

SUBMITTED SEPTEMBER 10, 2021

SUBMITTED INPUT

An NGO Input for the Special Rapporteur's Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the Torture of Migrant Children in the United States, Submitted by the Center for the Human Rights of Children, Loyola University School of Law, et al.

SUBMITTED BY

**Center for the Human Rights of Children
Loyola University Chicago**

25 E. Pearson St. Chicago, IL 60611, USA
(312) 915-7541 (t) www.luc.edu/chrc

Katherine Kaufka Walts, JD, Director,
kkaufkawalts@luc.edu

Sarah J. Diaz, JD, LLM, Associate Director,
sdiaz10@luc.edu

Alex Fox, Third Year Law Student

Liliana Jimenez, Second Year Law Student

Jenny Lee, PhD, Third Year Law Student



Input for the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the Torture of Migrant Children in the United States, Submitted by the Center for the Human Rights of Children, Loyola University School of Law, et al., September 10, 2021

Table of Contents

I. Migration-Related Torture in Focus: Parent-Child Border Separation in the United States2

II. Legal Framework: Migration-Related Torture and the UN Conventions Against Torture and on the Rights of the Child.....2

III. Parent-Child Separation as Migration-Related Torture and Ill-Treatment.....3

- a. Zero Tolerance Intentionally Inflicted Severe Pain and Suffering on Migrant Children...4
- b. The Illicit Purpose of Zero Tolerance was to Punish Migrants and Deter Third Party Migrants from Migrating to the United States.....7
- c. The Torture of Children Must Never be Considered Incidental to Lawful Sanctions.....7

IV. Conclusion and Recommendations7

Input for the Special Rapporteur’s Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on the Torture of Migrant Children in the United States, Submitted by the Center for the Human Rights of Children, Loyola University School of Law, et al. September 10, 2021

I. Migration-Related Torture in Focus: Parent-Child Border Separation in the United States

The Center for the Human Rights of Children, in collaboration with Kids in Need of Defense, the Women’s Refugee Commission and the Young Center for Immigrant Children’s Rights, submits this input in response to the call for submissions made by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to inform the Special Rapporteur’s forthcoming thematic report to the Human Rights Council at its 49th Session in March 2022. This input will focus specifically on the U.S. government’s (USG) implementation of forced parent-child separation under the Trump Administration’s Zero Tolerance policy.¹

Children are uniquely vulnerable due to their age, development, and dependence on adults for their safety and well-being. The USG has long treated migrant children merely as adults in miniature or as an invisible extension of their migrant guardians or parents. This input calls attention to the ways in which the USG specifically targeted and exploited the unique vulnerabilities of migrant children to achieve its unlawful policy goal of deterring migration to the U.S. and Mexico border. Via parent-child border separations resulting from Zero Tolerance, the USG engaged in state-sanctioned torture against migrant children with long-lasting, and in many cases permanent, impact on their physical, mental, emotional, and developmental well-being.

II. Legal Framework: Migration-Related Torture and the UN Conventions Against Torture and on the Rights of the Child

In his report to the Human Rights Council with respect to migration-related torture and ill-treatment, the Special Rapporteur noted the “escalating cycle of repression and deterrence” constituting torture and ill-treatment initiated by States to discourage migrants from entering their borders, including measures such as criminalization, detention, family separation, denial of due process, and expedited returns in the absence of status determination or habeas corpus proceedings.² The report reinforced that the prohibition of torture and ill-treatment is absolute and non-derogable under international law, and that states have both a positive duty to prevent such

¹ For purposes of this report, we follow the Biden Administration’s definition of “Zero-Tolerance Policy”: “The term ‘Zero-Tolerance Policy’ means the policy discussed in the Attorney General’s memorandum of April 6, 2018, entitled, “Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a),” and any other related policy, program, practice, or initiative resulting in the separation of children from their families at the United States-Mexico border.” The White House, *Executive Order on the Establishment of Interagency Task Force on the Reunification of Families* (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>.

² Nils Melzer, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/37/50, 4 (Nov. 23, 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/347/27/PDF/G1834727.pdf?OpenElement>.

acts via proactive measures and a negative duty to refrain from engaging in or knowingly contributing to acts of torture or ill-treatment.

The USG is party to several conventions related to the jus cogens prohibition against torture. The Convention against Torture (CAT), the most important international human rights treaty that addresses torture, obligates the U.S. to prohibit and prevent torture and cruel, inhuman or degrading treatment or punishment in all circumstances, as well as to investigate allegations of torture, prosecute perpetrators, and provide remedy to victims of torture.³ The Covenant on Civil & Political Rights (ICCPR) obligates the U.S. to ensure freedom from torture and ill treatment.⁴ As a signatory to the Convention on the Rights of the Child (CRC), the most comprehensive human rights treaty on children's rights,⁵ the U.S. has an obligation "to refrain from acts which would defeat the object and purpose of [the] treaty."⁶ Enshrined within the CRC are obligations to ensure that no child is separated from his or her parents against their will or subjected to torture or other cruel, inhumane, or degrading treatment or punishment.⁷

III. Parent-Child Separation as Migration-Related Torture and Ill-Treatment

Over the past decade, the U.S. has experienced an increase of refugees and migrants from Central America travelling to the U.S. to seek asylum.⁸ Many of these asylum seekers are children and families fleeing extraordinary levels of poverty, persecution, and violence from Central America's Northern Triangle region—El Salvador, Guatemala, and Honduras—which has experienced a surge in violence by organized criminal groups.⁹ In response to the increased number of refugees and migrants presenting themselves at the border, the Trump Administration implemented a series of pushback mechanisms designed to deter families from fleeing to the U.S.¹⁰ This input focuses

³ ACLU, *FAQ: The Convention against Torture*, <https://www.aclu.org/other/faq-convention-against-torture>. Article 7(2)(e) of the Rome Statute defines torture similarly to the CAT. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 ("the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused").

⁴ ACLU, *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr>.

⁵ Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention On Children's Rights: US* (Nov. 20, 2015), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens>.

⁶ Article 18 of the Vienna Convention on the Laws of Treaties states that "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." Vienna Convention on the Laws of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

⁷ Convention of the Rights of the Child art. 9 and 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3.

⁸ See Kids in Need of Defense, *Family Separation: Two Years Later, the Crisis Continues* (Jul 16, 2020), <https://supportkind.org/resources/family-separation-two-years-later-the-crisis-continues/>; see also Thomas Castelazo, *What Is Happening at the U.S. Southern Border?* (Mar. 24, 2021), <https://www.rescue.org/article/what-happening-us-southern-border>.

⁹ UNHCR, *Refugee Statistics*, <https://www.unrefugees.org/refugee-facts/statistics/>.

¹⁰ See CHRC, Report to the UN Special Rapporteur for the Human Rights of Migrants on Pushback Practices and Their Impact on the Human Rights of Migrant Children (Feb. 1, 2021), <https://www.luc.edu/media/lucedu/chrc/pdfs/Input-Special-Rapporteur-for-the-Human-Rights-of-Migrants.pdf>; see also Refugees International, *The Trump Zero Tolerance Policy: Cruel Approach with Human and Viable Alternatives* (July 31, 2018), <https://www.refugeesinternational.org/reports/2018/7/31/trump-zero-tolerance-policy>.

specifically on the Trump Administration’s policy of parent-child separation via “Zero Tolerance” – which was tantamount, by definition, to torture.

Under CAT, torture requires 1) the infliction of severe pain or suffering, whether physical or mental, 2) for an illicit purpose, specifically for our purposes to punish or coerce third party behavior, and 3) torture cannot include pain or suffering incident to lawful sanctions.¹¹ Each element, as it relates to the Zero Tolerance policy will be addressed below.

a. Zero Tolerance Intentionally Inflicted Severe Pain and Suffering on Migrant Children.

Less than two weeks after Donald Trump was sworn in as President, DHS officials met to begin planning the separation of migrant children from their mothers at the U.S.-Mexico border.¹² High-level Trump officials openly informed the media that they were considering parent-child separations *in order to deter family migration*.¹³ The same year, the Administration began testing secret pilot programs in the Yuma and El Paso sectors along the border, ripping children—including infants as young as ten months old—from their parents who were summarily prosecuted for criminal entry, sent to prison, and, in many cases, deported before they could be reunified their children.¹⁴

The response to the proposed separations from the medical community was unequivocal: separating children from their parents to deter migration was viewed as a form of torture against children.¹⁵ The American Academy of Pediatrics and the American Medical Association demanded the USG halt parent-child separations due to the incalculable emotional and physical harm they caused to children.¹⁶ According to Physicians for Human Rights (PHR), separated children exhibited signs of acute and long-lasting trauma in ORR shelters, including severely

¹¹ UN General Assembly, *Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art. 1, Dec. 15, 1989, A/RES/44/144.

¹² Julia Edwards Ainsley, *Exclusive: Trump Administration Considering Separating Women, Children at Mexico Border* (Mar. 7, 2017), <https://www.reuters.com/article/us-usa-immigration-children/exclusive-trump-administration-considering-separating-women-children-at-mexico-border-idUSKBN16A2ES>.

¹³ Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent* (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/>.

¹⁴ Kevin Sieff, *The Trump Administration Used an Early, Unreported Program to Separate Migrant Families along a Remote Stretch of the Border* (July 9, 2021), <https://www.washingtonpost.com/world/2021/07/09/trump-separated-families-yuma-2017/>.

¹⁵ Charles Oberg et al., *Treatment of Migrant Children on the US Southern Border Is Consistent With Torture*, 147 PEDIATRIC PERSPECTIVES 1 (Jan. 2021), available at <https://pediatrics.aappublications.org/content/pediatrics/147/1/e2020012930.full.pdf>. See also Sarah A. MacLean et al., *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOC. SCI. & MED. at 303-08, (June 2019), available at <https://www.sciencedirect.com/science/article/abs/pii/S0277953619302138?via%3Dihub>. Trauma resulting from family separation can severely harm a child’s development and create harmful consequences that last into adulthood. Research shows that children who experience more adverse experiences during childhood, such as separation from family and detention, are statistically more likely to experience negative behavioral and physical health outcomes as adults.

¹⁶ POLITICO, *Biggest U.S. Doctors Group Condemns Family Separation Policy* (June 20, 2018), <https://www.politico.com/story/2018/06/20/american-medical-association-family-separation-policy-655677>.

depressed moods and physiological manifestations of panic and despair.¹⁷ Children who were separated from their parents doubly suffered in their brain development because they were not only removed from their parents but also faced confinement, exacerbating an already exceedingly traumatic situation.¹⁸ Such stress has the ability to “disrupt brain circuits that affect memory and the ability to focus attention and regulate behavior” and increase “the risk of heart disease, diabetes, depression, and many other chronic illnesses in the adult years.”¹⁹

In addition to the incalculable harm to children caused by the separation itself, the USG subjected separated children to inhumane and squalid conditions while in detention, including abusive behavior by immigration authorities. One nine-year-old boy told his mother that while he was in detention, he was beaten by detention officials who “yelled at him and forced him to eat” and “hit him with his shoes to wake him up.”²⁰ Other children reported sleeping on the floor, poor quality of food, overcrowding, and being deprived of fresh air and sunlight.²¹

The Special Rapporteur has reiterated the prevailing view among the human rights community that “the deprivation of liberty of migrant children based solely on their own or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, is grossly disproportionate and, even in case of short-term detention, may amount to cruel, inhuman or degrading treatment.”²² However, the infliction of pain and suffering to children was not simply an unfortunate side effect of stricter immigration policies under the Trump Administration. Instead, *harm to children was central to the success of the Zero Tolerance policy to deter migration and coerce families from coming to the United States or—for those trapped in Zero Tolerance—into abandoning lawful claims for asylum.*²³ Despite a federal court injunction and repeated warnings from the medical community of the long-term trauma to children caused by parent-child separations, the Trump Administration continued to carry out parent-child separations with gross impunity.²⁴

¹⁷ Hajar Habbach et al., “*You Will Never See Your Child Again*”: *The Persistent Psychological Effects of Family Separation*, 39, 20, PHYSICIANS FOR HUMAN RIGHTS (Feb. 2020), <https://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf>.

¹⁸ Jonathan Todres, *The Trauma of Trump’s Family Separation and Child Detention Actions: A Children’s Rights Perspective*, 95 WASH. L. REV. 377, 406 (Mar. 2020). See also Jennifer Nagda, *Testimony before U.S. House of Representatives Committee on Oversight*, July 19, 2019, available at <https://www.theyoungcenter.org/stories/2019/7/16/young-centers-testimony-on-continued-family-separation>.

¹⁹ Todres, *supra* note 18.

²⁰ Habbach, *supra* note 17, at 18-19.

²¹ *Id.*

²² Melzer, *supra* note 2, at 9.

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

²⁴ Young Center for Immigrant Children’s Rights, *Family Separation Is Not Over: How the Trump Administration Continues to Separate Children from Their Parents to Serve Its Political Ends* (June 25, 2020), available at <https://static1.squarespace.com/static/597ab5f3beba0a625aaf45/t/5f032e87ff32c80f99c7fee5/1594044048699/Young+Center+Family+Separation+Report+Final+PDF.pdf>; see also, Kids in Need of Defense, *Family Separation: Two Years Later, the Crisis Continues* (July 2020), available at <https://supportkind.org/resources/family-separation-two-years-later-the-crisis-continues/>

While the Biden Administration has created a Task Force to enable the reunification of children separated from their parents, there is no indication that the USG intends to pursue accountability for the perpetrators of the Zero Tolerance policy nor institute an *effective* prohibition on the use of family separation for purposes of deterrence or punishment in the future.²⁵ Notably, the key mandates of the Task Force do not include individual accountability for the creation of a policy that sanctioned the use of torture nor the development of a prohibition.²⁶ To date, the Biden Administration has not dedicated resources to non-repetition guarantees, as its request for funding for the Reunification Task Force focused exclusively on services for impacted families.²⁷

b. The Illicit Purpose of Zero Tolerance was to Punish Migrants and Deter Third Party Migrants from Making the Journey to the United States.

From the beginning, family separation was touted as an *intended measure to deter migration*.²⁸ In other words, a punitive measure implemented with the intent to “intimidate[e] or coerc[e]... a third person” from migrating to the U.S. Mechanically, family separation via Zero Tolerance was implemented as punitive measure via wholesale unprecedented criminal prosecutions outside of the immigration process. Contrary to the practice of every USG administration that came before, on April 6, 2018, the USG under the Trump Administration formally implemented the Zero Tolerance policy, mandating that all individuals who entered or attempted to enter the U.S. at any time or place other than those designated by immigration officers be criminally prosecuted without exception.²⁹ The collateral consequence of this policy was the adoption of *pro forma* family separation to carry out the prosecutions. While family separations were said by the USG to be incidental to the prosecutions, parents and children were separated in all cases, including cases in which there were no grounds for prosecution, such as instances in which parents properly presented themselves for asylum.³⁰ Indeed, separating children from their families was carefully calculated as the heart of the strategy itself, no matter how young the child. As the Attorney General at the time clearly articulated, “We need to take away children.”³¹ Thus, thousands of children were taken from their parents by the USG, forcibly rendered unaccompanied, and scattered across the

²⁵ Dept. of Homeland Security, Initial Progress Report: Interagency Task Force on the Reunification of Families, 5 (June 2, 2021), https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf.

²⁶ While the Task Force is mandated to provide a report with recommendations “to ensure the Federal Government will not repeat the policies and practices leading to the separation of families at the border,” these recommendations will carry no binding force of law on this or any subsequent Administration. EO 14011 Sec. 4(c)(iii). See EO 14011 for full list of mandates – cited from Progress Report at page 5 https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf

²⁷ Fiscal Year 2022 Continuing Resolution (CR) Appropriation Issues, pp. 13-14, 19-20, available at https://www.whitehouse.gov/wp-content/uploads/2021/09/CR_Package_9-7-21.pdf.

²⁸ Bump, *supra* note 13.

²⁹ See Office of the Attorney Gen., *Memorandum for Federal Prosecutors Along the Southwest Border* (Apr. 6, 2018), available at <https://www.justice.gov/opa/press-release/file/1049751/download>.

³⁰ Camila Domonoske & Richard Gonzales, *What We Know: Family Separation And “Zero Tolerance” at the Border* (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-knowfamily-separation-and-zero-tolerance-at-the-border>.

³¹ Michael D. Shear et al., “We Need to Take Away Children,” *No Matter How Young, Justice Dept. Officials Said* (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html>.

country into a byzantine system of child detention facilities intended only for short-term care.³² In 2021, more than 2,127 children may remain separated from their parents, though only a few are in government custody.³³

At no point during the conception or implementation of Zero Tolerance did the USG have any plan to reunite children with their parents, nor did they have a plan to scale up resources to provide basic, humane care for the sudden influx of traumatized, separated children, toddlers and infants overwhelming the USG migrant detention system.³⁴ In its investigation of complaints related to family separation, the Office of Civil Rights and Civil Liberties cited the lack of clear, formalized decision-making criteria or procedures, inconsistent or no record-keeping on family separations, lack of contact or awareness of other family members' locations, and lack of established process to coordinate communication among separated family members.³⁵ Even after the USG understood the impact that family separation would create via its El Paso pilot project, the USG never developed a plan to mitigate harm or provide basic care for forcibly separated children. *The absent absence of such planning by the Trump Administration was strategic: to maximize the impact of state-sanctioned violence against children in order to accomplish its objective of deterrence, punishment and removal.*

c. The Torture of Children Must Never be Considered Incidental to Lawful Sanctions

USG officials defended family separation by articulating that the measure was either required by law or a lawful exercise of the government's prosecutorial discretion. However, state-sanctioned torture of children should never be deemed incidental to a lawful sanction, lest governments be permitted to subvert the Convention Against Torture by implementing laws or discretionary policies that on their face require the use of torture.

IV. Conclusions and Recommendations

The stated objective of this thematic report is "to evaluate the impact of [the Special Rapporteur's] thematic reports as a driver of change in laws, policies, and practices towards the eradication of torture and ill-treatment."³⁶ To redress the dissonance between the Report of the Special Rapporteur on torture in the context of migration (A/HRC/37/50) and the United States policy of

³² Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding up Deportation of Children* (Jan. 17, 2019), <https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811>.

³³ Interagency Task Force on the Reunification of Families, *Initial Progress Report* (June 2, 2021), https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf

³⁴ Anne Flaherty, *Government Official Says He Warned Trump Administration against Family Separations* (Feb. 7, 2019), <https://abcnews.go.com/Politics/government-official-warned-family-separations/story?id=60910531>.

³⁵ Furthermore, the Office received allegations that children with disabilities were being separated from their parents without proper care put in place. *DHS Records Regarding Communications with Outside Anti-Immigrant Groups*, <https://www.documentcloud.org/documents/6821391-DHS-18-0694-K.html#document/p15/a562425>; <https://www.documentcloud.org/documents/6257038-DHS-Records-Regarding-Communications-with.html#document/p230/a562352>; <https://www.documentcloud.org/documents/6206216-Records-relating-to-family-separation-at-ports.html#document/p724/a522554>.

³⁶ *Call for Input to a Report: Impact of Thematic Reports Presented by the Special Rapporteur on Torture*, <https://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/CFI-SRT-49th-HRC-session.aspx>.

family separation under Zero Tolerance, we offer the following recommendations for consideration by the Special Rapporteur to ensure that “effective measures [shall] be taken by States in order for them to integrate the recommendations of the Special Rapporteur into their policy and legal frameworks with a view to enhancing compliance with their universally recognized legal obligations arising from the absolute and non-derogable prohibition of torture and ill-treatment.”³⁷

First, the Special Rapporteur should thoroughly investigate the systemic human rights violations by the USG regarding its implementation of forced parent-child separation under the Trump Administration’s Zero Tolerance policy, and the traumatic impact that these practices and policies have had, and continue to have, on migrant children. An investigation will provide transparency and insight into the state actions and institutional failures which enabled such abuses.

Second, the Special Rapporteur, via its investigatory findings, should make a formal finding that parent-child separations carried out in a manner consistent with Zero Tolerance (i.e., the infliction of pain and suffering upon children for an illicit purpose) constitutes torture within the meaning of CAT. While UN experts called upon the USG to “stop using children to deter irregular migration,”³⁸ the UN has not gone far enough to condemn family separation pursuant to Zero Tolerance as a form of torture.

Third, pursuant to the restorative mandate under CAT, the Special Rapporteur, via its investigatory findings, should recommend that children impacted by family separation be eligible for USG-funded services for as long as necessary and that all impacted families should be provided permanent protection with access to health care, employment, and other services, and in the United States if they so desire.

Fourth, with a new Administration, the Special Rapporteur, via its investigatory findings, should call upon the USG to recommit to its international obligations under the ICCPR and the Convention Against Torture, and to urge the US government to finally ratify the UN CRC. This will strengthen international commitments to the rule of law and the responsible use of state power as applied to the rights of migrant children.

³⁷ *Id.*

³⁸ *UN Experts to US: “Release Migrant Children from Detention and Stop Using Them to Deter Irregular Migration”* (June 22, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>.