Trump's Torture Legacy: Isolating, Incarcerating, and Inflicting Harm Upon Migrant Children

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TRUMP’S TORTURE LEGACY: ISOLATING, INCARCERATING, AND INFlicting HARM UPON MIGRANT CHILDREN

BRENDAN LOKKA*

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* J.D. Candidate, May 2020, American University Washington College of Law; B.A. in Global Interdisciplinary Studies, 2012, Villanova University. Many thanks to Professor Cori Alonso-Yoder for her guidance and suggestions throughout this writing process. Her insights proved critical in structuring this argument and recommending means to redress the severe harm done to thousands of migrant children. I am also grateful to Todd Hull and the American University International Law Review for providing thoughtful feedback and detailed revisions. This Comment is dedicated to my parents, Beth Hogan and Duke Lokka, who have shown me how to advocate for those without a voice through their words, actions, and dedication to international development.
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I. INTRODUCTION

“Don’t tell me it doesn’t work- torture works . . . Half these guys [say]; ‘Torture doesn’t work.’ Believe me, it works.” - Donald J. Trump, Feb. 17, 2016.1

Since becoming a party to the Convention Against Torture (C.A.T.) in the 1990s, the United States federal government has faced repeated criticism from advocacy groups for its treatment of non-citizen detainees. In response to the 9/11 attacks, for example, the Bush Administration subjected suspected terrorists to what it called “enhanced interrogation techniques” in places like Guantanamo Bay, Cuba. Advocacy groups suggested that this wording disguised a harsher truth: that the United States actively engaged in torture.

In 2017, this debate over detention practices shifted from Guantanamo Bay to the U.S.-Mexico border and from suspected terrorists to migrant children. Parallel accusations of condoning torture have correspondingly followed from the Bush to Trump Administrations. As a presidential candidate, Donald Trump sought out...
and relied upon the advice of Paul Manafort and Roger Stone—lobbyists adept in advising torturers.\textsuperscript{7} Once elected, President Trump nominated a proponent and participant in the Bush Administration’s “enhanced interrogation” programs, Gina Haspel, to be Director of the Central Intelligence Agency.\textsuperscript{8}

This Comment asserts that the Trump Administration’s zero-tolerance immigration policy has violated the United States’ obligations pursuant to the C.A.T. by contravening the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment.

Section II of this Comment delineates the United States’ obligations under the C.A.T.\textsuperscript{9} Next, it describes how the zero-tolerance immigration policy\textsuperscript{10} separated thousands of migrant children from their parents\textsuperscript{11} and the fallout resulting from its inept execution.\textsuperscript{12}

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\textsuperscript{8} Goldman, supra note 6 (“With his elevation of Ms. Haspel, now the agency’s deputy director, Mr. Trump displayed a willingness to ignore the widespread denunciations of waterboarding, sleep deprivation, confinements in boxes and other interrogation techniques that were used by the C.I.A. more than a decade ago.”); Amanda Holpuch, Who is Gina Haspel? Donald Trump’s Pick for CIA Chief Linked to Torture Site, \textit{The Guardian} (May 9, 2018), https://www.theguardian.com/us-news/2018/mar/13/who-is-gina-haspel-trump-cia-director-torture-site-link (claiming, according to an ACLU source, that Haspel “was up to her eyeballs in torture”).

\textsuperscript{9} See infra Section II. A; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nov. 20, 1994, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].


\textsuperscript{11} OFF. OF INSPECTOR GEN., U.S. DEP’T OF HEALTH AND HUMAN SERV., OEL-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019) [hereinafter HHS OIG Report] (“HHS has thus far identified 2,737 children in its care . . . who were separated from their parents.”).

\textsuperscript{12} See infra Section II. B.
Section III detangles the *mens rea* and *actus reus* required to satisfy the definition of torture under the C.A.T. and U.S. understandings. It then assesses how federal agencies’ conduct has breached, and continues to breach, the aforementioned obligations. Finally, this section deems judicial intervention an ineffective remedy to an ongoing problem, at least thus far.

Section IV proposes alternative means to counter the government’s family separation practices. First, it recommends that prosecutors arrest and bring criminal charges in compliance with the C.A.T. Second, it calls for reinstating and modifying the Department of Homeland Security’s Central American Minors Program. Third, it urges the U.S. government to certify a class for immigration status adjustment. Fourth, Section IV endorses Congressional action to enact effective oversight and boost transparency in the immigration detention system.

II. BACKGROUND

A. U.S. OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

The United Nations General Assembly adopted the C.A.T. in 1984, and the U.S. Senate ratified it in 1990 with a series of understandings that will be addressed shortly. The United States did not become a party until it deposited this ratification instrument with the United Nations in 1994.

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13. *See infra* Section III. A.
14. *See id.*
15. *See infra* Section III. B.
16. *See infra* Section IV.
17. *See infra* Section IV. A.
18. *See infra* Section IV. B.
19. *See infra* Section IV. C.
20. *See infra* Section IV. D.
23. *See Convention Against Torture, supra* note 9, at art. 25.2 (“This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.”); STEPHEN H. LEGOMSKY ET AL., IMMIGRATION & REFUGEE LAW AND POLICY 1374 (Saul Levmore et al. eds., 7th ed. 2019) [hereinafter...
1. The meaning of “torture” under the C.A.T. and the U.S. understandings

Under Article 1 of the C.A.T., torture consists of “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...” Torture, under this rather expansive definition, must be performed for “such purposes as” eliciting confessions, punishment, intimidation, coercion, or discrimination. Underlying purposes like these may be directed toward either the victim or a third party. As for the perpetrator, the pain or suffering must generally be inflicted by a public official. Alternatively, a torturer could also be a person acting with the consent, acquiescence, or instigation of a public official or person acting within an official capacity. Torture does not, however, include pain or suffering incidental to lawful sanctions.

The U.S. Senate, in ratifying the C.A.T., entered several understandings that modified the government’s obligations from what they would have been under the plain language of Article 1. Understanding 1(a) amended the torture definition’s mens rea to specific, rather than general, intent. The contours of this specific intent remain unclear, though, given the Senate Committee on Foreign Relations’ understanding that Article 1’s phrasing of “for such purposes as”...
provides a more expansive view of the required intent. Additionally, Understanding 1(a) stated that mental pain or suffering must be long-term and in some way tied to physical harm or death, profound disruptions to one’s senses or personality, or a threat that a third party will be subjected to these conditions.

The United States further constrained its conception of the torture definition in Understanding 1(b) as “apply[ing] only to acts directed against persons in the offender’s custody or physical control.” According to Understanding 1(d), for cases in which the offender acts at the acquiescence of a public official, such acquiescence requires the official’s prior awareness of the act and subsequent failure to intervene.

2. State obligation to prevent certain acts

Foremost amongst the state obligations espoused by the C.A.T. is Article 2’s mandate to “prevent acts of torture in any territory under its jurisdiction.” Prevention shall, amongst other measures taken by State parties, take the form of “effective legislative, administrative, [and]
judicial . . . measures."\(^{38}\) The same prevention directives apply to acts which are "cruel, inhuman[,] or degrading" but fall short of the torture definition.\(^{39}\) However, this obligation to prevent does not apply with equal force to the Article 1 obligations.\(^{40}\)

3. *State obligation to investigate, arrest, and prosecute torture suspects*

If torturous acts occur or are attempted within its jurisdiction,\(^{41}\) regardless of a state’s efforts to prevent them, a state party to the C.A.T. has the distinct and affirmative obligation to address the issue within its domestic criminal law system.\(^{42}\) This obligation enables torture victims to seek redress for their severe pain or suffering by providing them with a private right of action subject to prompt judicial review.\(^{43}\)

To effectuate this review, state parties must promptly investigate where there are reasonable grounds to believe torture occurred.\(^{44}\) If satisfied by the allegations’ factual basis, considering all available information, a state party must arrest the perpetrators or otherwise

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38. *Id.*

39. *Id.* at art. 16.1 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment, which do not amount to torture . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.").

40. *Compare* S. REP. NO. 101-30, *supra* note 32, at 25 (1990) ("Article 16 thus creates a separate and more limited obligation . . . "), *with* IMMIGRATION AND REFUGEE LAW AND POLICY, *supra* note 23, at 1380-81 (differentiating Article 16 obligations from Article 2 ones on the basis that the former “merely require[s] states to include certain information in the education and training of law enforcement officials, investigate alleged misconduct, and provide a forum for complaints.”).

41. *See generally* Convention Against Torture, *supra* note 9, at art. 5 ("Each State Party shall . . . establish its jurisdiction over the offences referred to in article 4” via territorial, active, and passive jurisdiction).

42. *See id.* at art. 4.1 ("Each State Party shall ensure that all acts of torture are offenses under its criminal law” including attempted torture and conspirator liability); *id.* at art. 4.2 (“Each State Party shall make these offenses punishable. . . . ”).

43. *See id.* at art. 13 (“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.”) (emphasis added).

44. *Id.* at art. 12 (“Each State Party shall ensure . . . prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed. . . . ”) (emphasis added).
ensure their appearance in court. Once arrested, the state party must subsequently extradite the torture suspect to his/her home country, subject to limited restrictions, or prosecute him/her.

4. Civil remedies for C.A.T. violations

Article 14 of the C.A.T. provides an alternate, not substitute, remedy for torture victims: civil compensation. It establishes “an enforceable right to fair and adequate compensation” for claimants. Types of compensation, however, are left open-ended. Still, States must “ensure” that some form of this right be available to torture victims.

B. The Trump Administration’s Zero-Tolerance Policy and Resulting Mass Separation of Migrant Families by Federal Agencies

1. Implementation of the zero-tolerance policy and the roles of various federal agencies

On April 6, 2018, then Attorney General Jeff Sessions instructed the Department of Homeland Security (D.H.S.) and Department of Justice (D.O.J.) to adopt a “zero-tolerance policy” (Z.T.P.) for all suspected violations of 8 U.S.C. § 1325(a) along the United States’ Southern

45. Id. at art. 6.1 (“Upon being satisfied, after an examination of information available to it, . . . any State Party in whose territory a person alleged to have committed [torture under domestic law] is present shall take him into custody or take other legal measures to ensure his presence.”) (emphasis added).

46. See id. at art. 3.1 (prohibiting extradition to a state in which there are “substantial grounds for believing” that the individual may be subjected to torture, otherwise known as nonrefoulement obligations).

47. Id. at art. 7.1 (“The State Party . . . shall . . . , if it does not extradite [the suspect], submit the case to its competent authorities for the purpose of prosecution.”) (emphasis added).

48. Id. at art. 14.1 (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”) (emphasis added).

49. Id.

50. Id. (using of the word “including” before listing “full rehabilitation” as a form of redress).

51. Id. (failing to clearly state whether such compensation is available to victims of acts that fall short of the torture definition under Article 16).
That same day, President Trump terminated a policy authorizing various federal agencies to release migrant children and families from detention pending rulings in their asylum cases.\(^{53}\)

Though not explicitly stated in either executive order, their combined effect resulted in the D.H.S. separating undocumented children from their families along the U.S.-Mexico border.\(^{54}\) To comply with both directives, the D.O.J. took all apprehended adults into custody as they “await[ed] prosecution for immigration offenses,” rendering the separated minors Unaccompanied Minor Children (U.A.C.s).\(^{55}\) The Office of Refugee Resettlement (O.R.R.), a distinct office within the Department of Health and Human Services (D.H.H.S.), then obtained custody of these newly-designated U.A.C.s.\(^{56}\) The O.R.R. placed these children in a variety of facilities, from adult detention centers,\(^{57}\) to

\(^{52}\) Attorney General Zero Tolerance Memorandum, supra note 10 (“Today’s zero-tolerance policy further directs each U.S. Attorney’s Office along the Southwest Border . . . to prosecute all Department of Homeland Security referrals of section 1325(a) violations, to the extent practicable.”); 8 U.S.C.S. § 1325(a) (LexisNexis 2019) (“Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers . . . shall, for the first commission of any such offense, be fined . . . or imprisoned not more than 6 months, or both. . . .”).


\(^{54}\) OFFICE OF THE INSPECTOR GENERAL, supra note 11 (“Under these policies, when a child and parent were apprehended together by immigration authorities, DHS separated the family . . . .”).

\(^{55}\) See 6 U.S.C. § 279(g)(2) (2012) (defining UACs as children under the age of eighteen lacking lawful immigration status who are in the US without a parent or guardian “available to provide care and physical custody”); HHS OIG REPORT, supra note 11 (attributing these separation practices to the Attorney General’s and President’s mandates).


outdoor tents,\textsuperscript{58} to shelters operated by nonprofit organizations.\textsuperscript{59}

2. \textit{Stated government purpose of deterrence and responses to public criticism}

Most children separated from their families and later detained in O.R.R. facilities fled violence in El Salvador, Guatemala, and Honduras to seek asylum in the U.S.\textsuperscript{60} El Salvador is among the nations Trump deemed to be “shithole countries.”\textsuperscript{61} Some, including U.S. District Court for the Eastern District of New York Judge Nicholas G. Garaufis, have left open the possibility that Trump’s policies regarding Central Americans result from racial or nationality-based animus.\textsuperscript{62}

The Trump Administration offered a disjointed denial of

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responsibility for separating migrant families. For example, then D.H.S. Secretary Kirstjen Nielsen denied the policy’s existence while Trump simultaneously acknowledged and blamed Democrats for it.

Numerous D.H.S. officials, then Attorney General Jeff Sessions, and White House advisor Stephen Miller echoed an alternate explanation: that the Trump Administration intended to deter families from entering the United States via the zero-tolerance policy. The acting White House Chief of Staff John Kelly stated that “a big name of the game is deterrence.”

A draft memo co-authored by the D.O.J. and the

63. See Julie Hirschfeld Davis, Trump Again False Blames Democrats for His Separation Tactic, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/politics/trump-democrats-separation-policy.html (reporting that Trump “repeated his false assertion that Democrats were responsible” for child separations while Sessions “made a spirited case for it, arguing that a strict approach is a vital tool for deterrence”).

64. Kirstjen Nielsen (@SecNielsen), TWITTER (June 17, 2018, 2:52 PM), https://twitter.com/SecNielsen/status/1008467414235992069 (“We do not have a policy of separating families at the border. Period.”); see generally Stef W. Kight, Senator Asks FBI to Open Perjury Investigation into Kirstjen Nielsen, AXIOS (Jan. 18, 2019), https://www.axios.com/immigration-family-separation-nielsen-lying-fbi-merkley-830b1cecd761-4427-a003-522987f7e7e19.html (accusing Sec. Nielsen of perjuring herself by denying that the Trump Administration had a child separation policy).

65. See Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2018, 6:59 AM), https://twitter.com/realDonaldTrump/status/1000375761604370434 (“Put pressure on the Democrats to end the horrible law that separates children from their parents once they cross the Border. . . .”); id. (June 16, 2018, 6:03 AM), https://twitter.com/realDonaldTrump/status/1007972046666690561 (“Democrats can fix their forced family breakup at the Border. . . .”)

66. See HIRSCHFELD DAVIS, supra note 63 (naming numerous DHS officials and Sessions as proponents of the deterrence strategy); Nick Miroff et al., Trump Administration Weighs New Family-Separation Effort at Border, WASH. POST (Oct. 12, 2018), https://www.washingtonpost.com/local/immigration/trump-administration-weighs-new-family-separation-effort-at-border/2018/10/12/45895c7e-cd7b-11e8-920f-dd52e1ae4570_story.html [hereinafter Miroff et al., Trump Administration Weighs New Family-Separation Effort at Border] (“. . . Stephen Miller is advocating for tougher measures because he believes the springtime separations worked as an effective deterrent to illegal crossings.”); Raul A. Reyes, Opinion, Taken from Their Parents: There is Nothing Right About This, CNN (Apr. 23, 2018), https://www.cnn.com/2018/04/23/opinions/taken-from-their-parents-there-is-nothing-right-about-this-reyes/index.html (stating that DHS officials claiming the separations were meant to “protect the best interests of minor children crossing our borders” rather than deter undocumented entry).

67. John Burnett, 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-
D.H.S. in December 2017 also revealed an intent to deter.\textsuperscript{68}

Emblematic of the fragmented executive responses to public outcry, President Trump issued an Executive Order on June 20, 2018 that at once reiterated his Administration’s continued efforts “to rigorously enforce our immigration laws” while announcing a new policy of “maintain[ing] family unity,” subject to several qualifications.\textsuperscript{69} This second Executive Order effectively ended the Trump Administration’s Z.T.P.\textsuperscript{70} but not its child separation policy.\textsuperscript{71} In subsequent months, information about the scale of child separations emerged with figures ranging from a total of 700 to over 2,600 displaced children.\textsuperscript{72}

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\item 68. See Julia Ainsley, \textit{Trump Admin Weighed Targeting Migrant Families, Speeding Up Deportation of Children}, NBC NEWS (Jan. 17, 2019), https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-958811 (opining, according to the memo’s authors, that an “increase in prosecutions would be reported by the media and it would have a substantial deterrent effect”).
\item 69. See Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018) (blaming Congressional inaction for “put[t ing] the Administration in the position of separating alien families to effectively enforce the law”); see also \textit{L. v. United States Immigr. & Customs Enf’t} (“ICE”), 310 F. Supp. 3d 1133, 1142 (S.D. Cal. 2018) [hereinafter \textit{L. v. ICE}] (pointing out numerous qualifications that temper the Executive Order’s ability to halt child separations).
\item 70. See Michael D. Shear et al., \textit{Trump Retreats on Separating Families, but Thousands Remain Apart}, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html?module=inline (“President Trump caved to enormous political pressure on Wednesday and signed an executive order meant to end the separation of families at the border by detaining parents and children together for an indefinite period.”).
\item 71. See Miroff, supra note 66 (“The White House is actively considering plans that could again separate parents and children at the U.S.-Mexico border . . . “ in October 2018).
Oversight agencies later found that “thousands more” children than previously disclosed were separated\(^{73}\) and that the total number may never be known.\(^{74}\) One reason for this uncertainty are revelations that the Administration’s child separations began long before the April 2018 Z.T.P. announcement.\(^{75}\) Another reason is that the government tested new ways to continue the Z.T.P. by other names and means.\(^{76}\) In fact, in October 2018, Trump reiterated his Administration’s deterrence strategy.\(^{77}\) The American Civil Liberties Union (A.C.L.U.) further asserts

\(^{73}\) See JORDAN, supra note 72 (relaying an estimate obtained from Ann Maxwell, HHS’ Assistant Inspector General for Evaluation and Inspections); Dartunorro Clark, GOP Removes Lawmaker’s Remarks from the Record After Dispute over Border Deaths, NBC NEWS (May 22, 2019), https://www.nbcnews.com/politics/congress/gop-removes-lawmaker-s-remarks-record-after-dispute-over-border-n1008886 (estimating that 5,000 children had been separated as of May 2019, according to Rep. Lauren Underwood, D-Illinois).

\(^{74}\) See HHS OIG REPORT, supra note 11 (“The total number of children separated from a parent or guardian by immigration authorities is unknown . . . [T]housands of children may have been separated during an influx that began in 2017, before the accounting required by the Court [in L. v. ICE], and HHS has faced challenges in identifying separated children.”).

\(^{75}\) See JORDAN, supra note 72 (“But even before the administration officially unveiled the zero-tolerance policy in the spring of 2018, staff of the [DHHS] . . . had noted a ‘sharp increase’ in the number of children separated from a parent or guardian, according to the report from the agency’s Office of the Inspector General.”).

\(^{76}\) E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1231 (9th Cir. 2018), aff’d, 202 L.Ed.2d 510 (U.S. 2018) (denying the government’s request for a stay of a temporary restraining order that prevented it from denying asylum claims from those who crossed the US-Mexico border anywhere other than a port of entry, including children applying for derivative asylum through a parent); E.g., Miroff et al., Trump Administration Weighs New Family-Separation Effort at Border, supra note 66 (outlining options the White House subsequently considered to effectuate child separations by other means, including a “binary choice” proposal in which parents detained with their children could decide whether to remain detained indefinitely or relinquish custody of their children to government shelters); Pam Fessler, Proposed Rule Could Evict 55,000 Children from Subsidized Housing, NPR (May 10, 2019), https://www.npr.org/2019/05/10/722173775/proposed-rule-could-evict-55-000-children-from-subsidized-housing (proposing, via the Department of Housing and Urban Development, a rule withdrawing housing subsidies for 25,000 families of mixed immigration statuses, which “the agency assumes” would cause them to separate).

\(^{77}\) Trump Speaks About Border Security on South Lawn, MSNBC (Oct. 13, 2018), https://www.msnbc.com/msnbc/watch/trump-speaks-about-border-security-on-south-lawn-1343657027589 (“If they feel there will be separation, they won’t come.”).
that between June 28, 2018 and June 29, 2019, the Trump Administration separated an additional 911 families.\footnote{78} Due to the nebulous nature of its start and end dates, for the purposes of this Comment, references to the Z.T.P. shall encompass all child separations during President Trump’s tenure.

3. Detention facility conditions and their effects on migrant children’s health

Conditions at immigration detention facilities have been criticized long before the Z.T.P. took effect.\footnote{79} They include recorded instances of physical and sexual abuse, lack of adequate medical care, and inmate suicides.\footnote{80} The U.S. government itself determined that, as of 2015, “certain D.H.S.-owned facilities and [Contract Detention Facilities] are subjecting detained immigrants to torture-like conditions.”\footnote{81} These problems were exacerbated by the sudden influx of thousands of migrant children who were, as a result of the Z.T.P., automatically deemed U.A.C.s and sent to immigration detention centers.\footnote{82}

\footnote{78. Elliot Spagat & Astrid Galvan, \textit{ACLU: 911 children split at border since 2018 court order}, \textit{AP News} (July 31, 2019), https://www.apnews.com/ba5a05e6a7f14b6b898d75712dec1f6b (“More than 900 children, including babies and toddlers, were separated from their parents at the border in the year after a judge ordered the practice be sharply curtailed.”)}


\footnote{81. \textit{With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities}, U.S. COMM’N ON CIV. RTS., Sept. 2015, at 149-50 [hereinafter With Liberty and Justice for All].}

\footnote{82. \textit{See}, e.g., John Burnett, \textit{Almost 15,000 Migrant Children Now Held at Nearly Full Shelters}, NPR (Dec. 13, 2018), https://www.npr.org/2018/12/13/76300525/almost-15-000-migrant-children-now-held-at-nearly-full-shelters [hereinafter Burnett, \textit{Almost 15,000 Migrant Children Now Held at Nearly Full Shelters}] (attributing the DHHS’ detention facilities being over ninety percent full and in poor condition to the increased number of UACs held under the ZTP).}
i. Abuse and deaths of migrant children

Pediatrics experts, including members of the American Academy of Pediatrics, have determined that “[t]he Department of Homeland Security facilities do not meet the basic standards for the care of children in residential settings.” Pediatricians have also noted pervasively “egregious conditions” in child immigration detention. Such conditions include “constant light exposure, children sleeping on concrete floors . . . insufficient food, [and the] denial of access to thorough medical care . . . “ The A.C.L.U. further asserted that child immigrants in federal custody are exposed to “federal officials’ verbal, physical and sexual abuse . . . the denial of clean drinking water and adequate food . . . [and] detention in freezing, unsanitary facilities.”

The O.R.R. has, according to an investigative report, housed migrant children in nonprofit facilities with known histories of neglect or abuse. For example, in Texas, “state inspectors have cited homes with more than 400 deficiencies,” including the failure to seek medical care for children with burns, broken wrists, and sexually transmitted diseases. In Arizona, video evidence revealed several staffers at a private shelter pushing and dragging three children on the floor.

85. Id.
87. See e.g., Aura Bogado et al., Migrant Children Sent to Shelters with Histories of Abuse Allegations, REVEAL NEWS (June 20, 2018), https://www.revealnews.org/article/migrant-children-sent-to-shelters-with-histories-of-abuse-allegations/ (finding that “federal officials continued sending children who crossed the border to shelters after . . . [incidents of child abuse in these facilities] came to light”).
88. Id.
Sustained sexual abuse allegations of detained migrant children by nonprofit employees have also not prevented the O.R.R. from renewing or continuing contracts with these partner organizations.\(^90\) In fact, of the O.R.R.’s $3.4 billion budget for paying private organizations to house migrant children between 2014 and 2018, $1.5 billion of that was paid to companies facing allegations of serious maltreatment, including child pornography and sexual abuse.\(^91\) Sexual misconduct accusations against federal officials regarding children held in custody also abound.\(^92\) Evidence also suggests that federal officials “were aware of these abuses as they occurred, but failed to properly investigate, much less to remedy, these abuses.”\(^93\) D.H.S. received about two hundred claims of sexual abuse of detainees between 2007 and 2015, not including the unknown number of cases that have not been reported.\(^94\)

Detention conditions have also led to the numerous deaths during the Trump Administration’s tenure, including at least seven minors.\(^95\) As of this publication, the earliest known death of a minor in U.S. government custody was that of Darlyn Cristabel Cordova-Valle, a ten-year-old, in September 2018.\(^96\)

Mariee Juárez, a twenty-month-old infant, died from a respiratory illness in May 2018 that her mother alleges developed while in

\(^{90.}\) Bogado et al., supra note 86 (detailing various acts of sexual abuse or child pornography in nonprofit detention facilities for children in Florida, New York, Maine, and Texas between 2014 and 2018).

\(^{91.}\) Id.


\(^{93.}\) ACLU Abuse Report, supra note 85.

\(^{94.}\) *With Liberty and Justice for All,* supra note 80, at 149-50.

\(^{95.}\) See Nicole Acevedo, *Why are Migrant Children Dying in U.S. Custody?*, NBC News (May 29, 2019), https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316 (“At least seven children are known to have died in immigration custody since last year, after almost a decade in which no child reportedly died while in the custody of U.S. Customs and Border Protection.”); see also Lisa Riordan Seville et al., *22 Immigrants Died in ICE Detention Centers During the Past 2 Years*, NBC News (Jan. 6, 2019), https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781 (addressing twenty-two detainees’ deaths at ICE facilities during the Trump Administration, most of whom were adults).

\(^{96.}\) See ACEVEDO, supra note 94 (congenital heart defect).
Immigration and Customs Enforcement (I.C.E.) custody. On December 8, 2018, 7-year-old Jakelin Caal Maquin “died of dehydration and shock less than 36 hours after she was apprehended by border agents.” About two weeks later, a Guatemalan boy named Felipe Alonzo-Gomez succumbed to an unknown illness while in U.S. Customs & Border Patrol (C.B.P.) custody.

In April 2019, Juan de León Gutiérrez entered O.R.R. custody, transferred to a federally funded shelter, and died within nine days. For Wilmer Josué Rámirez Vásquez, eighteen months-old, it took just three days. A week later, Carlos Hernandez Vásquez was found unresponsive in a shared cell. The A.C.L.U. also detailed how one detainee’s pregnancy resulted in a stillbirth after C.B.P. officials “[d]enied [the] pregnant minor medical attention when she reported pain.”


101. See id. (pneumonia).

102. See id. (dying without prior hospitalization for the flu).

103. ACLU Abuse Report, supra note 85.
Amnesty International’s Americas Director, Erika Guevara-Rosas, has derided the Z.T.P. as a “spectacularly cruel policy” that dumps children into “overflowing detention centers, which are effectively cages.” She concludes that such treatment “is nothing short of torture.” The U.S. Commission on Civil Rights reached a similar conclusion in 2015 regarding the “torture-like physical and emotional pain” federal officials inflicted upon migrants as a form of punishment for their undocumented status.

Multiple pending lawsuits allege that, among other things, agencies acting as government contractors to detain migrant children have “[d]osed children with cocktails of psychotropic drugs disguised as vitamins” and held children “down for forcible injections, which medical records show are powerful antipsychotics and sedatives.” These medications rendered migrant children “unable to walk, afraid of people, and wanting to sleep constantly.” As a result, at least one federal court has ordered the Trump Administration to end its practice of prescribing powerful psychotropic drugs.

Aside from involuntary medical treatment, separations themselves may have profoundly negative effects on children’s mental health.
Adverse outcomes include post-traumatic stress disorder, disrupted neurodevelopment, toxic stress, depression, and heightened risks of both chronic mental and physical illnesses. More than a thousand mental health professionals agree that “disruptive attachment experiences can have profoundly negative impacts . . . not only during the acute phase of experience, but as well across the lifespan . . . .” According to one study, the harmful mental health outcomes for refugee family separations equates only to, among a list of twenty-six types of trauma, physical beatings, or torture.

4. Federal court intervention: L. v. ICE

On June 26, 2018, the U.S. District Court for the Southern District of California (S.D. Cal.) granted a class-wide preliminary injunction intended to halt the Trump Administration’s child separation policy. The certified class included all adult parents held in immigration detention centers and separated from their minor children who were, in turn, detained in O.R.R. facilities, O.R.R. foster care, or other D.H.S. locations. Absent individualized findings that a parent was unfit to care

longer that children and parents are separated, the greater the reported symptoms of anxiety and depression for the children.”)

111. See Letter from Physicians for Human Rights to Kirstjen Nielsen, Sec’y, U.S. Department of Homeland Security, to Jeff Session, Att’y Gen., U.S. Department of Justice (June 14, 2018) [hereinafter PHR Letter] (arguing that these adverse outcomes can result in social, emotional, and cognitive impairment that can continue into adulthood); Take Action to End Family Separation, PHYSICIANS FOR HUM. RTS. (Sept. 26, 2018), https://phr.org/resources/take-action-to-end-family-separation/#top (indicating that over 5,000 medical professionals signed a petition to end family separation because it is profoundly harmful to families and violates fundamental human rights).


114. See L. v. ICE, 310 F. Supp.3d, at 1141, 1148-49 (granting the injunction and ordering, amongst other things, that the government stop separating class members and reunify ones who have already been separated).

for or presented a danger to the child, the Court held that the U.S. government could no longer separate migrant families.\textsuperscript{116} Thus the government’s child separation policy, at least theoretically, ended.

To reach this result, the S.D. Cal. ruled that the irreparable harm of separating class members from their children\textsuperscript{117} warranted extraordinary relief in the form of a class injunction nationwide.\textsuperscript{118} Although the relevant class consisted entirely of parents, the Court addressed some long-term harms that the Z.T.P. inflicted upon migrant children.\textsuperscript{119} Using these “children as tools in the parents’ criminal and immigration proceedings,” the S.D. Cal. found was “so ‘brutal and offensive’” that it “shock[ed] the contemporary conscience.”\textsuperscript{120}

The U.S. government’s response consisted of arguments that this injunction would prevent the Executive Branch from enforcing criminal and immigration laws.\textsuperscript{121} Ultimately, this failed to persuade the court. The Trump Administration remained free to enforce the law as the injunction only restrained the manner in which it separated families.\textsuperscript{122}

\footnotesize{\textsuperscript{116} L. v. ICE, 310 F. Supp.3d at 1149.\textsuperscript{117} See id. at 1146 (“The injury in this case . . . is the separation of a parent from his or her child, which the Ninth Circuit has repeatedly found constitutes irreparable harm.”).\textsuperscript{118} See id. at 1136 (“Extraordinary relief is requested, and is warranted under the circumstances.”).\textsuperscript{119} See id. at 1146-47 (citing the Children’s Defense Fund as providing that separations lead to “serious, negative consequences to children’s health and development” including increased risks of physical and mental illness, psychological distress, anxiety, and depression that “would follow the children well after the immediate period of separation— even after eventual reunification . . . ”).\textsuperscript{120} L. v. ICE, 310 F. Supp.3d at 1145-46 (citing Breithaupt v. Abram, 352 U.S. 432, 435 (1957); Cty. of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)).\textsuperscript{121} Id. at 1148.\textsuperscript{122} See id. at 1148 (“Plaintiffs do not seek to enjoin the Executive Branch from carrying out its duties . . . ”); Rodriguez v. Robbins, 715 F.3d 1127, 1146 (9th Cir. 2013) (“While ICE is entitled to carry out its duty to enforce the mandates of Congress, it must do so in a manner consistent with our constitutional values.”).}
III. ANALYSIS

A. THE U.S. BREACHED ITS OBLIGATION TO PREVENT TORTURE AND OTHER INHUMAN, CRUEL, OR DEGRADING TREATMENT UNDER THE C.A.T.

Due to the C.A.T.’s construction of international obligations under domestic criminal law, it follows that the Trump Administration’s child separation policy should be assessed through a criminal lens. Standard criminal analysis requires that an offender possess the proper mens rea at the time he or she commits the offense’s actus reus. Thus, if federal agents possessed the proper intent while torturous conduct occurred within their purview, as defined by the C.A.T. and modified by the United States’ understandings, then those officials are subject to criminal liability for torture.

1. Mens rea: reconciling the differing intent requirements for torture under the C.A.T. and the U.S. Senate’s understandings

The Convention Against Torture, ratified by the United States on October 21, 1994, defines the mens rea for torture as “intentionally inflicting” a qualifying act upon a victim “for such purposes as” punishment, intimidation, coercion, or discrimination. Underlying purposes like these may be directed toward either the victim or a third

123. See Convention Against Torture, supra note 9, art. 2 (preventing torture); Convention Against Torture, supra note 9, art. 4 (criminalizing torture); art. 12 (investigating torture allegations); Convention Against Torture, supra note 9, art. 6 (arresting torture suspects); Convention Against Torture, supra note 9, art. 7 (prosecuting or extraditing torture suspects).

124. See David Cowley, Coincidence of Actus Reus and Mens Rea: R. v. Le Brun, 56 J. CRIM. L. 126, 163 (1992) (“It is a general rule of criminal law that to establish liability for an offence the mens rea required to be proved must coincide in point of time with the act which causes the actus reus of the particular crime charged.”).

125. See id.; Convention Against Torture, supra note 9, art. 1 (defining torture as “intentionally inflict[ing]” certain acts upon a victim with some form of consent by a public official); Convention Against Torture, supra note 9, art. 4 (requiring that torture be codified as a criminal offense in state parties’ domestic law).

126. 8 C.F.R. § 208.18.

127. Convention Against Torture, supra note 9, art. 1; see Legomsky et al., supra note 23, at 1381 (sharing the Senate Committee on Foreign Relations’ view that “[s]ince the listed purposes are prefaced by the phrase ‘such purposes as,’ they seem merely illustrative, not exhaustive”).
party.\textsuperscript{128} This intent to inflict harm must accompany a public official’s “instigation . . . or . . . consent or acquiescence” when performed by someone acting on their behalf.\textsuperscript{129} Simply put, the \textit{mens rea} for torture under the C.A.T.’s plain language is the intent to inflict an act on a person for specified purposes and with a public official’s permission when performed by a deputized person.

In ratifying the C.A.T., the United States took issue with the permissive form of transferred intent from a public official to any “other person acting in an official capacity.”\textsuperscript{130} The United States specified, accordingly, that “[a]cquiescence of a public official requires . . . prior . . . awareness of [the] activity and thereafter breach his or her legal responsibility to intervene or prevent” it.\textsuperscript{131} With an eye toward awareness, state acquiescence does not require an intricate grasp of each instance of torture or a \textit{respondeat superior} relationship.\textsuperscript{132} Neither does it require, according to U.S. federal caselaw, “actual control or knowledge, willful acceptance, or even an agency relationship” between the torturer and public official.\textsuperscript{133} Rather, “willful blindness” on the part of government officials toward abuse inflicted exclusively by private individuals” may suffice for acquiescence.\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}
\item 128. \textit{See} Convention Against Torture, \textit{supra} note 9, art. 1 (“. . . obtaining from . . . a third person information or a confession, punishing him for an act . . . a third person has committed or is suspected of committing, or intimidating or coercing . . . a third person . . .”).
\item 129. \textit{Id.}
\item 130. 8 C.F.R. § 208.18; \textit{See also} Convention Against Torture, \textit{supra} note 9, art. 2 (describing the obligation to prevent torture); S. REP. NO. 101-30, \textit{supra} note 32, at 14 (excluding from the torture definition that which “occurs as a wholly private act”).
\item 131. 8 C.F.R. § 208.18; \textit{see} LEGOMSKY ET AL., \textit{supra} note 23, at 1382 (“As for the ‘legal responsibility’ requirement . . . the General Counsel’s Office of the former INS agreed, that ‘legal’ includes international law and that the . . . CAT itself should therefore suffice.”).
\item 132. \textit{See} \textit{Respondeat Superior}, BLACK’s LAW DICTIONARY (10th ed. 2014) (“The doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.”); \textit{Morales v. Gonzales}, 478 F.3d 972, 983 (9th Cir. 2007) (“Government acquiescence is not restricted to actual . . . knowledge.”).
\item 133. \textit{Morales}, 478 F.3d at 983.
\item 134. \textit{Id.; see} Zheng \textit{v. Ashcroft}, 332 F.3d 1186, 1197 (9th Cir. 2003) (remanding to the Board of Immigration Appeals “to apply the correct standard of ‘acquiescence’ as intended by the Senate in ratifying the Convention -- a standard that includes awareness and willful blindness and does not require actual knowledge or ‘willful[] accept[ance]’.”).
\end{enumerate}
\end{footnotesize}
The willful blindness standard, as has been applied to C.A.T. cases, likens itself to one of advertent negligence rather than a rigid construction of specific intent. Unsurprisingly, then, a Circuit split exists as to whether willful blindness may satisfy the C.A.T.’s acquiescence requirement. Six Circuits have applied this standard and four have rejected it, while the 7th Circuit and D.C. Circuit have yet to expressly adopt or reject it. Taken together, federal caselaw tends to suggest that a government official may satisfy the mens rea for torture under the C.A.T. by failing to intervene where awareness of an unreasonable risk exists that torture may occur at the hands of another.

Importantly, the element of state acquiescence is “separate and distinguishable” from that of specific intent. Another significant difference between the mens rea required by the C.A.T. and by U.S. federal

135. See generally Morales, 478 F.3d at 983 (applying the willful blindness standard); Zheng, 332 F.3d at 1197 (applying the willful blindness standard and explaining that the application of the standard was intended by the Senate).

136. Compare Advertent Negligence, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Negligence in which the actor is aware of the unreasonable risk that he or she is creating. . . .”), with Specific Intent, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The intent to accomplish the precise criminal act that one is later charged with.”).

137. See Orellana-Arias v. Sessions, 865 F.3d 476, 489 n.3 (7th Cir. 2017) (“Our circuit has not affirmatively adopted the ‘willful blindness standard.’”); Ya Pao Vang v. Lynch, 620 F. App’x 3, 4 (1st Cir. 2015) (applying the standard); Suarez-Valenzuela v. Holder, 714 F.3d 241, 246 (4th Cir. 2013) (noting that the 2nd, 3rd, 5th, and 6th Circuits had discredited the willful blindness principle while the 4th and 9th Circuits approved of it); Diaz v. Holder, 501 F. App’x 734, 740 (10th Cir. 2012) (applying the standard); Mendoza-Rodriguez v. United States AG, 405 F. App’x 359, 363 (11th Cir. 2010) (applying the standard); Ramirez-Peyro v. Holder, 574 F.3d 893, 899 (8th Cir. 2009) (applying the standard).

138. See Orellana-Arias, 865 F.3d at 489; Lynch, 620 F. App’x at 4; Suarez-Valenzuela, 501 F. App’x at 246; Diaz, 501 D. App’x at 740; Mendoza-Rodriguez, 405 F. App’x at 363; Ramirez-Peyro, 575 F.3d at 899.

139. See Morales, 478 F.3d at 984 (reprimanding an immigration judge for not applying the willful blindness standard in denying an asylee’s CAT claims that entailed “prison officers laughing and ignoring [the transgendered plaintiff’s] screams and cries when she was repeatedly raped by fellow inmates.”); 8 C.F.R. § 208.18 (“Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”); Advertent Negligence, supra note 135 (“Negligence in which the actor is aware of the unreasonable risk that he or she is creating. . . .”).

140. Cherichel v. Holder, 591 F.3d 1002, 1013 n.14 (8th Cir. 2010).
law is the latter’s need for specific intent\textsuperscript{141} beyond unforeseeable consequences.\textsuperscript{142} Specific intent to inflict severe physical or mental suffering belongs to the perpetrator, whether a private party or state actor, and not necessarily the state actor who acquiesces.\textsuperscript{143} According to this reasoning, a way to understand the interplay between state acquiescence and specific intent is that the latter belongs to a private actor who tortures, while the former assigns to the government official who is aware and breaches the C.A.T. obligation to intervene.\textsuperscript{144}

Mirroring this melded \textit{mens rea} notion is the principle that repercussions incidental to lawful sanctions do not constitute torture because they lack the requisite intent.\textsuperscript{145} Pain or suffering that arises from inherent or incidental conditions cannot implicate any sort of mental state.\textsuperscript{146} Article 1’s use of the word “only” in its last sentences, though, implies that otherwise torturous intent may coincide with or supplement legitimate penal intent.\textsuperscript{147}

Contravening a narrow or strict interpretation of specific intent, and lending credence to the spirit of the willful blindness standard, is the C.A.T.’s inclusion of the phrasing “for such purposes as” in Article 1.\textsuperscript{148} Expansive on its face, this language does not limit the purposes

\begin{itemize}
  \item \textsuperscript{141} Compare Convention Against Torture, supra note 9, art. 1 (“torture . . . it intentionally inflicted on a person . . . “), with 136 Cong. Rec. 36198 (1990) (“an act must be specifically intended to inflict severe physical or mental pain or suffering.”) (emphasis added).
  \item \textsuperscript{142} See 8 C.F.R. § 208.18. (“An act that results in unanticipated and unintended severity of pain and suffering is not torture.”).
  \item \textsuperscript{143} See Cherichel, 591 F.3d at 1013 n.14 (“[I]t is the torturer who must possess the specific intent to inflict severe physical or mental pain or suffering, not necessarily the state actor.”).
  \item \textsuperscript{144} See id. (reasoning that where a private actor possesses the specific intent to inflict and a public official acquiesces, torture under the CAT occurs).
  \item \textsuperscript{145} See Convention Against Torture, supra note 9, art. 1 (“ . . . the term ‘torture’ . . . does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”) (emphasis added); S. Rep. No. 101-30, supra note 32, at 14 (interpreting “law enforcement actions authorized by U.S. law” as incapable of being “performed with the specific intent” required for the definition of torture).
  \item \textsuperscript{146} See S. Rep. No. 101-30, supra note 32, at 14 (“Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for the purposes of this Convention.”).
  \item \textsuperscript{147} Convention Against Torture, supra note 9, art. 1.
  \item \textsuperscript{148} See id. (modifying the required intent); S. Rep. No. 101-30, supra note 32, at 14 (finding these purposes to not be exhaustive but rather illustrative examples).
\end{itemize}
underlying the intentional infliction of severe pain or suffering. Instead, Article I recites examples like obtaining information or a confession, punishment, intimidation, coercion, and discrimination. One may infer that a torturer’s intent to deter exemplifies and conforms with the root motives envisioned by the C.A.T.

2. Actus reus: sufficiently severe pain or suffering

To qualify as torture, the acts in question must first be adequately “severe” to distinguish themselves from Article 16’s prohibition of “other acts of cruel, inhuman, or degrading treatment or punishment. . . .” Except for a few specified circumstances, this is a fact-specific, line-drawing inquiry based upon the degree of suffering. Denial of medical care may amount to torture. So too may choking, ear-boxing, burning, and electric shocks. Conversely, disorientation and sensory deprivation techniques may only amount to a level of severity meriting Article 16 treatment.

As for the severity of mental suffering, Understanding 1(a) delineates

149. See S. Rep. No. 101-30, supra note 32, at 14 (“The purposes given are not exhaustive, as is indicated by the phrasing “for such purposes as.” Rather, they indicate the type of motivation that typically underlies torture. . . .”).

150. Convention Against Torture, supra note 9, art. 1.

151. See id.; Legomsky et al., supra note 23, at 1374.

152. See Convention Against Torture, supra note 9, art. 1 (describing the severity of the act); Convention Against Torture, supra note 9, art. 16 (describing other harsh acts not amounting to torture).


157. See Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25, 96 (1978) (finding, before the CAT was adopted, that acts like forcing prolonged stress positions and hooding, playing continuous hissing sounds, and depriving inmates of sleep and food as inhuman and degrading treatment did not amount to torture).
its contours more precisely.\textsuperscript{158} Not only must mental suffering protract over a period of time beyond the immediate event causing harm, but it needs to accompany at least one of four listed acts or threats.\textsuperscript{159} Most relevant amongst these are the physical acts from the previous paragraph, administration of mind altering drugs, and utilizing procedures to profoundly disrupt one’s physical senses or personality.\textsuperscript{160}

Second, torturous acts cannot arise solely from lawful sanctions.\textsuperscript{161} Sanctions include punishments, “penalties imposed in order to induce compliance,” and extrajudicial law enforcement activity.\textsuperscript{162} Unlike the \textit{mens rea} section above, the focus here is on the lawful basis of the perpetrator’s actions. That the sanction must be lawful means they may include “enforcement actions authorized by law” but cannot defeat the object and purpose of the C.A.T.\textsuperscript{163} Sanctions’ lawfulness is ultimately evaluated by judicial interpretation.\textsuperscript{164}

Third, the victim must be in the torturer’s custody or physical control.\textsuperscript{165} This Comment will not delve further into this issue as it is uncontested that the children detained under the Trump Administration’s Z.T.P. were in government custody.\textsuperscript{166}

\textsuperscript{158} See generally 136 CONG. REC. 36193 (1990) (where the United States’ Senate delineates their understanding in reference to Article 1 of the Convention Against Torture).

\textsuperscript{159} See id. (“[M]ental pain or suffering refers to prolonged mental harm caused by or resulting from” one of four listed occurrences).

\textsuperscript{160} See id.

\textsuperscript{161} See Convention Against Torture, supra note 9, art. 1 (“It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”).

\textsuperscript{162} S. REP. NO. 101-30, supra note 32, at 14.

\textsuperscript{163} 8 C.F.R. § 208.18(a)(3)(“Lawful sanctions . . . do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.”); see Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (stating generally that “[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty”).

\textsuperscript{164} S. REP. NO. 101-30, supra note 32, at 14.

\textsuperscript{165} 136 CONG. REC. 36198 (1990) (enacted).

\textsuperscript{166} See HHS OIG REPORT, supra note 11, at 3-4 (explaining how the DHS executed the ZTP by placing UACs in ORR custody and how the ORR oversaw the various types of facilities in which children were placed).
3. The Trump Administration’s deterrence strategy and “willful blindness” toward child migrants’ severe physical and mental suffering in custody

At the time of this writing, less than eighteen months have passed since the Z.T.P. was first implemented. As a result, evidence continues to emerge regarding the scale of harm exacted upon unaccompanied migrant children in O.R.R. facilities, O.R.R. foster care, and D.H.S. jails. Available information, amid ongoing disclosures, already demonstrates a pattern of mass atrocities carried out against this vulnerable group.

The Trump Administration’s intent to “deter immigrants from coming to the United States illegally” and the President’s inclination to support the use of torture are both well documented. Trump’s deterrence strategy forced children to suffer as a means of punishing those attempting to cross the Southern Border, intimidating others who have not yet arrived, and coercing detained parents to revoke potentially valid asylum claims in an effort to reunite with their children.

167. See Attorney General Zero Tolerance Memorandum, supra note 10, (implementing the ZTP on April 6, 2018); Presidential Memorandum, supra note 53 (supplementing the DOJ’s actions on the same date).
168. See, e.g., Jordan, supra note 72 (reporting the HHS’ admission that thousands more children were separated than reported previously); CODE RED, supra note 78, at 2, 7 (acknowledging that its data sample of fifteen detainee deaths is incapable of accurately representing the conditions at “many of the 200-plus jails and prisons that ICE uses to detain immigrants”); Haag, supra note 168 (demonstrating one type of harm inflicted upon detained migrant children: sexual abuse).
170. See Bump, supra note 67 (deter); Johnson, supra note 1, (“Don’t tell me it doesn’t work- torture works . . . Believe me, it works.”); Woodruff & Mak, supra note 7 (detailing how “top Trump aide[s] Paul Manafort” and Roger Stone previously worked as lobbyists for “dictators, guerilla groups, and despots with no regard for human rights-including one man responsible for mass amputations, and another who oversaw state-sanctioned rape”).
171. See AMNESTY INTERNATIONAL, supra note 2; see also L. v. ICE, 310 F. Supp.3d at 1145-46 (using children as “tools” in parents’ criminal and immigration proceedings).
suffice for the “purposes” underlying torture. Acts that further these purposes cannot, then, be said to only arise from lawful sanctions, as this supplemental intent to penal interests directly contradicts the object and purpose of the C.A.T. Additionally, the Z.T.P. demonstrated a “casual, if not deliberate, separation of families,” including those arriving legally with valid asylum claims, which expanded the U.S. government’s actions beyond their lawful scope. Rather than merely enforcing the law, the evidence “portray[s] reactive governance—responses to address a chaotic circumstance of the Government’s own making.”

Considering the information that has surfaced since the L. v. ICE injunction, though, the Trump Administration’s intent appears more nefarious, punitive, and definite. The President frequently espoused contempt for Central American immigrants, suggesting that his intent to separate families rests upon a “rotten foundation” of racial animus.


173. See Convention Against Torture, supra note 9, at 1-2; 8 C.F.R. § 208.18(a)(3) (2019).

174. L. v. ICE, 310 F. Supp. 3d at 1143; see also 8 U.S.C.S. § 1158(a)(1) (LexisNexis 2019) (allowing any noncitizen present in the U.S. to apply for asylum, regardless of immigration status); Exec. Order No. 13767, 82 Fed. Reg. 8793, 8795 (Jan. 30, 2017) (“It is the policy of the executive branch to end the abuse of . . . asylum provisions currently used to prevent the lawful removal of removable aliens.”).

175. L. v. ICE, 310 F. Supp. 3d at 1149.

176. See PHR Letter, supra note 110, at 1-3, (punitive); Feuer, supra note 62 (alluding to, via quotes from Judge Garaufis, Trump’s racial or nationalistic animus); Ainsley, supra note 68 (outlining a DOJ and DHS memo laying bare the government’s deterrence strategy).


With a robust record as to the dismal conditions at immigration detention facilities, the Z.T.P. amounts to intentionally subjecting minors to woefully substandard treatment. In other words, the Trump Administration specifically intended to inflict severe physical and mental suffering upon migrant children to deter asylum claims.

Assume, for the moment, that the Z.T.P. was not animated by the specific intent to inflict severe harm. Criminal liability still arises, under the willful blindness standard, from the United States’ acquiescence to torture by federal contractors and officials operating detention facilities. Even if the specific intent to cause severe harm, such as rape or physical beatings, belonged only to the individual transgressors, the federal government nonetheless breached its duty to prevent torturous or inhuman suffering by continuing to place kids in these situations.

179. E.g., With Liberty and Justice for All, supra note 80, at 149-50 (detailing the “torture-like” conditions government facilities subject migrants to as punishment for crossing the Southern Border without documentation); CODE RED, supra note 78, at 3 (“This is the third report in which our organizations have found that significant numbers of the deaths in detention are linked to inadequate medical care in detention.”). 180. See CODE RED, supra note 78, at 2, 7 (appalling conditions); 136 CONG. REC. 36198 (1990) (specific intent); cf. In re J-E-, 23 I&N Dec. at 301 (finding that Haitian authorities intentionally detained people in substandard conditions not amounting to torture because they were the result of “budgetary and management problems[.]” not a specific intent to inflict torture).

181. See Presidential Memorandum, supra note 53 (alluding to asylum); Attorney General Zero Tolerance Memorandum, supra note 10 (criminalizing asylum claims by those arriving without inspection or documentation); Clark, supra note 73 (asserting that, according to Rep. Lauren Underwood of Illinois, the DHS’ actions “at this point, with five children dead and 5,000 separated from their families, this is intentional. It’s a policy choice being made on purpose by this administration, and it’s cruel and inhumane”) (emphasis added).

182. See 8 C.F.R. § 208.18 (requiring awareness and breach of a legal duty); Morales, 478 F.3d at 983-84 (willful blindness); Advertent Negligence, supra note 135.

183. See, e.g., Haag, supra note 168 (quoting Congressman Ted Deutch as attributing at least 178 sexual abuse claims by detained children to facility staff members); Bogado et al., supra note 86, (naming numerous federally funded shelters facing many, some as high as sixty-four, sexual assault complaints).

184. See generally id. (showing how hundreds of sexual assaults have occurred at the hands of detention center employees); Zubeda, 333 F.3d at 473 (recognizing the severity of suffering “endemic” to rape); AMNESTY INTERNATIONAL, supra note 2, (deeming the mental suffering experienced by separated children as “severe”).

185. See Convention Against Torture, supra note 9, at 2 (duty to prevent); Convention Against Torture, supra note 9, at 1-2, 6-7 (torture); Convention Against Torture, supra note 9, at 16 (inhuman treatment); LEGOMSKY ET AL., supra note 23, at 1382 (noting the
The Trump Administration was aware of these conditions,\textsuperscript{186} failed to intervene, and instead attempted other means of continuing its child separation policy after the \textit{L. v. ICE} injunction.\textsuperscript{187}

Contrary to the preceding hypothetical, though, President Trump blatantly exhibits a specific intent to cause severe harm to migrants.\textsuperscript{188} He has espoused plans to “fortify[] a border wall with a water-filled trench, stocked with snakes or alligators” to harm those who tried to cross the Southern Boarder.\textsuperscript{189} Trump also “wanted the wall electrified, with spikes on top that could pierce human flesh.”\textsuperscript{190} Most egregiously, he suggested that soldiers “shoot migrants in the legs to slow them down.”\textsuperscript{191}

Further exemplifying a specific intent to harm, his Administration has, during the course of this writing and amid condemnation for captivity conditions, supplanted various agency heads with candidates who take government’s acknowledgement that the legal duties under its acquiescence definition entail those within the CAT itself); Bogado et al., \textit{supra} note 86, (disclosing renewed contracts with problematic facilities).

\textsuperscript{186} See, e.g., Comm’n on Civ. Rts. Letter, \textit{supra} note 171 (putting the Trump Administration on notice of the “inadequate and inappropriate care” to which its “inhumane” ZTP subjected children); @realDonaldTrump, \textit{supra} note 65 (blaming Democrats for separating families); Haag, \textit{supra} note 168 (demonstrating the DOJ’s awareness of sexual assaults via its own data regarding complaints).

\textsuperscript{187} See Miriam Jordan et al., \textit{U.S. Continues to Separate Migrant Families Despite Rollback of Policy}, \textit{N.Y. TIMES} (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html (divulging that 245 children were removed from their families in the nine months after the injunction); Miroff et al., \textit{Trump Administration Weighs New Family-Separation Effort at Border}, \textit{supra} note 66 (summarizing the “binary choice” option the Administration considered in October 2018); \textit{Trump v. E. Bay Sanctuary Covenant}, 139 S. Ct. 782 (2018) (preventing an asylum ban that would potentially result in classifying more children as UACs subject to ORR custody).

\textsuperscript{188} See, e.g., Nick Miroff & Josh Dawsey, \textit{Trump Wants His Border Barrier to be Painted Black with Spikes. He Has Other Ideas, Too.}, \textit{WASH. POST} (May 16, 2019), https://www.washingtonpost.com/national/trump-wants-his-border-barrier-to-be-painted-black-with-spikes-he-has-other-ideas-too/2019/05/16/b088e07e-7676-11e9- b3f5-5673edf2d127_story.html (urging military engineers to build a border fence with pointed tips and heat-absorbing paint, “describing in graphic terms the potential injuries that border crossers might receive”).


\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.}
harder lines on detention practices, especially those involving children. For example, former D.H.S. Secretary Nielsen lost her job after resisting a White House plan that would “arrest thousands of parents and children in a blitz operation.” President Trump contemporaneously endorsed, or at least inspired, extrajudicial violence against migrants.

As for actus reus, the physical harms encountered by detained immigrant children clearly qualify as sufficiently severe to meet Article 1’s high bar. At least seven children, and one stillborn child, died as a

192. E.g., Goldman, supra note 6 (“With his elevation of Ms. Haspel, now the [CIA’s] deputy director, Mr. Trump displayed a willingness to ignore the widespread denunciations of waterboarding, sleep deprivation, confinements in boxes, and other interrogation techniques that were used by the C.I.A. more than a decade ago.”).

193. See Ted Hesson, Trump’s Pick for ICE Director: I Can Tell Which Migrant Children will Become Gang Members by Looking into Their Eyes, POLITICO (May 16, 2019), https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570 (“Mark Morgan, the White House choice to lead [ICE] . . . said . . . I’ve been to detention facilities where I’ve walked up to these individuals that are so-called minors, 17 or under . . . I’ve looked at them and I’ve looked at their eyes . . . and I’ve said that is a soon-to-be MS-13 gang member. It’s unequivocal.”).


195. See Antonia Noori Farzan, ‘Shoot Them!’: Trump Laughs Off a Supporter’s Demand for Violence Against Migrants, WASH. POST (May 9, 2019), https://www.washingtonpost.com/nation/2019/05/09/shoot-them-trump-laughs-off-supporters-demand-violence-against-migrants/ (questioning, at a rally, how CBP agents can “stop these people” without using weapons and responding to a spectator’s exclamation “Shoot them!” with a smile, finger point, and joke); Keith Allen, Border Patrol Agent Calls Migrants ‘Subhuman’ and ‘Savages’ in Text Messages, Court Papers Say, CNN (May 22, 2019), https://www.cnn.com/2019/05/21/us/border-patrol-agent-savages-subman-texts/index.html (inspiring a CBP agent to intentionally strike an immigrant with his government-issued Ford F-150 truck, as demonstrated by the agent’s text to “PLEASE let us take the gloves off trump!”).

196. Compare Convention Against Torture, supra note 9, at 1-2 (“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person”) (emphasis added), with Convention Against Torture, supra note 9, at 6-7 (“. . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . “) (emphasis added).