

**Submission to the United Nations Human Rights Committee for Consideration to the United States’ List of the Issues Prior to Reporting (LoIPR)**

**ABUSES AGAINST ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

**125th Session of the United Nations Human Rights Committee**

**January 14, 2019**

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**INTRODUCTION**

1. This report is submitted for consideration by the Human Rights Committee (“the Committee”) for its List of Issues Prior to Reporting (“LoIPR”) to the United States. Its submitted on behalf of Human Rights Advocates.
2. Human Rights Advocates is a California non-profit corporation founded in 1978 with national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Human Rights Advocates has Special Consultative Status in the United Nations and has participated regularly at the meetings of both Charter and treaty based human rights bodies, as well as filed petitions with the Inter-American Commission on Human Rights. Human Rights Advocates has submitted friends of the court briefs in both state and federal cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes and constitutions. Examples of cases where it has filed briefs include affirmative action and juvenile death penalty cases. Its brief in the case holding the juvenile death penalty unconstitutional was cited twice by the United States Supreme Court.[[1]](#footnote-1)

**EXECUTIVE SUMMARY**

1. This report addresses fives urgent issues concerning the U.S. government’s treatment of asylum seekers and refugees entering in the U.S. in 2018: (1) arbitrary detention, (2) cruel conditions of detention, (3) deaths in detention, (4) torture or cruel, inhuman and degrading treatment, and (5) family separation.
2. Human Rights Advocates proposes the following inquiries as part of the Committee’s List of Issues Prior to Reporting to the United States:

* **Inquire into possible violations of Article 9’s protection against freedom from arbitrary and unlawful detention, specifically relating to the U.S. government’s “zero tolerance policy.”** **In particular, the Committee is urged to examine a) the mandatory criminalization and detention of migrants, and b) the large-scale detention of minors for prolonged periods of time.**
* **Inquire into the U.S. government’s compliance with rules and guidance around conditions of detention, including but not limited to a) the use Customs and Border Protection detention cells, such as “ice boxes” and “dog kennels,” b) the prolonged detention of children in inappropriate settings and in conditions of overcrowding, and c) inadequate record keeping leading to extended or permanent separation of children from their families.**
* **Inquire into how the U.S. government is meeting its “heightened duty” to protect the lives of detained migrant children under Article 6, including providing access to adequate medical care. In addition, the Committee should inquire as to the nature and thoroughness of the investigation of migrant deaths in line with the right to life.**
* **Inquire into how U.S. Government plans to investigate, end, and prevent future practices that may amount to torture or cruel, inhuman and degrading treatment in immigration enforcement, such as the removal of thousands of minors, including those under thirteen years of age, indefinitely from their families for the purposes of deterring migration.**
* **Inquire as to how the the U.S. government has met its obligations to protect and honor family unity in its implementation of immigration policy, particularly with respect to the zero tolerance policy and the practice of separating migrant families.**

**BACKGROUND: UNITED STATES ZERO TOLERANCE POLICY**

1. On April 6, 2018, U.S. Attorney General Jeff Sessions announced the U.S. government’s “zero tolerance policy” for criminal irregular entry into the United States. As a result of this policy, nearly 3,000 children were separated from their families at the U.S. border in such a state of chaos that some will never be reunited with their parents.[[2]](#footnote-2) These children were placed in custody along side a group of unaccompanied minors that swelled to 15,000 children this year,[[3]](#footnote-3) 6,200 of whom were held in a tent encampment in Tornillo, Texas between June 2018 and January 2019.[[4]](#footnote-4)
2. The zero tolerance policy prohibits “both attempted illegal entry and illegal entry into the United States by an alien” under a statute governing improper entries by immigrants.[[5]](#footnote-5) Under this policy, parents who bring children across the border will be prosecuted and the children “will be separated from [the parent] as required by law.”[[6]](#footnote-6) Entering the country at a non port of entry is considered a misdemeanor in the U.S. but is being prosecuted at large scale under the zero tolerance policy.[[7]](#footnote-7)
3. U.S. officials have stated explicitly that the intent of this policy is to deter immigration.[[8]](#footnote-8) In June, Department of Health and Human Services acting assistant secretary Steven Wagner told reporters, “[w]e 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.”[[9]](#footnote-9)
4. Parents and children who cross the border at a non port of entry may be apprehended by Border Patrol. While their parents are being referred for criminal prosecution, children are placed in the custody of the Department of Health and Human Services and the Office of Refugee Resettlement (“ORR”). ORR currently oversees 15,000 unaccompanied children who are held over a 100 centers around the country, including but not limited to children who have been separated from their parents. Separated children are not only physically separated from their parents, but they also may undergo separate immigration proceedings while in government custody. The Department of Health and Human Services and U.S. Immigration and Customs Enforcement are authorized to facilitate family reunification where the parent or legal guardian of the child in custody “is capable of providing for the physical and mental well-being of the child.”[[10]](#footnote-10)
5. On June 20, 2018, President Trump signed an Executive Order purporting to suspend the family separation policy,[[11]](#footnote-11) although there is evidence to show that immigrant families continued to be separated over 2018.[[12]](#footnote-12) The Executive Order characterizes the policy as authorizing the “temporary detention” of families entering the country between ports of entry, such that parents and children can be detained until the conclusion of their criminal or immigration proceedings.[[13]](#footnote-13) One day after President Trump signed the Executive Order, the U.S. Department of Justice asked a federal court to remove the clear detention deadlines imposed by the settlement agreement in *Flores v. Reno* (“Flores Settlement Agreement”).[[14]](#footnote-14) Additionally, the Department of Homeland Security and the Department of Health and Human Services promulgated regulations attempting to terminate the terms of the Flores Settlement Agreement and Attorney General Sessions is seeking to eliminate the availability of expedited removal proceedings.[[15]](#footnote-15) Although the Flores Settlement Agreement has been the law for over twenty years, the Administration has made clear that it intends to change the terms to weaken the restrictions on detention time limits.
6. Shortly after the Executive Order was signed, 17 states and the District of Columbia sued the Trump Administration to reunite families separated by the policy.[[16]](#footnote-16) A federal district court judge ordered the children be reunited with their parents or sponsors by the end of July 2018. However, as of October 9, 2018, nearly 300 of these of these migrant children were still in government custody.[[17]](#footnote-17) In light of the Administration missing the deadline, the judge presiding over the suit has required regular reports from the government on the status of the children in custody and appears to be supervising settlement negotiations to reunite the migrant families.[[18]](#footnote-18) The zero tolerance policy remains the official immigration policy of the United States, although it continues to be subject to reconsideration. For example, on October 12, 2018, it was reported that the White House is considering giving parents the option to stay with their children in detention (once the government can expand its detention centers) or allow the children to be separated so other relatives or guardians can seek custody while the parents remain under prosecution.[[19]](#footnote-19)
7. Under the zero-tolerance policy, criminal prosecutions for immigration related offenses increased significantly on the U.S. Southern border.[[20]](#footnote-20) Parole has been blanket denied to immigrants awaiting decisions, even to separated family members, older people and those afflicted by acute illnesses,[[21]](#footnote-21) and many immigrants are held in criminal facilities.[[22]](#footnote-22)

**ISSUE 1: USE OF MANDATORY IMMIGRATION DETENTION - ARTICLE 9**

1. The rights established under the the International Covenant on Civil and Political Rights (“ICCPR”) “must be available to all individuals . . . such as asylum seekers, refugees . . . who may find themselves in the territory or subject to the jurisdiction” of a member state.[[23]](#footnote-23) Article 9 of the ICCPR states that “[n]o one shall be subjected to arbitrary arrest or detention”, and that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody.”[[24]](#footnote-24)
2. In General Comment No. 35, the Committee has noted that while asylum-seekers who enter a country unlawfully may be briefly detained for documentation and identification purposes, further detention “would be arbitrary in the absence of particular reasons specific to the individual.”[[25]](#footnote-25) This determination must be made on a “case by case” basis, subject to periodic review, and not “based on a mandatory rule for a broad category.”[[26]](#footnote-26)
3. Given that the current U.S. “zero tolerance” policy is not applied on a case-by-case basis, but rather imposes detention as to a whole class of persons, it would likely be viewed as arbitrary under the ICCPR and in violation of its obligations.
4. The Committee also has cautioned that children 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.”[[27]](#footnote-27) A blanket policy decision to detain families (including children) for an indefinite period of time appears to run afoul of this guidance.
5. In 2018, the number of child immigrants in U.S. government custody swelled to 15,000 who were held in more than 100 shelters across the country.[[28]](#footnote-28) These numbers include the nearly 3,000 children who were separated from their families and automatically placed into the ORR system.[[29]](#footnote-29) Of particular concern is the use of the Tornillo detention center - a tent encampment in Texas that was used to house 6,200 of the unaccompanied children between June 2018,[[30]](#footnote-30) and its closure on January 11, 2019.[[31]](#footnote-31) The detention of separated children and unaccompanied minors over 2018 likely constitutes a violation of Human Rights Committee guidance on Article 9.[[32]](#footnote-32)
6. **The Committee is urged to inquire into possible violations of Article 9’s protection against freedom from arbitrary and unlawful detention, specifically relating to the U.S. government’s “zero tolerance policy.”** **In particular, the Committee is urged to examine a) the mandatory criminalization and detention of migrants, and b) the large-scale detention of minors for prolonged periods of time.**

**ISSUE 2: CONDITIONS OF IMMIGRATION DETENTION - ARTICLE 10**

1. As outlined in Article 10 of the ICCPR, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” It further requires that accused persons be segregated from convicted persons and subject to separate treatment appropriate to their status as unconvicted persons. The U.N. General Assembly has put forward that when children are detained, the facility should provide childcare (for when the children are not in the care of a parent) and child-specific healthcare, including “ongoing monitoring of their development by specialists.”[[33]](#footnote-33)
2. There are currently multiple pending lawsuits against the U.S. with claims of inadequate and harmful conditions of immigration detention.[[34]](#footnote-34) Inadequacies include the use of “ice box” cells and cages resembling dog kennels that are notoriously cold enough to make people ill, and sent a 5 month old baby to the hospital with pneumonia in 2018.[[35]](#footnote-35) In addition, the U.S. has been housing immigrants in criminal facilities pending decisions from the court.
3. A recent report by the Office of the Inspector General of the U.S. Department of Homeland Security found inadequate detention conditions and processes, including unaccompanied children being held in detention far longer than permitted by law and inadequate systems to record and retrieve reliable information on detainees and separated family members.[[36]](#footnote-36) Many of the nearly 3,000 immigrant children separated from their families in 2018 were placed in facilities where the staff were not allowed to hold or touch even young children, due to policies developed for adolescent detainees.[[37]](#footnote-37) Of the 15,000 total detained immigrant children in ORR custody, 5,400 are sleeping in shelters with more than 1,000 other children and some 9,800 are in facilities with 100-plus total kids, according to confidential government data obtained and cross-checked by The Associated Press.[[38]](#footnote-38)
4. **The Committee is urged to inquire into the U.S. government’s compliance with rules and guidance around conditions of detention, including but not limited to a) the use Customs and Border Protection detention cells, such as “ice boxes” and “dog kennels,” b) the prolonged detention of children in inappropriate settings and in conditions of overcrowding, and c) inadequate record keeping leading to extended or permanent separation of children from their families.**

**ISSUE 3: DEATHS IN IMMIGRANT DETENTION AND CUSTODY - ARTICLE 6**

1. The Committee’s General Comment No. 36 clarifies that Article 6 requires States “to take special measures of protection towards persons in situation of vulnerability,” including children and especially unaccompanied migrant children.[[39]](#footnote-39) The Comment specifies that States have “a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State,” which includes taking any “necessary medical care and appropriately regular monitoring of their health.”[[40]](#footnote-40) These heightened duties are specifically outlined as applying to refugee camps and juvenile institutions. An important part of the state’s duty is to investigate potential violations of the right to life.[[41]](#footnote-41)
2. In the last month of 2018, a 7 year old girl and 8 year old boy died in U.S. immigration custody detention. Both were Guatemalan immigrants. The young girl died just two days after being apprehended, triggering a call for a thorough investigation from the UN Special Rapporteur on Migrants.[[42]](#footnote-42) In May 2018, a 19 month old Guatemalan girl died just weeks after being released from a family detention center. Her parents are now suing for alleged inadequate medical care. In 2018, a five month old girl was hospitalized with pneumonia after being held in a cold cell. Overall, there are 12 reported deaths of migrants in U.S. custody over 2018.[[43]](#footnote-43)
3. **The Committee is urged to inquire into how the U.S. government is meeting its “heightened duty” to protect the lives of detained migrant children under Article 6, including providing access to adequate medical care. In addition, the Committee should inquire as to the nature and thoroughness of the investigation of migrant deaths in line with the right to life.**

**ISSUE 4: THE ZERO TOLERANCE POLICY AND THE USE OF TORTURE OR CRUEL, INHUMAN AND DEGRADING TREATMENT IN IMMIGRATION ENFORCEMENT - ARTICLE 7**

1. Article 7 to the ICCPR prohibits “cruel, inhuman or degrading treatment or punishment.” While the U.S.’s reservation limits this article to a domestic Constitutional analysis, other forums remain persuasive. In particular, in 2006 the European Court of Human Rights found in *Becciev v. Moldova*, that when an act has the effect of arousing feelings of fear, anguish and inferiority capable of “humiliating and debasing” the victim, it may be characterized as “degrading.”[[44]](#footnote-44) In that case, Becciev was detained for thirty-seven days without sufficient food, outdoor exercise, or exposure to natural light.[[45]](#footnote-45) The European Court of Human Rights deemed those deprivations coupled with the harsh conditions of his cell qualified as inhuman and degrading treatment.[[46]](#footnote-46)
2. The U.S. is also party to the Convention Against Torture, which defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” for purposes of punishment, obtaining a confession, coercion, intimidation, or for any reason based on discrimination.”[[47]](#footnote-47) The U.S.’s reservation similarly limits this article.
3. Shortly after the implementation of the Executive Order, a group of human rights experts from the U.N. called on the U.S. to release unaccompanied immigrant minors from detention, stating that the detention of children in certain cases “could amount to torture” (include psychological analysis of family separation here).[[48]](#footnote-48) Researchers have found that PTSD symptoms are significantly higher for children of detained or deported parents compared with those whose parents were legal permanent residents or undocumented.[[49]](#footnote-49) Additional findings suggest that the trauma caused by family separation threatens mental health as much as the atrocities families experience in the countries they are fleeing.[[50]](#footnote-50)
4. **The Committee is urged to inquire into how U.S. Government plans to investigate, end, and prevent future practices that may amount to torture or cruel, inhuman and degrading treatment in immigration enforcement, such as the removal of thousands of minors, including those under thirteen years of age, indefinitely from their families for the purposes of deterring migration.**

**ISSUE 5: THE ZERO TOLERANCE POLICY AND SEPARATION OF MIGRANT FAMILIES - ARTICLES 17 AND 23**

1. Article 23 of the ICCPR recognizes the family as the “natural and fundamental group unit of society and is entitled to protection by society and the State.” Article 17 specifies that “no one shall be subjected to arbitrary or unlawful interference with his… family.”
2. In 2018, the UN High Commissioner for Refugees published a “Legal and Protection Policy Research” paper specifically looking at the right to family unity for refugees. This analysis reaffirms “the principle of the best interest of the child is an overarching human rights principle that must be respected in all matters including those relating to the child’s right to family life.”[[51]](#footnote-51) UNHCR’s 2001 Summary Conclusions on family unity state: “Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated.”[[52]](#footnote-52)
3. **The Committee is urged to inquire as to how the the U.S. government has met its obligations to protect and honor family unity in its implementation of immigration policy, particularly with respect to the zero tolerance policy and the practice of separating migrant families.**

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5. Press Release, U.S. Dept. of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018) (available at https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policycriminal-illegal-entry). [↑](#footnote-ref-5)
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11. Exec. Order No. 13841, 83 Fed. Reg. 29,435 (June 20, 2018). [↑](#footnote-ref-11)
12. Ginger Thompson, Families Are Still Being Separated at the Border, Months After “Zero Tolerance” Was Reversed, PROPUBLICA (Nov. 27, 2018, 4:45 PM EST), https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed. [↑](#footnote-ref-12)
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