

AMERICA’S VIOLATION OF INTERNATIONAL LAWS: THE TRUMP ADMINISTRATION’S ZERO-TOLERANCE IMMIGRATION POLICY

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ABSTRACT

This paper argues that the Trump administration’s policy of separating children from their families at the border violates at least three international laws: (1) The Refugee Convention and its Protocol; (2) refugee and human rights law, as summarized in the United Nations High Commissioner for Refugees (“UNHCR”) Detention Guidelines; and (3) the Torture Convention. The laws identified here may not be exhaustive; that is, the Trump administration’s zero-tolerance immigration policy may have violated other international laws as well. This paper suggests that the United States can adopt several changes to better effectuate the policy related to families seeking asylum.

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INTRODUCTION

The Trump administration's zero-tolerance immigration policy violated international laws which are binding on the United States. Specifically, a blanket zero-tolerance policy violates three pieces of international legislation: (1) the Refugee Convention and its Protocol; (2) the refugee and human rights laws set forth by the United Nations High Commissioner for Refugees ("UNHCR"); and (3) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").

First, the Refugee Convention and its Protocol, which binds the United States, are clear that treating those seeking asylum as criminals is unlawful. However, asylum seekers are being treated like criminals as they were automatically detained and separated from their children without consideration of whether there was a pressing need for detaining any given individual.

Second, separating children from their parents seeking asylum and placing children in detention is a violation of refugee and human rights law as set forth by the UNHCR for three main reasons. A zero-tolerance policy does not respect a person's right to seek asylum, as articulated in Guideline 1.¹ Utilizing detention for the purpose of deterrence is arbitrary, in violation of Guideline 4.² A blanket detention policy denies fundamental procedural safeguards implemented by the UNHCR, such as the right to be informed of a specific reason for detention, access to legal counsel, and prompt hearing before a judicial authority.

Finally, separating children from their families in this context arguably amounts to torture, in violation of the Torture Convention. This is so because separating families intentionally inflicts pain and suffering on the basis of the detainee's suspected illegal arrival in the United States. The separation of families and detention is accepted by the Trump administration, and the purpose is punishment and deterrence. This paper will show why these acts may amount to torture pursuant to the Torture Convention. The two arguments in favor of a zero-tolerance policy do not stack up well against the numerous available alternatives that should have

¹ U.N. High Comm.'r for Refugees (UNHCR), *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 6 (2012), <http://www.refworld.org/pdfid/503489533b8.pdf> [<https://perma.cc/4XPF-EVSH>].

² *Id.* at 7.

been utilized to avoid the atrocity of separating families and violating international laws.

President Trump stated: “We have the worst immigration laws in the entire world. Nobody has such sad, such bad and, actually, in many cases, such horrible and tough—you see about child separation, you see what’s going on there.”³ In his remarks, President Trump refers to the zero-tolerance immigration policy that he implemented, announced by former Attorney General Jeff Sessions on April 6, 2018.⁴ There was widespread shock and dismay at the Trump administration’s policy of “zero tolerance” enforcement of criminal penalties for irregular border crossing—even against asylum-seekers⁵—and its most extreme element, the separation of families and the incarceration of children.⁶ On June 20, 2018, President Trump issued an executive order officially ending the zero-tolerance policy.⁷ The executive order came just days after President Trump said that the only way to end the division of families was through congressional action because “you can’t do it through an executive order.”⁸ President Trump caved to enormous political pressure from Democrats, activists, members of his own party, Pope Francis, and even his wife and eldest daughter, who all told him that the zero-tolerance policy is wrong.⁹ While a zero-tolerance policy may no longer officially exist, the crisis has not ended. Since June 2018, despite the official end of the separation policy, hundreds of additional children have been separated from their parents.¹⁰ The House Committee on Oversight and Reform reported in

³ Donald Trump, *Remarks at a Meeting with the National Space Council and Signing of Space Policy Directive-3*, WHITEHOUSE.GOV (June 18, 2018) [<https://perma.cc/3LJE-PWPB>].

⁴ Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs (Apr. 6, 2018) (press release number 18-417) [<https://perma.cc/P582-F9ZN>].

⁵ “Asylum” is a form of discretionary relief available to individuals who qualify as “refugee[s]” by demonstrating past “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Immigration and Nationality Act (I.N.A.) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

⁶ Meg Satterthwaite & Rebecca Riddle, “Zero Tolerance” and the Detention of Children: *Torture Under International Law*, JUST SEC. (June 21, 2018) [<https://perma.cc/6966-S2Q6>].

⁷ Exec. Order No. 13,841, 83 Fed. Reg. 122 (June 20, 2018).

⁸ Michael D. Shear et al., *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018) [<https://perma.cc/L5DG-EZGV>].

⁹ *Id.*

¹⁰ Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES (Mar. 9, 2019) [<https://perma.cc/8H3R-J768>].

July 2019 that over 700 children were separated from their parents after the policy's official end.¹¹

Meg Satterthwaite and Rebecca Riddle described the criminalization of seeking asylum as unethical, the forced separation of families as abhorrent, and the intentional deployment of the suffering children as especially vile.¹² As this comment will show, it is also illegal under international law binding on the United States.

Part I of this paper discusses how the zero-tolerance immigration policy came to be. Part II explains that the Refugee Convention and its Optional Protocol, which binds the United States, made clear that treating those seeking asylum as criminals is unlawful—even if they enter irregularly.¹³ Part III shows that the Trump Administration separating children from their parents seeking asylum and placing children (who are thereby rendered unaccompanied through the criminalization of their parents) in detention is a violation of refugee and human rights law. Part IV asserts that the separation of children from their families in this context may also amount to torture. Part V considers arguments in favor of zero-tolerance immigration policy and counters that there are a range of alternatives to detention that our government and decision-makers should utilize when shaping immigration policy. This paper concludes that the violations of international law clearly outweigh arguments in favor of zero-tolerance immigration policy.

I. THE GENESIS OF THE ZERO-TOLERANCE IMMIGRATION POLICY

The Trump administration's zero-tolerance immigration policy is one of many failed attempts to deal with the refugee crisis at the border when considered against the laws in place to protect those who are among the most vulnerable in society—children fleeing violence and poverty. First, this Part explains what the *Flores* agreement is and how it came to be. Second, this section describes the significant influx of migrants fleeing from Central America to the United States and explains some of the factors contributing to their plight. Next, this Part explains how the Obama administration tried and failed to deal with the influx of migrants in

¹¹ U.S. H.R. COMM. ON OVERSIGHT AND REFORM, CHILD SEPARATIONS BY THE TRUMP ADMINISTRATION (2019).

¹² Satterthwaite & Riddle, *supra* note 6.

¹³ In this article, "irregularly" means when migrants cross the border in a way that does not conform with established procedures such as via a designated port-of-entry or with a travel visa.

conjunction with the *Flores* Agreement. The final section of this Part explains how the Trump administration attempted to break ways with the failing Obama-era policy. Unfortunately, the Trump administration's response to the crisis by separating families greatly exacerbated an already dire situation.

A. THE FLORES AGREEMENT

The *Flores* settlement agreement is at the heart of family separation because it effectively regulates the detention, release, and treatment of children in the custody of federal immigration authorities.¹⁴ The *Flores* settlement agreement has its roots in the 1980s, when the ACLU and four minor children, including Jenny Flores, filed a class action lawsuit seeking to instill procedural safeguards to protect non-criminal immigrant children who were being placed in detention at the border.¹⁵ The lawsuit was necessary because detained children were subject to inhumane conditions and abuse by federal authorities and contractors.¹⁶ For example, Jenny Flores fled violence in El Salvador to unite with her aunt in the United States.¹⁷ Unfortunately, Jenny never made it to her aunt's house because the Immigration and Naturalization Service (INS) detained her at the border.¹⁸ Jenny was handcuffed, strip searched, and placed in a detention center where she was forced to share beds and bathrooms with unrelated adult men and women.¹⁹ The INS refused to release her to her aunt because they did not allow unaccompanied minors to be released to "third-party adults."²⁰

Litigation in this case spanned more than nine years, eventually reaching the United States Supreme Court.²¹ Justice Scalia wrote the

¹⁴ Fiona Chong, *President Trump's International Order and the Flores Settlement Agreement Explained*, REFUGEES INT'L (June 28, 2018) [<https://perma.cc/8UPB-PZ4C>]; Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px), [hereinafter *Flores Settlement Agreement*] [available at: <https://perma.cc/ZXN7-9Q7M>].

¹⁵ Rebeca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1648 (2012) (citing *Flores v. Meese*, 681 F. Supp. 665, 666 (C.D. Cal. 1988)).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1649.

opinion for the majority, which mostly sided with the government.²² Justice Scalia stated that the release procedures did not violate minors' substantive due process or procedural due process rights and that the Attorney General was acting appropriately within his discretion.²³ Scalia further described the arrangements as "legal custody" and not "detention" because the facilities met state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children.²⁴ The case was remanded to the District Court and the parties reached an agreement before the District Court could make a final determination.²⁵

The resulting *Flores* settlement agreement "sets out a policy for the detention, release, and treatment of minors in the custody of the INS."²⁶ The *Flores* settlement agreement states that whenever the INS arrests a minor, it shall expeditiously process the minor and provide the minor with a notice of rights.²⁷ The agreement states that holding facilities shall be safe and sanitary, provide for adequate supervision, allow contact with family members who were arrested with the minor, and segregate unaccompanied minors from unrelated adults.²⁸ Additionally, the *Flores* settlement agreement requires that the INS release children promptly from detention, place detained children in the "least restrictive" setting appropriate for the child's age and special needs, and implement standards of care for children in detention.²⁹

Although the *Flores* settlement agreement laid out the rights of children who were detained by the INS, immigration authorities did not fully comply with it.³⁰ In 2003, Amnesty International did an independent study that found that the INS consistently deprived detained children of their civil rights.³¹ Infractions included detaining non-offending minors in

²² See *Reno v. Flores*, 507 U.S. 292 (1993).

²³ *Id.* at 293.

²⁴ *Id.* at 298.

²⁵ Lopez, *supra* note 15, at 1649.

²⁶ See *Flores Settlement Agreement*, *supra* note 14.

²⁷ *Id.* at 7, ¶ 12A.

²⁸ *Id.*

²⁹ Lopez, *supra* note 15, at 1650 ("(1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending in the 'least restrictive' setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention").

³⁰ *Id.*

³¹ AMNESTY INT'L U.S., WHY AM I HERE?: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION, 17 (2003).

facilities for juvenile offenders³² and holding minors for months, or sometimes years, even though an adult was available to care for them.³³

In the 2000s, Congress passed several laws which codified the *Flores* settlement agreement's policies into specific rules related to the duration and conditions under which children can be held.³⁴ While these laws made great strides in protecting children who came to the border, the protections were only afforded to unaccompanied minors, to the exclusion of minors who arrived at the border with family.³⁵ Eventually, plaintiffs filed a lawsuit to uphold the terms of the *Flores* settlement agreement. The District Court for the Central District of California held that the *Flores* settlement protections extend to both unaccompanied and accompanied minors,³⁶ and it set a standard that the government could not hold minors for more than 20 days.³⁷

B. THE SURGE

After the *Flores* settlement agreement was in place, the United States experienced a surge of immigrants fleeing Honduras, Guatemala, and El Salvador seeking asylum in the United States. Beginning in October 2011, the United States documented what is commonly known as “the surge”—a dramatic increase in the number of unaccompanied minor immigrants entering the United States seeking asylum.³⁸ Specifically, in 2011, U.S. Customs and Border Patrol documented 4,059 unaccompanied minors entering the U.S.³⁹ That number jumped to 10,443 in 2012, and then more than doubled again to 21,537 in 2013.⁴⁰ Between 2013 and 2014, an estimated 63,000 unaccompanied minors, mostly coming from

³² *Id.* at 1.

³³ *Id.* at 54.

³⁴ 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.); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044 (codified as amended in scattered sections of 22 U.S.C., 8 U.S.C., 18 U.S.C., and 34 U.S.C.) [hereinafter TVPRA].

³⁵ Lopez, *supra* note 15, at 1654.

³⁶ *Flores v. Lynch*, 212 F. Supp. 3d 907, 909 (C.D. Cal. 2015).

³⁷ Ingrid Eagly et al., Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 795–96 n.44 (2018).

³⁸ UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, at 4 (Mar. 13, 2014) [<https://perma.cc/PH4L-46EP>].

³⁹ *Id.*

⁴⁰ *Id.*

Central America, crossed the United States border.⁴¹ The child migrants were predominately boys in their teens, but the Pew Research Center found that children under the age of twelve, often sent with older siblings or smugglers, represented a growing proportion of incoming migrants.⁴²

While individual reasons for fleeing to the United States varied, the common trend was that migrant children sought a chance for a better and peaceful life. Most children fled violence and poverty. Violent crimes spiked in the region during the studied period because of fragile institutions, corrupt law enforcement, and gangs that increasingly targeted teenage boys for recruitment and as victims.⁴³ Particularly, in Honduras, a 2009 military coup caused much of the country to fall out of the rule of law, making it prime territory for crime.⁴⁴ According to United Nations Office on Drugs and Crimes, Honduras, El Salvador, and Guatemala suffer the world's first, fourth, and fifth highest homicide rates, respectively.⁴⁵

Economic opportunity was another motivating factor for children fleeing to the United States.⁴⁶ In Guatemala, 53.2% of the population survives on less than \$4 per day; the figure is 52% in Honduras and 42.7% in El Salvador.⁴⁷ However, despite the desperate conditions and ongoing poverty, many experts believe that the migrant surge is rooted in violence more than poverty.⁴⁸

The surge of unaccompanied children migrants essentially made the *Flores* settlement agreement unworkable on the ground. As a result, immigration officials did not adhere to the order, leading to the violation of the rights of minor asylum seekers.

C. THE OBAMA ADMINISTRATION FAILED TO LITIGATE AROUND THE *FLORES* AGREEMENT

The Obama administration attempted to get a handle on the surge of immigrants at the border in part by revising the *Flores* Agreement. Specifically, the Obama administration sought to revise the *Flores*

⁴¹ Danielle Renwick, *The U.S. Child Migrant Influx*, COUNCIL ON FOREIGN RELATIONS: BACKGROUNDER [<https://perma.cc/SL5E-MYSV>].

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

settlement agreement in four ways: (1) to modify the release provisions so that they would not apply to accompanied minors; (2) to modify the release provisions to the extent superseded by legislation (in particular, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”)⁴⁹); (3) to modify the state licensing requirements so that they would not apply to family residential facilities; and (4) to modify reporting obligations.⁵⁰ None of these attempts were successful.

First, as a threshold matter, the Obama administration argued that the language of the *Flores* Agreement that “[a]ll minors who are detained in the legal custody of the INS”⁵¹ should not determine who was intended to be in the class.⁵² The administration contended that the definition of a class member should be read narrowly to exclude accompanied minors because the plaintiffs’ lawsuit originally challenged “the constitutionality of INS’s policies, practices, and regulations regarding the detention and release of *unaccompanied* minors.”⁵³ The court disagreed, finding the plain language of the Agreement unambiguous.⁵⁴

Second, the Obama administration sought to modify the Agreement’s release provisions, arguing that they were superseded by legislation, mostly the TVPRA.⁵⁵ TVPRA applies only to unaccompanied minors.⁵⁶ It states that Customs and Border Patrol is required to screen children determined to be a national or habitual resident of a country contiguous to the United States to see if the child is a victim of trafficking, fears return because of a credible fear of persecution, or is otherwise unable to consent to return.⁵⁷ If those factors are not present, the child may

⁴⁹ See TVPRA, *supra* note 34.

⁵⁰ *Flores v. Johnson*, 212 F. Supp. 3d 864, 871–72 (C.D. Cal. 2015).

⁵¹ See *Flores Settlement Agreement*, *supra* note 14, at ¶ 10 (emphasis added).

⁵² *Flores v. Johnson*, 212 F. Supp. 3d at 871.

⁵³ See *Flores Settlement Agreement*, *supra* note 14, at ¶ 3 (emphasis in the original); *see also id.*

⁵⁴ *Flores v. Johnson*, 212 F. Supp. 3d at 872 (“To the extent that Defendants are arguing that Plaintiffs’ original intent in filing the lawsuit should inform the Court’s understanding of what the parties meant when they defined the class in their Agreement, Defendants’ argument is not sufficiently compelling to outweigh the plain language of the Agreement indicating the parties’ intent to make “all minors,” without qualification, part of the class”).

⁵⁵ See TVPRA, *supra* note 34, § 235 (codified in principal part at 8 U.S.C. § 1232 (2018)); Order Re Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement at 21, *Flores v. Lynch*, No. CV 85-04544 DMG (AGRx) (C.D. Cal. July 24, 2015).

⁵⁶ See 6 U.S.C. § 279(g)(2) (2008); 8 U.S.C. § 1232 (2018) (“Any unaccompanied alien child who is a national or habitual resident of a country that is contiguous with the United States shall be treated in accordance with subparagraph (B)”).

⁵⁷ 8 U.S.C. § 1232(a)(2)(A) (2018).

withdraw the application for admission to the United States and return to his country.⁵⁸ If those factors are present, or a determination cannot be made within forty-eight hours of the child's apprehension, the child is transferred to Health and Human Services ("HHS") within seventy-two hours and may be placed in removal proceedings before an immigration judge.⁵⁹ HHS must then place the child "in the least restrictive setting that is in the best interest of the child," taking into consideration "danger to self, danger to the community, and risk of flight."⁶⁰

The Obama administration argued that TVPRA prevents them from complying with (1) Paragraph 14 of the Agreement, requiring release of minors following a certain order of preference; (2) Paragraph 12A of the Agreement, providing the government up to three days to transfer an unaccompanied minor to a licensed program in the same district, and up to five days to transfer an unaccompanied minor to a licensed facility outside the area; and (3) Paragraph 21 of the Agreement, providing that a minor may be transferred to a suitable state or county juvenile detention facility (or secure INS facility) under certain conditions.⁶¹ However, the court held that the administration's arguments missed the mark because the Agreement's provision does not interfere with the grounds for removal, nor does it interfere with the TVPRA's requirement that Customs and Border Patrol transfer a minor to HHS custody within seventy-two hours of determining that she is an unaccompanied minor. Once Customs and Border Patrol transfers the minor to HHS custody, HHS then has the responsibility to comply with the *Flores* Agreement.⁶² Accordingly, the court said that the Obama administration did not show that a significant change in the law occurred making compliance with the Agreement impermissible, and thus modification of the Agreement was not required.⁶³

Third, the Obama administration sought to modify the Agreement's state licensing requirements so that they would not apply to family residential facilities. According to the language of the Agreement, the government must house children who are not released in a non-secure

⁵⁸ 8 U.S.C. § 1232(a)(2)(B) (2018).

⁵⁹ 8 U.S.C. §§ 1232(a)(4), (a)(5)(D), (b)(3), (c)(3)-(5) (2018).

⁶⁰ 8 U.S.C. § 1232(c)(2) (2018).

⁶¹ Order Re Plaintiffs' Motion to Enforce Settlement of Class Action and Defendants' Motion to Amend Settlement Agreement at 22, *Flores v. Lynch*, No. CV 85-04544 DMG (AGRx) (C.D. Cal. July 24, 2015).

⁶² *Id.*

⁶³ *Id.* at 23-24.

facility that is licensed by an appropriate state agency to care for dependent children.⁶⁴ The Obama administration argued that the licensing provision cannot be interpreted to apply to family residential centers because (1) these centers did not exist at the time the agreement was formed, and (2) there is no state licensing process available now—nor was there in 1997—for facilities that hold children in custody along with their parents or guardians. However, the court stated that this reasoning is backwards because the court’s task is to examine whether Defendants’ actions in 2014 satisfy the obligations set forth in the 1997 Agreement and not whether the government’s 2014 policy was contemplated by the parties to the 1997 Agreement.⁶⁵ Stated simply, under the Agreement, the government is required to provide children who are not released temporary placement in a licensed program.⁶⁶

Finally, the Obama administration sought to amend ongoing reporting requirements to eliminate the reporting requirements that applied to the implementation of the original Agreement in 1997 and to add reporting requirements related to the inspection of family residential facilities.⁶⁷ However, given the legal standard that “[a] court may, on motion and just terms, relieve a party or its legal representative from a final judgment, order, or proceeding if applying it prospectively is no longer equitable,”⁶⁸ the court found that the defendant did not prove there was either a change in fact or a change in law sufficient to warrant such relief.⁶⁹

Following the Obama’s administration’s failed attempt to revise the *Flores* Agreement, they reinstated the Bush-era policy known as “catch-and-release.”⁷⁰ Essentially, border patrol agents were ordered to prioritize who they arrested and to focus chiefly on criminals, national security risks, and illegal immigrants.⁷¹ Others, including families seeking asylum, were no longer being detained. Instead, immigrant officials placed

⁶⁴ Flores Settlement Agreement, *supra* note 14, at ¶ 6, 14, 19, 23; Order Re Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement at 12, *Flores v. Lynch*, No. CV 85-04544 DMG (AGRx) (C.D. Cal. July 24, 2015).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 19.

⁶⁸ *Id.* at 19–23 (internal quotes omitted).

⁶⁹ *See id.*

⁷⁰ Stephen Dinan, *Obama Reinstates ‘catch-and-release’ policy for illegal immigrants*, WASH. TIMES (Feb. 4, 2016) [<https://perma.cc/K2BS-VCJ9>].

⁷¹ *Id.*

GPS devices on families and released them into the community, pending a hearing.

D. THE TRUMP ADMINISTRATION CHANGED OBAMA'S POLICY

The Trump Administration changed Obama's policy; however, the *Flores* Agreement tied their hands and the work-around led to a violation of international laws. In 2016, then-presidential candidate Donald Trump vowed that "anyone who illegally crosses the border will be detained until they are removed out of our country and back to the country from which they came."⁷² To that end, on January 25, 2017, President Trump signed an Executive Order requiring the Secretary of Homeland Security to issue new policy guidance regarding appropriate and consistent use of detention authority under the Immigration and Nationality Act (INA) and end to the so-called catch-and-release policies.⁷³ Accordingly, on February 20, 2017, the Secretary issued a Memorandum taking steps to end catch-and-release.⁷⁴ However, thousands of people apprehended by U.S. authorities were still released while awaiting hearing, including women and children who could not be detained longer than twenty-one days pursuant to the *Flores* Agreement.⁷⁵

In response, like the preceding Obama administration, the Trump administration also attempted to revise the *Flores* Agreement, making several of the same arguments already submitted by the Obama administration. Specifically, the Trump administration argued that several material changes have transpired since the *Flores* Agreement was entered, including the increased and worsening influx of migrants crossing U.S. borders.⁷⁶

When that attempt failed, on April 6, 2018, former Attorney General Jeff Sessions directed federal prosecutors "to adopt immediately a zero-tolerance policy for all offenses" related to the misdemeanor of

⁷² Philip Bump, *Here's what Donald Trump said in his big immigration speech, annotated*, WASH. POST (Aug. 31, 2016) [<https://perma.cc/G9XE-BE2J>].

⁷³ Exec. Order No. 13, 767, 82 Fed. Reg. 8793 (Jan. 12, 2017).

⁷⁴ Ending "Catch and Release" at the Border of the United States and Directing Other Enhancements to Immigration Enforcement, 83 Fed. Reg. 16179, (Apr. 13, 2018) [<https://perma.cc/6BXR-9GUP>].

⁷⁵ Julia Edwards Ainsley, *Despite Trump vow to end catch and release, he is still freeing thousands of migrants*, REUTERS (June 6, 2017) [<https://perma.cc/UMT8-98JQ>].

⁷⁶ *President Trump's Executive Order And The Flores Settlement Agreement Explained*, REFUGEES INT'L, (June 28, 2018) [<https://perma.cc/8849-WXNJ>].

improper entry into the United States, and that this “zero-tolerance policy shall supersede any existing policies.”⁷⁷ The zero-tolerance policy aimed to criminally convict first-time offenders, where such was previously reserved for those who committed the felony of illegal re-entry after removal.⁷⁸ Since pursuant to the *Flores* Agreement, children of detained parents could not be held in detention for more than twenty days, the zero-tolerance directive led in practice to separation of these children from their parents. The zero-tolerance policy was a disaster. It also violated international law which is binding on the United States.

II. ZERO-TOLERANCE VIOLATES THE REFUGEE CONVENTION AND PROTOCOL

The United Nations Convention relating to the Status of Refugees (“Convention”), adopted in 1951, is the centerpiece of contemporary international refugee protection.⁷⁹ The United States is a Contracting State to the Convention and is, therefore, bound by it.⁸⁰ The 1951 Convention is a post-Second World War instrument and was originally limited in scope to persons fleeing the events that occurred in Europe prior to 1951.⁸¹ The Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level.⁸²

In 1967, the Convention was amended with a Protocol (“Amendment” or “Protocol”) that removed the temporal and geographic limitations, thus giving the Convention universal coverage.⁸³ The Protocol obliges states to comply with the substantive provisions of the 1951 Convention to all persons covered by the refugee definition in Article 1,⁸⁴ without any limitation of date.⁸⁵ Although related to the Convention in this

⁷⁷ See Press Release, *supra* note 4.

⁷⁸ See Masood Farivar, *Sessions Announces ‘Zero-Tolerance’ Policy on Illegal Border Crossings*, VOICE OF AMERICA (Apr. 6, 2018) [<https://perma.cc/6VRZ-EPYQ>].

⁷⁹ G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Dec. 16, 1966), at 2.

⁸⁰ See *id.* at 6.

⁸¹ *Id.* at 2.

⁸² *Id.* at 3.

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 14–16.

⁸⁵ UNHCR, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 4 (2010), <https://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [hereinafter Refugee Convention] [<https://perma.cc/RH72-B4CP>].

way, the Protocol is an independent instrument, accession to which is not limited to states parties to the Convention. While the 1967 Amendment was the only amendment to the Convention, it has been supplemented by refugee and subsidiary protection regimes in several regions,⁸⁶ as well as by the progressive development of international human rights law.⁸⁷

Article 1 of the Convention sets forth the definition of a *refugee*.⁸⁸ The emphasis of this definition is on the protection of persons from political or other forms of persecution.⁸⁹ According to the Convention, a refugee is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.⁹⁰ The Convention is both a status- and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization, and non-refoulement.⁹¹ The Convention recognizes that seeking asylum can require refugees to breach immigration rules.⁹² Therefore, the Convention prohibits charging those seeking asylum with immigration or criminal offenses related to the seeking of asylum.⁹³ The Convention further prohibits the arbitrary detention of a person purely on the basis of seeking asylum.⁹⁴ Importantly, the Convention contains various safeguards against the expulsion of

⁸⁶ See, for example, (a) the Organization of African Unity (now African Union) Convention governing the Specific Aspects of Refugee Problems in Africa, *opened for signature* Sept. 10, 1969, U.N.T.S. 14691 (entered into force Jun. 20, 1974); (b) Directive 2004/83 of the European on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, of 29 April 2004 Official Journal L 304 , 30/09/2004 P. 0012 – 0023; *Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, CARTAGENA DECLARATION OF REFUGEES art. 3, ¶ 3 (Nov. 22, 1984); *id.* at 2.

⁸⁷ G.A. Res. 2198 (XXI), *supra* note 79.

⁸⁸ “[A]ny person who . . . (2) . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” *Id.* at 14.

⁸⁹ *Id.* at 3.

⁹⁰ *Id.*

⁹¹ *Non-Refoulement*, MERRIAM-WEBSTER.COM (defining “non-refoulement” as the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution) [<https://perma.cc/9323-65TG>].

⁹² See Refugee Convention, *supra* note 85, at 3.

⁹³ *Id.*

⁹⁴ *Id.*

refugees.⁹⁵ For example, the principle of nonrefoulement is so fundamental that the Convention states that no country may make any reservations or derogations limiting it.⁹⁶ The nonrefoulement principle provides that no one shall expel or return (“refoul”) a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom.⁹⁷

Additionally, the Convention lays down the basic minimum standards for the treatment of refugees. Such rights include access to the courts,⁹⁸ to gainful employment,⁹⁹ to welfare,¹⁰⁰ and to public primary education,¹⁰¹ as well as the provision for documentation, including a refugee travel document in passport form.¹⁰²

The fundamental importance and enduring relevance of the Convention and the Protocol is widely recognized.¹⁰³ In 2001, the same year as the September 11th terrorist attacks in New York City, states’ parties issued a Declaration reaffirming their commitment to the 1951 Convention and the 1967 Protocol.¹⁰⁴ In particular, they recognized that the core principle of non-refoulement is embedded in customary international law.¹⁰⁵

The Trump administration’s zero-tolerance immigration policy blatantly violates the Convention and its Protocol. Former Attorney General Jeff Sessions directed federal prosecutors to immediately adopt a zero-tolerance policy for all offenses of improper entry into the United States.¹⁰⁶ This includes people who crossed the border for the purpose of seeking asylum as well as those who crossed in fear for their life.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Art. 16 provides that “(1) A refugee shall have free access to courts of law on the territory of all Contracting States; (2) a refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance.” *Id.* at 21.

⁹⁹ *Id.* at 21–23.

¹⁰⁰ *Id.* at 24–26.

¹⁰¹ *Id.* at 24.

¹⁰² *Id.* at 3; *see also, id.* at 27–28.

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; *see generally* Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Geneva, Switz., Sept. 12–13, 2001, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees PP2, 6, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002).

¹⁰⁶ Press Release, *supra* note 4.

Prosecuting a person who crosses the border seeking asylum violates the Convention because the Convention prohibits charging people who seek asylum with immigration or criminal offenses related to the seeking of asylum.¹⁰⁷ The zero-tolerance policy aimed to criminally convict first-time offenders, where such action was previously reserved for those who committed the felony of illegal re-entry after removal.¹⁰⁸

Additionally, the Convention prohibits countries from arbitrarily detaining someone purely based on seeking asylum; however, a zero-tolerance immigration policy does just that. When a policy mandates that everyone who irregularly crosses the border be detained, those seeking asylum by irregularly crossing the border are automatically detained. Hence, their detention is solely because they are seeking asylum, and not for any other reason. For a detention to not be arbitrary, immigration officials should give reasons for the detention, rather than lumping asylum-seekers in with those who clearly should be detained, such as those with prior convictions. The practice of detaining asylum-seekers simply for crossing the border violates the Convention, which makes clear that treating those seeking asylum as criminals is unlawful—even if they enter irregularly.

Moreover, the Convention lays down basic minimum standards for the treatment of refugees. Such rights include access to the courts, to gainful employment, to welfare, to public primary education, and to the provision for documentation, including a refugee travel document in passport form. Contrary to these basic minimum standards, an empirical analysis of asylum adjudication in family detention found that families have been detained in remote locations, faced language barriers in accessing the courts, and, despite valiant pro bono efforts to assist them, routinely gone to court without legal representation.¹⁰⁹ Only half of the family members who remained detained even found counsel, fewer than 2% spoke English, and 93% had their hearings in detention adjudicated remotely over video conference, rather than in a traditional face-to-face courtroom setting.¹¹⁰

¹⁰⁷ See Refugee Convention, *supra* note 85, at 3.

¹⁰⁸ Farivar, *supra* note 78.

¹⁰⁹ Eagly et al., *supra* note 37, at 785.

¹¹⁰ *Id.*

III. ZERO-TOLERANCE VIOLATES REFUGEE AND HUMAN RIGHTS LAW

The rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement.¹¹¹ The UNHCR Detention Guidelines reflect the current state of international law relating to the detention of asylum-seekers.¹¹² The Guidelines are intended to guide: (1) governments in creating and implementing asylum and migration policies which involve an element of detention; and (2) decision-makers, including judges, in making assessments about the necessity of detention in individual cases.¹¹³

A zero-tolerance immigration policy violates at least three UNHCR Detention Guidelines. For one: “Guideline 1: The right to seek asylum must be respected.”¹¹⁴ This Guidelines states: “[e]very person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations, and other serious harm. Seeking asylum is not, therefore, an unlawful act.”¹¹⁵ The fact that asylum-seekers have often experienced traumatic events needs to be considered in determining any restrictions on freedom of movement based on irregular entry or presence.¹¹⁶ Clearly, when an asylum-seeker is automatically detained, that person’s right to seek asylum is not being respected and is instead being treated as an unlawful act, in violation of Guideline 1.

Second, a zero-tolerance immigration policy violates Guideline 4: “[d]etention must not be arbitrary, and any decision to detain must be based on an assessment of the individual’s particular circumstances.”¹¹⁷ To avoid arbitrariness, detention needs to be necessary in the individual case, reasonable in all the circumstances, and proportionate to a legitimate purpose.¹¹⁸ Despite this Guideline, Trump’s zero-tolerance immigration

¹¹¹ UNHCR, *supra* note 1, at 6.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 12.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 15.

¹¹⁸ *See id.* at 16 (“Guideline 4.1: Detention is an exceptional measure and can only be justified for a legitimate purpose”); *see also id.* at 21 (“Guideline 4.2: Detention can only be resorted to when it

policy was created to have a blanket deterrence effect. Several Trump officials admitted that the zero-tolerance immigration policy has a deterrence value, including former White House Chief of Staff John F. Kelly. "They're coming here for a reason," Kelly said of migrants fleeing violence in Central America. "And I sympathize with the reason. But a big name of the game is deterrence."¹¹⁹ The ACLU brought a legal challenge seeking a nationwide injunction to stop family separation caused by this practice. District Court Judge Sabraw wrote that implementing a family separation policy to deter other migrants "arbitrarily tears at the sacred bond between parent and child. Such conduct, if true, as it is assumed to be on the present motion, is brutal, offensive, and fails to comport with traditional notions of fair play and decency."¹²⁰ Deterrence is not a permissible ground to justify the detention of asylum seekers because it is not based on an individual assessment as to the necessity to detain. Therefore, it violates UNHCR Detention Guidelines 4.1 and 4.2.

Further, failure to consider less coercive or intrusive means could also render detention arbitrary.¹²¹ Therefore, the UNHCR Detention Guidelines stipulate that the "detention of asylum seekers should normally be avoided and be a measure of last resort."¹²² The Trump administration's policy of detaining everyone automatically who crosses the border irregularly clearly violates that guideline.

Additionally, a zero-tolerance immigration policy violates Guideline 7:

Decisions to detain or to extend detention must be subject to minimum procedural safeguards, including but not limited to (i) being informed at the time of detention of the reasons for the detention, and their rights in connection with the order, in a language and in terms they understand, (ii) being informed of the right to legal counsel, and (iii)

is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose").

¹¹⁹ Philip Bump, *Here are the Administration Officials who have said that family separation is meant as a deterrent*, WASH. POST (June 19, 2018) [<https://perma.cc/QJ39-PQPK>].

¹²⁰ Roque Planas, *Trump's Family Separation Policy Aims to Deter Immigration. That May Make it Illegal*, THE HUFFINGTON POST (June 7, 2018) [<https://perma.cc/Z6JJ-ZQZ9>].

¹²¹ See UNHCR, *supra* note 1, at 22 (stating "Alternatives to detention need to be considered").

¹²² Human Rights Watch, *Human Rights Watch Submits Comments on Proposed Rule Regarding the Detention of Children and Families*, HUMANRIGHTSWATCH.ORG (Nov. 6, 2018) [<https://perma.cc/C6PC-9P9D>]; see also UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees* (Jan. 16, 2002) [<https://perma.cc/4SN6-RSCD>].

to be brought promptly before a judicial or other independent authority to have the detention decision reviewed.¹²³

Here, the Trump administration provided no reasons for the detention, many detainees were not aware of their right to legal counsel, and the detention decision was not being judicially reviewed.

IV. SEPARATING CHILDREN FROM FAMILIES UNDER THESE CONDITIONS AMOUNTS TO TORTURE

Pursuant to Article 1, Part 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”), the term “torture” means

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹²⁴

Article 2, Part 2 of the Torture Convention states “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹²⁵

To illustrate how a zero-tolerance immigration policy can amount to torture, it is helpful to break down the definition of torture into its five elements. Specifically, using the definition set forth above, torture requires: (1) an act; (2) that intentionally inflicts either physical or mental pain and suffering; (3) for an act that either he or a third person has committed or is suspected to have committed; (4) with the consent or acquiescence of a public official, or person acting in their official capacity; (5) for the purpose of punishment. Under this definition, the atrocity known as a zero-tolerance immigration policy arguably amounts to torture.

First, there is an act of detaining people automatically for irregularly crossing the U.S. border. Second, when detention causes families to be separated, the separation intentionally inflicts mental pain and suffering on both the parent and the children. To understand this point,

¹²³ UNHCR, *supra* note 1, at 26–27.

¹²⁴ G.A. Res. 39/46, art. 1, ¶ 1 (Dec. 10, 1984).

¹²⁵ *Id.* at art. 2.

it is important to remember that when families leave their home to seek refuge or asylum in foreign country, all a family has left is each other. It is not a stretch of the imagination to recognize that when families in this circumstance are separated, mental pain and suffering is inflicted on both the parent and the child. As noted above, Judge Sabraw recognized this when he wrote in favor of the ACLU in their legal challenge seeking a nationwide injunction to stop family separation to this practice.¹²⁶ The third element requires the person being tortured, or a third party, to have done an act. We can look at this element both from the perspective of the parent and the child. The parent is suspected of illegally crossing the U.S. border and automatically detained. The child is in the position of the third person. Therefore, emotional pain and suffering is inflicted on the child because of the act of the parent—alleged illegal border crossing. Fourth, given that this was the Trump administration's policy, the act is clearly acquiesced to by public officials in their official capacity.

The fifth element of torture requires the purpose of detention to be punishment. Here, it is important to acknowledge the adverse and punitive conditions that children and their families have endured inside family detention. Research by Emily Ryo has found that detainees themselves experience detention as criminal punishment.¹²⁷ The family detention facilities in her study were all locked and surrounded by barbed wire and guards.¹²⁸ Several of these facilities were managed by private prison companies, such as the GEO Group and CoreCivic.¹²⁹ Furthermore, family

¹²⁶ See Planas, *supra* note 120 (“Implementing a family separation policy to deter other migrants arbitrarily tears at the sacred bond between parent and child. Such conduct, if true, as it is assumed to be on the present motion, is brutal, offensive, and fails to comport with traditional notions of fair play and decency”).

¹²⁷ Eagly, *supra* note 37 (citing Emily Ryo, *Fostering Legal Cynicism through Immigration Detention*, 90 S. CAL. L. REV. 999 (2017)); see also ELEANOR ACER & JESSICA CHICCO, HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 45 (2009) (“For arriving asylum seekers in particular, many expressed surprise at being handcuffed, imprisoned and treated like criminals.”) [<https://perma.cc/B9QL-FUTS>].

¹²⁸ Eagly, *supra* note 37 (citing Dora Schriro, *U.S. Dep’t of Homeland Sec., Immigration Detention Overview and Recommendations* 4, 10, 15 (2009)) (describing the prison-like conditions of detention) [<https://perma.cc/E7TL-SHG9>].

¹²⁹ *Id.* (citing Denise Gilman, *Opinion, Case Management Instead of Jailing Asylum-Seeking Mothers, Children for Profit*, U. TEX. NEWS (July 18, 2017)) (noting that two of the three family detention centers operating in the United States are run by private prison companies) [<https://perma.cc/X5NH-UZJR>].

detainees wear institutional clothing,¹³⁰ work for as little as \$1.00 a day,¹³¹ and must abide by strict rules, the violation of which can result in even more severe conditions, such as solitary confinement.¹³² Family detention facilities have also been the sites of severe medical neglect,¹³³ psychological trauma,¹³⁴ and have been found to violate basic standards for detaining children.¹³⁵ For these reasons, the Trump administration's zero-tolerance immigration policy is torture, as defined by the Torture Convention. Pursuant to Article 2, Part 2 of the Torture Convention, no circumstances whatsoever may be invoked to justify torture.¹³⁶

¹³⁰ See Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015) (describing young children forced to wear prison jumpsuits) [<https://perma.cc/DC9Q-8DRV>].

¹³¹ Eagly, *supra* note 37 (citing immigrant detainees in Colorado filing suit to challenge, as unlawful, a privately-run detention center's practices forcing them to work for \$1 a day, or no pay at all; *Menocal v. GEO Grp.*, 113 F. Supp. 3d 1125 (D. Colo. 2015), appeal docketed, No. 17-1125 (10th Cir. Apr. 14, 2017)); see also Inter-Am. Comm'n on Human Rights, *Impact of Executive Orders on Human Rights in the United States (Ex-officio)*, YOUTUBE.COM (Mar. 21, 2017) (discussing the lawsuit and the conditions of detainee labor at the Colorado detention center) [<https://perma.cc/V6E6-5VQG>].

¹³² Eagly, *supra* note 37 (citing Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013) ("On any given day, about 300 immigrants are held in solitary confinement at the 50 largest detention facilities... Nearly half are isolated for 15 days or more.") [<https://perma.cc/ZFH3-JZBM>].

¹³³ Eagly, *supra* note 37 (citing Molly Hennessy-Fiske, *Immigrant Detention Centers Criticized at Capitol Hill Forum*, L.A. TIMES (July 28, 2015) (reporting on allegations of insufficient medical care and other prison-like conditions in family detention centers)) [<https://perma.cc/T98F-8M57>]; Roque Planas, *Lawyers Claim Medical Neglect at ICE Family Detention Centers*, THE HUFFINGTON POST (July 31, 2015) (discussing a lawsuit alleging severe medical neglect at Karnes and Dilley) [<https://perma.cc/Y9H9-YE4T>].

¹³⁴ Eagly, *supra* note 37 (citing Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCI. 341, 353–55 (2010) (finding that parents' legal vulnerability due to detention and deportation is associated with poor outcomes for their children's emotional well-being and academic performance)); see generally Kalina M. Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496 (2014) (discussing the psychological harm of detention and deportation on migrant families); Ximena Urrutia-Rojas & Néstor Rodríguez, *Potentially Traumatic Events Among Unaccompanied Migrant Children from Central America*, HEALTH & SOC. SERVICES AMONG INT'L LAB. MIGRANTS 151, 162–64 (Antonio Ugalde & Gilberto Cárdenas eds., 1997) (arguing/positing that detention and deportation contribute to serious anxiety disorders for some unaccompanied children who migrate to the United States).

¹³⁵ Eagly, *supra* note 37 (citing Bunikyte, *ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at 6, 8 (W.D. Tex. Apr. 9, 2007) (finding that Hutto was unlicensed and failed to meet other requirements of the Flores Settlement Agreement)); see also *Grassroots Leadership v. Tex. Dep't of Family and Protective Servs.*, No. D-1-GN-15-004336, 2016 WL 9234059, at 4 (250th Tex. Jud. Dist. Ct. Dec. 16, 2016) (ordering the Texas Department of Family and Protective Service to refrain from licensing the Dilley and Karnes facilities because of the harmful conditions that these facilities imposed on children).

¹³⁶ See G.A. Res. 39/46, *supra* note 124, art. 2.

V. ARGUMENTS IN SUPPORT OF ZERO-TOLERANCE AND ALTERNATIVES TO INCARCERATION

Three arguments are often cited in support of family detention. First, supporters argue that these families do not appear at future court hearings.¹³⁷ Second, it is asserted that the people crossing the border irregularly lack viable claims to remain in the United States.¹³⁸ Finally, administration officials and immigration enforcement advocates have asserted there is no other choice, and that a zero-tolerance policy is necessary to secure the border.¹³⁹

The first two arguments in support of family detention are not supported by facts. First, family members seeking asylum who were released from detention attended their hearings in 96% of cases that began in family detention since 2001.¹⁴⁰ Second, nearly half (49%) of those who were released and sought legal relief from removal with the help of an attorney were allowed to stay.¹⁴¹ Therefore, it cannot be accurate that those crossing the border irregularly lack viable claims to remain in the United States. They simply needed an advocate to articulate their case on their behalf.

There are several other viable alternatives to detention. Given the violations of international law, alternatives to detention can and should be considered. The UNHCR issued Alternatives to Detention.¹⁴² These recommendations are intended to guide governments and decision-makers, including the judiciary, when setting policies regarding detention.¹⁴³ Detention is not the only way. These other viable options should be utilized.

The first alternative that the UNHCR describes is the deposit or surrender of documentation.¹⁴⁴ Here, asylum-seekers would be required to deposit or surrender identity, perhaps travel documentation, such as passports.¹⁴⁵ Individuals would then need to be issued substitute

¹³⁷ Eagly, *supra* note 37, at 792.

¹³⁸ *Id.*

¹³⁹ WILLIAM A. KANDEL, CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 2 (2019).

¹⁴⁰ Eagly, *supra* note 37, at 792.

¹⁴¹ *Id.*

¹⁴² See UNHCR, *supra* note 1, Annex A.

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.* at 41.

¹⁴⁵ *Id.*

documentation that authorizes their stay in the territory, or their release into the community.¹⁴⁶ Normatively, it is hard to predict the extent to which asylum-seekers are tethered to their documentation. Keeping track of all the documentation could prove an administrative hurdle, and there will be an expense involved with issuing substitute documentation. Nevertheless, this alternative is viable when compared to separating families in violation of international law.

In addition to surrendering documentation, there are also several conditions that could be imposed on asylum-seekers in lieu of incarceration. For example, a reporting condition could be imposed requiring asylum-seekers to periodically report to immigration or other authorities (for example, the police) during the status determination procedure.¹⁴⁷ Reporting could be periodic or scheduled around asylum hearings, or other official appointments.¹⁴⁸ Reporting could also be to a non-governmental organization (NGO) or private contractor within community supervision arrangements.¹⁴⁹ However, a delicate balance would need to be struck to make a reporting condition viable because overly onerous reporting conditions can lead to non-cooperation and can compel individuals willing to comply to instead fail.¹⁵⁰ For example, reporting conditions that require an individual or his or her family to travel long distances and/or at their own expense can lead to non-cooperation through inability to fulfill the conditions, and can unfairly discriminate on the basis of economic position.¹⁵¹ Nevertheless, the concept of reporting conditions in lieu of incarceration should be explored for families seeking asylum.

Housing conditions should be utilized where practicable. In lieu of incarceration, asylum-seekers could be asked to reside at a specific address, or within an administrative region, until their status has been determined.¹⁵² Asylum-seekers could further be required to obtain prior approval if they wish to move out of the designated region before their status has been determined, or to inform the authorities if they change

¹⁴⁶ *Id.* at 41.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Community supervision arrangements are discussed in more detail below.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 42.

address within the same administrative region.¹⁵³ Of course, efforts should be made to approve residency that facilitates family reunification or closeness to relatives or other support networks.¹⁵⁴

Not all asylum-seekers have a specific address, or even a region, in mind when fleeing to the United States. In this situation, asylum centers may be practicable and even desirable to both asylum-seekers and immigration officials alike. However, asylum centers do not need to be synonymous with detention: they can still allow for freedom of movement. To that end, the UNHCR's fourth alternative suggests that some asylum-seekers be housed in semi-open centers during the determination process.¹⁵⁵ Semi-open centers are those which allow for freedom of movement while also imposing some rules and regulations for the good administration of the center, such as curfews and/or signing in to or out of the center.¹⁵⁶ General freedom of movement within and outside the center should, however, be observed to ensure that it does not become a form of detention.¹⁵⁷

Another condition which could be imposed on asylum-seekers in lieu of incarceration is community supervision arrangements. Community supervision arrangements refer to a wide range of practices in which individuals and families are released into the community with a degree of support and guidance (that is, "supervision").¹⁵⁸ Support arrangements can include support in finding local accommodation, schools, or work; or, in other cases, the direct provision of goods, social security payments, or other services.¹⁵⁹ The "supervision" aspect may take place within open or semi-open reception or asylum facilities, or at the offices of the relevant service provider while the individual lives freely in the community.¹⁶⁰ When supervision is a condition of the asylum-seeker's release, it may involve direct reporting to the immigration or other relevant authorities.¹⁶¹ The UNHCR notes that supervision need not be solely structured as a condition; it can also be optional. When supervision is optional,

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 43.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 43–44.

individuals are informed about the services available to them without any obligation to participate in them.¹⁶²

Finally, for asylum-seekers already in detention, the UNHCR recommends they be allowed to apply for release on bail.¹⁶³ However, for bail to be genuinely available to asylum-seekers, asylum-seekers must be informed of its availability and it needs to be accessible and effective.¹⁶⁴ Given the amount of people in this crisis, bail hearings need to be automatic.¹⁶⁵ However, they also need to be individualized. That is, the bond amount set must be reasonable given the unique situation of each asylum-seeker and should not be so high as to render the bail system merely theoretical.¹⁶⁶ Conditions could be imposed as part of bail, such as the reporting, housing and/or supervision conditions discussed above.¹⁶⁷ Access to legal counsel is an important component to that equation.¹⁶⁸ Unfortunately, an adequate amount of effective legal counsel may be the bail system's biggest hurdle.

Overall, from both a moral and legal standpoint, the imposition of conditions in lieu of incarceration is a humane, reasonable, and legal alternative to automatic detention of those who cross the border irregularly. Like any policy, there are normative and administrative details that need to be addressed in order to implement conditions that fit each family's unique situation. However, those issues are not insurmountable. Conditions are viable and should be utilized. They are far superior to separating families at the border.

VI. CONCLUSION

There is no doubt that America's immigration system needs a major overhaul. Unfortunately, the Trump administration's zero-tolerance immigration policy is one of many failed attempts to deal with the refugee crisis at the border when considered against the laws in place to protect those who are among the most vulnerable in society—children fleeing violence and poverty. The *Flores* Agreement is in place to regulate the detention, release, and treatment of children in the custody of federal

¹⁶² *Id.* at 44.

¹⁶³ *Id.* at 43.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

immigration authorities. The significant influx of migrants fleeing from Central America to the United States created challenges for the Obama administration considering the restraints put in place by the *Flores* Agreement. While the Obama administration's response had problems, the Trump administration's attempt to part with the failing Obama-era policy greatly exacerbated an already dire situation.

The Trump administration's policy to separate families at the border was tragic. This is clear from the array of fundamental international laws that were violated, including the Refugee Convention and its Protocol, refugee and human rights laws promulgated by the UNHCR, and the Torture Convention. The arguments in favor of the policy are unpersuasive when considered alongside the numerous viable alternatives that should be utilized, or at least considered on a case-by-case basis, to avoid the cruelty of a policy that automatically separates families. Immigration reform should not include policies that violate important international laws that are in place for the protection of fundamental human rights.

As President Obama said,

To watch those families broken apart in real time puts to us a very simple question: are we a nation that accepts the cruelty of ripping children from their parents' arms, or are we a nation that values families, and works to keep them together? Do we look away, or do we choose to see something of ourselves and our children?"¹⁶⁹

While litigation in this regard is ongoing as the story of America's immigration policy continues to unfold, it is important to remember that how we treat the most vulnerable members in our society speaks to who we are as a nation. The world is watching.

¹⁶⁹ Shear et al., *supra* note 8.