of the alleged crimes on children is incorporated into its analysis of the gravity of potential cases.[384]

When considering the "manner of commission of the crimes" the Prosecutor is directed to assess the means employed to carry out the crime including "the *intent of the perpetrator…,* the extent to which

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378 The Office of the Prosecutor, *Report on Preliminary Examination Activities 2020* (Dec. 14, 2020), https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf. *See also* in concurrence *Prosecutor v. Abu Garda,* Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 Feb. 2010; ICC-01/09-19-Corr; ICC-02/11-14-Corr.

379 Policy Paper on Preliminary Examinations, International Criminal Court (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf.

380 Associated Press, *supra* note 155.

381 Interagency Task Force, *supra* note 163.

382 Policy Paper, *supra* note 379.

383 *Id.*, emphasis added.

384 *Policy on Children*, *supra* note 310 at para. 58.

the crimes were systematic or result from a plan or organised policy or otherwise resulted from *the abuse of power or official capacity*, and *elements of particular cruelty, including the vulnerability of the victims*, any *motives involving discrimination*."[385] As demonstrated above, the Trump Administration abused its authority in establishing its cruel policy of parent-child separation under Zero Tolerance to be waged against vulnerable migrant families and children from Central America who were seeking asylum in the U.S.

Lastly, the Prosecutor is directed to consider the "impact of crimes… in light of, inter alia, the *sufferings endured by the victims and their increased vulnerability*; the *terror subsequently instilled*, or the social, economic and environmental damage inflicted on the affected communities."[386] The Trump Administration indisputably exacerbated the suffering endured by migrant victims of the Zero Tolerance policy—especially young children, who were rendered even more vulnerable by being wrenched from their parents and disappeared into a system where many had no hope of seeing their parents again. Government officers systematically wielded tools of terror, including physical and psychological force, to coerce separated parents into relinquishing their rights to their children and "consenting" to deportation. The extent of the trauma and harm inflicted on thousands of migrant family members and their communities, both in the U.S. and in Central America, is impossible to calculate.

Interests of Justice

The Rome Statute offers the Prosecutor discretion in deciding whether to undertake an investigation where "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[387] The Prosecutor has recognized that the exercise of discretion pursuant to this exception is an extraordinary measure because "there is a presumption in favour of investigation or prosecution wherever the criteria [jurisdiction and admissibility] have been met."[388] The Prosecutor need not affirmatively demonstrate that proceeding with an investigation is in the interests of justice where jurisdiction and admissibility are established.[389] Where children are concerned, "there is a strong presumption that investigations and prosecutions of crimes against or affecting children are in the interests of justice."[390] To uphold the object and purpose of the Statute, to "guarantee lasting respect for and the enforcement of international justice,"[391] and to serve the interests of the victims in seeing justice restored by having access to the *only* justice mechanism available, we urge that this case proceed in order to serve the interests of justice.

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385 *Id.*, emphasis added.

386 The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (Nov. 2013), https://www.legal-tools.org/doc/acb906/pdf/ at para. 65, emphasis added (hereinafter, *OTP Policy Paper*).

387 Art. 53(a)(c), Rome Statute; *see also* Art. 2(c) ("A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime…").

388 Preamble, Rome Statute.

389 See. *OTP Policy Paper*, *supra* note 386.

390 *Policy on Children*, *supra* note 310 at para. 59.

391 Preamble, Rome Statute.

Concluding Observations and Recommendations

The following observations and recommendations are designed to provide a roadmap to accountability for crimes against humanity. However, it must be noted, *above all else*, if there are children *still* separated from their parents and families, their reunification must be the paramount goal of the U.S. government. Their reunification should be immediate, no matter the cost. The following recommendations on accountability should be considered while the government proceeds with immediate reunification.

a. Recommendation to the Office of the Prosecutor of the International Criminal Court

The prosecution of crimes against children has been a stated priority of the Office of the Prosecutor (OTP) "in an effort to close the impunity gap."[392] The formal policy of the Office articulates a deep commitment to "pay[ing] particular attention to sexual and gender-based crimes and crimes against children."[393] This policy has been steadfastly reaffirmed in strategic plans over the years.[394]

In recognizing the special considerations for children, the OTP lends great deference to the Convention on the Rights of the Child, an interdisciplinary human rights document ratified by *every* country in the world except the United States.[395] In so doing, the OTP recognizes that children are:

> …persons with individual rights, as members of families and as constituents of multi-generational communities. This recognition corresponds with international understandings, set forth in the 1989 Convention on the Rights of the Child ("CRC") and many other international instruments, that children are vulnerable and are entitled to special care and protection, and that their interests, rights and personal circumstances should be given due consideration.[396]

The recognition of the need for accountability related to crimes against children came up recently for ICC Prosecutor, Karim Kahn, during a trip to Ukraine. In a coincidental use of the term "zero tolerance," the Prosecutor insisted that the ICC would maintain its own policy of "zero tolerance" with respect to crimes against children as the war in Ukraine intensified.[397] Presumably, zero tolerance of atrocity crimes against children applies with equal force for children from the Global South. In light of the foregoing, we recommend that the Office of the Prosecutor initiate an investigation *propio motu*, pursuant to the authority vested in the OTP under Article 15.

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392 *Policy on Children*, *supra* note 310 at para. 114.

393 *Id.*

394 In its Strategic Plan 2012-2015, the Office elevated this issue to one of six strategic goals, committing to "pay particular attention to sexual and gender-based crimes and crimes against children." The Office of the Prosecutor, *Strategic Plan June 2012-2015* (Oct. 11, 2013), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Strategic-Plan-2013.pdf. This commitment was reaffirmed in the Strategic Plan 2016-2018, in which one of the goals is to "continue to integrate a gender perspective in all areas of the Office's work and to pay particular attention to sexual and gender-based crimes and crimes against and affecting children, in accordance with Office policies." The Office of the Prosecutor, *Strategic Plan 2016-2018* (Nov. 16, 2015), https://www.icc-cpi.int/sites/default/files/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf.

395 *Policy on Children, supra* note 310 at para 11 (stating, "[t]his Policy is based on the Statute, Rules, Regulations of the Court and Regulations of the Office, and it aligns with other policy documents. Where appropriate, it is also based on applicable treaties, particularly the CRC, and the principles and rules of international law. It also draws on the experience of the Office, its existing good practices and lessons learned, as well as relevant jurisprudence, including that of the ICC and other courts and tribunals.).

396 *Policy on Children*, *supra* note 310 at para. 3.

397 Anthony Deutsch and Stephen Farrell, *ICC Insists on "Zero Tolerance" of Crimes against Children in Ukraine*, Reuters (Mar. 16, 2022), https://www.reuters.com/world/icc-prosecutor-khan-visits-ukraine-holds-virtual-meeting-with-president-2022-03-16/#:~:text=THE%20HAGUE%2FLVIV%2C%20March%2016,as%20fighting%20intensifies%20in%20Ukraine.

b. Recommendations to the U.S. Government

A review of the findings made in this report lead to the conclusion that crimes against humanity have been perpetrated against children and families pursuant to the policy of parent-child separation under Zero Tolerance. To address the fact that the prior Administration committed grave crimes against children and families, and to prevent these crimes from being committed in the future, we call upon the Biden Administration to adopt the following recommendations.

Recommendation 1: The Biden Administration Must Restore Victims of Crimes Against Humanity Perpetrated by the Trump Administration

The Biden Administration must make every effort, through any civil legal mechanisms available, to restore the victims of crimes against humanity. To date, the Biden Administration has not agreed to financial compensation as part of any settlement with the victims of parent-child separation pursuant to the Trump Administration's policy of Zero Tolerance. Moreover, as of the writing of this report, separated parents attempting to reunify with their children in the United States are doing so under temporary grants of parole. These families have not been offered a grant of permanent protection (or semi-permanent protection as in the case of DACA). As a result, they may face deportation, and the possibility of another separation from their child, at any point in the future.

Recommendation 2: Appoint a Special Prosecutor with Special Expertise to Investigate Avenues for Domestic Criminal Accountability

In March of 2022, the Biden Administration's appointment of Ambassador-at-Large for Global Criminal Justice was confirmed by the Senate. The Office of Global Criminal Justice (GCJ) advises the "U.S. Government and foreign governments on the appropriate use of a wide range of transitional justice mechanisms, including truth and reconciliation commissions, lustrations, and reparations, in addition to judicial processes."[398] In addition, GCJ provides "advice and expertise on transitional justice, including ways to ensure justice and accountability for genocide, crimes against humanity, and war crimes, as well as other grave human rights violations."[399] The GCJ is well positioned to coordinate with a special prosecutor to investigate the allegations of crimes against humanity contained within this report. To that end, the Biden Administration, in connection with the U.S. Attorney General, should appoint special counsel to investigate allegations of crimes against humanity perpetrated by the previous Administration.[400]

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398 Office of Global Criminal Justice, *About Us*, U.S. Department of State, https://www.state.gov/about-us-office-of-global-criminal-justice/.

399 *Id.*

400 28 C.F.R. § 600.1. Grounds for appointing a Special Counsel. The Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General, will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted and— (a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and (b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.

Recommendation 3: Self-refer the Situation of Parent-Child Separation pursuant to Zero Tolerance or Explicitly Submit to the Jurisdiction of the International Criminal Court.

If the Biden Administration persists in its unwillingness to restore the victims of atrocity crimes committed by the Trump Administration—whether by civil or criminal accountability measures—then it should refer the matter for investigation by the Office of the Prosecutor of the ICC[401] and/or submit to the jurisdiction of the ICC with respect to the crime in question.[402] Assuming that the Biden Administration is unable or unwilling to investigate or prosecute crimes against humanity that took place inside the United States and at the hands of the prior Administration, for any reasons—political or otherwise, then the decision should be made to allow a unbiased prosecutorial body with significant subject matter expertise investigate the matter. This can be accomplished by referring the situation directly to the Prosecutor or, if the Prosecutor takes up the investigation on a *propio motu* basis, by accepting the exercise of jurisdiction by the Court specifically for the crimes against humanity being investigated.

Recommendation 4: Congress Must Pass the Crimes Against Humanity Act

For over a decade, advocates have called upon the United States government to "eliminate any possibility that it would remain a safe haven for war criminals and other perpetrators" of atrocity crimes.[403] Experts have observed that "U.S. federal criminal law and military law have become comparatively antiquated during the last seventeen years in their respective coverage of atrocity crimes" notwithstanding the extensive progression of international criminal law over the same period.[404] Former Ambassador-At-Large for War Crimes, David Scheffer, has bluntly stated:

> [T]he prospects of U.S. courts exercising jurisdiction (subject matter, territorial, personal, passive, or protective jurisdiction) over atrocity crimes under current law remain relatively poor. U.S. Attorneys, in even the best of jurisdictional circumstances, appear not to have pursued the types of investigations and possible prosecutions one might expect if there were an aggressive commitment to bringing perpetrators of atrocity crimes to justice…[405]

401 Article 14 of the Rome Statute allows for self-referral. "Self-referral takes place when a State Party itself refers alleged crimes committed on its territory or by its nationals to the Prosecutor. Self-referrals has emerged as the major way to seize the Court. Interestingly, drafters of the Rome Statute shared an assumption that self-referrals would be an exception…But the subsequent practice of States Parties has changed the underlying meaning of 'referral' in the Rome Statute. After entry into force of the Statute, vast majority of situations before the Court has been brought by self-referrals." Giorgi Nakashidze, Uniting for Justice: Group Referrals to the International Criminal Court, OpinioJuris (Mar. 25, 2022), https://opiniojuris.org/2022/03/25/uniting-for-justice-group-referrals-to-the-international-criminal-court/.

402 Rome Statute Article 12(3) states: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

403 David Scheffer, *Closing the Impunity Gap in U.S. Law*, Northwestern Journal of International Human Rights 8:1 (Fall 2009), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1092&context=njihr.

404 *Id.*

405 *Id.*

Passage of the Crimes Against Humanity Act would remediate the inability to pursue accountability for atrocity crimes by providing "a clear basis for such prosecutions."[406] In the absence of guidance for domestic prosecutions of perpetrators of crimes against humanity, whether the perpetrators be foreign or domestic, the United States government equivocates on its commitment to investigate and prosecute the full range of the *worst imaginable crimes* that might be committed against mankind.

c. Concluding Observations on the Role of Universal Jurisdiction in Prosecuting those Accountable for Committing Crimes Against Humanity against Children and Families

The applicability of universal jurisdiction contemplates the authority of any state to assert jurisdiction over an individual in connection with their unlawful act, irrespective of the nationality of the perpetrator or the territory on which the act took place. Pursuant to this theory of the law, some crimes are so exceptionally grave that they simply must be punished because the consequences of impunity are too great.[407] The result is that the one may be prosecuted by virtue of having committed the offense, regardless of where. In addition to helping close the impunity gap, universal jurisdiction can provide access to justice for victims of international crimes that may not have otherwise been prosecuted.[408]

Should the ICC Prosecutor or the U.S. decline to prosecute the crimes against humanity detailed above, these offenses may still be prosecutable via universal jurisdiction. In particular, acts of torture are routinely prosecuted pursuant to the legal theory of universal jurisdiction. The Convention against Torture obligate states to bring foreign nationals to justice for crimes against humanity. Those states that have implemented extraterritorial jurisdiction for individuals in their custody who have committed the crime of torture or other crimes against humanity should consider initiating investigations of and, where appropriate, prosecutions of U.S. officials for crimes against humanity.

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406 *Id.*

407 Beth Van Schaak and Ronald Slye, International Law and its Enforcement, 3rd ed. (2015).

408 Center for Constitutional Rights, Factsheet: Universal Jurisdiction (Dec. 7, 2015), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-universal-jurisdiction#:~:text=The%20principle%20of%20universal%20jurisdiction,were%20committed%20in%20another%20country.