U.S. IMMIGRATION DETENTION OF CHILDREN AND THEIR FAMILIES IN THE TIME OF CORONAVIRUS AND FAMILY SEPARATION

SUBMISSION TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS
Executive Summary

The Global Justice Clinic at New York University School of Law\(^1\) hereby submits this report in response to the U.N. Special Rapporteur on the Human Rights of Migrants’ request for information about alternatives to immigration detention of children. This submission focuses on ongoing immigration detention during the coronavirus pandemic and continued U.S. policies of family separation at the U.S.-Mexico border.

The first part of this report demonstrates that the ongoing immigration detention of children and adults during the coronavirus pandemic violates international human rights law. While international law prohibits the immigration detention of children and places considerable restrictions on the immigration detention of adults, the Trump administration’s wholly inadequate response to the ongoing pandemic makes continued immigration detention of any kind unlawful. Article 10 of the International Covenant on Civil and Political Rights (ICCPR) requires that individuals deprived of their liberty be treated with dignity and Article 7 prohibits ill-treatment. The crisis conditions in U.S. immigration facilities, including overcrowding, poor hygiene, and inadequate medical care, endanger the lives of detainees by exacerbating the risks posed by the pandemic. The Trump administration’s recklessly deficient response violates the inherent dignity of those in immigration detention and creates conditions that constitute ill-treatment. The Trump administration has persistently shown that it is unwilling to protect those in immigration detention from the coronavirus pandemic, reinforcing the conclusion that release remains the proper remedy. As such, the Special Rapporteur should urgently call on the United States to release all individuals, children and adults, from immigration detention.

The second part of this report details the Trump administration’s intertwined policies of immigration detention and family separation. Though the Trump administration formally ended family separation under the zero-tolerance policy, a de facto policy of family separation continues to this day. Statements by high-level officials in the Trump administration, including President Trump himself, make clear that the underlying objective of immigration detention and family separation is to discourage migration to the United States. Pursuit of these policies to prevent migration violates the prohibition on arbitrary detention enshrined in Article 9 of the ICCPR. To avoid arbitrary detention in the immigration context, the state must provide an appropriate justification for each individual’s particular detention and show that no alternative, less restrictive means could achieve that objective. Widespread immigration detention and family separation aimed at discouraging migration flagrantly violates this standard. The Trump administration’s insistence on designing its immigration policies to prevent migration represents a formidable obstacle to the adoption of non-custodial alternatives to detention. The Special Rapporteur should make clear that preventing migration is a fundamentally inappropriate objective for detention and that the U.S. should not use cruel and unlawful policies to pursue it.

\(^1\) This report does not purport to represent the institutional views, if any, of New York University.
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Introduction

The Global Justice Clinic at New York University School of Law hereby submits this report in response to the U.N. Special Rapporteur on the Human Rights of Migrants’ call for information about obstacles to the implementation of non-custodial alternatives to immigration detention of children and their families. This report focuses on U.S. immigration detention during the coronavirus pandemic and continued U.S. policies of family separation.

Part 1. The United States Is Obligated under International Law Not to Subject Children to Immigration Detention. During the Coronavirus Pandemic, the U.S. Must Release All Immigrants from Detention.

Each year, tens of thousands of children are held in U.S. immigration detention. Children are held by two different agencies, which handle child detainees in different ways: those deemed unaccompanied minors are held by the Office of Refugee Resettlement (ORR) and children arriving with their families are detained in family residential centers, run by Immigration and Customs Enforcement (ICE).

While tens of thousands of children are held each year, the number detained at any one moment is considerably less as it does not include children who have been deported or released. Currently, about 2,100 children are in ORR custody while 342 children are in ICE family residential centers. About 34,000 total people, adults and children, are currently in immigration detention.

The United States is obligated to end the immigration detention of children under international law. But given the special circumstances posed by the coronavirus pandemic, the Special

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3 Children who arrive with parents or other primary caregivers may be deemed “unaccompanied minors” as a result of U.S. policies of family separation. See Part II, infra.


Rapporteur should urgently call on the U.S. to release all individuals, both adults and children, from immigration detention.

1.1 The Crisis Conditions in U.S. Immigration Detention Facilities, Exacerbated by the Recklessly Deficient Response of the Trump Administration to the Coronavirus Pandemic, Make the Continued Detention of Children and Adults Unlawful. International Law Requires that the U.S. Release All Individuals from Immigration Detention.

The United States is obligated under international law not to hold children in immigration detention beyond a very brief initial period for processing purposes. Article 3 of the Convention on the Rights of the Child (CRC) requires that a child’s best interest be a primary consideration in all actions concerning children. The U.N. Committee on the Rights of the Child, the U.N. Committee on the Protection of the Rights of All Migrant Workers, the U.N. High Commissioner for Refugees (UNHCR), and other U.N. human rights experts have each concluded that the immigration detention of children always contravenes the principle of the best interest of the child. Even though the United States has not ratified the Convention on the Rights of the Child, the U.S. is obligated under international law to act in a child’s best interest, including by abstaining from the immigration detention of children.

While immigration detention of adults may be lawful in discrete circumstances, the Trump administration’s detention policies contravene international law concerning both children and adults. This point will be further developed in Section 2.2, below. This section focuses on additional violations of international law relating to continued immigration detention during the coronavirus pandemic.

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8 See text accompanying note 80.
11 The U.S. is obligated under international law not to hold children in immigration detention. This obligation applies to the U.S. even though the country has not ratified the Convention on the Rights of the Child. Other sources of international law require that the U.S. end the immigration detention of children. An analysis of U.S. international law obligations to end the immigration detention of children can be found in Annex 1 to this submission.
12 U.S. immigration detention policies are built and implemented to discourage migration to the United States. Pursuing immigration detention to achieve this policy objective contravenes international law and makes the entire U.S. immigration detention regime unlawful. See text accompanying notes 73–82. While the second part of this submission analyzes this issue, this part of the report focuses on how the crisis conditions in U.S. immigration detention facilities during the coronavirus pandemic are independently unlawful and justify the release of all individuals, adults and children, from immigration detention.
Article 10 of the International Covenant on Civil and Political Rights (ICCPR), which the U.S. has ratified, requires that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The U.N. Human Rights Committee has interpreted Article 10 as imposing a positive obligation on states not to subject detainees to “any hardship or constraint other than that resulting from the deprivation of liberty.” To comply with this provision, states must respect the dignity of detained persons under the same conditions as free persons, including with respect to health care. When conditions of confinement are characterized by “structural deprivation and the non-fulfilment of rights necessary for a humane and dignified existence,” a state’s violations may amount to inhuman and degrading treatment, in contravention of Article 7 of the ICCPR.

Crisis conditions in U.S. immigration detention facilities, including overcrowding, poor hygiene, and inadequate medical services, exacerbate the risks posed by the coronavirus pandemic and threaten the lives and wellbeing of those held in immigration detention. The Trump administration’s recklessly deficient response to the pandemic in the immigration detention setting violates Article 10 and Article 7 of the ICCPR.

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13 International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (last visited Apr. 27, 2020). While the U.S. has made several reservations to the ICCPR, including with respect to Article 7, no reservations concern Article 10. See id.


16 HRC General Comment 21, supra note 15, at ¶ 3 (Persons deprived of their liberty may not be “subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”).


First, the Trump administration’s detention policies have made it impossible for both adults and children\(^\text{20}\) to engage in “social distancing,” the main method used to limit transmission, as recommended by both the U.S. Centers for Disease Control and Prevention (CDC)\(^\text{21}\) and the WHO.\(^\text{22}\) Overcrowding makes social distancing impossible\(^\text{23}\) and is one of the “major factors in the transmission of diseases with epidemic potential.”\(^\text{24}\) U.S. immigration detention centers have long been overcrowded. The DHS Inspector General reported dangerous overcrowding of both children and adults in immigration detention in July 2019.\(^\text{25}\) The Inter-American Commission on Human Rights (IACHR) similarly noted that U.S. immigration detention centers were considerably overcrowded.\(^\text{26}\)

The Trump administration has done little to address the overcrowding of ICE detention facilities during the pandemic, only releasing about 700 of the more than 30,000 people detained.\(^\text{27}\) Such overcrowding on its own and separate from the pandemic can “contribute to a high level of death in custody,” constitutes a violation of Article 10,\(^\text{28}\) and may constitute or lead to a violation of Article 7.\(^\text{29}\) In the coronavirus context, where overcrowding means that detained individuals cannot engage in social distancing, such conditions risk the lives of those held in detention and plainly constitute violations of these key ICCPR provisions.

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Second, the Trump administration had not provided individuals in immigration detention with access to adequate hygiene, making the CDC and WHO recommendations of frequent hand washing impossible. Lack of adequate hygiene has long been a problem in U.S. immigration detention centers. With respect to its coronavirus response, ICE only began distributing hand sanitizer and soap more widely to detainees on 27 March 2020, weeks into the pandemic. And ICE may not be distributing a sufficient supply of such products; one detainee reported that officials provided two small bars of soap for 50 people, which were quickly depleted. A lack of hygiene, including no or limited access to soap, has been found by the U.N. Human Rights Committee to violate detainees’ right to inherent dignity and to constitute ill-treatment under international law. With coronavirus making inadequate hygiene more deadly than ever, the Trump administration’s failure to provide access to proper hygiene to immigration detainees violates both Article 10 and Article 7 of the ICCPR.

Third, the U.S. has not tested sufficient numbers of individuals in immigration detention to enable disease control. The CDC has recognized that individuals living in “congregate living settings,” like prisons, are a priority for testing. By the end of April, only 705 detainees had been tested of the over 30,000 in immigration detention, with 425 testing positive, an alarming rate of over 60 percent. Only 87 of the 2,500 children in ORR custody had been tested as of 13 April 2020. Twenty-seven of those tested had positive results. The withholding of proper medical care from those in detention has been found to constitute ill-treatment.

30 See notes 21 and 22, supra.
38 Id.
comprehensive or widespread testing makes containing the spread of the virus more difficult, putting the lives of those held further at risk and violating their rights under international law.

While the immigration detention of children is never permissible under international law, the wholly inadequate U.S. response to the coronavirus makes the continued detention of both children and adults unlawful, in contravention of Articles 10 and 7 of the ICCPR. The Trump administration has shown that it is absolutely unwilling to provide the resources required to comply with international standards, reinforcing that release is the proper remedy. Given the ongoing danger posed by the coronavirus to those held in the overcrowded, unhygienic, and undertested detention facilities, the Special Rapporteur should urge the U.S. to immediately release all those in immigration detention.

1.2 Not Only Has the Trump Administration Refused to Implement Non-Custodial Alternatives to Detention during the Coronavirus Pandemic, It Has Also Capitalized on that Refusal to Justify the Mass Expulsion of Immigrants, including Children, in Violation of International Law.

On 20 March 2020, the CDC authorized the summary expulsion of noncitizens arriving at land borders without valid documents. Prior to this order, such individuals were already subject to summary removal proceedings, unless they sought asylum or other protections. This order allows the Trump administration to expel even those seeking asylum or protection from torture—
individuals the U.S. has an obligation to protect—regardless of their documentation status. The Trump administration has cited public health to justify this policy. The order states: “The danger to the public health that results from the introduction of such persons into congregate settings at or near the borders is the touchstone of this order.” This statement reflects the Trump administration’s recognition that “congregate settings,” code for immigration detention facilities, pose considerable danger during the coronavirus pandemic.

But the Trump administration’s logic presents the false dichotomy that arriving immigrants must either be deported or placed in detention. This rationale conveniently avoids the obvious third option: the use of non-custodial alternatives to immigration detention while the government considers migrants’ claims for asylum and other protections. The Trump administration’s mass expulsions violate the principle of non-refoulement, the international law requirement that no one should be returned to a country where they would face torture or other irreparable harm. Under international law, the U.S. is obligated to respect this principle by considering, on a case-by-case basis, each individual’s claim for asylum or other protection. Summary expulsion by definition means that individual cases are not being considered.

More than 20,000 individuals have already been removed from the U.S. border under this “health” measure, including dozens of families as well as hundreds of unaccompanied minors. These expulsions put the lives of children in danger and flagrantly violate U.S. obligations under international law. The U.S. justification for these expulsions—the avoidance of immigration detention—fails to recognize that alternatives to detention would address both public health concerns and ensure that the rights of these individuals are respected. In these circumstances, alternatives to detention could literally save hundreds, if not thousands, of lives.

1.3 Conclusion

The NYU Global Justice Clinic calls on the Special Rapporteur to recognize that, due to the reckless deficiency of the U.S. government’s response to the pandemic and the overcrowded

44 While asylum protections are the primary type of protection sought, immigrants can also apply for protection under the Convention Against Torture and as victims of human trafficking. See id.
45 See CDC Order, supra note 42, at 1.
47 The United States is obligated not to violate the principle of non-refoulement under binding international customary law, refugee law, humanitarian law, and human rights law. For example, the United States has ratified the Convention Against Torture and the International Covenant on Civil and Political Rights, both of which incorporate this principle. For additional information, see Meg Satterthwaite & Alexandra Zetes, Explainer on the Legal Obligation Not to Return Refugees and How Trump’s Exec Order Breaks It, JUST SECURITY (Feb. 4, 2017), https://www.justsecurity.org/37305/explainer-legal-obligation-return-refugees-trumps-executive-order-breaks/ (explaining U.S. obligations not to violate the principle of non-refoulement in the context of the Trump administration’s Muslim Ban policies).
conditions in immigration facilities, continued U.S. immigration detention during the pandemic contravenes international law. With the pandemic posing a major threat to those in detention, the Special Rapporteur should make clear that all individuals, whether children or adults, should be swiftly released from immigration detention.

**Part 2. The United States Is Continuing to Separate Families at the U.S.-Mexico Border.**

The Underlying Purpose of Family Separation, the Prevention of Migration, Represents a Formidable Obstacle to the Adoption of Non-Custodial Alternatives to Detention.

In July 2017, the Trump administration began forcibly separating parents and other primary caregivers from their children at the U.S.-Mexico border. This practice, later termed the “zero-tolerance policy,” formally ended in June 2018. Since that time however, and with considerably less media attention, immigration officials have continued to separate families by exploiting pre-existing criteria to inappropriately flag adults as threats to their children. Once adults are flagged, the children travelling with them are deemed unaccompanied minors and sent to separate facilities while their adult caregivers remain in ICE detention.

The Trump administration’s intertwined policies of immigration detention and family separation are both pursued with the same purpose: to discourage migration to the United States. This entrenched policy objective represents a considerable obstacle to the U.S. adoption of non-custodial alternatives to detention.

**2.1 Despite Formally Ending the Zero Tolerance Policy, the United States Has Continued to Separate Families at the U.S.-Mexico Border.**

Since the Trump administration took office, more than 5,400 children have been separated from their families under the zero-tolerance policy and a subsequent de facto policy of family separation.49

   a. **Zero-Tolerance Policy**

The Trump administration formally announced its zero-tolerance policy on 6 April 2018, after a nine-month secretive pilot phase.50 On that day, then-Attorney General Sessions directed

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prosecutors “to adopt immediately a zero-tolerance policy” requiring criminal prosecution of those irregularly crossing the border to “the extent practicable.”\footnote{Memorandum for Federal Prosecutors Along the Southwest Border, DEP’T OF JUSTICE (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download. Also on that day, President Trump directed federal agencies to report on efforts to end “catch and release,” whereby individuals irregularly crossing the border were released from custody pending the resolution of their cases. See “Ending “Catch and Release” at the Border of the United States and Directing Other Enhancements to Immigration Enforcement,” Presidential Memorandum for the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security, WHITE HOUSE (Apr. 6, 2018), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-defense-attorney-general-secretary-health-human-services-secretary-homeland-security/.} Such prosecutions occur pursuant to U.S. criminal statutes, which make it a crime to irregularly cross the border.\footnote{See 8 U.S.C. § 1325 (2012) (crime of improper entry); 8 U.S.C. § 1326 (2012) (crime of reentry). The criminalization of migration in this manner is in it of itself a human rights concern as it often violates individuals’ rights to liberty and security and promotes arbitrary detention, which is prohibited by international law. See Office of the High Commissioner of Human Rights, The Criminalization of Irregular Migration, https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/CriminalisationIrregularImmigration.pdf (last visited Apr. 28, 2020).} Under this policy, thousands of families were separated: parents and other caregivers were criminally prosecuted and sent to ICE detention facilities, while their children were classified as unaccompanied minors and transferred to ORR facilities.\footnote{See 6 U.S.C. § 279(g)(2) (2012) (defining an unaccompanied alien child); see also Separated Children Placed in Office of Refugee Resettlement Care, OFFICE OF INSPECTOR GENERAL (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-0511.pdf [hereinafter OIG, Separated Children].}

Before zero-tolerance, most adults irregularly entering the U.S. with children faced civil proceedings and were not criminally prosecuted for irregularly crossing the border.\footnote{8 U.S.C. § 1227 (2012) (civil grounds for removal).} Families were held in ICE family residential centers for a maximum of 20 days or released with an order to appear in immigration court.\footnote{The U.S. government agreed to limit family detention to a maximum of 20 days in a 1997 settlement in the case of Flores v. Reno, 507 U.S. 292 (1993). See also Flores v. Lynch, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015) (interpreting the Flores settlement agreement to require a 20 day maximum of detention of children). For additional information about the Flores settlement agreement and resulting consent decree, see Beth Van Schaack, Family Separations: Evolved Not Resolved, JUST SECURITY (Oct. 16, 2018), https://www.justsecurity.org/61071/family-separations-evolved-resolved/.} Families were only separated if the adult had a serious criminal background or if there were questions of parentage.\footnote{OIG, Separated Children, supra note 53.}
While the administration initially reported that 2,737 children had been separated from their families, the government later told a federal court that approximately 5,400 children had been separated—more than double the original number. This remains the most recent estimate of separated children.

The zero-tolerance policy was subject to numerous legal challenges and public opprobrium, including by many who demonstrated that the policy violates international law. Following this widespread condemnation, on 20 June 2018, President Trump issued Executive Order 13,841, which formally ended the zero-tolerance policy.

b. De Facto Policy of Family Separation

While the zero-tolerance policy has ended, hundreds of families continue to be separated under a de facto policy of family separation. Instead of criminally prosecuting parents or other primary caregivers who arrive with children, CBP now flags them at unprecedented levels for alleged fraud, suspected disease, or past criminal history. Like with zero-tolerance, flagged parents are

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57 The exact number of separated families was initially unclear. As a January 2019 report from HHS’s Office of Inspector General explains: “The total number of children separated from a parent or guardian by immigration authorities is unknown. Pursuant to a June 2018 Federal District Court order, HHS has thus far identified 2,737 children in its care at that time who were separated from their parents. However, thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court.” See id.

58 See Da Silva, supra note 49; Aguilera, supra note 49.

59 It is worth noting that in May 2018, U.S. Customs and Border Patrol (CBP) had predicted that 26,000 families would be separated under this policy. Fortunately, the number of family separations never reached such heights. See DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families, OFFICE OF INSPECTOR GENERAL 17–18 (Nov. 25, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf.


61 The Executive Order stated that “the policy of this Administration to maintain family unity.” See Exec. Order No. 13,841, Affording Congress an Opportunity to Address Family Separation (June 20, 2018), https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.

detained in ICE facilities while their children are deemed unaccompanied minors and transferred to ORR custody.63

Under previous administrations, U.S. immigration officials would separate families when the parent or other caregiver was determined to be a threat to the child’s safety or faced a medical emergency.64 Separations were undertaken to promote the child’s best interests and were rare.65 But in the first year following the end of zero-tolerance, 911 children were separated from their families under this immigration practice.66 A review by the American Civil Liberties Union (ACLU) as part of ongoing litigation demonstrates how immigration officials exploited the criteria under which children can be lawfully separated from adults to perpetuate a de facto policy of family separation.67

U.S. immigration officials cited criminal history as the reason for separating 678 of the 911 families.68 While the government failed to include details in many cases, a review of those with information reveals that families were separated because the caregivers had been charged or convicted of minor crimes including traffic offenses, marijuana possession, shoplifting, and destruction of property valued at five dollars. Forty-eight parents were separated solely based on

65 ORR staff confirm that historically, prior to the implementation of the zero-tolerance policy, they received “small numbers of separated children, citing reasons such as the parent experiencing a medical problem that precluded caring for the child.” Separated Children Placed in Office of Refugee Resettlement Care, OFFICE OF INSPECTOR GENERAL 3 n.6 (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf. Jeh Johnson, the former Secretary of Homeland Security under President Obama was asked about family separation under the Obama administration. He replied: “I can't say that it never happened. There may have been some exigent situation, some emergency. There may be some doubt about whether the adult accompanying the child was in fact the parent of the child. I can't say it never happened but not as a matter of policy or practice.” See Scott Simon, Jeh Johnson on Immigration and Trump, NPR (June 9, 2018), https://www.npr.org/2018/06/09/618496706/jeh-johnson-on-immigration-and-trump.
66 911 children have been separated from their families between June 26, 2018 and June 29, 2019. See Order Granting in Part and Denying in Part Plaintiffs’ Motion to Enforce Preliminary Injunction at 7 n.4, Ms. L. v. U.S. Immigr. & Customs Enf’t, No. 18cv0428 DMS (MDD) (Jan. 13, 2020), ECF No. 509 [hereinafter Ms. L Preliminary Injunction Order] (noting that 911 children were separated: 678 based on criminal conduct, 71 based on gang affiliation, 20 based on lack of fitness or child safety concerns, 46 based on unverified familial relationships, and 24 based on illness); see also Aguilera, supra note 49.
67 The ACLU presented a review of these cases in a memorandum in their ongoing Ms. L v. Immigration and Customs Enforcement litigation. See Memorandum in Support of Motion to Enforce Preliminary Injunction at 7–15, Ms. L. v. U.S. Immigr. & Customs Enf’t, No. 18cv0428 DMS (MDD) (July 30, 2019), ECF No. 439-1 [hereinafter ACLU Memorandum].
68 The facts in this paragraph and the subsequent paragraph are drawn from the ACLU Memorandum, supra note 67, at 7–15.
past immigration convictions and do not have any other criminal history listed. One hundred eighty-five of these separations involved children under the age of five.

Forty-four additional families were separated because the parent or primary caregiver had an alleged gang affiliation, despite not having a criminal background. A closer look reveals that many of those accused of gang affiliation had actually been gang targets and had fled to escape gang violence. Immigration officials likewise separated families based on abuse or neglect, without properly investigating whether such harm actually took place. In one case, a two-year-old was separated from her father because she was malnourished, but officials failed to take into account that they had arrived from a part of Guatemala with high rates of malnutrition.

These examples show that the Trump administration is pursuing family separations not to further the best interest of the child. Instead, the administration is exploiting rarely used pre-existing criteria in a de facto policy of family separation.

The Trump administration is likely to continue separating families in this way. On 13 January 2020, Judge Dana Sabraw, who is presiding over the ACLU litigation, declined to “engage in prospective oversight” of the government’s use of factors like criminal history and neglect in their separation decisions. Judge Sabraw’s refusal to intervene means that the Trump administration can continue exploiting such criteria to separate families, allowing a de facto policy of family separation to persist.

2.2 The Underlying Purpose of Immigration Detention and Family Separation Is the Prevention of Migration. This Inappropriate Objective Represents a Formidable Obstacle to the Adoption of Non-Custodial Alternatives to Detention.

Family separation is integrally related to immigration detention. Criminal prosecution solely for irregular border crossing and the subsequent detention of arriving adult caregivers, which is itself a violation of international law, provides the U.S with the legal infrastructure to separate families. It is only once caregivers are under criminal prosecution or flagged as threats that officials can deem their children unaccompanied minors and send them to ORR custody. Moreover, the expansive network of immigration detention facilities provides the authorities

69 In addition, journalist Jack Herrera reported that on 14 May 2020, ICE gave parents detained with their children the “choice” of indefinite detention or family separation. Parents can either have their children released to sponsors while they remain in detention or the family unit can be subjected to indefinite detention. Herrera reports that ICE officials allegedly told parents that if they do not sign the form consenting to separation, then they have “waived” their child’s right to release. Release as a family unit, as required by law, is not included as an option. See @jherrerx, TWITTER (May 14, 2020, 5:27 PM), https://twitter.com/jherrerx/status/1261045579745906688. See also note 55, supra.

70 Ms. L Preliminary Injunction Order, supra note 66 at 25.

with varied options to physically separate families as a means of furthering its policy objective of discouraging migration.

The Trump administration is pursing these twin policies of immigration detention and family separation to discourage migration. The administration remains unlikely to adopt alternatives to detention while officials believe that this objective is being achieved. Pursing immigration policies to deter migration contravenes international law, is grounded in racism and xenophobia,72 and represents a formidable obstacle to the U.S. adoption of alternatives to detention.

The pursuit of immigration detention and family separation to discourage migration violates international law. Article 9 of the ICCPR guarantees that everyone, including migrants,73 have the right to liberty and security, including the right not to be subjected to arbitrary detention.74 The U.N. Human Rights Committee has found that to not be arbitrary, “detention must be justified as reasonable, necessary and proportionate in the light of the circumstances.”75 To meet

72 While outside the scope of this submission, the underlying racism and xenophobia permeating U.S. immigration policies is worth briefly analyzing. Statements from the highest levels of the Trump administration show how prevalent such racism and xenophobia is. For example, on 16 May 2018, at the height of the government’s implementation of the zero-tolerance policy, President Trump, referring to the “people coming into the country,” said that “[y]ou wouldn’t believe how bad these people are. These aren’t people. These are animals.” See Remarks by President Trump at a California Sanctuary State Roundtable, WHITE HOUSE (May 16, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/. Such comments build on what President Trump said from the first day of his presidential campaign, when he referred to migrants who irregularly cross the border as people with “lots of problems” alleging that “they’re rapists” and that migrants are “bringing crime.” See Full Text: Donald Trump Announces a Presidential Bid, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?arc404=true. President Trump is not the only government official to make such statements. In a May 2018 interview, then-White House Chief of Staff John Kelly expressed a discriminatory animus for the zero-tolerance policy, explaining that the people coming over the border are “not people that would easily assimilate into the United States into our modern society. They're overwhelmingly rural people in the countries they come from – fourth, fifth, sixth grade educations are kind of the norm. They don't speak English, obviously that's a big thing. They don't speak English. They don't integrate well, they don't have skills.” See Transcript: White House Chief of Staff John Kelly’s Interview with NPR, NPR (May 11, 2018), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr. Civil society and the media have further documented the discriminatory animus emanating from the most senior levels of the Trump administration. See e.g., Amnesty, Separating Children, supra note 50, at 28–31; David & Graham, et al., An Oral History of Trump’s Bigotry, ATLANTIC (June 2019), https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/.

73 The text of Article 9 uses the terms “everyone” and “no one,” showing that the rights enshrined in the provision are universally applicable. The International Court of Justice has also confirmed that Article 9 applies to all forms of detention including that which results from criminal proceedings as well as administrative detention including in the immigration context. See Diallo Case (Republic of Guinea v. Democratic Republic of Congo), Judgment, 2010/39, at ¶ 77 (Nov. 30, 2010).

74 ICCPR, supra note 14, at art. 9.

this standard in the migration context, the state must provide an appropriate justification\textsuperscript{76} for the
detention of the individual in question\textsuperscript{77} and the state must show that the least restrictive means
are being used to achieve that objective.\textsuperscript{78}

While the ICCPR itself does not enumerate permissible reasons to deprive individuals of liberty,\textsuperscript{79} the U.N. Human Rights Committee has identified appropriate justifications for initial brief immigration detention including to document an individual’s entry, record their preliminary claims, and determine their identity when it is in doubt.\textsuperscript{80} Following such an initial period, continued detention may only be justified based on an individualized likelihood of absconding or to conduct a security verification if it is found that an individual may pose a threat to others.\textsuperscript{81}

Using immigration detention to discourage migration does not meet this standard: deterrence is not a permissible justification for detention, it is a blanket objective not unique to the particular circumstances of an individual detainee, and it is not the least restrictive means as it ignores non-custodial alternatives to detention. Given these considerations, immigration detention pursued to discourage migration is arbitrary and thereby violates Article 9 of the ICCPR.

Preventing migration has always been an explicit purpose of family separation and the immigration detention that it relies upon. Statements from the highest levels of the Trump administration, including President Trump himself, make this abundantly clear.\textsuperscript{82} Moreover, the Trump administration utilizes family separation to coerce those already in the country to


\textsuperscript{79} Article 9 of the ICCPR does recognize that individuals may be detained on criminal charges and Article 11 prohibits imprisonment for failure to fulfill contracts. See CCPR General Comment 35, supra note 34, at ¶ 14.


\textsuperscript{81} Id.

\textsuperscript{82} Annex 2 outlines some of the many statements by high-level Trump administration officials to this effect.
terminate pending protection claims and acquiesce to deportation.83 Adult asylum seekers have been given the choice between rescinding asylum claims with a promise of being reunited with their children through deportation or continuing their claims while remaining separated from their children.84 Under this false and cruel “choice,” which in itself is a violation of the principle of non-refoulement,85 many parents and caregivers have acquiesced to deportation as the only way to be reunited with their children.

The Trump administration has built its policies of immigration detention and family separation to achieve the malicious and unlawful objective of discouraging migration to the United States. The U.S. remains unlikely to adopt non-custodial alternatives to detention while also believing that immigration detention and family separation are successfully preventing migration. As such, a major obstacle to the Trump administration implementing alternatives to detention remains its deep commitment to preventing migration across the U.S.-Mexico border.

2.3 Conclusion

83 For example, a DHS fact-sheet stated that the government has “a process established to ensure that family members know the location of their children and have regular communication after separation to ensure that those adults who are subject to removal are reunited with their children for the purposes of removal.” See Fact Sheet: Zero-Tolerance Prosecution and Family Reunification, U.S. DEP’T OF HOMELAND SEC. (June 23, 2018), https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification. This fact-sheet does not discuss reunification for individuals with pending asylum claims who are not yet subject to deportation. By not including this option, the Trump administration is coercing asylum seekers to give up their claims and be deported by implying that reunification can only happen in such instances. Similarly, a few weeks after the formal end of the zero-tolerance policy, ICE told a group of about 60 separated fathers that they could be “be removed without their child, be removed with their child, or continue to fight their case for asylum.” ICE did not inform parents that they had the right to continue their asylum claims while being reunited with their children. See American Immigration Council & American Immigration Lawyers Association, The Use of Coercion by U.S. Department of Homeland Security (DHS) Officials Against Parents Who Were Forcibly Separated From Their Children 6 (Aug. 23, 2018), [hereinafter AILA Report].

84 The U.S. Commission on Civil Rights, a federal government agency, found that the government used “coercive tactics” and failed to provide families with due process. It also determined that the government’s policies “can coerce parents into withdrawing what may be valid asylum applications or otherwise impairing their immigration proceedings, for fear of what may be happening to their children.” See U.S. Commission on Civil Rights, Letter to Attorney General Sessions and DHS Secretary Nielsen (June 15, 2018), https://www.usccr.gov/press/2018/06-15-letter.pdf. See also Chris Hayes & Brian Montopoli, Exclusive: Trump administration plans expanded immigrant detention, MSNBC (Mar. 3, 2017), https://www.msnbc.com/all-in/exclusive-trump-admin-plans-expanded-immigrant-detention (“Under the plan under consideration, DHS would break from the current policy keeping families together. Instead, it would separate women and children after they’ve been detained – leaving mothers to choose between returning to their country-of-origin with their children, or being separated from their children while staying in detention to pursue their asylum claim.”); Dara Lind, Trump’s DHS Is Using an Extremely Dubious Statistic to Justify Splitting up Families at the Border, VOX (May 8, 2018), https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-illegal-immigration-border-asylum-families (“In some cases, according to immigration lawyers, parents separated from their children have begged to withdraw their asylum applications — on the logic that it would be easier for them to reunify their families in their home countries.”); Jay Root & Shannon Najambadi, Kids in Exchange for Deportation: Detained Migrants Say They Were Told They Could Get Kids Back on Way Out of US, TEXAS TRIBUNE (June 24, 2018), https://texastribune.org/2018/06/24/kids-exchange-deportation-migrants-claim-they-were-promised-they-could (including an interview with an asylum seeker from Honduras who agreed to sign a voluntary removal order after being promised to be reunited with his six year old daughter). Immigration attorneys have also reported that asylum seekers are often given this difficult choice. See AILA Report, supra note 83; Amnesty, Separating Children, supra note 50, at 31.

85 See notes 46–47, supra.
The Trump administration is relentlessly pursuing the intertwined policies of immigration detention and family separation to prevent further migration to the United States. The administration has continued to pursue these policies despite their grounding in racism and their flagrant violation of international law. The Special Rapporteur should make clear that preventing migration is a fundamentally inappropriate policy objective and that the U.S. should not use cruel and unlawful policies to pursue it. Dismantling this underlying purpose is essential to both ending immigration detention and family separation and furthering the adoption of non-custodial alternatives to detention.

Submission Conclusion

The Special Rapporteur has an important opportunity to educate the U.N. Human Rights Council about U.S. immigration detention during the coronavirus pandemic as well as about ongoing U.S. policies of family separation. Under international law, the U.S. is obligated to release children from immigration detention. But given the unique circumstances surrounding the coronavirus pandemic, including the impossibility of social distancing and the lack of adequate hygiene or testing, the Special Rapporteur should make clear that the U.S. is obligated to release all immigrants, children and adults, from detention in this time of crisis.

The U.S. continues to separate families at the U.S.-Mexico border without the considerable media attention that surrounded the zero-tolerance policy. Immigration authorities are pursuing policies of immigration detention and family separation with the express purpose of preventing migration to the United States. With the Trump administration set on using these policies to prevent migration, the country remains unlikely to adopt non-custodial alternatives to detention. The Special Rapporteur should call out the U.S. for using cruel and unlawful measures to advance political objectives and urge the U.S. to immediately cease family separation and immigration detention during the coronavirus pandemic.
Annex 1: U.S. Obligations Under International Law to End the Immigration Detention of Children

Even though the United States has not ratified the Convention on the Rights of the Child, the U.S. is obligated under international law to act in a child’s best interest, including by abstaining from the immigration detention of children.86 First, the fact that the U.S. has signed the CRC, even though it has not ratified the treaty, imposes some obligations on the state.87 Pursuant to Article 18 of the Vienna Convention on the Law of Treaties, states that have signed a treaty must “refrain from acts which would defeat the [treaty’s] object and purpose.”88 Violating the principle of the best interest of the child through immigration detention contravenes the CRC’s object and purpose.

Second, many of the provisions of the CRC have likely passed into customary international law.89 As such, the best interest of the child principle may be binding on the U.S. as custom. Third, the U.S. has ratified the International Covenant on Civil and Political Rights (ICCPR).90 Article 24 of the ICCPR recognizes that every child is entitled to special measures of protection as required by their status as a minor, a standard which implicitly incorporates the best interest principle.91 And fourth, Article VII of the American Declaration of the Rights and Duties of Man, which similarly recognizes that children are deserving of special protection,92 is binding on the U.S. as an authoritative interpretation of states’ human rights obligations under the Charter of the Organization of American States (OAS), a treaty which the United States has ratified.93

The immigration detention of children violates additional international human rights law standards. The U.N. Special Rapporteur on Torture, among other human rights bodies, has concluded that the immigration detention of children puts them at risk of cruel, inhumane or

89 See RHONA K.M. SMITH, TEXT AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS 15 (3d ed. 2013) (“Arguably, the ‘best interests of the child’ principle now transcends the treaty and is rightly considered part of customary international law.”); Beharry v. Reno, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002), rev’d on other grounds, 329 F.3d 51 (2d Cir. 2003) (“Given its widespread acceptance, to the extent that it acts to codify longstanding, widely-accepted principles of law, the CRC should be read as customary international law.”).
91 International Covenant on Civil and Political Rights art. 24(1), Dec. 16, 1966, 999 U.N.T.S. 171. The U.N. Human Rights Committee has determined that “[c]hildren should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.” CCPR General Comment 35, supra note 34, at ¶ 18.
92 American Declaration of the Rights and Duties of Man art. VII, May 2, 1948.
degrading treatment. Such treatment is contrary to the Convention Against Torture, which the U.S. has both signed and ratified. The immigration detention of children violates additional human rights standards.

Taken together, these considerations make clear that international human rights law requires that the U.S. abstain from holding children in immigration detention.

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94 See e.g., U.N. Special Rapporteur on Torture, Thematic Report on Torture and Ill-Treatment of Children Deprived of their Liberty, U.N Doc. A/HRC/28/68 (Mar. 5, 2015); IACHR Concludes Visit to Colombia’s Border with Venezuela, OAS (Sept. 28, 2015), http://www.oas.org/en/iachr/media_center/PRReleases/2015/109A.asp (“With regard to the situation of child and adolescent migrants, the Commission believes it necessary to underline that when they are deprived of their liberty they are at greater risk of torture and mistreatment owing to their vulnerability and unique needs.”).

95 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85.


Annex 2: Statements by High-Level Trump Administration Officials Asserting that the Purpose of Family Separation Is to Prevent Migration

The following is a list of statements by high-level officials in the Trump administration that explicitly detail how the purpose of family separation is to prevent migration to the U.S.

- **John Kelly**, then-DHS Secretary who would go on to be White House Chief of Staff before resigning, in March 2017: Asked on CNN whether the administration was considering separating families, he replied, “Yes I'm considering, in order to deter more movement along this terribly dangerous network.”

- **John Lafferty**, an official in the Department of Homeland Security, discussed in early 2017 the idea of family separation as a way to curb the numbers of individuals crossing the border into the United States.

- **Gene Hamilton**, then-assistant to then-Attorney General Jeff Sessions, reportedly requested in August 2017 that aides “generate paperwork laying out everything we could do to deter immigrants from coming to the U.S. illegally.”

- **Kirstjen Nielsen**, then-Secretary of Homeland Security, told the Senate Judiciary Committee in January 2018: Family separation was a tool that would “discourage parents from bringing their children here.”

- **John Kelly**, who had become White House Chief of Staff but had yet to resign, said in May 2018: Family separation is a “tough deterrent” and that “a big name of the game is deterrence.”

- **Jeff Sessions**, then-Attorney General, explained in May 2018: “Today we are here to send a message to the world: we are not going to let this country be overwhelmed… I have put in place a ‘zero tolerance’ policy for illegal entry… If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.”

- **Jeff Sessions**, then-Attorney General, in an interview on Fox News, was asked in June 2018 concerning the family separation policy, “Are you considering it a deterrent?” Sessions answered, “I see that the fact that no one was being prosecuted for this was a

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factor in a fivefold increase in four years in this kind of illegal immigration.” He continued, “So, yes, hopefully people will get the message…”

- Steven Wagner, then-Acting Assistant Secretary of the Department of Health and Human Services (HHS), told reporters in June 2018: “we expect that the new policy will result in a deterrence effect, we certainly hope that parents stop bringing their kids on this dangerous journey and entering the country illegally. So we are prepared to continue to expand capacity as needed.”

- President Donald Trump on 1 November 2018, said that “[n]o nation can allow itself to be overwhelmed by uncontrolled masses of people rushing their border… And I will therefore take every lawful action at my disposal to address this crisis.” When asked about family separation, President Trump replied, “when they hear they’re not going to be separated, they come many, many times over.”

- Other high-level officials have continued to remark that family separation impacts the overall number of new arrivals, showing an ultimate objective of deterrence.


105 Id.


107 See e.g., Press Briefing by Acting ICE Director Matthew Albence, WHITE HOUSE (Oct. 10, 2019), https://www.whitehouse.gov/briefings-statements/press-briefing-acting-ice-director-matthew-albence/ (noting that the ability to “present as a family” is a “pull factor” that “allow[s] people to come to this country” and has led to a “spike with regard to crossings”); Press Briefing by Acting CBP Commissioner Mark Morgan, WHITE HOUSE (Nov. 14, 2019), https://www.whitehouse.gov/b Briefings-statements/press-briefing-acting-cbp-commissioner-mark-morgan-2/ (citing the fact that single adults have surpassed families as a reason why “numbers are down”).
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