

15 MAY 2020



**Global
Justice
Clinic**
nyu school of law

**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 Law¹ 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.² Children are held by two different agencies, which handle child detainees in different ways: those deemed unaccompanied minors³ are held by the Office of Refugee Resettlement (ORR)⁴ and children arriving with their families are detained in family residential centers, run by Immigration and Customs Enforcement (ICE).⁵

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.⁶ About 34,000 total people, adults and children, are currently in immigration detention.⁷

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

² *Southwest Border Migration FY 2019*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019> (last visited Apr. 27, 2020); Christopher Sherman, et al., *US Held Record Number of Migrant Children in Custody in 2019*, AP (Nov. 12, 2019), <https://apnews.com/015702afdb4d4fbf85cf5070cd2c6824> (reporting that 69,550 migrant children were held in U.S. government custody in FY2019).

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*.

⁴ ORR is part of the Department of Health and Human Services (HHS). Children in ORR custody are held in restrictive environments. For information about the types and restrictions in ORR facilities, see *Immigration Detention in the United States by Agency*, AMERICAN IMMIG. COUNCIL, https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf. For information about the numbers of children in ORR custody each year, see *Latest UAC Data—FY2019*, DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2019/index.html#tender-age> (last visited Apr. 27, 2020).

⁵ ICE is part of the U.S. Department of Homeland Security (DHS). See *Detention Management*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-management> (last visited Apr. 27, 2020).

⁶ Order Re Plaintiffs’ Motion to Enforce, *Flores v. Barr*, CV 85-4544 DMG (AGRx), ECF No. 784 (C.D. Cal. Apr. 24, 2020); see also Camilo Montoya-Galvez, *Judge Finds Government Is Violating Protections for Migrant Children During Pandemic*, CBS NEWS (Apr. 24, 2020), <https://www.cbsnews.com/news/coronavirus-judge-finds-government-is-violating-protections-for-migrant-children-during-pandemic/>.

⁷ Spencer S. Hsu, *Number of Migrant Family Members Detained by ICE Plunges 39% in a Week*, WASH. POST (Apr. 13, 2020), https://www.washingtonpost.com/local/legal-issues/number-of-migrant-family-members-detained-by-ice-plunges-39percent-in-a-week/2020/04/13/2d5c4d9a-7d9d-11ea-9040-68981f488eed_story.html.

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.⁸ 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.⁹ 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.¹⁰ 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.¹¹

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.¹² 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.

⁸ See text accompanying note 80.

⁹ Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁰ See e.g., U.N. Committee on the Rights of the Child, *General Comment 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ¶ 61, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005); U.N. Committee on the Rights of the Child, *Report on the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, ¶ 78 (2012); *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, U.N. HIGH COMMISSIONER FOR REFUGEES, ¶ 51, (2012), <https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html> [hereinafter UNHCR Detention Guidelines]; U.N. Special Rapporteur on Torture, *Thematic Report on Torture and Ill-Treatment of Children Deprived of their Liberty*, ¶ 80, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015); U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & U.N. Committee on the Rights of the Child, *Joint General Comment, State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, ¶¶ 5, 10, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

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,¹³ requires that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹⁴ 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.”¹⁵ To comply with this provision, states must respect the dignity of detained persons under the same conditions as free persons,¹⁶ including with respect to health care.¹⁷ 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,¹⁸ in contravention of Article 7 of the ICCPR.¹⁹

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.

¹³ *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtmsg_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.*

¹⁴ International Covenant on Civil and Political Rights art. 10, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁵ U.N. Human Rights Committee, *General Comment 21, Article 10 (Humane Treatment of Persons Deprived of their Liberty)*, ¶ 3, U.N. Doc. HRI/GEN/1/Rev.9 (Apr. 10, 1992) [hereinafter HRC General Comment 21]; *see also* U.N. Special Rapporteur on Torture, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 35, U.N. Doc. A/68/295 (Aug. 9, 2013) [hereinafter 2013 Special Rapporteur on Torture Report] (discussing the positive obligations of states in this context).

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.”).

¹⁷ *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, Rule 24, G.A. Res. A/RES/70/175 (Jan. 8, 2016). Moreover, the WHO has declared that the same standard of health care should be available to all persons, “without discrimination on the grounds of their legal status.” *See* World Health Organization, *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance*, at 3 (Mar. 15, 2020). As UN experts have reminded states, everyone without exception “has the right to life saving interventions and this responsibility lies with the government.” *See No Exceptions with COVID-19: “Everyone Has the Right to Life-Saving Interventions”—UN Experts Say*, U.N. OFF. HIGH COMMISSIONER ON HUM. RTS. (Mar. 26, 2020),

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E>.

¹⁸ 2013 Special Rapporteur on Torture Report, *supra* note 15, at ¶ 45; *see also* U.N. Special Rapporteur on Torture, *Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, including an Assessment of Conditions of Detention*, ¶ 230, U.N. Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010).

¹⁹ Subjecting detainees to ill-treatment may also violate Article 16 of the Convention Against Torture, which is binding on the United States. *Convention Against Torture*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&clang=en (last visited Apr. 27, 2020).

First, the Trump administration’s detention policies have made it impossible for both adults and children²⁰ 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)²¹ and the WHO.²² Overcrowding makes social distancing impossible²³ and is one of the “major factors in the transmission of diseases with epidemic potential.”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 2019.²⁵ The Inter-American Commission on Human Rights (IACHR) similarly noted that U.S. immigration detention centers were considerably overcrowded.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.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 10,²⁸ and may constitute or lead to a violation of Article 7.²⁹ 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.

²⁰ It is worth noting that children generally appear to experience coronavirus less severely than adults. *See Coronavirus Disease 2019 in Children*, CTRS. FOR DISEASE CONTROL & PREV., <https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e4.htm> (last visited May 10, 2020). *But see* Pam Belluck, *A New Coronavirus Threat to Children*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/article/kawasaki-disease-coronavirus-children.html>. Though children are less likely to experience severe symptoms, this does not justify their continued detention.

²¹ *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission*, CTRS. FOR DISEASE CONTROL & PREV. (2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf>; *see also* *What Is Social Distancing?* CTRS. FOR DISEASE CONTROL & PREV., <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited Apr. 29, 2020).

²² *Coronavirus Disease (COVID-19) Advice for the Public*, WORLD HEALTH ORG., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> (last updated Apr. 29, 2020).

²³ *See e.g.*, Nicole Narea, *Trump Faces Pressure from a Federal Judge to Release Detained Migrant Kids as Coronavirus Spreads*, VOX (Mar. 30, 2020), <https://www.vox.com/2020/3/30/21199652/judge-dolly-gee-migrant-kids-immigration-detention-coronavirus-trump>.

²⁴ *Water Sanitation Hygiene*, WORLD HEALTH ORG., https://www.who.int/water_sanitation_health/emergencies/qa/emergencies_qa9/en/ (last visited Apr. 29, 2020).

²⁵ *Management Alert—DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley*, OFF. INSPECTOR GEN., DEP’T OF HOMELAND SEC. (July 2, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf.

²⁶ *IACHR Conducted Visit to the United States’ Southern Border*, INTER-AM. COMMISSION ON HUM. RTS. (Sept. 26, 2019), https://www.oas.org/en/iachr/media_center/PReleases/2019/228.asp [hereinafter *IACHR Visit Conclusions*].

²⁷ *See* Matt Katz, *ICE Releases Hundreds of Immigrants as Coronavirus Spreads in Detention Centers*, NPR (Apr. 16, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835886346/ice-releases-hundreds-as-coronavirus-spreads-in-detention-centers>.

²⁸ U.N. Human Rights Committee, *Concluding Observations- Nigeria*, ¶ 19, U.N. Doc. CCPR/C/79/Add. 65 (1996); *see also* U.N. Human Rights Committee, *Concluding Observations- Brazil*, ¶ 9, U.N. Doc. CCPR/C/79/Add.66 (1996).

²⁹ U.N. Special Rapporteur on Torture, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, ¶ 45, U.N. Doc. A/68/295 (Aug. 9, 2013); *see also* U.N. Human Rights Committee, *Concluding Observations-Columbia*, ¶ 26, U.N. Doc. CCPR/C/79/Add.75 (1997).

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 washing³⁰ impossible. Lack of adequate hygiene has long been a problem in U.S. immigration detention centers.³¹ 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.³² 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.³³ 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.³⁴ 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.³⁵ 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.³⁶ Only 87 of the 2,500 children in ORR custody had been tested as of 13 April 2020.³⁷ Twenty-seven of those tested had positive results.³⁸ The withholding of proper medical care from those in detention has been found to constitute ill-treatment.³⁹ The lack of

³⁰ See notes 21 and 22, *supra*.

³¹ See e.g., Caitlin Dickerson, *'There Is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>; Stephanie Grob Plante, *How a Lack of Personal Care Products Contributes to Harrowing Conditions for Detained Migrants*, VOX (July 3, 2019), <https://www.vox.com/the-goods/2019/7/3/20681071/border-detention-aoc-shampoo-personal-hygiene>. A lack of adequate hygiene was also recognized as a concern by the IACHR following their 2019 visit. See IACHR Visit Conclusions, *supra* note 26.

³² Nicole Narea, *Trump Faces Pressure from a Federal Judge to Release Detained Migrant Kids as Coronavirus Spreads*, VOX (Mar. 30, 2020), <https://www.vox.com/2020/3/30/21199652/judge-dolly-gee-migrant-kids-immigration-detention-coronavirus-trump>.

³³ Emily Kassie, *"I Do Not Want to Die Somewhere Like This." Medically Vulnerable Immigrants in ICE Detention Sue for Release Before Coronavirus Arrives*, MARSHALL PROJECT (Apr. 8, 2020), <https://www.themarshallproject.org/2020/04/01/i-do-not-want-to-die-somewhere-like-this>.

³⁴ Bouton v. Uruguay, U.N. Human Rights Committee, ¶¶ 2.5, 13, U.N. Doc. CCPR/C/OP/1 (Mar. 27, 1981); Giri v. Nepal, U.N. Human Rights Committee, ¶¶ 2.4, 7.6, U.N. Doc. CCPR/C/101/D/1761/2008 (Apr. 27, 2011); Deogratias Niyonzima v. Burundi, U.N. Committee Against Torture, ¶¶ 2.14, 9, U.N. Doc. CAT/C/53/D/514/2012 (Nov. 21, 2014); Velez Lloor v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 212 (Nov. 23, 2010); Juvenile Reeducation Institute v. Paraguay, Inter-Am. Ct. H.R. (ser. C), No. 112, ¶ 69(a) (Sept. 2, 2004); see also U.N. Human Rights Committee, *General Comment 35, Article 9 (Liberty and Security of Person)*, ¶ 18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter CCPR General Comment 35].

³⁵ *Priorities for COVID-19 Testing*, CTRS. FOR DISEASE CONTROL & PREV., <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html> (last visited May 1, 2020).

³⁶ Jeffery Martin, *60 Percent of ICE Detainees Tested Have Coronavirus*, NEWSWEEK (Apr. 28, 2020), <https://www.newsweek.com/60-percent-ice-detainees-tested-have-coronavirus-1500817>.

³⁷ Priscilla Alvarez, *27 Migrant Children in US Government Custody Test Positive for Coronavirus*, CNN (Apr. 14, 2020), <https://www.cnn.com/2020/04/14/politics/migrant-children-coronavirus/index.html>.

³⁸ *Id.*

³⁹ The withholding of medical treatment from detainees experiencing acute conditions has been found to constitute ill-treatment. See Cariboni v. Uruguay, U.N. Human Rights Committee, ¶¶ 2.4, 10, U.N. Doc. CCPR/C/OP/2 at 189 (Oct. 27, 1987); Abdulrahman Kabura v. Burundi, U.N. Committee Against Torture, ¶ 7.8, U.N. Doc.

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,⁴⁰ 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.⁴¹ 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 Immigrations, 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.⁴² Prior to this order, such individuals were already subject to summary removal proceedings, unless they sought asylum or other protections.⁴³ This order allows the Trump administration to expel even those seeking asylum or protection from torture—

CAT/C/59/D549/2013 (Nov. 11, 2016). Like in those situations, the lack of access to coronavirus testing and other preventive measures risks the health and wellbeing of those in detention. Moreover, accessing such health measures is essential to ensuring that detainees receive the same access to healthcare services as the general population, a requirement under international law. *See* text accompanying notes 16–17. Failure to respect this obligation further violates international human rights law. *See also United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, Rule 13, G.A. Res. A/RES/70/175 (Jan. 8, 2016).

⁴⁰ *See* text accompanying notes 9–11 and Annex 1.

⁴¹ *See* C. v. Australia, U.N. Human Rights Committee, ¶ 8.4, U.N. Doc. CCPR/C/76/D/900/1999 (2002) (finding that states should consider release when continued detention exacerbates medical conditions); UNHCR Detention Guidelines, *supra* note 10, at ¶ 48(vi) (“Where medical or mental health concerns are presented or develop in detention, those affected need to be provided with appropriate care and treatment, including consideration for release.”).

⁴² *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, DEP’T OF HEALTH & HUMAN SERVICES & CTRS. FOR DISEASE CONTROL & PREV. (Mar. 20, 2020),

https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf

[hereinafter CDC Order]. The order has been extended to 20 May 2020. *See Extension of Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, DEP’T OF HEALTH & HUMAN SERVICES & CTRS. FOR DISEASE CONTROL & PREV. (Apr. 20, 2020),

<https://www.cdc.gov/quarantine/pdf/10-24-16-PRB-Members-Federal-Register-Notice-FY-2016-04-19-2020-p.pdf>.

The Trump administration is currently considering the indefinite extension of this order. *See* Michael D. Shear & Zolan Kanno-Youngs, *Trump Administration Plans to Extend Virus Border Restrictions Indefinitely*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/politics/trump-coronavirus-border-restrictions.html>.

⁴³ For a detailed analysis of the order and its effect on individuals seeking protection, see Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020),

<https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

individuals the U.S. has an obligation to protect—regardless of their documentation status.⁴⁴ 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.”⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.

⁴⁶ Much has been written on the principle of non-refoulement. For a summary of relevant international law sources, see *The Principle of Non-Refoulement under International Human Rights*, U.N. OFF. HIGH COMMISSIONER ON HUM. RTS. (2018), <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

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).

⁴⁸ Camilo Montoya-Galves, *20,000 Migrants Have Been Expelled Along Border under Coronavirus Directive*, CBS NEWS (May 7, 2020), <https://www.cbsnews.com/news/coronavirus-20000-migrants-expelled-border-cdc-order/>; Caitlin Dickerson & Kirk Semple, *U.S. Deported Thousands Amid Covid-19 Outbreak. Some Proved to Be Sick.*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/deportations-coronavirus-guatemala.html>.

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

⁴⁹ Chantal Da Silva, *More than 5,400 Children Were Separated from their Parents by the Trump Administration, ‘Shocking’ New Tally Shows*, NEWSWEEK (Oct. 25, 2019), <https://www.newsweek.com/trump-administration-family-separation-policy-aclu-1467715>; Jasmine Aguilera, *Here’s What to Know About the Status of Family Separation at the U.S. Border, Which Isn’t Nearly Over*, TIME (Oct. 25, 2019), <https://time.com/5678313/trump-administration-family-separation-lawsuits/>.

⁵⁰ As a first step, ICE replaced the Obama-era “Parental Interests Directive,” which required that ICE not “unnecessarily disrupt the parental rights of both alien parents or legal guardians of minor children.” See *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities*, U.S. IMMIGR. & CUSTOMS ENF’T 1 (Aug. 23, 2013), <https://www.immigrantdefenseproject.org/wp-content/uploads/2013-ICE-Parental-Interests-Directive.pdf>. The Trump administration eliminated these protections, renaming its policy “Detention and Removal of Alien Parents or Legal Guardians.” See *Detention and Removal of Alien Parents and Legal Guardians*, U.S. IMMIGR. & CUSTOMS ENF’T (Aug. 29, 2017), <https://www.ice.gov/doclib/detention-reform/pdf/directiveDetainedParents.pdf>. The separation of this many children from their families led the American Civil Liberties Union (ACLU) to request class certification in their ongoing lawsuit *Ms. L v. Immigration and*

prosecutors “to adopt immediately a zero-tolerance policy” requiring criminal prosecution of those irregularly crossing the border to “the extent practicable.”⁵¹ Such prosecutions occur pursuant to U.S. criminal statutes, which make it a crime to irregularly cross the border.⁵² 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.⁵³

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.⁵⁴ Families were held in ICE family residential centers for a maximum of 20 days or released with an order to appear in immigration court.⁵⁵ Families were only separated if the adult had a serious criminal background or if there were questions of parentage.⁵⁶

Customs Enforcement to include the hundreds of individuals subjected to family separations that had occurred over the preceding year. See Memorandum in Support of Motion for Class Certification at 5, Ms. L v. U.S. Immigration & Customs Enf’t, No. 3:18-cv-00428-DMS-MDD, (S.D. Cal. Mar. 9, 2018), ECF No. 35-1. For more about the pilot phase of the zero-tolerance policy, see *USA: Policy of Separating Children from Parents Is Nothing Short of Torture*, AMNESTY INTERNATIONAL 29, n.90 (June 18, 2018), <https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture/> [hereinafter Amnesty, *Separating Children*]; Jessalyn Schwartz, *Updated ICE Policy on the Detention and Removal of Alien Parents or Legal Guardians*, AM. BAR ASS’N (Apr. 23, 2018), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/practice/2018/updated-ice-policy-detention-removal-alien-parent-legal-guardian/>; Tory Johnson, *Family United Is Threatened by This New Immigration Enforcement Policy*, IMMIGR. IMPACT (Apr. 19, 2018), <https://immigrationimpact.com/2018/04/19/parents-threatened-immigration-enforcement-policy/#.XicuY2hKjcs>.

⁵¹ *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/>.

⁵² 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 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).

⁵³ 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-BL-18-00511.pdf> [hereinafter OIG, *Separated Children*].

⁵⁴ 8 U.S.C. § 1227 (2012) (civil grounds for removal).

⁵⁵ 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/>.

⁵⁶ OIG, *Separated Children*, *supra* note 53.

While the administration initially reported that 2,737 children had been separated from their families,⁵⁷ the government later told a federal court that approximately 5,400 children had been separated—more than double the original number.⁵⁸ This remains the most recent estimate of separated children.⁵⁹

The zero-tolerance policy was subject to numerous legal challenges and public opprobrium, including by many who demonstrated that the policy violates international law.⁶⁰ Following this widespread condemnation, on 20 June 2018, President Trump issued Executive Order 13,841, which formally ended the zero-tolerance policy.⁶¹

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.⁶² Like with zero-tolerance, flagged parents are

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>.

⁶⁰ *See e.g.*, Anjali Mehta, Ashley Miller, & Nikki Reisch, *Arbitrary Detention of Asylum Seekers Perpetuates the Torture of Family Separation*, JUST SECURITY (Mar. 15, 2019), <https://www.justsecurity.org/63255/arbitrary-detention-asylum-seekers-prolongs-torture-family-separation/>; Amicus Brief, [Redacted] v. Whitaker (W.D. Tex. Feb. 14, 2019), <https://chrgj.org/wp-content/uploads/2019/02/Redacted-GJC-et-al-Brief-Amici-Curiae-Feb-2019.pdf> [hereinafter NYU Amicus Brief]; Beth Van Schaack, *The Torture of Forcibly Separating Children from their Parents*, JUST SECURITY (Oct. 18, 2018), <https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/>; *Ten Human Rights Standards Implicated by US Immigration Policy Changes*, INTERNATIONAL JUSTICE RESOURCE CENTER (June 27, 2018), <https://ijrcenter.org/2018/06/27/ten-human-rights-standards-implicated-by-u-s-immigration-policy/>; Meg Satterthwaite & Rebecca Riddell, “Zero Tolerance” and the Detention of Children: *Torture under International Law*, JUST SECURITY (June 21, 2018), <https://www.justsecurity.org/58269/zero-tolerance-detention-children-torture-international-law/>; Amnesty, *Separating Children*, *supra* note 50; Jillian Blake, *Trump Administration’s Family Separation Policy Violates International Law*, INTLAWGRRLS (June 10, 2018), <https://ilg2.org/2018/06/10/trump-administrations-family-separation-policy-violates-international-law/>; *Emergency Request for Precautionary Measures*, Inter-Am. Comm’n. H.R. (May 31, 2018), https://texascivilrightsproject.org/wp-content/uploads/2018/05/20180531-Emergency-Request-For-Precautionary-Measures_Redacted.pdf; Precautionary Measure No. 505-18, Inter-Am. Comm’n. H.R., Res. 63/2018 (Aug. 16, 2018), <https://texascivilrightsproject.org/wp-content/uploads/2018/08/20180820-IACHR-Precautionary-Measures.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/>.

⁶² *Myth vs. Fact: DHS Zero-Tolerance Policy*, DEP’T OF HOMELAND SEC. (June 18, 2018), <https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy>.

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

⁶³ In years past, families with similar circumstances would not have been separated. See Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html>; Alan Gomez, *Despite Ban, Separating Migrant Families Continues in Some Cases*, USA TODAY (Feb. 21, 2019), <https://www.usatoday.com/story/news/politics/2019/02/21/trump-administration-breaks-up-some-migrant-families-heres-how-cbp-border-sabraw-separate/2836085002/>; Ginger Thompson, *Families Are Still Being Separated at the Border, Months After "Zero Tolerance" Was Reversed*, PROPUBLICA (Nov. 27, 2018), <https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed>.

⁶⁴ *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, OFFICE OF INSPECTOR GENERAL 13 n.33 (Oct. 2018), <https://www.gao.gov/products/gao-19-163>.

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 have been 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 examples⁶⁹ 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.⁷⁰ 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,⁷¹ 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.

⁷¹ See U.N. Working Group on Arbitrary Detention, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development*, ¶ 53, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008); U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, ¶ 18, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014); see also Anjali Mehta, Ashley Miller, & Nikki Reisch, *Arbitrary Detention of Asylum Seekers Perpetuates the Torture of Family Separation*, JUST SECURITY (Mar. 15, 2019), <https://www.justsecurity.org/63255/arbitrary-detention-asylum-seekers-prolongs-torture-family-separation/>.

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

The Trump administration is pursuing 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. Pursuing 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 motivation 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 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.

⁷⁵ CCPR General Comment 35, *supra* note 34, at ¶ 18. *See also* Van Alphen v. The Netherlands, U.N. Human Rights Committee, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (July 23, 1990) (evaluating the drafting history of Article 9 to confirm that arbitrariness must be broadly interpreted to include elements like reasonableness and necessity); F.K.A.G. v. Australia, U.N. Human Rights Committee, ¶ 9.3, CCPR/C/108/D/2094/2011 (Oct. 28, 2013); UNHCR Detention Guidelines, *supra* note 10, at ¶ 34.

this standard in the migration context, the state must provide an appropriate justification⁷⁶ for the detention of the individual in question⁷⁷ and the state must show that the least restrictive means are being used to achieve that objective.⁷⁸

While the ICCPR itself does not enumerate permissible reasons to deprive individuals of liberty,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.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.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.⁸² Moreover, the Trump administration utilizes family separation to coerce those already in the country to

⁷⁶ *A. v. Australia*, U.N. Human Rights Committee, ¶ 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) (“[D]etention should not continue beyond the period for which the State can provide appropriate justification. ... [otherwise] detention may be considered arbitrary.”); *C. v. Australia*, U.N. Human Rights Committee, ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002) (“[I]n terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.”); *Baban v. Australia*, U.N. Human Rights Committee, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (Sept. 18, 2003) (same).

⁷⁷ Any decision to detain must be made on a case-by-case basis following a detailed individualized assessment regarding the person in question. *See* CCPR General Comment 35, *supra* note 34, at ¶ 18 (Detention is arbitrary “in the absence of particular reasons specific to the individual...”); *A. v. Australia*, U.N. Human Rights Committee, ¶ 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) (highlighting the need for grounds particular to the author’s case); *F.K.A.G. v. Australia*, U.N. Human Rights Committee, ¶ 9.3, CCPR/C/108/D/2094/2011 (Oct. 28, 2013); UNHCR Detention Guidelines, *supra* note 10, at ¶¶ 19, 35.

⁷⁸ Detention should be considered a last resort, only carried out when there is no less restrictive means to achieve the same ends. *See* CCPR General Comment 35, *supra* note 34, at ¶ 18; *C. v. Australia*, U.N. Human Rights Committee, ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002); *Baban v. Australia*, U.N. Human Rights Committee, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (Sept. 18, 2003); *Bakhtiyari v. Australia*, U.N. Human Rights Committee, ¶ 9.3, U.N. Doc. CCPR/C/79/D/1069/2002 (Nov. 6, 2003); *F.K.A.G. v. Australia*, U.N. Human Rights Committee, ¶ 9.3, CCPR/C/108/D/2094/2011 (Oct. 28, 2013).

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.

⁸⁰ CCPR General Comment 35, *supra* note 34, at 18; *F.K.A.G. v. Australia*, U.N. Human Rights Committee, ¶ 9.3, CCPR/C/108/D/2094/2011 (Oct. 28, 2013); *see also* UNHCR Detention Guidelines, *supra* note 10, at ¶¶ 21–32; UNHCR Executive Committee, *Conclusion No. 44 on the Detention of Refugees and Asylum Seekers*, ¶ (b), U.N. Doc. A/41/12/Add.1 (Oct. 31, 1986).

⁸¹ *Id.*

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 reunified 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 reunified 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/2018/06-15-18-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

⁸⁶ For additional evidence that the U.S. is bound by the principle of the best interest of the child, see Inter-American Commission on Human Rights, *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, ¶¶ 46–53, Doc. OAS/Ser.L/V/II. 155 (July 24, 2015), <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>.

⁸⁷ *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=en (last visited Apr. 27, 2020).

⁸⁸ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

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.").

⁹⁰ *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).

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.

⁹³ *Signatories and Ratifications, Charter of the Organization of American States*, ORG. OF AM. STATES, http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp.

degrading treatment.⁹⁴ Such treatment is contrary to the Convention Against Torture,⁹⁵ which the U.S. has both signed and ratified.⁹⁶ The immigration detention of children violates additional human rights standards.⁹⁷

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

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/PReleases/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.

⁹⁶ *Convention Against Torture*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en (last visited Apr. 27, 2020).

⁹⁷ Many human rights scholars and practitioners have outlined how the immigration detention of children violates international law. See e.g. *Ten Human Rights Standards Implicated by U.S. Immigration Policy Changes*, INT’L JUSTICE RESOURCE CTR. (June 27, 2018), <https://ijrcenter.org/2018/06/27/ten-human-rights-standards-implicated-by-u-s-immigration-policy/>; Amicus Brief by Human Rights Watch and Amnesty International USA, *Flores v. Barr* (C.D. Cal. Aug. 30, 2019), <https://www.amnestyusa.org/wp-content/uploads/2019/09/09.05.2019-Brief-in-Support-of-Challenge-to-Flores-Regulations.pdf>; *The International Human Rights Community Affirms that Immigration Detention Is a Violation of the Rights of Children*, END IMMIGRATION DETENTION OF CHILDREN, <https://endchilddetention.org/toolbox/issue-child-immigration-detention/international-law/child-rights/> (last visited Apr. 27, 2020).

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.”⁹⁸
- 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.⁹⁹
- 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.”¹⁰⁰
- 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.”¹⁰¹
- 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.”¹⁰²
- 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.”¹⁰³
- 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

⁹⁸ Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from their Parents at the Border*, CNN (March 7, 2017), <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/>.

⁹⁹ Julia Ainsley, *Trump Admin Discussed Separating Moms, Kids to deter Asylum-Seekers in Feb. 2017*, NBC NEWS (June 18, 2018), <https://www.nbcnews.com/politics/immigration/trump-admin-discussed-separating-moms-kids-deter-asylum-seekers-feb-n884371>.

¹⁰⁰ See Jonathan Blitzer, *How the Trump Administration Got Comfortable Separating Immigrant Kids from their Parents*, NEW YORKER (May 30, 2018), <https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents>.

¹⁰¹ See *Senate Hearing with DHS Secretary Nielsen*, C-SPAN (Jan. 16, 2018), <https://www.c-span.org/video/?c4709347/separation-families>.

¹⁰² *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>.

¹⁰³ *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, DEP’T OF JUSTICE (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

factor in a fivefold increase in four years in this kind of illegal immigration.” He continued, “So, yes, hopefully people will get the message...”¹⁰⁴

- 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.”¹⁰⁵
- 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.”¹⁰⁶
- Other high-level officials have continued to remark that family separation impacts the overall number of new arrivals, showing an ultimate objective of deterrence.¹⁰⁷

¹⁰⁴ Philip Bump, *Here Are the Administration Officials Who Have said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/> (quoting Sessions’ June 2018 interview with Laura Ingraham on Fox News).

¹⁰⁵ *Id.*

¹⁰⁶ *Remarks by President Trump on the Illegal Immigration Crisis and Border Security*, WHITE HOUSE (Nov. 1, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/>.

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 CPB Commissioner Mark Morgan*, WHITE HOUSE (Nov. 14, 2019), <https://www.whitehouse.gov/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”).

Acknowledgements

This report was authored by Sara Robinson, Legal Fellow at the NYU Global Justice Clinic, under the supervision of Professor Margaret Satterthwaite. On U.S. obligations under international law during the coronavirus pandemic, this report builds on the research of Tyler Walton, Tuttleman Legal Empowerment Fellow at the Bernstein Institute for Human Rights, under the supervision of Sukti Dhital, Executive Director of the Bernstein Institute for Human Rights and Professor Margaret Satterthwaite. On the subject of family separations under the zero-tolerance policy, this report relies on the research and writing of Anjali Mehta and Ashley Miller, former law student advocates at the NYU Global Justice Clinic, under the supervision of Nikki Reisch, former Legal Director at the NYU Center for Human Rights and Global Justice and Professor Margaret Satterthwaite.