

COMMENTS

GIVE ME YOUR TIRED, YOUR POOR (UNLESS THEY ARE FROM “ONE OF THREE MEXICAN COUNTRIES”): UNACCOMPANIED CHILDREN AND THE HUMANITARIAN CRISIS AT THE U.S. SOUTHERN BORDER¹

INTRODUCTION

There is undoubtedly a humanitarian crisis at the southern border of the United States.² At the height of the Trump Administration’s Family Separation policy in Summer 2018, thousands of children were separated from their parents.³ Photos of children in

1. The reference to “three Mexican countries” was the headline on a Fox & Friends story discussing the Trump Administration’s decision to suspend foreign aid to Guatemala, Honduras, and El Salvador. Herman Wong, *Fox News Host Apologizes for ‘3 Mexican Countries’ Chyron: ‘It Never Should Have Happened’*, WASH. POST (Mar. 31, 2019), https://www.washingtonpost.com/arts-entertainment/2019/03/31/fox-news-host-apologizes-mexican-countries-chyron-it-never-should-have-happened/?noredirect=on&utm_term=.3e8c7a84a641 [<https://perma.cc/EY7V-GLXF>].

2. In April 2019, the Deputy Commissioner of Customs & Border Protection (“CBP”) stated, “The humanitarian crisis created by a massive influx of family groups and unaccompanied children in recent months has forced CBP to reallocate resources away from law enforcement, trade and travel missions to process and provide care for those in our custody.” *CBP Releases March Statistics for Southwest Border Migration*, U.S. CUSTOMS & BORDER PROT. (Apr. 9, 2019) [hereinafter *CBP March Statistics*], <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-statistics-southwest-border-migration> [<https://perma.cc/UH66-4LUQ>].

3. In subsequent litigation, the government certified a class of 2816 children, 2737 of which were separated from a parent. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUM. SERVS. OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 10 (2019) [hereinafter *SEPARATED CHILDREN IN ORR CARE*]; *see also infra* Section III.A.3. However, because the government had no formal tracking system in place, the total number of children separated from their families is unknown. *SEPARATED CHILDREN IN ORR CARE*, *supra* at 13.

cages,⁴ children sleeping on the floor wrapped in mylar blankets,⁵ and children screaming,⁶ went viral. This issue was in the news again in June 2019 when several Democratic Presidential candidates visited a detention center for unaccompanied children in Florida.⁷ This issue reflects the inadequacies within the United States immigration system. Specifically, it reflects a failure to respond to the increased number of children and families seeking admission into the United States, primarily at the southern border.⁸

This Comment argues that the United States's response to the humanitarian crisis at its border is wholly inadequate. It argues that the government *chose* to advance two policies, Zero Tolerance and Family Separation, that exacerbated the humanitarian crisis at the border. These policies facilitated practices that violated do-

4. Nomaan Merchant, *Hundreds of Children Wait in Border Patrol Facility in Texas*, ASSOCIATED PRESS (June 18, 2018), <https://www.apnews.com/9794de32d39d4c6f89fbefaea3780769> [<https://perma.cc/734D-YDXK>]. Some immigration advocates shared photos of children in cages that were actually from 2014, not from summer 2018. Anne Flaherty & Calvin Woodward, *AP Fact Check: Fallacies on Both Sides in Immigration Debate*, ASSOCIATED PRESS (May 29, 2018), <https://www.apnews.com/d110c36836ab4003ad77396025616f04> [<https://perma.cc/CP5E-KSKV>]. Unfortunately, the inhumane treatment of unaccompanied children in government custody is not a new issue.

5. Merchant, *supra* note 4.

6. Dominique Mosbergen, *The Heartbreaking Story Behind That Viral Crying Toddler Photo*, HUFFINGTON POST (June 18, 2018, 8:09 AM), https://www.huffpost.com/entry/crying-toddler-border-viral-photo-john-moore-getty-photographer_n_5b277ec6e4b0f9178a9edc31 [<https://perma.cc/LPD3-H99A>]. This two-year-old Honduran girl was featured as *Time's* July 2018 cover. Kainaz Amaria, *Time Magazine's Cover Isn't Bold or Brave. It's Exploitative.*, VOX (June 22, 2018, 1:10 PM), <https://www.vox.com/2018/6/21/17488680/time-magazine-cover-family-separation-border-trump-john-moore> [<https://perma.cc/5529-NSL3>].

7. Maxwell Strachan, Angelina Chapin & Gavriella Jacobovitz, *Elizabeth Warren Says Detained Kids Treated 'like Little Prisoners' at Homestead Shelter*, HUFFINGTON POST (June 26, 2019, 11:39 AM), https://www.huffpost.com/entry/elizabeth-warren-homestead-migrant-children-debates_n_5d1382abe4b01ab45fc182b4 [<https://perma.cc/9HHF-NSJN>].

8. The total number of migrants apprehended at the southwestern border has decreased since 2000, when 1,643,679 migrants were apprehended. U.S. BORDER PATROL, SOUTHWEST BORDER SECTORS TOTAL ILLEGAL ALIEN APPREHENSIONS BY FISCAL YEAR (2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf> [<https://perma.cc/CH26-3F8G>]. By comparison, from October 2018 through August 2019, 811,016 migrants were apprehended at the southwestern border. U.S. CUSTOMS & BORDER PROT., SOUTHWEST BORDER MIGRATION FY 2019, <https://www.cbp.gov/newsroom/stats/sw-border-migration> [<https://perma.cc/Q3TC-79XG>]. What makes this situation a humanitarian crisis is not the number of apprehensions; it is *who* is apprehended. In the first six months of Fiscal Year 2019, sixty percent of apprehended migrants at the southwestern border were families and unaccompanied children, generally from Guatemala, Honduras, and El Salvador. *CBP March Statistics*, *supra* note 2. The number of families apprehended increased 370% between Fiscal Year 2019 and Fiscal Year 2018. *Id.*

mestic and international law. Most importantly, this Comment argues that the United States government traumatized one of the most vulnerable groups of people in the world: children.

Part I discusses United States immigration law, specifically as it relates to unaccompanied children. It will also discuss the background of the Zero Tolerance and Family Separation policies implemented in response to the border crisis. Part II will discuss the United States's international legal obligations under the Convention on the Rights of the Child. Part III will discuss the policy implications of Zero Tolerance and Family Separation on domestic law. It will also provide policy alternatives and recommendations. Lastly, Part IV will discuss the policy implications of Zero Tolerance and Family Separation under international law.

I. UNITED STATES FEDERAL LAW

First, this Part will discuss what happens to an unaccompanied child when she reaches the United States border. This process is also applicable to children who arrive at the border with their family but are subsequently separated. This Part will then discuss the rights of children in government detention under the *Flores* Settlement Agreement and relevant federal law. Lastly, this Part will discuss how the Trump Administration's Zero Tolerance and Family Separation policies impacted unaccompanied children.

A. *Custody and Detention of Unaccompanied Children*

Noncitizens arriving at the border must navigate both the custodial system and the removal system.⁹ While this Part focuses on the rights of children within the custodial system, a child's journey does not end there. An immigration judge may make the discretionary decision to remove or deport the child at the end of the child's immigration proceedings.¹⁰ The custodial system is meant to provide for the child's care while the child's removal proceedings in immigration court are pending.¹¹ There are typically two ways

9. M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 333 (2010).

10. 8 U.S.C. § 1229a(a)(1) (2018).

11. Somers et al., *supra* note 9, at 333–34.

that the government cares for an unaccompanied child in its custody: detention or release to a sponsor.¹² The custodial process for unaccompanied children involves three agencies: the Department of Justice (“DOJ”), which is responsible for the adjudication of immigration law;¹³ the Department of Homeland Security (“DHS”), which is responsible for the enforcement of immigration law;¹⁴ and the Department of Health and Human Services (“HHS”), which is responsible for the care and custody of unaccompanied children.¹⁵

The custodial process involves two periods of detention. First, when a child arrives at the border, or is apprehended within the United States, the child is typically placed in CBP custody.¹⁶ CBP must initially determine whether the child is an “unaccompanied alien child[]” (“UAC”).¹⁷ CBP detains the child pending UAC status

12. Ashley Ham Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J. C.R. & SOC. JUST. 68, 74 (2014).

13. Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 379 (2017). The Attorney General heads the Executive Office of Immigration Review and appoints administrative law judges to serve as immigration judges. *Id.* at 402; *see also* § 1101(b)(4) (defining the term “immigration judge” as an attorney appointed by and subject to the supervision of the Attorney General). This can create a conflict of interest for immigration judges, who serve at the discretion of the Attorney General. *See* Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will To Make It an Article I Court?*, 19 BARRY L. REV. 17, 19–20 (2013) (arguing that administrative immigration courts cannot provide the kind of judicial independence necessary to conduct a fair and impartial trial).

14. Chen, *supra* note 13, at 379. The Homeland Security Act divided immigration enforcement responsibilities to three agencies within DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.); Chen, *supra* note 13, at 379. First, the Homeland Security Act created U.S. Citizenship and Immigration Services (“USCIS”), which handles immigration service functions, such as processing immigration benefits, refugee applications, and issuing green cards. *Our History*, U.S. CITIZENSHIP & IMMIGRATION SERV’S, <https://www.uscis.gov/about-us/our-history> (last updated May 25, 2011) [<https://perma.cc/LD7X-P6Y3>]; *A Day in the Life of USCIS*, U.S. CITIZENSHIP & IMMIGRATION SERV’S, <https://www.uscis.gov/about-us/a-day-life-uscis> (last updated Apr. 20, 2018) [<https://perma.cc/VBB8-VBSF>]. Second, it created Immigrations and Customs Enforcement (“ICE”), which is responsible for the internal enforcement of civil and criminal immigration law. *History*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/history> (last updated Mar. 4, 2019) [<https://perma.cc/SKQ6-LRSR>]. Lastly, it created CBP, which patrols all U.S. borders and ports of entry. *About CBP*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/about> (last updated Sept. 18, 2019) [<https://perma.cc/MD24-LFZX>].

15. Somers et al., *supra* note 9, at 341. This responsibly is delegated to the Director of the Office of Refugee Resettlement (“ORR”) within HHS. *Id.*; *see also* 6 U.S.C. § 279(b)(1)(A) (2018) (“[T]he Director of [ORR] shall be responsible for . . . coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status . . .”).

16. Pong, *supra* note 12, at 74.

17. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 5 & n.24 (2017). Even if the child does not meet the statutory

determination.¹⁸ If the child meets the requirements for UAC status, CBP must normally transfer the child to ORR within seventy-two hours of making the status determination.¹⁹ This rule may only be violated in “exceptional circumstances.”²⁰

Second, after UAC status determination, the child is transported from CBP to ORR custody.²¹ ORR must ensure that the child is “promptly placed in the least restrictive setting that is in the best interest of the child.”²² Realistically, ORR has two choices: release the child to an individual sponsor or detain the child during the pendency of the child’s immigration proceedings. ORR may release the child to an individual sponsor if ORR determines that the “proposed custodian is capable of providing for the child’s physical and

definition of a UAC, CBP must notify the HHS within forty-eight hours if the agency suspects that the child is under eighteen. 8 U.S.C. § 1232(b)(2) (2018). If the child is from a contiguous country, DHS must also determine, within forty-eight hours, whether the child has been a victim of trafficking or is at risk of becoming trafficked. § 1232(a)(2), (4). CBP must immediately transfer the child to HHS if the child meets these criteria. § 1232(a)(4).

18. KANDEL, *supra* note 17, at 6. A child is deemed to be a UAC if the child (1) is under eighteen, (2) “has no lawful immigration status in the United States,” and (3) has “no parent or legal guardian in the United States” or “no parent or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C. § 279(g)(2)(A)–(C) (2018). Usually, CBP also provides the UAC with a Notice to Appear, a document that the government files with the immigration court to commence civil removal proceedings against the child. Pong, *supra* note 12, at 74.

19. 8 U.S.C. § 1232(b)(3) (2018). UACs are subject to formal removal proceedings regardless of whether the child is already in the United States. HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10150, AN OVERVIEW OF U.S. IMMIGRATION LAWS REGULATING THE ADMISSION AND EXCLUSION OF ALIENS AT THE BORDER 4 (2018). Formal removal proceedings mean that the noncitizen is given the opportunity to appear before an immigration judge. *Id.* at 2. Detention pending formal removal proceedings is usually *permissible*; the noncitizen may be released on bond or be granted parole. *Id.* Generally, UACs are not subject to expedited removal proceedings, but their noncitizen parent may be. *Id.* at 2–4. Noncitizens may be subject to expedited removal proceedings if they arrive at the United States border, or other port of entry, without valid entry documents. *Id.* at 2. Expedited removal proceedings allow the noncitizen to be removed from the United States without a hearing or further review by an immigration judge. § 1225(b)(1)(A)(i). Detention is *mandatory* pending expedited removal proceedings. § 1225(b)(1)(B)(iii)(IV).

20. § 1232(b)(3). CBP facilities are not meant to hold children long term and have been criticized for their gruesome conditions. *See, e.g.*, Sheri Fink & Caitlin Dickerson, *Border Patrol Facilities Put Detainees with Medical Conditions at Risk*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/us/border-patrol-deaths-migrant-children.html> (alleging that a woman in a CBP facility was sexually assaulted, endured heavy vaginal bleeding, and was not provided medical attention) [<https://perma.cc/UT6Q-FJVR>].

21. KANDEL, *supra* note 17, at 4–5. ICE is responsible for transporting UACs from CBP to ORR custody. *Id.* at 4.

22. § 1232(c)(2)(A). Generally, the best interest of the child means placement with a sponsor, not detention. *See Saravia v. Sessions*, 905 F.3d 1137, 1143 (9th Cir. 2018) (“ORR has already determined that the ‘least restrictive setting that is in the best interest of the child’ is placement with a sponsor.”).

mental well-being.”²³ As part of this process, all potential UAC sponsors undergo background checks and are required to complete a sponsor assessment process to identify risk factors or potential safety concerns.²⁴ If the child is detained, ORR must do so in the “least restrictive setting that is in the best interest of the child.”²⁵ This generally requires that children be detained in a nonsecure, state-licensed facility within five days of apprehension.²⁶ The requirements for such detention facilities are outlined in the *Flores* Settlement Agreement discussed below.

B. *Rights of Children Under the Flores Settlement Agreement*

The *Flores* Settlement Agreement established national standards of detention for all immigrant children held in government custody.²⁷ The *Flores* Settlement Agreement arose out of a class action lawsuit challenging the prison-like conditions in which children were detained, despite undergoing *civil* immigration proceedings.²⁸ The litigation spanned nine years and resulted in the *Flores*

23. § 1232(c)(3)(A).

24. U.S. DEPT OF HEALTH AND HUMAN SERVS., UNACCOMPANIED ALIEN CHILDREN PROGRAM 2 [hereinafter UAC PROGRAM], <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf> (last updated Aug. 2019) [<https://perma.cc/Y5NL-MPLY>]. ORR also requires a home study before releasing the child in certain circumstances. *Id.* at 3. A home study is mandatory for a child who (1) is the victim of sex trafficking, (2) has a disability, and (3) has been a victim of physical or sexual abuse where the child’s health or welfare has been significantly harmed. *Id.* If the potential sponsor lives with other household members, those members are no longer required to submit background checks before a potential sponsor is approved. *Id.* ORR still performs a public-records check on all adult household members. *Id.*

25. § 1232(c)(2)(A). ORR is also responsible for creating a plan to ensure timely appointment of legal counsel for each child, determining whether the child is a victim of human trafficking, and whether the child has a possible claim to asylum. KANDEL, *supra* note 17, at 8.

26. SARAH HERMAN PECK & BEN HARRINGTON, CONG. RESEARCH SERV., RG5297, THE “FLORES SETTLEMENT” AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS 1 (2018); Stipulated Settlement Agreement, ¶ 12A *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Settlement Agreement]. Situations where a child may be detained for longer than five days are discussed further, *infra* Section I.B.

27. Rebeca M. López, Comment, *Codifying the Flores Settlement Agreement: Seeking To Protect Immigrant Children in U.S. Custody*, 95 MARQUETTE L. REV. 1635, 1642 (2012). Prior to the enactment of the Homeland Security Act of 2002, INS was responsible for the detention of immigrant children. *Id.*; see also 6 U.S.C. § 279 (2006) (transferring responsibility of the detention of immigrant children from INS to ORR).

28. López, *supra* note 27, at 1647. The litigation is named after Jenny Lisette Flores, a fifteen-year-old El Salvadorian girl who came to the United States in 1985 to live with her aunt, an American citizen. Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of*

Settlement Agreement, which established a “nationwide policy for the detention, release, and treatment of minors” in government custody.²⁹ The *Flores* Settlement Agreement applies to accompanied and unaccompanied children.³⁰

The *Flores* Settlement Agreement requires the government to “place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs . . . and to protect the minor’s well-being and that of others.”³¹ It favors releasing children into the custody of a parent or legal guardian over detention while civil immigration proceedings are pending.³² However, if children are detained instead of released, the *Flores* Settlement Agreement requires that the child be “expeditiously” processed³³ and detained in a nonsecure, state-licensed facility.³⁴ Placement in such a facility may be permissibly non-expeditious if there is an “influx of minors into the United States,” meaning more than 130 children are eligible for placement in a state-licensed facility at any

Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody, 19 CHICANO-LATINO L. REV. 589, 596 (1998). Jenny never made it to her aunt. *Id.* She was arrested at the border, strip searched, and placed in a juvenile detention center for two months. *Id.* Jenny could not be released into her aunt’s custody because, even though her aunt was a blood relative, regulations at the time only allowed children to be released to third-party adults under “unusual and extraordinary” circumstances. *Id.* at 596 n.47.

29. *Flores* Settlement Agreement, *supra* note 26, ¶ 9. A 2001 Stipulation and Order amended the *Flores* Settlement Agreement so that it would remain in effect until forty-five days after INS passed final regulations ensuring its compliance with the Agreement. López, *supra* note 27, at 1650. However, neither INS nor DHS ever passed final regulations, meaning the Agreement is still in effect. *Id.*

30. *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016) (“We agree with the district court that the ‘plain language of the Agreement clearly encompasses accompanied minors.”). While the *Flores* Settlement Agreement applies equally to all children, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), which only applies to the treatment of UACs. Pub. L. No. 110-457, 122 Stat. 5047 (codified as amended in scattered sections of 8 U.S.C.). TVPRA preserves the *Flores* Settlement Agreement but does not supersede its requirements. *Flores v. Sessions*, 862 F.3d 863, 870–71 (9th Cir. 2017).

31. *Flores* Settlement Agreement, *supra* note 26, ¶ 11.

32. *Id.* ¶ 14. Releasing a child to a parent or legal guardian is the preferred method of release; however, release to an adult relative, a third-party adult, or a licensed program willing to accept custody, is permissible. *Id.* Additionally, the *Flores* Settlement Agreement requires a “prompt and continuous effort” toward family reunification. *Id.* ¶ 18.

33. *Id.* ¶ 12A.

34. PECK & HARRINGTON, *supra* note 26, at 1. Normally, the child must be transferred to such a facility within five days, except in the event of an emergency, in which case children should be placed in state-licensed facilities “as expeditiously as possible.” *Flores* Settlement Agreement, *supra* note 26, ¶ 12A.

given time.³⁵ Generally, detention in an unlicensed facility in excess of twenty days is impermissible.³⁶ This rule is often violated.³⁷

If a child is detained, the minimum requirements for detention include “suitable living accommodations, food, appropriate clothing, and personal grooming items.”³⁸ Children must have access to “[a]ppropriate routine medical and dental care, family planning services, and emergency health care services” as well as educational services, recreation, and leisure time activities.³⁹ While detained, children must be afforded a bond redetermination hearing before an immigration judge.⁴⁰

Children must have at least one individual counseling session per week, where the counselor addresses the developmental and crisis-related needs of the child, and group counseling sessions at least twice per week.⁴¹ The child should be given access to religious

35. *Flores* Settlement Agreement, *supra* note 26, ¶¶ 12A, 19. Under these circumstances, courts have held that the government may not indefinitely detain children, but courts have not clearly identified how long children may be detained in nonqualifying facilities before being transferred to nonsecure, state-licensed facilities. *Flores v. Sessions*, No. 2:85-CV-04544, 2017 U.S. Dist. LEXIS 224718, at *62 (C.D. Cal. 2017) (“[T]he *Flores* Agreement creates an affirmative obligation on the part of Defendants to individually assess each class members’ release”); PECK & HARRINGTON, *supra* note 26, at 9. For example, DHS was in substantial noncompliance with the *Flores* Settlement Agreement when children were detained for periods ranging from five weeks to thirteen months. *Flores*, 2017 U.S. Dist. LEXIS 224718, at *53.

36. *Flores*, 2017 U.S. Dist. LEXIS 224718, at *63. Because the *Flores* Settlement Agreement requires individualized determinations for release, detention for twenty days may not always be reasonable. *Id.* Conversely, courts have held that detention in unlicensed facilities in excess of twenty days may be reasonable under certain individualized circumstances. *See, e.g., Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015) (“[I]f 20 days is as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go . . . [the twenty day policy] may fall within the parameters of Paragraph 12A of the Agreement.”). There, the twenty-day limitation was permissible when children were detained pending reasonable or credible fear determinations to see if the child could make an asylum claim. *Id.*

37. ORR reports show that between 2008 and 2010, the average length of ORR custody was sixty-one days and the total time in custody ranged from less than one day to 710 days. KANDEL, *supra* note 17, at 10. In 2019, the average length of ORR custody is sixty-six days. UAC PROGRAM, *supra* note 24, at 2.

38. *Flores* Settlement Agreement, *supra* note 26, at Ex. 1 ¶ A.1.

39. *Id.* at Ex. 1 ¶ A.2, 4–5.

40. *Id.* ¶ 24.A. Children must also be given an explanation of the right to judicial review and a list of free legal services available. *Id.* ¶ 24.D. Given the civil nature of immigration law, children do not have to be provided a lawyer. *See, e.g., Christina Jewett & Shefali Luthra, Immigrant Toddlers Ordered To Appear in Court Alone*, TEX. TRIB. (June 27, 2018, 9:00 PM), <https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/> (explaining that some children as young as three are being ordered to appear in immigration court for deportation proceedings, often without a lawyer) [<https://perma.cc/73RY-V9KL>].

41. *Flores* Settlement Agreement, *supra* note 26, at Ex. 1 ¶ A.6–7.

services of the child's choice "whenever possible," as well as visitation with family members, regardless of the family member's immigration status.⁴² Lastly, children may not be detained with unrelated adults, unless separation is not "immediately possible," in which case the child should not be detained with an unrelated adult for more than twenty-four hours.⁴³

C. *Executive Policy*

This section discusses two discretionary policies implemented by the Trump Administration: Zero Tolerance and Family Separation. The policies set by each presidential administration have a significant impact on immigration law. There are a number of discretionary choices a president can make to enforce immigration law.⁴⁴ Discretion can be exercised to address immediate human concerns of the child.⁴⁵ It can be used to prioritize prosecution of certain groups of migrants over others, such as those migrants who pose the greatest threat to public safety.⁴⁶ Or, discretion can be used to fully prosecute certain offenses. Nonetheless, discretion can result in a myriad of unintended consequences for the rest of the immigration system and for the people within it. This section explains the consequences of two discretionary policies, Zero Tolerance and Family Separation, on the United States immigration system.

42. *Id.* at Ex. 1 ¶¶ A.10–11.

43. *Id.* ¶ 12.A.

44. *See e.g.*, 8 U.S.C. § 1158(b)(1)(A) (2018) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum" (emphasis added)); § 1229b(a) ("The Attorney General *may* cancel removal" (emphasis added)); § 1229c(a)(1) ("The Attorney General *may* permit an alien voluntarily to depart the United States" (emphasis added)).

45. *Arizona v. United States*, 567 U.S. 387, 396 (2012) (holding that, when considering a discretionary decision regarding removal, "[u]nauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime").

46. For example, President Obama implemented a system wherein the administration prioritized the enforcement of immigration laws against migrants convicted of certain crimes. DEPT OF HOMELAND SEC., POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS 3–4 (Nov. 2014); *see also* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY, CONG. RESEARCH SERV. 6–7 (2019).

1. Zero-Tolerance Policy

On April 6, 2018, President Trump issued a memorandum, ending President Obama's "Catch and Release" policy.⁴⁷ On the same day, then-Attorney General Jeff Sessions issued a memorandum to all federal prosecutors directing them "to adopt immediately a zero-tolerance policy for *all* offenses referred for prosecution under section 1325(a)."⁴⁸ Section 1325(a), "Improper entry by alien," makes it a crime to (1) enter or attempt "to enter the United States at any time or place other than as designated by immigration officers," (2) elude "examination or inspection by immigration officers," or (3) attempt to enter or obtain entry "to the United States by a willfully false or misleading representation or the willful concealment of a material fact."⁴⁹ The memorandum required federal prosecutors to prosecute, "to the extent practicable," all improper entry cases referred to their offices.⁵⁰ Improper entry is a *misdemeanor*

47. Presidential Memorandum on Ending "Catch and Release" at the Border of the U.S. and Directing Other Enhancements to Immigration Enf't (Apr. 6, 2018). Under President Obama's policy, certain noncitizens suspected of violating immigration laws were allowed to leave the United States before the resolution of their civil immigration proceedings or criminal case. OFFICE OF INSPECTOR GEN., OIG-18-84, SPECIAL REVIEW-INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 2 (Sept. 27, 2018) [hereinafter OIG SPECIAL REVIEW]. Additionally, undocumented persons were arrested for immigration violations, but were released from custody pending their civil immigration proceedings. Marc Rod, *Border Patrol Union President on Catch and Release: 'No Way It Can Stop'*, CNN (June 22, 2018, 11:42 AM ET), <https://www.cnn.com/2018/06/21/politics/border-patrol-immigration-trump-catch-release-stop-cnn/index.html> [https://perma.cc/VV4Y-3HN7]. In addition to catch and release, President Obama continued a practice that began under President Bush, called "Operation Streamline," that operated in three border states. Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, N.Y. TIMES (Feb. 11, 2014), <https://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html> [https://perma.cc/72D4-R482]. Under that policy, noncitizens are charged criminally, either with illegal entry or illegal re-entry, and are tried and sentenced in large groups during the same proceeding. *Id.*

48. OFFICE OF THE ATTORNEY GEN., MEMORANDUM FOR FEDERAL PROSECUTORS ALONG THE SOUTHWEST BORDER: ZERO TOLERANCE FOR OFFENSES UNDER 8 U.S.C. § 1325(a) (2018) (emphasis added). This policy included fully prosecuting asylum seekers and families. KANDEL, *supra* note 46, at 7–8.

49. § 1325(a).

50. OFFICE OF THE ATTORNEY GEN., *supra* note 48, at 7–8. Sessions argued that taking a hardline stance on immigration was necessary to prevent "increased crossings" which occur because of "loopholes in our laws being exploited by illegal aliens and open border radicals." Jefferson Sessions, Attorney General, Remarks on Immigration Enforcement, (Apr. 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement> [https://perma.cc/9X3A-C5EG]. As a result of this policy, in Fiscal Year 2018, fifty-seven percent of *all* federal criminal charges filed were for illegal entry or reentry. "Zero Tolerance" Policy Greatly Accelerates Migrant Criminalization Through End of 2018, GRASSROOTS LEADERSHIP (Mar. 18, 2019), <https://grassrootsleadership.org/releases/2019/03/zero-tolerance-policy-greatly-accelerates-migrant-criminalization-through-end-20>

for a first offense, punishable by not more than six months imprisonment.⁵¹

Prior to the implementation of the Zero Tolerance policy, when CBP apprehended a noncitizen family attempting to enter the United States without inspection, CBP usually placed the adult family members in civil immigration proceedings but did not refer the adult family members for criminal prosecution.⁵² If the adult had a criminal history or an outstanding warrant, or if CBP could not determine whether the adult was the child's legal parent or guardian, then the family was separated.⁵³ Most families were detained together or released while their immigration cases were pending.⁵⁴ The Zero Tolerance policy fundamentally changed this process and resulted in the subsequent Family Separation policy.

2. Family Separation Policy

Family Separation was an inevitable consequence of the Zero Tolerance policy. If an undocumented family was apprehended at a point of entry, or if a family was apprehended while attempting to cross the border illegally, Zero Tolerance required CBP to refer the adult family members to DOJ for criminal prosecution.⁵⁵ Thus, noncitizen, adult family members were referred for criminal prosecution, pursuant to Zero Tolerance, but their children were not.⁵⁶ As a result, most children were deemed UACs because the child's parents were unable "to provide care and physical custody" of the child while the parents were being criminally prosecuted.⁵⁷ The child would remain in CBP custody, separate from their parents, who would be criminally prosecuted.⁵⁸

18 [<https://perma.cc/EK8E-ZPTS>].

51. § 1325(a). Improper entry is a felony for each subsequent offense, punishable by not more than two years imprisonment. *Id.*

52. OIG SPECIAL REVIEW, *supra* note 47, at 2. Under Bush and Obama, prosecutors often did not pursue charges for improper entry, in part because DOJ did not want to waste significant resources on misdemeanor offenses. KANDEL, *supra* note 46, at 1.

53. OIG SPECIAL REVIEW, *supra* note 47, at 2.

54. *Id.*

55. KANDEL, *supra* note 46, at 8.

56. OIG SPECIAL REVIEW, *supra* note 47, at 3.

57. *Id.* at 3 & n.4; *see also* Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2)(C) (2018) (defining the term unaccompanied alien child as a child with "no parent or legal guardian in the United States . . . available to provide care and physical custody").

58. KANDEL, *supra* note 46, Summary.

Family separation also occurs when DHS does not believe the adult is actually the parent or legal guardian of the child.⁵⁹ Even if the adult is the parent or legal guardian of the child, DHS can choose to separate the parent and the child because of the parent's criminal history or because of medical concerns.⁶⁰ Under this policy, families lawfully seeking asylum could be separated.⁶¹ Parents released from criminal custody, and later placed in civil immigration custody, have had difficulties locating and reuniting with their children.⁶² In some cases, parents are deported without their children.⁶³

On June 20, 2018, President Trump signed an Executive Order amending his Family Separation policy to prefer family detention where the law and resources permitted such detention.⁶⁴ Five days later, CBP decided to temporarily stop referring adults with children for criminal prosecution because CBP lacked family detention space.⁶⁵ Then-Attorney General Jeff Sessions contradicted CBP's stance and emphasized that the federal prosecutors would continue to fully prosecute noncitizen adult family members, requiring separation from their children.⁶⁶ But, a June 26, 2018 court

59. SARAH HERMAN PECK, CONG. RESEARCH SERV., LSB10180, FAMILY SEPARATION AT THE BORDER AND THE *Ms. L.* LITIGATION 2 (2018).

60. *Id.*

61. *See id.* Families seeking asylum are not required to be detained together in immigration detention facilities. *Id.*

62. *Id.*

63. *See, e.g.,* Rafael Carranza, *Are Migrant Parents Being Deported Without Their Kids?*, AZCENTRAL (June 9, 2018, 5:30 AM MST), <https://www.azcentral.com/story/news/politics/immigration/2018/06/09/migrant-parents-being-deported-without-kids-immigration-border/683483002/> (describing the parents of an eleven-month-old and a nineteen-month-old who were deported back to Guatemala while their children remained in U.S. custody; this occurred even before the implementation of the Zero Tolerance policy) [<https://perma.cc/V4BE-SZ24>].

64. *See* Executive Order Affording Congress an Opportunity to Address Family Separation, 83 Fed. Reg. 29435 (June 25, 2018) ("It is also the policy of this Administration to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources."). In effect, the executive order still allows for family separation in instances where detaining families together is not appropriate or consistent with law and available resources. Currently, there are no family detention centers capable of lawfully detaining families together. *See* PECK & HARRINGTON, *supra* note 26, at 8. ICE operates three family detention facilities, none of which are state licensed as required by the *Flores* Settlement Agreement. *Id.* at 8 & n.64. *See infra* Section III.A.2.

65. KANDEL, *supra* 46, at 10. The Trump Administration reserves the right to reinstate the policy once family detention space is available. *Id.*

66. Ron Nixon et al., *Border Officials Suspend Handing Over Migrant Families to Prosecutors*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/politics/border-officials-suspend-handing-over-migrant-families-to-prosecutors.html> [<https://perma.cc/959P-WJCZ>].

order preliminarily enjoined DHS from continuing to separate families under certain circumstances.⁶⁷

The number of children separated from their families because of the Zero Tolerance and Family Separation policies is unknown because DHS did not have a centralized system to identify or track separated families.⁶⁸ It is possible that children continue to be separated from their parents even after the Executive Order, CBP announcement, and preliminary injunction.⁶⁹ The Trump Administration's discretionary decision to implement these policies has resulted in substantial human rights violations, even after the policies were rescinded.⁷⁰ The next Part will analyze the consequences of these policies, as well as their legality, under international and domestic law.

II. INTERNATIONAL LAW

Nearly fifty million children around the world have been uprooted from their homes.⁷¹ Not all children are forcibly displaced; some children migrate for educational or work opportunities.⁷² Some twenty-eight million children are fleeing conflict or escaping poverty.⁷³ No matter the reason for child migration, children should be seen as children first and as immigrants second. This principle is enshrined in the Convention on the Rights of the Child ("CRC"), the leading human rights treaty on children's rights. This Part will first discuss the CRC and will then discuss the United States's legal obligations under the CRC. For the purposes of this Part and Part IV, the term "state" or "nation-state" will be used to refer to a sovereign nation.

67. See *infra* note 142 and accompanying text.

68. SEPARATED CHILDREN IN ORR CARE, *supra* note 3, at 1–5.

69. See Priscilla Alvarez, *At Least 245 Children Separated from Families Since Trump Admin Said It Would Stop Doing So*, CNN (Feb. 22, 2019, 11:12 AM), <https://www.cnn.com/2019/02/21/politics/separations-status-report/index.html> [<https://perma.cc/LQU9-PGU3>].

70. See *infra* Section III.A.

71. *Child Refugees and Migrants*, UNICEF, <https://www.unicefusa.org/mission/emergencies/child-refugees-and-migrants> [<https://perma.cc/7X6S-QWMR>].

72. TARA DOOLEY & TIMOTHY LEDWITH, UNICEF, A RIGHT TO BE HEARD: LISTENING TO CHILDREN AND YOUNG PEOPLE ON THE MOVE 8 (2018), https://data.unicef.org/wp-content/uploads/2018/12/A_right_to_be_heard_youthpoll.pdf [<https://perma.cc/LW8X-QYRT>].

73. *Help Children on the Move*, UNICEF, <https://www.unicefusa.org/help-children-move> [<https://perma.cc/X3MU-X8JE>].

A. *The Convention on the Rights of the Child*

The CRC is unique in its definition of the rights of children under international law. It combines civil, political, economic, social, and cultural rights into a single instrument, while emphasizing that these rights are equally important and inextricably related to one another.⁷⁴ Under United States federal law, unaccompanied children are typically treated as migrants first and as children second.⁷⁵ Conversely, the CRC adopts the view that children are first and foremost persons and active bearers of rights.⁷⁶ Children's rights are divided into four general principles: (1) nondiscrimination; (2) the best interests of the child; (3) the right to participation; and (4) the right to life, survival, and development.⁷⁷

First, nondiscrimination requires state parties to ensure that all children are treated equally irrespective of the child's, or their parent's, "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."⁷⁸ Girls and boys, children with disabilities and able-bodied children, noncitizen children and children with citizenship status must be given equal opportunities under this principle. Second, the "best interests of the child" is the primary consideration in any decision regarding the child.⁷⁹ The child's interest is at the forefront of all actions "whether undertaken by public or private

74. Eugeen Verhellen, *The Convention on the Rights of the Child: Reflections from a Historical, Social Policy and Educational Perspective*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN'S RIGHTS STUDIES 43, 49 (Wouter Vandenhoe et al. eds., 2015).

75. See David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 990–91 (2002) (arguing that children's rights come second to immigration law and that UACs are subject to the same procedural complexities as adults); see also Olga Byrne, *Promoting a Child Rights-Based Approach to Immigration in the United States*, 32 GEO. IMMIGR. L.J. 59, 68 (2017) (noting that because migrant children do not have the same set of legal rights under United States law as citizens, migrant children are not fully recognized as active bearers of rights).

76. Verhellen, *supra* note 74, at 50.

77. Byrne, *supra* note 75, at 77; see also, Convention on the Rights of the Child arts. 2, 3, 6, 12, Nov. 20, 1989, 28 I.L.M. 1456, 1577 U.N.T.S. 3.

78. Convention on the Rights of the Child, *supra* note 77, art. 2. In the immigration context, this means that "the child is a child first and an asylum seeker second." Byrne, *supra* note 75, at 78.

79. Byrne, *supra* note 75, at 84. In deciding the best interest of the child, the State must consider the rights and duties of the parent or legal guardian who is legally responsible for the child. Convention on the Rights of the Child, *supra* note 77, art. 3. The State must also ensure that the "institutions, services and facilities responsible for the care or protection of children . . . conform with the standards established by competent authorities," especially standards meant to protect the safety, health, and competent supervision of children. *Id.*

social welfare institutions, courts of law, administrative authorities or legislative bodies.”⁸⁰ Ultimately, the goal is to holistically determine the best interests of the child to ensure that the child effectively enjoys their rights, as laid out by the CRC.⁸¹

Third, a child has the right to participation.⁸² This principle recognizes that children are individuals and ensures that the views of the child are protected, particularly during judicial and administrative proceedings.⁸³ It also recognizes a right for children who are “capable of forming his or her own views” to “express those views freely in all matters affecting the child.”⁸⁴ Lastly, a child has the inherent right to life, survival, and development.⁸⁵ This provision is broad sweeping; “development” encompasses a child’s physical, mental, spiritual, moral, psychological, and social development.⁸⁶

B. *United States’s Legal Obligations Under the CRC*

The United States has signed the CRC, but it is the only country in the world that has not ratified the CRC.⁸⁷ A treaty is legally binding on a nation-state when it consents to be bound by the treaty.⁸⁸ In the United States, this requires a two-step process: signature and ratification. When a nation-state signs a treaty, it “signifies agreement over the negotiated text, preliminary endorsement of the treaty and an intention to consider its adoption as a binding legal obligation.”⁸⁹ Signatories to a treaty have “the obli-

80. Convention on the Rights of the Child, *supra* note 77, art. 3.

81. Byrne, *supra* note 75, at 84.

82. *Id.* at 92–93.

83. *Id.*

84. Convention on the Rights of the Child, *supra* note 77, art. 12. A child’s age and maturity should be given “due weight” when considering the ability of a child to express those views. *Id.* In the context of children’s asylum, this principle acknowledges that young people may need to seek asylum for their political opinions. Byrne, *supra* note 75, at 93–94. However, children who seek asylum based on their own political opinions may face skepticism from government officials who incorrectly assume that children are unable to form their own political views. *Id.* at 94.

85. Convention on the Rights of the Child, *supra* note 77, art. 6.

86. Comm. on the Rights of the Child, General Comment No. 5 of Its Thirty-Fourth Session, 4 U.N. Doc. CRC/GC/2003/5 (2003). To comply with this requirement, states must ensure equal opportunity, access to services, and the chance for all children to thrive and reach their full potential. Byrne, *supra* note 75, at 89.

87. Byrne, *supra* note 75, at 68.

88. DOUGLAS LEE DONOHO WITH JAMES WILETS, INTERNATIONAL HUMAN RIGHTS LAW 19 (2017).

89. *Id.* (emphasis omitted).

gation to refrain from acts which would defeat the object and purpose of that Treaty prior to its entry into force.”⁹⁰ A treaty only becomes binding once the nation-state has ratified it, and the ratification process varies based on the domestic process of each nation-state.⁹¹

The United States has not ratified the CRC. However, that does not mean it has no international obligations under the treaty. The widespread international acceptance of the CRC supports the argument that it has risen to the level of customary international law.⁹² This is because customary international law is defined by similar standards of nation-state action, or inaction, over time.⁹³ In addition to general international acceptance of a given rule, the individual nation-state must “expect that those practices are legally required of them” before the practice becomes binding customary international law.⁹⁴ Customary international law is not

90. Paolo Palchetti, *Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 25, 25 (Enzo Cannizzaro ed., 2011); see also Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. This means that a nation-state may not “violate the central purposes of the treaty . . . unless and until it expresses clear intent to not become a party.” DONOHO, *supra* note 88, at 19.

91. Megan Smith-Pastrana, Note, *In Search of Refuge: The United States’ Domestic and International Obligations To Protect Unaccompanied Immigrant Children*, 26 *IND. INT’L & COMP. L. REV.* 251, 264 (2016); see also DONOHO, *supra* note 88, at 19. In the United States, ratification by the Senate is necessary for the treaty to become enforceable domestic law. *Id.* at 71. The Constitution seems to imply that treaties, like the Constitution itself, are the “supreme law of the land.” U.S. CONST. art. VI (“This Constitution . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”). However, treaties are equivalent to Congressional legislation and require passage in the Senate before becoming domestically enforceable. DONOHO, *supra* note 88, at 71. Congress has only passed legislation making a treaty domestically enforceable in a few instances. *Id.* at 75. For example, Congress has enacted legislation relating to the Convention against Torture and the Genocide Convention. See generally 18 U.S.C. §§ 1091–93 (2018) (making genocide a federal crime); § 2340 (making torture a federal crime).

92. Smith-Pastrana, *supra* note 91, at 265.

93. DONOHO, *supra* note 88, at 35. Universal acceptance of a given rule is not required for it to become customary international law. Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 *HARV. INT’L L.J.* 457, 458 (1985). It is not always easy to determine how much international participation is required for customary law to develop. *Id.* However, in the case of the CRC, only one country in the world, the United States, has not signed and ratified the treaty. Byrne *supra* note 75, at 68.

94. DONOHO, *supra* note 88, at 35; see also Stein, *supra* note 93, at 458 (“In order for a rule to become part of customary international law, it must be supported by the widespread and uniform practice of states acting on the conviction that the practice is obligatory.”).

binding on nation-states that have “expressly and persistently objected” to generally accepted international standards that would otherwise bind the nation-state.⁹⁵

Assuming the CRC rises to the level of customary international law, it could be argued that the United States is a persistent objector, and thus, is not bound to the terms of the CRC.⁹⁶ Though the United States played a pivotal role in drafting the CRC, government leaders and American citizens have expressed opposition to its ratification.⁹⁷ Dissidents note that the CRC would undermine freedom and independence for families and interfere with the United States’s sovereignty.⁹⁸ Despite these objections, the United States has adopted provisions of the CRC into its domestic law, refuting the idea that the United States is a persistent objector of the entire treaty. The “best interest of the child” principle, enshrined in Article 3 of the CRC, is incorporated to United States domestic immigration law with respect to unaccompanied children.⁹⁹ The United States has also adopted two optional protocols to the CRC that create obligations under international law.¹⁰⁰

95. DONOHO, *supra* note 88, at 35.

96. A State may be a persistent objector if it “manifestly and continuously refuse[s] to accept” the rule. Stein, *supra* note 93, at 459; *see also* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 516 (2002) (“The ‘persistent objector’ rule stems from the proposition that, in a world of diverse sovereign nations lacking a central decisionmaker, customary international law draws its legitimacy from national consent.”).

97. Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 185, 185, 195 (2006).

98. *See* S. Res. 99, 112th Cong. (2011) (introduced). Some organizations were also concerned that ratification of the CRC would force the United States to “recognize rights of same-sex parents, provide teens access to reproductive-health services, and override parental desire to use corporal punishment.” Amy Rothschild, *Is America Holding Out on Protecting Children’s Rights?*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/> [<https://perma.cc/Z3JU-88KQ>].

99. Convention on the Rights of the Child, *supra* note 77, at art. 3; *see also* 8 U.S.C. § 1232(c)(2)(A) (2012) (“[A]n unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child.”).

100. *Convention on the Rights of the Child*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://indicators.ohchr.org/> [<https://perma.cc/UN27-RTTL>]; *see* Optional Protocol to the Convention the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *ratified on* Jan. 23, 2003, S. TREATY DOC. NO. 106-37(B), 2171 U.N.T.S. 227; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *ratified on* Jan. 23, 2003, S. TREATY DOC. NO. 106-37(A), 2173 U.N.T.S. 222. The United States adopted both protocols, provided that they could be ratified without ratification of the underlying CRC. Bernardine Dohrn, *United States: The Surprising Role of the CRC in a Non-State-Party*, in LITIGATING THE RIGHTS OF THE CHILD: THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN DOMESTIC AND INTERNATIONAL JURISPRUDENCE 71, 74 (Ton Liefaard & Jaap E. Doek eds., 2015). As a result, the United States submits periodic reports to the Committee on the Rights of the Child

Therefore, even though the United States has not ratified the CRC, the United States has legal obligations under the CRC.¹⁰¹

III. ZERO TOLERANCE AND FAMILY SEPARATION UNDER UNITED STATES FEDERAL LAW

DHS was not fully prepared for the implementation, or the consequences, of the Zero Tolerance and Family Separation policies.¹⁰² In December 2018, nearly 15,000 children were detained.¹⁰³ An Office of the Inspector General (“OIG”) review of HHS in January 2019 concluded that “[t]he total number and current status of all children separated from their parents or guardians by DHS and referred to ORR’s care is unknown.”¹⁰⁴ The sharp increase in the number of children who met UAC status, and were thus detained, is a government-created issue. The government’s response to the consequences of its own policies were wholly inadequate in addressing the continued influx of unaccompanied children at the southern border. The fallout of these policies created a number of problematic consequences. This Part will analyze the consequences of Zero Tolerance and Family Separation. It will then provide policy recommendations and alternatives.

to comply with the two optional protocols. *Id.* at 74.

101. *See supra* Section II.B.

102. OIG SPECIAL REVIEW, *supra* note 47, at 4. Under the Zero Tolerance Policy, the government encouraged asylum seekers to come to United States ports of entry, which led to overcrowding. *Id.* at 5–6. CBP had to limit the number of people that could enter the United States due to overcrowding, which could have led asylum seekers to attempt illegal border crossings instead. *Id.* at 5. The Trump Administration later forced non-Mexican migrants seeking asylum at the United States-Mexico Border to remain in Mexico pending immigration proceedings. *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019) (granting preliminary injunction). While a federal district court judge granted a preliminary injunction halting the practice in April 2019, that injunction was stayed pending an appeal just one month later. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

103. John Burnett, *Almost 15,000 Migrant Children Now Held at Nearly Full Shelters*, NPR (Dec. 13, 2018 5:00 AM ET), <https://www.npr.org/2018/12/13/676300525/almost-15-000-migrant-children-now-held-at-nearly-full-shelters> [<https://perma.cc/UX9R-SQZX>].

104. SEPARATED CHILDREN IN ORR CARE, *supra* note 3, at 13. While the total number of separated children is unclear, HHS attempted to define a class of children who may have been separated from their parents in response to a class action lawsuit. *Id.* at 4; *see infra* Section III.A.3. For the purposes of the *Ms. L.* Litigation, HHS certified a class of 2816 children, 2737 of which were separated from a parent. SEPARATED CHILDREN IN ORR CARE, *supra* note 3, at 11.

A. *Policy Implications*

The Zero Tolerance and Family Separation policies had major consequences in three areas: (1) children in CBP detention, (2) family detention, and (3) family reunification. First, these policies impacted the duration and quality of CBP detention. Section one will examine those issues in the context of two CBP detention facilities in Tornillo and McAllen, Texas. Second, as an alternative to these policies, some have suggested detaining families together, not in ORR facilities but in one of the three existing ICE-owned facilities. However, section two argues that the existing family detention centers do not meet the requirements necessary to comply with the *Flores* Settlement Agreement. Lastly, after the Trump Administration amended the Family Separation policy, family reunification became difficult. These difficulties will be explored through an analysis of the *Ms. L.* litigation.

1. Children in CBP Custody

First, the Zero Tolerance and Family Separation policies do not comply with federal law because UACs remain in CBP custody for much longer than is legally permissible.¹⁰⁵ Because these policies increased the number of children classified as UACs, it became difficult for CBP to quickly transfer children to ORR custody, resulting in extended periods of detention in CBP facilities meant for short-term detention. This issue will be examined through an analysis of two CBP facilities located at the southern border: one in Tornillo, Texas, and the other in McAllen, Texas.

The Trump Administration built a temporary housing facility in June 2018 with 450 beds in Tornillo, Texas, to deal with the overflow of children in CBP custody.¹⁰⁶ This facility opened days after Trump signed an executive order announcing his administration's

105. The general rule is that CBP must transfer a UAC to ORR custody within seventy-two hours of determining UAC status except for in "exceptional circumstances." 8 U.S.C. § 1232(b)(3) (2012); *see supra* Section I.A.

106. Alan Taylor, *Photos: A Tent City for Detained Children in Texas*, ATLANTIC (June 19, 2018), <https://www.theatlantic.com/photo/2018/06/photos-a-tent-city-for-detained-children-in-texas/563147/> (photographing life at the Tornillo, Texas facility) [<https://perma.cc/WH5Y-5HBA>].

policy to maintain family unity.¹⁰⁷ Despite the “end” of Family Separation, the Tent City rapidly expanded, housing upwards of 6000 children before it closed in January 2019.¹⁰⁸

Between May 5 and June 20, 2018, when Zero Tolerance was formally in effect, the OIG collected data on the average length of custody from detention centers in the El Paso, Texas sector, which includes Tornillo.¹⁰⁹ The OIG report indicated that nearly forty percent of children detained in the El Paso sector were detained in excess of seventy-two hours.¹¹⁰ Border Patrol officials indicated that children remained in CBP custody beyond the seventy-two hour requirement because HHS was unable to accept the child for placement in ORR detention facilities.¹¹¹ They also indicated possible delays due to medical needs of the child or issues with arranging transportation of the child with ICE.¹¹²

Despite the various reasons for prolonged detention, CBP is violating federal law by failing to transfer children to ORR custody in a timely manner. In “exceptional circumstances,” CBP may exceed the seventy-two hour rule.¹¹³ This statutory standard creates tension with the *Flores* Settlement Agreement because release to a

107. Executive Order Affording Congress an Opportunity to Address Family Separation, 3 C.F.R. 13841, § 1 (2018) (announcing policy of family unity on June 20, 2018); Tanvi Misra, *The Life and Death of an American Tent City*, CITY LAB (Jan. 15, 2019), https://www.citylab.com/equity/2019/01/border-crisis-migrant-children-detention-tornillo-tent-city/578557/?utm_source=twb [<https://perma.cc/A9EW-U8AH>].

108. Misra, *supra* note 107 (providing a graphic of the facility’s rapid expansion). Initially, the detention center was only supposed to be open for one month, but the facility remained open as the influx of UACs increased. *Id.* With other facilities at capacity, children were transported to the Tornillo Tent City in the middle of the night. *Id.*

109. OIG SPECIAL REVIEW, *supra* note 47, at 8, 17.

110. *Id.* at 8. The report also notes that these numbers may be higher than reported because the data OIG received does not list the specific hour when the child was apprehended. *Id.* at 8 & n.18.

111. *Id.* at 8–9. This may have been due, in part, to CBP officials inadvertently omitting critical information necessary to place children in ORR custody. *Id.* at 9.

112. *Id.* at 9. In addition to violations of the seventy-two-hour rule, the Tornillo facility did not conduct required FBI fingerprint background checks for approximately 1300 members of its staff. OFFICE OF THE INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS. A-12-19-20000, THE TORNILLO INFLUX CARE FACILITY: CONCERNS ABOUT STAFF BACKGROUND CHECKS AND NUMBER OF CLINICIANS ON STAFF 1, 6 (2018). Tornillo instead used a private vendor to perform nonfingerprint background checks, which were not as extensive as the FBI fingerprint background checks. *Id.* Tornillo also did not employ enough clinicians necessary to provide adequate mental healthcare for UACs in its custody. *Id.* at 7. ORR regulations generally require one clinician for every twelve children, but Tornillo operated with one clinician for every fifty-five children. *Id.*

113. 8 U.S.C. § 1232(b)(3) (2012).

sponsor, not prolonged detention, is preferred under *Flores*.¹¹⁴ Even in situations where a child may be detained longer than seventy-two hours, it is rarely in the child's best interest to remain in CBP custody for an indeterminate amount of time. Detained, unaccompanied children have high rates of post-traumatic stress disorder, anxiety, depression, and suicidal ideation.¹¹⁵

Moreover, CBP detention centers were not created for long-term detention and do not have the resources necessary to meet the detention standards required by the *Flores* Settlement Agreement. At the central Ursula facility in McAllen, Texas, for example, a former warehouse was converted into a detention and processing facility for migrant children and adults, who are separated by metal wire cages.¹¹⁶ In June 2018, OIG visited nine CBP facilities, including Ursula.¹¹⁷ It found that Ursula provided children with basic necessities such as bottled drinking water, portable toilets in the holding areas, and food.¹¹⁸ However, the *Flores* Settlement Agreement does not require only that children's basic necessities are met; it also requires that children have access to educational services, recreation, and leisure time activities.¹¹⁹ Ursula does not provide these services, which are necessary to maintain a child's well-being.

For example, in her Congressional testimony, Michelle Brané described her visit to the Ursula Processing center:

114. See *supra* Section I.B.

115. Julie M. Linton et al., Policy Statement, *Detention of Immigrant Children*, 139 PEDIATRICS, Mar. 13, 2017, at 6; see also OFFICE OF THE INSPECTOR GEN., DEPT OF HEALTH & HUMAN SERVS., CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY, OEI-09-18-00431, <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf> (describing the challenges HHS facilities faced in addressing the mental health needs of children in its custody) [<https://perma.cc/S9F2-LDLS>].

116. Amanda Arnold, *What To Know About the Detention Centers for Immigrant Children Along the U.S.-Mexico Border*, CUT (June 21, 2018), <https://www.thecut.com/2018/06/immigrant-children-detention-center-separated-parents.html> [<https://perma.cc/MW7J-LER2>]. The Ursula facility is CBP's largest immigration processing center. Lisa Ryan, *Inside 3 Detention Centers Where Immigrant Children Are Kept from Their Parents*, CUT (June 18, 2018), <https://www.thecut.com/2018/06/inside-ursula-border-patrol-center-family-separation.html> [<https://perma.cc/9GAU-WFRD>].

117. OFFICE OF INSPECTOR GEN., OIG-18-87, RESULTS OF UNANNOUNCED INSPECTIONS OF CONDITIONS FOR UNACCOMPANIED ALIEN CHILDREN IN CBP CUSTODY 3 (2018) [hereinafter UNANNOUNCED INSPECTIONS]. OIG assessed CBP's compliance with the 2015 National Standards on Transport, Escort, Detention, and Search, which differs from the standards required under the *Flores* Settlement Agreement. *Id.*

118. *Id.* at 4–6.

119. See *supra* Section I.B.

There were no toys, no books, and generally nothing for the children to do. Some televisions hung from the fencing in some of the cages, but they were not on when I was there. Children were not permitted to run around or play, and in fact were scolded by guards if they tried. The lights were on 24 hours a day, as in all Border Patrol facilities. Despite the summer Texas heat outside, the warehouse was extremely cold. There were no windows. The children had access to porta-potties set up in a central station in the middle of a set of cages. There was no plumbing in this section of the warehouse. There were tanks of water for washing hands, but the children told me that the water usually ran out by mid-morning.¹²⁰

Her testimony continues to describe the conditions of the facility and the demeanor of the children, who were mostly scared, confused, and crying.¹²¹

These conditions do not meet the standards set forth in the *Flores* Settlement Agreement because the well-being of children in the Ursula Processing Facility is not protected.¹²² For example, Brané spoke with a sixteen-year-old girl who had been caring for a non-related toddler girl detained in the same cage as her.¹²³ A sixteen-year-old girl should not be responsible for a toddler, nor should a toddler be dependent on a sixteen-year-old girl. Both children are traumatized enough from the mere fact of detention where they have little to do but worry about what comes next or what happened to their family. Detaining a child under these circumstances, and beyond the seventy-two hour limit, only increases trauma.¹²⁴

120. *The Department of Homeland Security's Family Separation Policy: Perspectives from the Border Hearing Before the Subcomm. on Border Security, Facilitation, and Operations of the H. Comm. on Homeland Security*, 116th Cong. 26 (Mar. 26, 2019) (statement of Michelle Brané, Director, Migrant Rights and Justice Program Women's Refugee Commission) [hereinafter Brané Testimony].

121. *Id.* at 26–28.

122. *See supra* Section I.B.

123. Brané Testimony, *supra* note 120, at 26. When Brané brought this situation to CBP's attention, the officials discovered that the toddler was separated from her aunt four days prior. *Id.* Apparently, the child's aunt was also detained in the Ursula facility, but officials failed to realize this until Brané asked the CBP officials to look into the matter. *Id.* at 26–27. CBP also incorrectly listed the toddler's name and date of birth; the toddler was listed as being two years old, but was actually almost four. *Id.* at 27.

124. The amount of trauma imposed on detained children by the United States government has raised the attention of doctors who urge that separating children from their families can cause “toxic stress” that disrupts brain development and negatively impacts long-term health. Joel Rose, *Doctors Concerned About 'Irreparable Harm' to Separated Migrant Children*, NPR (June 15, 2018), <https://www.npr.org/2018/06/15/620254326/doctors-warn-about-dangers-of-child-separations> [<https://perma.cc/VHN3-97W5>].

Unfortunately, the situation at Tornillo and Ursula are not isolated; space at CBP processing facilities is generally dwindling.¹²⁵ The government is trying to make up for the inadequacies in detention space, but in so doing, it is ignoring the requirements of the *Flores Settlement Agreement*.¹²⁶ CBP facilities are not meant to detain children for long periods of time, and detaining children in such an unsuitable environment in excess of the seventy-two-hour period is particularly harmful and cruel to a child's development and mental health. Though there is an unprecedented number of children and families apprehended at the southern border,¹²⁷ minimizing the psychological harm of children should be the government's priority.

More simply, the Zero Tolerance and Family Separation policies are not pragmatic solutions to the reality of the situation at the southern border. Immigrants seeking admission into the United States are no longer single adults.¹²⁸ The issue is now a humanitarian crisis wherein thousands of families are running from lives of poverty, violence, and corruption in Guatemala, El Salvador, and Honduras.¹²⁹ The focus should not be on deterrence through full prosecution and endless detention. Civil detention is costly, both in terms of the psychological toll it exacts on children and in

125. See Geneva Sands, *Border Patrol Facility over Capacity as Government Struggles to Keep Pace in the Rio Grande Valley*, CNN (Mar. 22, 2019, 9:38 AM), <https://www.cnn.com/2019/03/20/politics/border-patrol-facility-overcapacity-rio-grande-valley/index.html> [<https://perma.cc/4ETP-VA43>].

126. This is especially pronounced in El Paso where CBP agents are apprehending more migrants than it has space to detain, resulting in a makeshift detention encampment under a bridge. Simone Romero, *Migrants Are Detained Under a Bridge in El Paso. What Happened?*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/us/el-paso-immigration-photo.html> [<https://perma.cc/U47V-ELWK>]. Some detainees sleep inside a large military tent under the bridge, while others sleep on the ground outside the tent. *Id.*; see also Robert Moore, *"They Treated Us like We Are Animals": Holding Pen for Migrant Families in El Paso Shut Down*, TEX. MONTHLY (Mar. 31, 2019), <https://www.texasmonthly.com/news/holding-pen-migrant-families-shut-down-el-paso/> [<https://perma.cc/NY6E-KFLR>].

127. The number of families apprehended at the southwestern border has increased by 406% in the last year, between August 2018 and August 2019. *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions> (last updated Sept. 9, 2019) [<https://perma.cc/M7K5-U6ZE>].

128. Joel Rose, *Fact Check: Migrants Are Not Overwhelming the Southwest Border*, NPR (Nov. 2, 2018 6:28 PM ET), <https://www.npr.org/2018/11/02/663532238/fact-check-migrants-are-not-overwhelming-the-southwest-border> [<https://perma.cc/8QJC-N23R>].

129. Miriam Jordan, *More Migrants Are Crossing the Border This Year. What's Changed?*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/us/crossing-the-border-statistics.html?module=inline> [<https://perma.cc/GLAT-D48C>].

terms of fiscal expense.¹³⁰ Given the humanitarian concern, the government should treat UACs as children first and as immigrants second.

2. Family Detention as an Alternative to Family Separation

Once a child is transferred from CBP to ORR custody, a child should spend no more than twenty days in ORR detention.¹³¹ Detaining a child beyond the twenty day limit, especially if the child was also detained beyond the seventy-two hour limit, is not in the best interest of the child.¹³² Not only does the child suffer the trauma of having her liberty taken away from her while in detention, she may also be separated from her family. One alternative to having ORR detain children separately from their adult family members, is to detain families together.

There are currently three civil family detention centers in the United States. Two family detention centers, the Karnes County (“Karnes”) and South Texas (“Dilley”) detention facilities, are owned and operated by private companies under contract with ICE.¹³³ The third facility, Berks County Residential Center in Pennsylvania, is operated by Berks County and can hold up to

130. As the number of children at the border increases, CBP is expanding its facilities to detain the apprehended children. Manny Fernandez, *Two New Tent Cities Will Be Built in Texas To Hold Migrants*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/us/mcaleenan-migrants-border-texas.html> [https://perma.cc/8A57-UJVE]. Additionally, ORR awards million dollar contracts each year to private prison companies to detain children in its care. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-343, IMMIGRATION DETENTION: OPPORTUNITIES EXIST TO IMPROVE COST ESTIMATES 18 (2018).

131. *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1070 (C.D. Cal. 2017); see *supra* note 35 and accompanying text.

132. The system-wide length of care for a UAC in ORR custody was forty-seven days at the end of July 2019, down from ninety-three days of the end of 2018. U.S. DEPT OF HEALTH AND HUMAN SERVS., UNACCOMPANIED ALIEN CHILDREN PROGRAM, <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf> (last updated Aug. 2019) [https://perma.cc/4CNC-JHAC].

133. *Texas Dep't of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 Tex. App. LEXIS 9643, at *2 (Tex. App. Nov. 28, 2018). In 2017, seventy-three percent of all persons in immigration detention were detained in facilities operated by private prison companies. KARA GOTSCH & VINAY BASTI, THE SENTENCING PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 5 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/07/Capitalizing-on-Mass-Incarceration.pdf> [https://perma.cc/GK3J-9V8H]. In comparison, in 2016, 8.5% of incarcerated persons in federal or state prisons were incarcerated in private prisons. *Id.* From 2000 to 2016, the population of persons incarcerated in private federal prisons increased by 120%. *Id.* Over the same time period, the number of persons detained in private immigration detention facilities increased by 442%. *Id.*

ninety-six people, but as of April 2019, houses only nine people.¹³⁴ None of these facilities are state licensed, as required by the *Flores* Settlement Agreement.¹³⁵ There is also concern over whether these facilities are “nonsecure.”¹³⁶

The basic model of civil detention mirrors criminal confinement in a way that calls into question whether a civil detention facility can be truly “nonsecure.” Civil immigration detention involves around the clock confinement, continuous staff supervision of detainees, and envisions a facility with “secure perimeters” similar to jails.¹³⁷ Though the inside of a civil detention facility may allow for greater movement of detainees than prisoners, detainees cannot leave the facility.¹³⁸ The inability to leave the facility is a massive deprivation of liberty and in many ways requires constant supervision to ensure detainees do not try to leave. It is difficult to argue that civil family detention facilities are “nonsecure” because each

134. David Mekeel & Karen Shuey, *Numbers Shrink at Immigration Facility in Bern Township*, *READING EAGLE* (Apr. 15, 2019, 7:45 AM), <https://www.readingeagle.com/news/article/numbers-shrink-at-immigration-facility-in-bern-township> [<https://perma.cc/9F4A-PH2G>]. Berks County receives \$1.3 million in annual revenue from ICE to run the facility. *Id.*

135. PECK & HARRINGTON, *supra* note 26, at 8 & n.64. The Berks facility is the only facility that was ever state licensed, but its license was revoked in 2016. *Id.* Litigation is still ongoing regarding the Berks facility’s license. Mekeel & Shuey, *supra* note 134. The Karnes and Dilley facilities sought, but did not obtain, licensing after the Texas Department of Family and Protective Services issued an emergency rule. *Texas Dep’t of Family & Protective Servs.*, 2018 Tex. App. LEXIS 9643, at *2. A Texas court issued a temporary injunction prohibiting the issuance of that emergency rule, but on appeal that case was dismissed with prejudice for lack of standing, so the rule went into effect. *Id.* at *2–3. Under the emergency rule, Karnes and Dilley could apply for licenses in Texas as childcare facilities despite being operated by private prison companies. Teo Armus, *A Court Ruling May Allow Migrant Families To Be Held Indefinitely. These Families Know What That Could Be Like.*, *TEX. TRIB.* (Dec. 10, 2018, 12:00 AM), <https://www.texastribune.org/2018/12/10/migrant-families-indefinite-detention-in-dilley/> [<https://perma.cc/3K7F-974R>].

136. PECK & HARRINGTON, *supra* note 26, at 8.

137. Mark Noferi, Note, *Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm*, 27 *J. C.R. & ECON. DEV.* 533, 553–54 (2014). The goals of civil and criminal detention are also similar in that both are meant to prevent flight before proceedings and protect public safety. *Id.* at 548. Despite these similarities, there may be better ways to achieve the goals of civil immigration detention that do not involve indefinite detention, particularly when children are detained. For example, one option would be to allow families detained together to leave these residential facilities for specified periods of time.

138. ICE has allegedly told attorneys who visited the Berks County facility that detainees would be criminally charged if they left the facility. Jacob Pramuk, *A Controversial Detention Center in Pennsylvania Could Be a Model as Trump Looks To Detain Migrant Families Together*, *CNBC POL.* (July 17, 2018, 11:43 AM ET), <https://www.cnn.com/2018/07/17/berks-county-pennsylvania-detention-center-could-be-model-for-trump.html> [<https://perma.cc/AP75-G6LJ>].

existing facility employs a variety of security measures for “detainee safety” to keep detainees within the four walls of the facility.¹³⁹ Unless the Karnes, Dilley, and Berks facilities become “non-secure,” legal family detention is not possible.

Family detention also may not be possible because of the overall lack of space available for immigrants in civil detention.¹⁴⁰ Thus, even if the three existing family detention centers were state licensed and nonsecure, there would not be enough room at these facilities to detain all families apprehended at the southern border.¹⁴¹ Family detention would also require reunification of thousands of separated children and their parents, something the government continues to struggle with months after it allegedly stopped separating families.

3. Family Reunification and the *Ms. L.* Litigation

Six days after President Trump issued an executive order amending his family separation policy, a federal court issued a preliminary injunction, ordering the Trump Administration to stop separating families and to reunite those families who were separated.¹⁴² As of December 2018, DHS reported to the court that 2737 children may have been separated from a parent while the family separation policy was in full force.¹⁴³ The original *Ms. L.* class included only children who were detained in ORR or DHS custody,

139. OFFICE OF INSPECTOR GEN., OIG-17-65, RESULTS OF OFFICE OF INSPECTOR GENERAL FY 2016 SPOT INSPECTIONS OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FAMILY DETENTION FACILITIES 5 (2017).

140. Molly Hennessy-Fiske & Molly O’Toole, *Border Patrol Says Detention Centers Are Full—And Starts Releasing Migrants*, L.A. TIMES (Mar. 20, 2019, 3:40 PM), <https://www.latimes.com/nation/la-na-texas-border-migrants-released-20190319-story.html> [https://perma.cc/UU2E-4D4J].

141. See *supra* note 125 and accompanying text.

142. *Ms. L. v. U.S. Immigration & Customs Enft.*, 310 F. Supp. 3d 1133, 1136–37 (S.D. Cal. 2018). Specifically, the class of persons that this injunction applies to are

[a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the [DHS], and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody absent a determination that the parent is unfit or presents a danger to the child.

Id. at 1139 n.5 (alteration in original) (quoting Order Granting in part Plaintiff’s Motion for Class Certification, *Ms. L. v. U.S. Immigration & Customs Enft.*, No. 3:18-cv-0428-DMS-MDD, 17 (S.D. Cal. June 26, 2018)). Children under the age of five were to be reunited with their families within fourteen days and children five and older were to be reunited within thirty days of the entry of the Order. *Id.* at 1149.

143. SEPARATED CHILDREN IN ORR CARE, *supra* note 3, at 11.

or were in ORR foster care, on the date the preliminary injunction was issued.¹⁴⁴ On March 8, 2019, the class was amended and the court ordered the Trump Administration to also identify children who were separated before the preliminary injunction was issued on June 26, 2018.¹⁴⁵

The total number of children separated from their parents by DHS is unknown.¹⁴⁶ Creating a procedure to unify families has been difficult for the government.¹⁴⁷ Some families are still being separated at the border¹⁴⁸ while other families are reunited but

144. Order Granting Plaintiffs' Motion to Modify Class Definition, *Ms. L. v. U.S. Immigration & Customs Enft.*, No. 3:18-cv-0428-DMS-MDD, 3 (S.D. Cal. Mar. 8, 2019).

145. *Id.* at 3. The motion to modify the class definition did not require the Trump Administration to actually reunite those children; it only required identification of the class. *Id.* at 14. To identify the expanded class, the government stated that it would need to manually review the case records of about 47,000 children referred to ORR, which could possibly take two years. Julia Jacobs, *U.S. Says It Could Take 2 Years To Identify up to Thousands of Separated Immigrant Families*, N.Y. TIMES (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/us/family-separation-trump-administration.html> [<https://perma.cc/7RA2-H5AA>].

146. SEPARATED CHILDREN IN ORR CARE, *supra* note 3, at 13. The uncertainty is due to several factors. Neither DHS nor HHS officials were aware of the family separation policy until it was publicly announced. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 12 (2018) [hereinafter EFFORTS TO REUNIFY CHILDREN]. Prior to the family separation policy, there was no integrated data system between HHS and DHS to track the identity and status of separated children. SEPARATED CHILDREN IN ORR CARE, *supra* note 3, at 13. DHS made changes to its data system to better indicate which children were separated after the implementation of the Family Separation policy, but ORR officials were unaware that DHS made these changes. EFFORTS TO REUNIFY CHILDREN *supra*, at 16. The number of children identified for the purposes of the *Ms. L.* litigation did not include the estimated thousands of children who were separated beginning in 2017 up until the date that the lawsuit was brought. SEPARATED CHILDREN IN ORR CARE, *supra* note 3, at 14.

147. The court order was entered into on June 26, 2018, but HHS did not approve reunification procedures until July 10, 2018. EFFORTS TO REUNIFY CHILDREN, *supra* note 146, at 26–27. One ORR staff member reported that “there were times when she would be following one process in the morning but a different one in the afternoon.” *Id.* at 27. The approved reunification procedures were twofold: (1) determine parentage, and (2) determine whether the parent presents any danger to the child and whether the parent is fit to care for the child. *Id.* First, HHS initially sought to use DNA swabs to determine parentage, but the court only approved DNA testing “when necessary to verify a legitimate, good-faith concern about parentage or to meet a reunification deadline.” *Id.* at 27–28. Second, HHS determined fitness to care for the child by relying on the fingerprints and criminal background checks performed by DHS when the adult was first taken into DHS custody. *Id.* at 28. It also reviewed the child's case file for any indication of safety concern. *Id.*

148. Families may still be separated if DHS determines that the parent is unfit or present a danger to the child. *See infra* Section III.B.1. The court in the *Ms. L.* case did not specify what qualified as being an unfit parent or presenting a danger to the child. *Ms. L. v. U.S. Immigration & Customs Enft.*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018). Immigration attorneys claim the Trump Administration is taking advantage of this exception by coming up with “anything . . . to say that the separation is for the health and welfare of the child, then they'll separate them.” Ginger Thompson, *Families Still Being Separated at Border—Months After Trump's 'Zero Tolerance' Policy Reversed*, USA TODAY (Nov. 27 2018, 9:26

must deal with the lasting trauma of being separated. Ultimately, the consequences of the Zero Tolerance and Family Separation policies are government created. Neither the Zero Tolerance policy nor the Family Separation policy achieved its goal of deterring families from coming to the United States. Between October 2018 and August 2019, CBP apprehended 457,871 family units and 72,873 UACs at the southern border.¹⁴⁹ CBP apprehended 107,212 family units and 50,036 UACs in 2018 and 75,622 family units and 41,435 UACs in 2017 at the southern border.¹⁵⁰ The federal government continues to view civil immigration detention as a way to deter immigrant families from attempting to cross the southern border.¹⁵¹ Empirical research does not support this view.¹⁵² If the government's goal is to deter families, it should consider alternatives to

PM ET), <https://www.usatoday.com/story/news/politics/elections/2018/11/27/donald-trump-zero-tolerance-policy-border-migrants-families-separated-immigration/2132426002/> [https://perma.cc/HBT8-BEG7]. The determination of whether the parent poses a present danger to the child is a discretionary decision made by the CBP agent alone; it cannot be appealed. Alan Gomez, *Despite Ban, Separating Migrant Families at the Border Continues in Some Cases*, USA TODAY (Feb. 21, 2019, 6:00 AM ET), <https://www.usatoday.com/story/news/politics/2019/02/21/trump-administration-breaks-up-some-migrant-families-heres-how-cbp-border-sabraw-separate/2836085002/> [https://perma.cc/6SM6-66WQ].

149. SOUTHWEST BORDER MIGRATION FY 2019, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration> [https://perma.cc/5Y73-UL3U].

150. SOUTHWEST BORDER MIGRATION FY 2018, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> [https://perma.cc/U7QM-RH7B]; SOUTHWEST BORDER MIGRATION FY 2017, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> [https://perma.cc/5K8S-2LRU].

151. For example, in April 2019, Attorney General William Barr overruled a 2005 decision from the Board of Immigration Appeals that allowed certain asylum seekers to be released on bond. *Matter of M.S.*, 27 I. & N. Dec. 509, 509–10 (2019) (interim decision). Barr has instructed immigration judges to detain a migrant until her asylum claim is fully adjudicated, instead of permitting immigration judges to release the migrant on bond after she establishes a credible fear. *Id.* Viewing detention as deterrence is not unique to the Trump Administration. The Obama Administration announced a “No-Release Policy” wherein DHS detained families seeking asylum, even those found to have a credible fear of prosecution, and often refused to consider such families for bond, recognizance, or other conditions of release. Emily Ryo, Essay, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 239 (2019). When Jeh Johnson, the Secretary of Homeland Security under Obama, announced this policy he stated, “Frankly, we want to send a message that our border is not open to illegal migration, and if you come here, you should not expect to simply be released.” Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html> [https://perma.cc/98XJ-TUJE].

152. Ryo, *supra* note 151, at 239; see also Adam Cox & Ryan Goodman, *Detention of Migrant Families as “Deterrence”: Ethical Flaws and Empirical Doubts*, JUST SEC. (June 22, 2018), <https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts/> [https://perma.cc/J9F7-JP4M]; Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, CTR. FOR AM. PROGRESS (July 2018), <https://cdn.americanprogress.org/content/uploads/2018/07/23131244/FamilySeparation-brief1.pdf> [https://perma.cc/3UBD-392M].

Zero Tolerance and Family Separation. Though, the government's goal should not be deterrence; it should be to address immediate humanitarian concerns.

B. *Policy Recommendations*

I propose three alternatives to Zero Tolerance and Family Separation. First, the court overseeing the *Ms. L.* litigation should clarify the meaning of when a parent “presents a danger” to the child. The *Ms. L.* litigation requires reunification of children separated from a parent, “absent a determination that the parent is unfit or presents a danger to the child.”¹⁵³ This language gives the government a massive amount of discretion to continue to separate children from their parents if the CBP agent makes a discretionary and nonreviewable decision that the parent “presents a danger” to the child.¹⁵⁴ DHS considers four things when determining whether a parent presents a danger to a child, the parent's: “(1) criminal history; (2) communicable disease; (3) unfitness or dangerousness (including hospitalizations); or (4) some other criteria that do not automatically exclude the parent from being treated as a *Ms. L.* class member at a later point in time.”¹⁵⁵ Because the court did not define what “presents a danger,” DHS is able to use the four vague standards listed above to make the determination itself.

The court should specifically define when a parent “presents a danger” to the child to reduce the number of children unnecessarily separated from their parents.¹⁵⁶ For example, under DHS's interpretation, a parent may have a “criminal history,” and be deemed to “present a danger to the child” if the parent attempted to enter the United States illegally.¹⁵⁷ Such a “criminal history” does not

153. *Ms. L.*, 310 F. Supp. 3d at 1139 n.5.

154. Gomez, *supra* note 148.

155. Joint Status Report ¶¶ 7–10, *Ms. L. v. U.S. Immigration & Customs Enf't*, 330 F.R.D. 284 (S.D. Cal. 2019) (No. 3:18-cv-00428 DMS (MDD)). CBP does not tell parents why they are being separated from their children if doing so “would create a risk to the child's safety or would not otherwise be in the child's best interests” or where CBP suspects fraud, smuggling, or trafficking. *Id.*

156. This criterion should be objective, because as Judge Sabraw, the judge overseeing the litigation, noted, “Objective standards are necessary, not subjective ones, particularly in light of the history of this case.” *Ms. L.*, 310 F. Supp. 3d at 1142.

157. 8 U.S.C. § 1325(a) (2018).

necessarily mean that the parent is dangerous, particularly if the family is seeking asylum.¹⁵⁸

The decision of whether a parent presents a danger to a child should also be reviewable by an immigration judge.¹⁵⁹ Initial separations are “based on the information that is available at the time to those [CBP] agents encountering an adult and child.”¹⁶⁰ As additional information becomes available, a parent or child should be able to ask for review of DHS’s initial determination that family separation is necessary. This check on DHS’s discretion is necessary to prevent needless and severe trauma. The overriding interest should be to ensure that families are not arbitrarily separated given the irreparable harm that family separation causes.¹⁶¹

Second, the *Flores* Settlement Agreement should be codified to reflect its preference for releasing children, not detaining them. DHS and HHS have proposed a rule that would terminate the *Flores* Settlement Agreement and promulgate new regulations to take its place.¹⁶² Among other things, the proposed regulations would eliminate the state licensure requirement for accompanied children and adopt an alternate federal licensing scheme.¹⁶³ Adoption

158. In one case, DHS refused to reunite Hilario Maldonado with his six-year-old son because Maldonado had an outstanding warrant for a DUI from when he lived in Florida more than a decade ago. Eva Ruth Moravec & Ginger Thompson, *A Defendant Shows up in Immigration Court by Himself. He’s 6.*, PROPUBLICA (Nov. 27, 2018, 4:45 PM ET), <https://www.propublica.org/article/6-year-old-in-immigration-court-by-himself-zero-tolerance-family-separation> [<https://perma.cc/WU8F-WJQ3>].

159. An immigration judge may be in the best position to review this decision. However, review by an immigration judge may be difficult because of the massive backlog of immigration cases. In January 2019, it was estimated that 800,000 cases were being handled by around 400 immigration judges. Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html> [<https://perma.cc/YS6T-85RR>]. The alternative would be to allow DHS to review its own decisions. An immigration judge could at least provide neutral review, whereas DHS could not.

160. Joint Status Report, *supra* note 155, ¶ 14.

161. Of course, family separation also harms the parents. *See, e.g.*, Molly Hennessy-Fiske, *Honduran Migrant Who Was Separated From Family Is Found Dead in Texas Jail in an Apparent Suicide*, L.A. TIMES (June 9, 2018, 5:55 PM), <https://www.latimes.com/nation/la-na-border-patrol-suicide-20180609-story.html> [<https://perma.cc/8K5R-HFX4>] (describing a situation where a father apparently committed suicide while in custody after being separated his wife and three-year-old child).

162. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486 (proposed Sept. 7, 2018). Since writing this Comment, the final rule has been issued. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (codified at 8 C.F.R. pts. 212, 236, 45 C.F.R. pt. 410) (effective Oct. 22, 2019). With respect to federal licensing, the final rule is largely the same as the proposed rule. *Id.* at 44,394.

163. Apprehension, Processing, Care, and Custody of Alien Minors & Unaccompanied

of the rule would effectively allow for indefinite detention of children with their parents, contrary to the *Flores* Settlement Agreement's core preference for releasing children.

Under the *Flores* Settlement Agreement, all children must generally be released from an unlicensed facility after twenty days,¹⁶⁴ including children who are detained with their parents. Because none of the three family detention facilities are state licensed under the *Flores* Settlement Agreement, children, but not their parents, must be released from those facilities after twenty days.¹⁶⁵ The proposed rule would legally allow children to be detained longer than twenty days because family detention centers could become licensed by the federal government instead of by states.¹⁶⁶ Because it would be easier for a detention facility to obtain a federal license under the proposed rule, non-state-licensed facilities could quickly become federally licensed and allow for prolonged detention of children with their family.

Extended detention of children creates tension with the *Flores* Settlement Agreement's preference for release, but it allows a child to remain with her parents. If the government reconsidered its civil detention model, it would not have to decide between traumatizing a child through detention or traumatizing a child through family

Alien Children, 83 Fed. Reg. at 45,488. It would also define "non-secure." *Id.* at 45,497 ("a facility will be deemed non-secure if it meets its state's or locality's definition, but if no such definition is provided by the state or locality, the proposed rule provides that a facility will be deemed non-secure if it meets an alternative definition derived from Pennsylvania's definition of secure care"). DHS relied on 55 Pa. Code § 3800.5 because the Berk County family detention center is the longest operating family detention center. *Id.* at 45,497 n.14. DHS does not define its "alternate definition" of the Pennsylvania Code in the regulations.

164. *See supra* note 36 and accompanying text.

165. This statement is only true in theory since the government detains children in excess of twenty days in the three existing family detention facilities anyway. *See supra* Section III.A.2.

166. Apprehension, Processing, Care, and Custody of Alien Minors & Unaccompanied Alien Children, 83 Fed. Reg. at 45,497. DHS proposes that a detention facility would be federally licensed "if DHS employs an outside entity to ensure that the facility complies with family residential standards established by ICE." *Id.* It urges adoption of an "alternative licensing process [that] would mirror analogous state licensure processes for detention centers." *Id.* However, the proposed rule also notes that, while all states have licensing schemes for unaccompanied juveniles, states "generally do not have licensing schemes for facilities to hold minors who are together with their parents or legal guardians." *Id.* at 45,488. Therefore, the proposed rule does not provide an alternative licensing process mirroring analogous state licensure processes because states generally do not have such licensure processes for detaining *accompanied* children. The proposed rule attempts to take advantage of states' lack of licensing processes for accompanied children by creating a vague federal licensing process that would allow DHS and HHS to detain accompanied children in excess of twenty days. This is contrary, not consistent with, the *Flores* Settlement Agreement, which prefers release.

separation.¹⁶⁷ Therefore, the government could codify the *Flores* Settlement Agreement in its current form without having to worry about licensing issues because it could release, instead of detain, the family.

Lastly, and most importantly, children should be viewed as children first and as immigrants second. United States immigration laws treat children differently depending on whether the child is deemed unaccompanied, accompanied, an asylum seeker, trafficked, undocumented, and so on.¹⁶⁸ These labels ignore the reality that the steps necessary to protect the rights of children, and to keep children safe, are often the same despite their legal status.¹⁶⁹ Children are one of the world's most vulnerable populations, and yet, the United States uses its laws to differentiate between which children are deserving and which are not. The United States may not realistically be able to grant every child citizenship. However, the United States can do a lot more to help the children who come knocking at its door.

IV. ZERO TOLERANCE AND FAMILY SEPARATION UNDER INTERNATIONAL LAW

The CRC takes a different approach to children's rights than United States domestic law. For example, the United States has adopted the "best interest of the child" principle, but only with respect to placement of unaccompanied children in ORR custody.¹⁷⁰ The CRC takes the broader stance that the best interest of the child is the primary consideration for *any* decision regarding the child.¹⁷¹ This Part will first discuss what a system that implements the best interest of the child principle, as articulated in CRC Article 3, could look like in the United States. Secondly, it will discuss foreign policy and the root causes of the current humanitarian crisis.

167. See *infra* Part IV.

168. Byrne, *supra* note 75, at 65.

169. *Id.*

170. 8 U.S.C. § 1232(c)(2)(A) (2018) ("[A]n unaccompanied alien child in the custody of [HHS] shall be promptly placed in the least restrictive setting that is in the best interest of the child.").

171. See *supra* Section II.A.

A. *Best Interest of the Child*

The Committee on the Rights of the Child has emphasized that immigration detention on the sole basis of a child's immigration status is a clear violation of the CRC and is never in the best interest of the child.¹⁷² In the United States, the best interest of the child principle is narrow and does not apply to all children.¹⁷³ This principle should apply to all children because it is discriminatory to give children more or less rights solely on the basis of their immigration status.¹⁷⁴ Moreover, one of the fundamental purposes of the CRC is to ensure that nation-states implement policies that prioritize the child's best interest over their other laws and policies.¹⁷⁵ The United States can begin to achieve that goal by recognizing that accompanied and unaccompanied children are *children* deserving of the same rights under the law.

There are many ways the United States can act in the best interest of all children apprehended at its border. First, it could change its model of civil detention for children. Around-the-clock confinement of children in CBP or HHS custody is a massive deprivation of a child's liberty, whether it is deemed civil detention or criminal incarceration. A system that puts the best interest of the child first would ensure that when a child is in CBP or HHS custody, that child is not subject to prison-like detention.¹⁷⁶ This could mean expanded efforts to place unaccompanied children with a sponsor while their immigration case is pending.¹⁷⁷ It could also

172. COMM. ON THE RIGHTS OF THE CHILD, REPORT OF THE 2012 DAY OF GENERAL DISCUSSION: THE RIGHTS OF ALL CHILDREN IN THE CONTEXT OF INTERNATIONAL MIGRATION ¶ 32 (2012), <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> [<https://perma.cc/C9EM-64HG>].

173. This principle only applies to placement of unaccompanied children in ORR custody. See 8 U.S.C. § 1232(c)(2)(A) (2012 & Supp. V 2018) (“[A]n unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child.”).

174. Unlike unaccompanied children, accompanied children may be placed in expedited removal proceedings. SMITH, *supra* note 19, at 5. Expedited removal proceedings allow an accompanied child to be removed from the United States without a hearing or further review if the child lacks valid entry documents. See § 1225(b)(1)(A)(i) (stating that an immigrant arriving to the United States without valid entry documents shall be removed “without further hearing or review” unless the immigrant intends to apply for asylum or has a fear of persecution).

175. Comm. on the Rights of the Child, *supra* note 172, ¶ 73.

176. See *supra* Section III.A.

177. ORR has signed an agreement with ICE to share the legal status of a child's sponsor with ICE. Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced To Risk Everything*, NEW YORKER (Oct. 16, 2018), <https://www.newyorker.com/news/dispatch>

mean that children are allowed to leave the facility during the day with a case worker. However, keeping a child in a non-state-licensed, secure facility is not the best interest of the child.¹⁷⁸

The United States could also expand the appointment of child advocates to all children.¹⁷⁹ A child advocate could help the child ensure her basic needs are being met, ensure the child is safe, and help the child overcome language barriers. However, a child advocate may not be enough. General Comment No. 6 of the CRC requires that children have proper representation through a guardian or advisor *and* a legal representative.¹⁸⁰ Appointment of counsel is not required in civil cases in the United States, even for children facing deportation.¹⁸¹ This should not be the case. Providing all children with counsel to assist them in removal proceedings would help protect the child's best interest.¹⁸² Government-sponsored legal representation for all children is one of the best ways

/to-free-detained-children-immigrant-families-are-forced-to-risk-everything [https://perma.cc/3MER-FPU9]. This creates a dilemma wherein undocumented families may want to care for an unaccompanied child, perhaps a niece, cousin, or other family member, but may face immigration consequences for doing so. Placing a child with a sponsor, instead of detaining her, is often in the child's best interest. It is also in the child's best interest if her sponsor is not deported. ORR should stop sharing the legal status of a child's sponsor with ICE, or ICE should not refer these people for prosecution to reduce the number of children in ORR custody.

178. For example, the nation's largest facility for unaccompanied children, Homestead, is operated by a private company, Comprehensive Health Services. Graham Kates, *Nation's Largest Holding Facility for Migrant Children Expands Again*, CBS NEWS (Apr. 4, 2019, 11:33 AM), <https://www.cbsnews.com/news/homestead-nations-largest-holding-facility-for-migrant-children-expands-again/> [https://perma.cc/8RPE-VALR]. The facility is the nation's only site that is not subject to routine inspections by state child welfare experts. *Id.* Children have a very strict schedule that begins at 6:00 a.m. every morning and includes education not monitored or certified by local public schools. *Id.* Children have one hour of daily outdoor recreation in a field surrounded by a tall fence. *Id.* This prison-like environment is not appropriate for children who were not found guilty of any crime.

179. The TVPRA permitted HHS to "appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children." § 1232(c)(6) (2012 & Supp. V 2018). TVPRA does not require appointment of a child advocate nor does it define "vulnerable." However, children, especially unaccompanied children, are almost always vulnerable.

180. Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 33, U.N. Doc. CRC/GC/2005/6 (2005).

181. See § 1362 (2018) ("[T]he person concerned *shall* have the privilege of being represented (at no expense to the Government) by such counsel.") (emphasis added).

182. See generally, Benjamin Good, *A Child's Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 148–56 (2014).

to ensure a child's rights are protected during immigration proceedings given their vulnerability and the possibility of deportation.

B. *Foreign Policy Concerns*

Implementing the best interest of the child approach for all children does not begin when a child arrives at the southern border. It requires consideration of broader issues, namely why children seek asylum in the first place. The current humanitarian crisis primarily involves children coming from El Salvador, Guatemala, and Honduras. Immigration is multifaceted; there is not often one reason why people choose to immigrate. Generally, violence and gangs in Central America have influenced many children to seek asylum in the United States.¹⁸³ Poverty, lack of meaningful education, and employment are other reasons for immigration.¹⁸⁴

Despite the high number of people fleeing Central America, the Trump Administration proposed ending foreign-assistance programs in Guatemala, Honduras, and El Salvador.¹⁸⁵ President Trump has portrayed this action as a punishment for Central America's failure to stop immigration.¹⁸⁶ However, ending foreign-assistance programs will only hurt children and increase the number of asylum seekers at the southern border. It also ignores the reality that a majority of foreign aid goes to nongovernmental organizations, churches, charities, and private contractors.¹⁸⁷ If the

183. For example, in El Salvador, boys and girls older than twelve are prime targets for gang recruitment. Sofia Martinez, *Today's Migrant Flow Is Different*, ATLANTIC (June 26, 2018), <https://www.theatlantic.com/international/archive/2018/06/central-america-border-immigration/563744/> [<https://perma.cc/67KT-T57C>]. A United Nations High Commissioner for Refugees report notes that of the 104 Salvadoran children it interviewed, sixty-nine children stated that they left El Salvador because of organized violence or lack of state protection from such violence. U.N. High Comm'r for Refugees, Reg'l Office for the U.S. and the Caribbean, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 31 (May 2014), [hereinafter *Children on the Run*] <https://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html> [<https://perma.cc/S72E-Z57V>].

184. *Children on the Run*, *supra* note 183, at 24.

185. Phil Hesel et al., *Trump Administration Says It Will Cut Foreign Aid for Guatemala, Honduras, El Salvador*, NBC NEWS (Mar. 30, 2019, 7:43 PM ET), <https://www.nbcnews.com/politics/politics-news/trump-administration-says-it-will-cut-foreign-aid-guatemala-honduras-n989246> [<https://perma.cc/6BLL-YALM>].

186. Elisabeth Malkin, *Where Does Aid to Central America Go? Police Officers, Farmers and NGOs*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/world/americas/trump-central-america-aid.html> [<https://perma.cc/NC7G-WFQB>].

187. *Id.*

United States wants to decrease the number of children from Central America seeking asylum, it should help address the underlying causes of immigration through foreign-assistance programs.

CONCLUSION

The United States's approach to the current humanitarian crisis at the border is entirely misplaced. The Zero Tolerance and Family Separation policies, in addition to cutting off foreign aid to Guatemala, Honduras, and El Salvador, are simply not going to stop people from immigrating. A fifteen-year-old girl left El Salvador because, "the gang threatened me. One of them 'liked' me. . . . In El Salvador they take young girls, rape them and throw them in plastic bags."¹⁸⁸ A sixteen-year-old girl left Guatemala because her grandmother, "beat me from the time I was little . . . my boyfriend also beat me . . . I left because he tried to kill me by strangling me."¹⁸⁹ A twelve-year-old boy left Honduras "because I wanted to be with my mother . . . My grandmother mistreated me . . . She forced me and my siblings to work. I couldn't stand to be there anymore."¹⁹⁰

The United States's current policies do not achieve their goal of deterrence.¹⁹¹ However, the goal of the immigration system, in light of the current humanitarian crisis should not be deterrence. It should be child focused. Families should be separated in limited circumstances, such as where the child is being trafficked. Children should not be detained in prison-like settings. Children should be given an advocate who can help them navigate the immigration system. Most importantly, children should be treated as children first and as immigrants second.

Samantha R. Bentley *

188. Children on the Run, *supra* note 183, at 34.

189. *Id.* at 35.

190. *Id.* at 26.

191. President Trump described the border as being "like Disneyland" since formally ending his family separation policy because there is no longer a strong deterrent stopping families from seeking asylum. Nicholas Wu, *Trump Calls for Changes to Immigration Laws, Says the Border Is 'Like Disneyland'*, USA TODAY (Apr. 28, 2019, 11:32 AM ET), <https://www.usatoday.com/story/news/politics/2019/04/28/donald-trump-border-like-disneyland/3608274002/> [<https://perma.cc/6CFA-QJJZ>].

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