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List of Abbreviations

UC: Unaccompanied Children. Also referred to as unaccompanied immigrant children, unaccompanied alien children, and unaccompanied immigrant children.

FY: Fiscal Year

CBP: Customs and Border Patrol

UNHCR: United Nations High Commissioner for Refugees

CAT: Convention Against Torture

ICCPR: International Covenant on Civil and Political Rights

HSA: Homeland Security Act of 2002

TVPR: Trafficking Victims Reauthorization Act of 2008

ICE: Immigration and Customs Enforcement

DHS: Department of Homeland Security

INA: Immigration and Nationality Act (INA)

ORR: Office of Refugee Resettlement

DHHS: Department of Health and Human Services

USCIS: United States Citizenship and Immigration Services

NTA: Notice to Appear

EOIR: Executive Office for Immigration Review

DOJ: Department of Justice

BIA: Board of Immigration Appeals

OIG: Office of the Inspector General

SIJ: Special Immigrants Visa

T-Visa: Trafficking-visa

FCMP: Family Case Management Program

ATD: Alternative to Detention Program

NIJC: National Immigrant Justice Centre

ACLU: American Civil Liberties Union

GAO: Government Accountability Office

POE: Port of Entry

NGO: Non-government Organisation

URM: Unaccompanied Refugee Minor

MOA: Memorandum of Agreement (also referred to as the MOU, Memorandum of Understanding)

WRC: Women's Refugee Commission

TRAC: Transactional Records Access Clearinghouse

PSG: Particular Social Group

LIRS: Lutheran Immigration and Refugee Services

EO: Executive Order

UDHR: Universal Declaration of Human Rights

NYCLU: New York Civil Liberties Union

PTSD: Post-Traumatic Stress Disorder

IJ: Immigration Judge

Glossary of Terms

Unaccompanied child (UC): A person under the age of 18 years old who has no lawful immigration status in the United States and who either does not have a parent or legal guardian in the United States or does not have a parent or legal guardian in the United States available to provide care and custody. Also referred to as an unaccompanied alien child or an unaccompanied immigrant minor.

Non-refoulement: The right of the individual to not to be returned in any manner to a state or territory in his or her which life or freedom may be at risk on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

Refugee: A person who has been forced to leave his or her country due to a well- founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group.

Asylum-seeker: A person who is waiting for their asylum claim to be processed and to be granted refugee status.

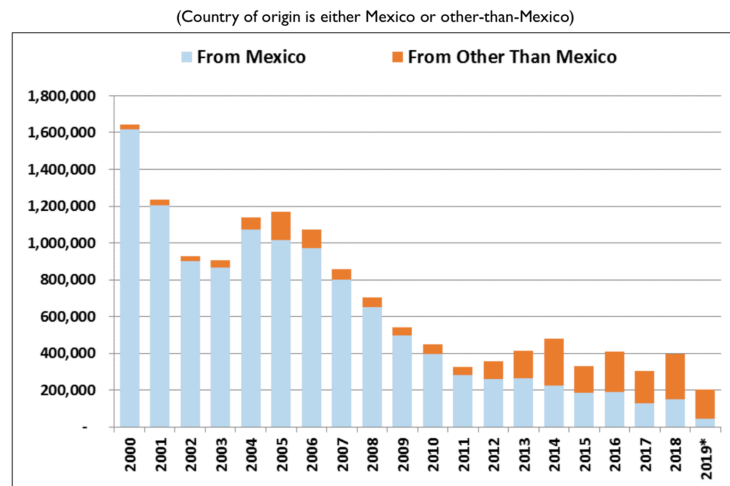
Asylum: Protection granted by a state to a person who meets the definition of a refugee.

Chapter I: Introduction

1.0 Context of problem

Immigration has become a major topic of discussion in the United States despite the fact that border crossings have been steadily declining since 2006 (see Figure 1).¹ The current President of the United States, Donald J. Trump, ran his 2016 presidential campaign on hardline immigration policies, promising that, “A Trump administration will stop illegal immigration, deport all criminal aliens, and save American lives.”² On numerous occasions, the President has stated that asylum is exploited as a loophole for those seeking legal status in the United States.³ The President has stated that those who enter the U.S illegally, “seek to harm Americans through acts of terror or criminal conduct.”⁴

Figure 1⁵: Total Alien Apprehensions at the Southwest Border by Country of Origin, FY2000-FY2019*



Source: FY2000-FY2017: U.S. Department of Homeland Security, United States Border Patrol, “Stats and Summaries,” <https://www.cbp.gov/newsroom/media-resources/stats>; FY2018-FY2019: CRS presentation of unpublished data received from CBP Leg Affairs.

Notes: *FY2019 includes October 2018 through January 2019, or one-third of the fiscal year.

¹ W. A. Kandel, ‘The Trump Administration’s “Zero-Tolerance” Immigration Enforcement Policy,’ Congressional Research Service., 26 February 2019 (accessed 31 July 2019)

² Presidential Candidate Donald Trump, ‘Campaign Rally,’ speech to Bayfront Park Amphitheater in Miami, Florida, 2 November 2016, <https://www.c-span.org/video/?417864-1/donald-trump-campaigns-miami-florida>, (accessed 31 July 2019).

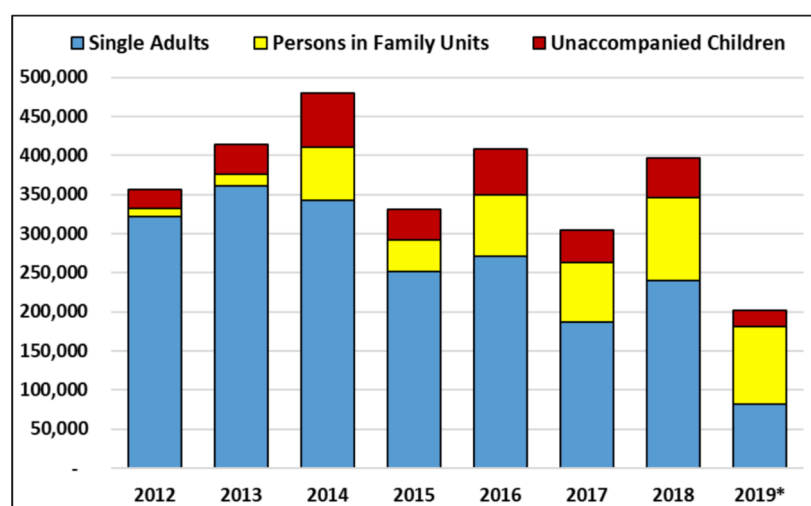
³ see: The White House, *President Trump’s Bold Immigration Plan for the 21st Century*, (website) 2019, <https://www.whitehouse.gov/articles/president-trumps-bold-immigration-plan-21st-century/> (accessed 31 July 2019).

⁴ Executive Order 13767 of January 25, 2017: Border Security and Immigration Enforcement Improvements., 2017.

⁵ Kandel, p.22.

While the overall number of individuals illegally crossings the border has declined, the numbers of unaccompanied children (UC) and family units crossing the border have increased.⁶ Over the past 8 years in particular, increasing numbers of unaccompanied children have entered the United States at the southern border.⁷ Violence, poverty, and political instability have driven children to leave their homes in Central America to seek protection in the United States.⁸ In fiscal year (FY) 2016, US Customs and Border Patrol (CBP) agents apprehended 60,000 unaccompanied children, of which 61% were from El Salvador and Guatemala.⁹ Between October 2018 and June 2019, CBP apprehended 63,624 unaccompanied children and 390,308 family units at the Southwest border (see Table 1 and Figures 1 and 2 for more details).¹⁰

Figure 2¹¹: Total Alien Apprehensions at the Southwest Border, by Demographic Classification, FY2012-FY2019*



Source: For FY2008-FY2013: U.S. Department of Homeland Security, United States Border Patrol, "Juvenile and Adult Apprehensions—Fiscal Year 2013." For FY2014-FY2016, "Customs and Border Protection, Southwest Border Unaccompanied Alien Children." For FY2017-FY2019, "U.S. Border Patrol Southwest Border Apprehensions by Sector FY2017," <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions>.
Notes: *FY2019 includes October 2018 through January 2019, or one-third of the fiscal year. Family unit apprehensions represent apprehended individuals in family units, not apprehended families.

⁶ Kandel, 2019, pp. 21-23.

⁷ Kandel, 2019, pp. 22-23.

⁸ UNHCR, 'Children on the run: Unaccompanied children leaving Central America and Mexico and the need for international protection' *United Nations High Commissioner for Refugees*, 2014 http://www.unhcrwashington.org/sites/default/files/1_UC_Children%20on%20the%20Run_Full%20Report.pdf. (accessed 29 April 2019)

⁹ J. Ataiants et. al, 'Unaccompanied Children at the United States Border, a Human Rights Crisis that can be Addressed with Policy Change,' *Journal of immigrant and minority health* vol. 20, no. 4, 2018, pp. 1000-1010, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5805654/> (accessed 2 April 2019).

¹⁰ U.S. Customs and Border Patrol Statistics, *U.S. Border Patrol Southwest Border Apprehensions FY 2019*, 10 July 2019, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (accessed 31 July 2019)

¹¹ Kandel, 2019, p. 23.

Table 1. Children at the Border	FY15	FY16	FY 17	FY2018	FY19 (10/18-06/19)
UC apprehended by CBP	39,970	59,692	41,435	50,036	63,624
Family Units apprehended by CBP	39,838	77,674	75,622	107,212	390,308
OFO UC Inadmissibles	----	----	7,246	8,642	3,542
OFO Family Unit Inadmissibles	-----	----	29,375	53,901	37,573
UC Referrals to ORR	33,726	59,170	40,810	49,100	61,000

Figure 1. Children at the Border.¹² Apprehensions by CBP are the number of individuals arrested and temporarily detained by CBP for crossing the border illegally. The Office of Field Operations (OFO) Inadmissibles refers to persons who present themselves at a port of entry but are deemed inadmissible, persons seeking humanitarian protection, and persons who withdraw their application for admission and return to their country of origin. Data for OFO Inadmissibles was not made available for FY 2015 and FY 2016. Family units are the number of individuals who come to the U.S. with a family member. UC referrals to ORR are the number of unaccompanied children that DHS refers to the Office of Refugee Resettlement (ORR) for custody and care. Any unaccompanied child from a non-contiguous country (any country aside from Mexico or Canada) must be transferred to ORR.

Studies by the Office of United States High Commissioner for Refugees (UNHCR) suggest that *more than half* of these children are fleeing violence and merit protection under international law.¹³ Violence in Central America has continued to escalate since 2014¹⁴ yet the Trump administration has continued to slash refugee admissions, which only fuels more asylum seekers to come to the border. For fiscal year 2018, the proposed ceiling for refugee admissions from Latin American and the Caribbean was 1,500.¹⁵ To compare, the FY2015 ceiling set by former President Barack Obama was 4,000 for Latin America and the

¹² U.S. Customs and Border Patrol Statistics, *U.S. Border Patrol Southwest Border Apprehensions FY 2019*, 10 July 2019, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (accessed 31 July 2019); United States Customs and Border Patrol Statistics, *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, 17 June 2019, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (accessed 31 July 2019); United States Customs and Border Patrol Statistics, *Southwest Border Migration FY2019*, 2019, <https://www.cbp.gov/newsroom/stats/sw-border-migration>; United States Customs and Border Patrol Statistics, *Southwest Border Migration FY2018*, 2018, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> (accessed 31 July 2019); United States Customs and Border Patrol Statistics, *Southwest Border Migration FY2017*, 2017, <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017> (accessed 31 July 2019); Office of Refugee Resettlement Statistics, *Facts and Data: General Statistics*, 2019, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (accessed 31 July 2019)

¹³ UNHCR, 'Children on the run' p.6. (emphasis added).

¹⁴ UNHCR, 'Children on the run' 9-11.

¹⁵ Bureau of Population, Refugees, and Migration, 'Proposed Refugee Admissions for Fiscal Year 2018,' (website) 2017, <https://www.state.gov/j/prm/releases/docsforcongress/274613.htm> (accessed 20 July 2019)

Caribbean.¹⁶ In 2017, the administration decided to end the Central American Children program, which allowed children suffering from violence in Guatemala, Honduras, and El Salvador who had family members living legally in the United States the chance to apply for asylum while remaining in their home country.¹⁷ This program saved lives and discouraged children from making the dangerous journey to the U.S. border.¹⁸

The administrations strong anti-immigration rhetoric is reflective in the policies enacted, which have had devastating impacts on unaccompanied children seeking asylum in the United States. There are numerous reports that indicate that the administration is failing to properly care for unaccompanied children and has caused further trauma to these children. There are reports of children being torn from their parents, of overcrowding in shelters, of placement of children in unlicensed shelters, of prolonged detention, and increasing numbers of young children facing court alone due to cuts in funding for legal aid.¹⁹

The United States has national and international obligations to protect these children and respect their rights yet the administration is working to dismantle protections for these children, limit asylum seekers from entering the country, and worsen the situation in order

¹⁶ President Barack Obama, Presidential Memorandum—FY 2015 Refugee Admissions 2014, The White House, <https://obamawhitehouse.archives.gov/the-press-office/2014/09/30/presidential-memorandum-fy-2015-refugee-admissions> (accessed 31 July 2019)

¹⁷ C. Currier and D. Mackey, ‘Trump Administration Suddenly Cancels Refugee Program that Saved Lives of Central American Children,’ *The Intercept*, 10 November 2017 <https://theintercept.com/2017/11/10/trump-administration-suddenly-cancels-refugee-program-that-saved-lives-of-central-american-children/> (accessed 2 April 2019)

¹⁸ Currier and Mackey, ‘Trump Administration Suddenly Cancels Refugee Program that Saved Lives of Central American Children’.

¹⁹ J. Ataiants et al, 2018; United States Government Accountability Office, “Unaccompanied children: HHS Can Take Further Actions of Monitor their Care,” Report to Congressional Requesters, 2016, <https://www.gao.gov/assets/680/675001.pdf> (accessed 2 April 2019); Permanent subcommittee on investigations, Committee on Homeland Security and Governmental Affairs, “Protecting Unaccompanied Immigrant Children from Trafficking and Other Abuses; The Role of the Office of Refugee Resettlement,” *Staff Report to the United States Senate*, <https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf> (accessed 2 April 2019); C. Jewett, ‘Immigrant toddlers ordered to appear in court alone,’ *The Texas Tribune*, 27 June 2018, <https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/> (accessed 29 July 2019).

to deter further immigration.²⁰ It is vital to highlight and challenge these policies and practices, to fight for the rights of children who have neither the resources nor knowledge to advocate for their rights, and to urge the government to end unlawful and immoral practices that inflict lifelong trauma on children seeking protection.

2.0 Research questions and purpose

The purpose of my research is to answer the following questions:

1. How have the Trump administration's policies contributed to the situation of unaccompanied minor children in regards to their right to family, right to personal liberty, and right to *non-refoulement*?
 - a. What are the legal (national and international) obligations the United States has to unaccompanied children as it relates to their right to family, right to personal liberty, right to *non-refoulement*?
 - b. Are the administrations' policies in accordance with national law in regards to these three rights?
 - c. Are the administrations' policies and practices in accordance with international law in regards to these three rights?

I chose this main research question because President Trump often tries to place blame for the situation of unaccompanied children elsewhere, such as on Democrats or Former President Barack Obama.²¹ Thus, I was interested specifically in how the Trump administrations' policies were impacting unaccompanied children in practice and how this situation compared to prior administrations. The administration has often argued that they are just "enforcing the law" to justify policies such as family separation²² so I chose to

²⁰ See: Chapter V .

²¹ See: E. Nilsen, 'Trump keeps blaming democrats for his own policy of family separation,' *Vox*, 18 June 2018, <https://www.vox.com/policy-and-politics/2018/6/18/17474816/trump-blames-congressional-democrats-family-separation-us-mexico-border> (accessed 31 July 2019)

²² CNN Newsroom Transcript, 9 March 2019:

<http://transcripts.cnn.com/TRANSCRIPTS/1903/09/cnr.08.html>

(accessed 31 July 2019): DHS Secretary Kirstjen Nielsen, "Ma'am, it's not a policy. It's the law. We enforce the law. We didn't make up the law. The law was already there."

analyze whether the Trump administration policies were in fact in accordance with national and international law. I chose these three fundamental rights due to the overwhelming news reports that children were being separated from their parents, that children were being held in prolonged detention, and that numerous children were being denied asylum. It is well documented that family separation and prolonged detention have traumatic, long-lasting impacts on children.²³ The right to *non-refoulement* is perhaps the most fundamental right on the refugee; it protects the refugee from being returned to a territory where they may face threats to life and freedom. Children not afforded the ability to properly make a case for asylum are thus at risk of being returned to their country of origin where they will face persecution. This paper is not a political opinion; it is an analysis of evidence to evaluate how the administration's immigration policies fail to adhere to national and international law.

A guide to thesis structure

Chapter II is a review of the existing literature and national legal framework regarding unaccompanied children. In this chapter, I provide the reader with a history of asylum policy in the United States and a background of the current situation that is driving asylum seekers from Central America to the United States. In Chapter III, I summarise the international obligations the U.S. has in regards to the rights of unaccompanied children seeking asylum. Chapter IV details the methodology of my research, including information on the participants interviewed and the method of my analysis. In Chapter V, I discuss my findings using my own primary research as well as secondary data gathered online, such as court cases and CBP statistics. Chapter VI discusses my findings and answer the above specified research questions. Chapter VII concludes the paper and states the relevance of this research project.

²³ Physicians for Human Rights, *Doctors: Stop Detaining Children and Separating Families*, (website) 2019, <https://phr.org/news/doctors-stop-detaining-children-and-separating-families/> (accessed 31 July 2019); R. Rayasam, 'Doctors say migrant children separated from parents will face lasting ills,' *Politico*, 26 June 2018 <https://www.politico.com/story/2018/06/26/separated-families-doctors-children-illnesses-654228> (accessed 31 July 2019)

Chapter II: Literature Review and National Legal Framework

This chapter includes four sections and nine subsections to provide the reader with a foundation of the situation of unaccompanied children prior to President Trump's inauguration. The first section includes a very brief history of refugee and asylum policy in the United States and why children are fleeing Central America to seek asylum in the U.S. The second section describes the structure of immigration and asylum law, the federal agencies involved, and what their responsibilities are to UC. In the third section, I discuss the national legal framework regarding UC and two forms of relief that children can apply for in order to remain in the US. In the fourth section, I use national law as well as existing research and literature to describe the situation of unaccompanied children in relation to their right to personal liberty, right to family, and right to *non-refoulement* prior to the Trump administration. In Chapter IV I examine the situation of unaccompanied children, in terms of the three specified rights, after 2017. This will allow the reader to how compare the treatment of unaccompanied children prior to and after the inauguration of President Donald Trump.

1.0 Background

Over the past ten years, violence, poverty, and political instability have driven significant numbers of children to leave their homes in Central America and Mexico. Children from three Northern Triangle countries—El Salvador, Honduras, and Guatemala—seek asylum in the U.S., Mexico, Panama, Nicaragua, Costa Rica, and Belize.²⁴ El Salvador, Honduras, and Guatemala have consistently had very high homicide rates and incidences of domestic violence.²⁵ In 2016, the homicide rate in El Salvador was 81.2 per 100,000 inhabitants.²⁶ Gangs and drug trafficking foster violence and a weak rule

²⁴ UNHCR, 'Children on the run.'

²⁵ R. C. Labrador and D. Renwick, *Central America's Violent Northern Triangle*, Council on Foreign Relations, 26 June 2018, <https://www.cfr.org/background/central-americas-violent-northern-triangle>

²⁶ D. Gagne, 'InSight Crime's 2016 Homicide Round-up,' *InSight Crime* (website) 2017 <https://www.insightcrime.org/news/analysis/insight-crime-2016-homicide-round-up/> (accessed 1 July 2019).

of law and corruption mean that people living in the Northern Triangle are afforded little protection from their governments.²⁷

As a result of this violence, children and families are fleeing the Northern Triangle to seek protection in other countries. The U.S. receives the majority of these applications; during FY 2012, the United States received 85% of new asylum applications from persons originating from the three Northern Triangle countries.²⁸ The so-called “surge” of asylum applicants from these countries as well as from Mexico began in 2011.²⁹ In FY 2011, U.S. Customs and Border Protection apprehended 4,059 unaccompanied children from the Northern Triangle and 13,000 from Mexico.³⁰ In FY 2013, these numbers more than doubled to 21,537 unaccompanied child arrivals from the Northern Triangle and 18,754 arrivals from Mexico.³¹ In 2014 and 2015, the UNHCR conducted over 400 interviews with unaccompanied children who had arrived in the U.S. during or after 2011.³² Their goal was to determine why children were leaving their countries of origin and whether any of these children were in need of international protection.³³ They found that over half (58%) had potential international protection needs due to violence by organised armed criminal actors, violence in the home, and fear of violence in society.³⁴ Children from Mexico additionally faced persecution in the form of recruitment and exploitation in the human smuggling industry.³⁵ Threats by criminal organisations in society as well as threats in the home, combined with weak law enforcement and unstable political systems, have created a dangerous situation for children, who are especially vulnerable and easily exploited.³⁶ The UNHCR concluded that all children entering the U.S. from these countries needed to be screened for international protection needs to ensure they were not returned to harm or

²⁷ Labrador and D. Renwick, ‘Central America’s Violent Northern Triangle,’ *Council on Foreign Relations*, 26 June 2018.

²⁸ UNHCR, ‘Children on the run,’ p. 4

²⁹ UNHCR, ‘Children on the run,’ p. 4

³⁰ Ibid.

³¹ UNHCR, ‘Children on the run,’ p. 5

³² UNHCR, ‘Children on the run,’ p. 5

³³ Ibid.

³⁴ Ibid.

³⁵ UNHCR, ‘Children on the run,’ pp. 6-7.

³⁶ Ibid.

danger.³⁷ Based on their findings, they predicted that at least half of new arrivals would be in need of protection.³⁸

Following these findings, the UNHCR made a number of recommendations to the United States. They called upon the U.S. government to recognise the violence emerging in the Northern Triangle countries as well as Mexico and to recognise that these children have potential international protection needs.³⁹ In order to meet these needs, they recommended that the U.S. increase staff and training to systematically identify children who merit protection, to ensure that policies were centred around the principle of the best interests of the child, and to refrain from the use of detention.⁴⁰

The next section of this chapter will describe how asylum seekers are received in the U.S. under the law.

2.0 Structure of U.S. Immigration and Asylum Law

Immigration and asylum law is codified in Section 8 of the U.S. Code and is complemented by directives, orders, and policy statements from the Immigration Customs Enforcement (ICE) and Department of Homeland Security (DHS).⁴¹ Section 8 of the U.S. Code contains the Immigration and Nationality Act (INA), which is the main body of immigration law in the U.S. and was introduced in 1951.⁴² The 1980 Refugee Act adopted the U.N. definition of a refugee and established an asylum procedure.⁴³ The Attorney General retains the ultimate authority in granting asylum. However, under the Refugee Act he or she is prohibited from deporting or returning a person to a country where they would face persecution, except in special cases where there are reasonable grounds to believe that the person is a danger to the U.S.⁴⁴

³⁷ Ibid.

³⁸ Ibid.

³⁹ UNHCR, 'Children on the run,' pp.12-13.

⁴⁰ UNHCR, 'Children on the run,' pp.12- 13.

⁴¹ *Title 8—Aliens and Nationality*, 8 U.S. Code.

⁴² *Title 8—Aliens and Nationality*, 8 U.S. Code.

⁴³ *Refugee Act of 1980* (96th United States Congress).

⁴⁴ *Refugee Act of 1980*.

There are several immigration agencies involved in immigration and asylum, most of which fall under the umbrella of the Department of Homeland Security. For purposes of this paper, I will discuss their responsibilities as it relates to unaccompanied children. Customs and Border Protection, the agency that controls peoples and goods that come to the U.S. border and ports of entry, is most often the agency that first comes into contact with an unaccompanied immigrant child.⁴⁵ Once a CBP officer designates a child as unaccompanied, Immigration Customs Enforcement, the agency responsible for enforcing immigration law through finding and removing illegal immigrants, is required to transfer the child from CBP custody to the Office of Refugee Resettlement (ORR) within 72 hours.⁴⁶ ORR is an agency within the Department of Health and Human Services (DHHS) and is responsible for providing temporary housing and services to UC until they can be safely released to a parent or sponsor.⁴⁷ An unaccompanied immigrant child, unlike adult immigrants, can first submit their asylum claim to an asylum officer at the U.S. Citizenship and Immigration Services (USCIS).⁴⁸ USCIS processes applications, conducts interviews, determines eligibility and grants visas and other benefits to immigrants.⁴⁹ When CBP apprehends a UC, they provide the child with a notice to appear (NTA).⁵⁰ This NTA contains the date and location of their immigration court hearing, which is operated by The Executive Office for Immigration Review (EOIR).⁵¹ The EOIR is an agency within the Department of Justice (DOJ) that administers the immigration court system as well as the Board of Immigration Appeals (BIA).⁵² If an unaccompanied immigrant child submits their

⁴⁵ Ataiants et al., “Unaccompanied Children at the United States Border, a Human Rights Crisis that can be Addressed with Policy Change” 2018.

⁴⁶ *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*, (USC 7101, Public Law 110-457, H.R. 7311), 23 December 2008,

⁴⁷ *Homeland Security Act of 2002*, (USC6, Public Law 107-296, H.R. 5005) 25 November 2002,

⁴⁸ *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*, (USC 7101, Public Law 110-457, H.R. 7311)

⁴⁹ Ataiants et al., 2018.

⁵⁰ Notice to Appear Policy Memorandum, ‘USCIS (website) 2019 <https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum> (accessed 31 July 2019)

⁵¹ ‘Notice to Appear Policy Memorandum,’ USCIS (website) 2019

⁵² Ataiants et al., 2018.

asylum application to USCIS, they still must appear to their court hearing.⁵³ USCIS can either grant relief or refer the case to the immigration court.⁵⁴ Immigration judges are able to interpret and enforce federal immigration laws and either grant relief for those determined to be in need of protection or order removal for those who do not meet the asylum requirements.⁵⁵ In some, but not all cases, an unaccompanied minor is able to appeal a decision made by an immigration judge to the BIA.⁵⁶

Table 2. Agencies involved with Unaccompanied Immigration Children	
Customs and Border Patrol (DHS)	Initially apprehend and designate child as unaccompanied. Legally can hold UC in custody for no more than 72 hours; Screen children from Mexico and Canada for protection, remove those who do not meet grounds
Immigration and Customs Enforcement (DHS)	Transfer UC from CBP custody to ORR custody; Can arrest and detain UC suspected of criminal activity; Deport UC ordered for removal; Arrest and detain UC when they turn 18.'
Office of Refugee Resettlement (DHHS)	Place UC in licensed shelters; Refer special cases to unaccompanied refugee minor program; Release UC to sponsors or foster homes.
United States Citizenship and Immigration Services (DHS)	Process UC asylum applications; Conduct asylum interview for UC; Grant relief or refer to immigration judge.
Executive Office of Immigration Review/Board of Immigration Appeals (DOJ)	Conduct removal hearings; Grant asylum, other form of relief, or order removal.

2.1 Legislative Framework

2.1.1 *Flores* Settlement Agreement

In 1985, the Immigration and Naturalisation Service (INS) was in charge of the detention and care of unaccompanied children, acting as both as the “prison guard and

⁵³ ‘Minor Children Applying for Asylum by Themselves,’ *USCIS* (website) 2019 <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves> (accessed 29 June 2019).

⁵⁴ Ataiants et al., 2018.

⁵⁵ Ataiants et al., 2018.

⁵⁶ ‘Board of Immigration Appeals,’ *The United States Department of Justice* (website) 2018 <https://www.justice.gov/eoir/board-of-immigration-appeals> (accessed 31 July 2019)

parent.”⁵⁷ An unaccompanied immigrant child is defined as a person under the age of 18 years who does not have lawful immigration status nor a parent or legal guardian.⁵⁸ After reports of inhumane care of children in INS detention, advocacy groups began a series of lawsuits in 1985 to challenge INS treatment of unaccompanied children in their care.⁵⁹ In 1997, the parties reached the *Flores* Settlement Agreement and agreed to a number of policies for detention, treatment, and release of unaccompanied children.⁶⁰ Under the original *Flores* settlement, children are to be placed in the least restrictive setting and are required to be released from custody “without unnecessary delay.”⁶¹ DHS is required to release children within three days to a licensed program in the same district or within five days to a licensed program in another district.⁶² If a licensed shelter is not immediately available, a child can temporarily be placed in an INS detention facility for three to five days.⁶³ Children are to be released in order of preference, to: a parent, a legal guardian, an adult relative, an adult or entity who has been designated by the parent or legal guardian, a licensed program, or an adult or entity seeking custody.⁶⁴ A minor cannot be held in a secure facility, except in special cases.⁶⁵ This agreement also laid out minimum standards relating to the care and treatment of children in custody.⁶⁶ Children in custody are required to be treated with “dignity, respect, and special concern for their particular vulnerability as children.”⁶⁷

⁵⁷ Women’s Commission for Refugee Women & Children (Women’s Commission), ‘Prison Guard or Parent? INS Treatment of Unaccompanied Refugee Children,’ *New York: Women’s Commission*, 2002 https://www.womensrefugeecommission.org/images/zdocs/ins_det.pdf (accessed 31 July 2019)

⁵⁸ *US Code* 6, 279 (g) (2)

⁵⁹ W.A. Kandel, ‘Unaccompanied Immigrant Children: An Overview,’ *Congressional Research Service Report* No. R43599, 18 January 2017, <http://bit.ly/2zRYyZz> (accessed 29 April 2019); L. Zamora, ‘Unaccompanied Immigrant Children: A Primer,’ *Bipartisan Policy Centre* (web blog), 21 July 2014, <https://bipartisanpolicy.org/blog/unaccompanied-alien-children-primer/> (accessed 31 July 2019)

⁶⁰ *Flores Settlement Agreement* (1997) United States District Court, Central District of California. Case No. CV 85-4544-RJK(Px), 1997. (accessed 29 April 2019)

⁶¹ *Flores Settlement Agreement* (1997)

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*; if the minor has committed a criminal offence, is an escape-risk, is at risk of being smuggled, engaged in disruptive behavior in a licensed shelter, made credible threats to commit a violent act while in custody.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

In 2001, the Department of Justice Office of the Inspector General (OIG) conducted a nationwide study to evaluate the detention, treatment and release of unaccompanied children in INS custody and compliance with *Flores* standards. The report concluded that INS had failed to adequately implement the policies from the *Flores* settlement.⁶⁸ The OIG study found, “deficiencies in the handling of juveniles continue to exist in some INS districts, Border Patrol sectors, and headquarters that could have potentially serious consequences for the well-being of juveniles.”

In 2014, Immigrant and Customs Enforcement adopted a no-release policy in response to the “surge” of Central Americans coming into the United States from the Southern Border. ICE began detaining all female-headed families while their cases were pending, including detaining the children.⁶⁹ In 2015, a U.S. District Court concluded that *Flores* applied to all children, not just unaccompanied children, and reiterated that children cannot be held in a “secure” or an unlicensed facility.⁷⁰ The court allowed for children to be held in family detention for 20 days in order to keep the family together while DHS conducted credible fear interviews.⁷¹ The court additionally concluded that as long as a parent was not a significant flight risk or danger to safety that they should be released with the child so as not to separate families.⁷²

2.1.2 Homeland Security Act 2002

Many organisations, such as Amnesty International, Human Rights Watch, the Women’s Commission for Refugee Women and Children, as well as political leaders such as Senator Dianne Feinstein lobbied to change the custodial care of unaccompanied

⁶⁸ U.S. Department of Justice, ‘Unaccompanied Juveniles in INS Custody,’ *Office of the Inspector General*, 2001, Washington, DC: DOJ, <http://www.usdoj.gov/oig/reports/INS/e0109/index.htm> (accessed 29 April 2019).

⁶⁹ *Flores, et al. v. Johnson, et al* (2015)

⁷⁰ *Flores, et al. v. Johnson*,; The Flores Settlement and Family Incarceration: A Brief History and Next Steps,’ *Human Rights First* (website), 2018 <https://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps> (accessed 29 April 2019); A secure facility is defined as “a detention facility where individuals are held in custody and are not free to leave.”

⁷¹ *Flores, et al., v. Lynch, et al.*, (2015) Case No. CV 85-04544 DMG (Ex), p. 10:6-17

⁷² *Flores, et al., v. Lynch, et al.*, (2015) p. 14:19-24

children.⁷³ As a result, in 2003 Congress passed the Homeland Security Act of 2002 (HSA). The Immigration and Naturalisation Service (INS) was abolished and replaced by the Department of Homeland Security (DHS) and its bureaus, which include Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and United States Citizenship and Immigration Services (USCIS).⁷⁴ Custodial authority of children was transferred to the Office of Refugee Resettlement in the branch of the Department of Health and Human Services (DHHS).⁷⁵ Advocates welcomed this change and observed immediate improvements in detention conditions and treatment of children.⁷⁶

2.1.3 The William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008

Despite these improvements, criticisms remained about the treatment of unaccompanied children.⁷⁷ In response to allegations of the failure to properly screen children for protection, Congress passed the 2008 William Wilberforce Trafficking Victims Protection Reauthorisation Act (TVPRA) and codified parts of *Flores* into law.⁷⁸ Any federal agency that comes into contact with an unaccompanied child is required to notify the DHHS within 48 hours of apprehension and to transfer the UC to DHHS within 72 hours.⁷⁹ This act codified into law that children cannot be held in a secure facility unless the

⁷³ O. Byrne, 'Unaccompanied Children in the United States: A Literature Review,' New York: The Vera Institute Of Justice, 2008 https://storage.googleapis.com/vera-web-assets/downloads/Publications/unaccompanied-children-in-the-united-states-a-literature-review/legacy_downloads/UAC_literature_review_FINAL.pdf (accessed 29 June 2019); Amnesty International USA, 'Why Am I Here? Children In Immigration Detention,' 2003, https://www.amnestyusa.org/wp-content/uploads/2017/09/why_am_i_here.pdf (accessed 29 April 2019)

⁷⁴ *Homeland Security Act of 2002*, (USC6, Public Law 107-296, H.R. 5005)

⁷⁵ *Homeland Security Act of 2002*

⁷⁶ Byrne, 'Unaccompanied Children in the United States: A Literature Review,' 2008.; J. Bhabha, and S. Schmidt, 'Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.,' Cambridge, MA: Harvard University Committee on Human Rights Studies, 2006, http://www.childmigration.net/files/SAA_UK.pdf (accessed 29 July 2019)

⁷⁷ Kandel, 'Unaccompanied Immigrant Children: An Overview,' 2017.

⁷⁸ *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*, (USC 7101, Public Law 110-457, H.R. 7311).

⁷⁹ *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*, (USC 7101, Public Law 110-457, H.R. 7311), except in the case of exceptional circumstances

child is a danger to self or others or has been charged with a criminal offense.⁸⁰ The Secretary of Health and Human Services is required to “make every effort to utilise the services of pro bono counsel” in order to “ensure to the greatest extent practicable” that all unaccompanied children have legal representation in legal proceedings.⁸¹

A child non-contiguous country (i.e. all other countries aside from Mexico and Canada) who is apprehended by a federal agency, typically CBP, must be transferred to ORR within 72 hours of apprehension.⁸² Once in the care of ORR, children must be placed in the least restrictive setting that is in the best interest of the child while they await their immigration court hearing.⁸³ ORR is responsible for screening children in their care for trafficking and protection grounds.⁸⁴ The TVPRA also have the United States Citizenship and Immigration Services (USCIS) initial jurisdiction over asylum applications filed by UC.⁸⁵ Prior to 2008, unaccompanied children applied for asylum during their removal proceedings. This change is a positive development that grants unaccompanied children the opportunity to present their case to a trained asylum officer in a non-adversarial setting at a USCIS office. USCIS can grant a protection visa or refer the case to an immigration judge.⁸⁶ Unaccompanied children can receive relief in the form of asylum, a T-visa, or they can petition for Special Immigrant Juvenile Status (SIJS).⁸⁷ The Executive Office for Immigration Review (EOIR) oversees immigration court proceedings and can either grant protection from removal, order removal, or allow “voluntary return.”⁸⁸

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*

⁸³ *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008; Homeland Security Act of 2002*

⁸⁴ Ataiants, 2018.

⁸⁵ R. E. Wasem, ‘Asylum Policies for Unaccompanied Children Compared with Expedited Removal Policies for Unauthorized Adults: In Brief,’ *Congressional Research Service*, 2014, <https://fas.org/sgp/crs/homesecc/R43664.pdf> (accessed 1 June 2019).

⁸⁶ Ataiants, 2018.

⁸⁷ Bhabha, and Schmidt, 2006.

⁸⁸ Ataiants, 2018.

Table 3. National Legislative Framework	
<i>Flores</i> Settlement Agreement	<p>Children are to be placed in the least restrictive setting and are released from custody without unnecessary delay;</p> <p>Children must be released within five days to: a parent, a legal guardian, an adult relative, an adult or entity who has been designated by the parent or legal guardian, a licensed program, or an adult or entity seeking custody;</p> <p>If a licensed shelter is not immediately available, a child can temporarily be placed in an INS detention facility for 3 to 5 days;</p> <p>Children cannot be held in a secure facility, except in special cases;</p> <p>Children must be treated with dignity, respect, and special concern for their particular vulnerability as children;</p> <p>Laid down minimum standards for treatment and conditions of children in custody.</p>
Homeland Security Act of 2002	<p>Created the Department of Homeland Security (DHS);</p> <p>Custodial authority of children transferred to Office of Refugee Resettlement (ORR) in the branch of Department of Health and Human Services (DHHS);</p> <p>ORR responsible for care and custody of UC;</p> <p>ORR must ensure that the interests of the child are considered when making decisions in regards to the UC;</p> <p>ORR must ensure that legal counsel is appointed to represent the interests of the child.</p>
Trafficking Victims Reauthorisation Act of 2008	<p>Codified existing policies from <i>Flores</i> into law;</p> <p>Children cannot be held in a secure facility unless the child is a danger to self or others or has been charged with a criminal offense;</p> <p>All agencies required to notify DHHS within 48 hours of apprehension of a UC and to transfer the UC to DHHS within 72 hours;</p> <p>DHHS required to ensure to the greatest extent practicable that all unaccompanied children have legal representation;</p> <p>Children from contiguous countries screened by CBP to assess whether they meet grounds for protection within 48 hours of apprehension;</p> <p>CBP returns children to home country who do not meet grounds;</p> <p>ICE transfers those who meet grounds for protection do to ORR custody;</p> <p>Children from a non-contiguous country must be transferred to ORR within 72 hours;</p> <p>USCIS has initial jurisdiction over an asylum applications filed by a UC;</p>

2.2 Forms of Relief

For purposes of length, this project focuses on the two main forms of relief that unaccompanied children most often seek. There are other pathways to relief, such as a trafficking visa, that I do not discuss.

2.2.1 Asylum

All unaccompanied children, whether or not they are apprehended by a federal authority, have a special right to file their asylum claim at an USCIS office prior to their

removal hearing.⁸⁹ This is a unique right; adults and accompanied children do not have the ability to file their asylum claim with USCIS if they are in removal proceedings.⁹⁰ Asylum officers are specially trained to conduct “in-person, in-depth, non-adversarial interviews” and fully evaluate the asylum claim using country reports and security checks.⁹¹ The asylum officer can either grant relief or refer the case to the immigration judge.⁹² Between 2009 and 2015, USCIS granted 42.6% of unaccompanied children asylum.⁹³ The majority (92%) of asylum applicants between 2009 and 2015 were from El Salvador, Honduras, and Guatemala.⁹⁴

A child who has been apprehended by authorities is eligible to apply for defensive asylum with the immigration judge who is presiding over their removal proceeding.⁹⁵ The majority of unaccompanied children file for asylum during their removal hearing; only 6% of apprehended UCs between FY2009 and FY2015 applied for asylum with the USCIS office.⁹⁶

In order to be granted relief, a child must meet the definition of a refugee. They must prove that they have a well-founded fear of persecution due to race, religion, nationality, political opinion, or membership in a particular social group.⁹⁷ If a child files their asylum claim to USCIS, a USCIS asylum officer interviews the child and can either grant asylum or refer the case to an immigration judge, who can then deny or grant relief. If

⁸⁹ ‘Minor Children Applying for Asylum by Themselves,’ *USCIS* (website) 2019 <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves> (accessed 29 June 2019)

⁹⁰ *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*, (USC 7101, Public Law 110-457, H.R. 7311)

⁹¹ J.E. Langlois, written testimony for a hearing on ‘The 2014 Humanitarian Crisis at our Border: A Review of the Government’s response to Unaccompanied Minors One Year Later,’ *Senate Committee on Homeland Security and Governmental Affairs, D.C.*, 7 July 2015, <https://www.uscis.gov/archive/2014-humanitarian-crisis-our-border-review-governments-response-unaccompanied-minors-one-year-later-senate-committee-homeland-security-july-2015-associate-director-joseph-e-langlois> (accessed 29 July 2019)

⁹² ‘Minor Children Applying for Asylum by Themselves,’ *USCIS*, 2019.

⁹³ Langlois, written testimony for a hearing on ‘The 2014 Humanitarian Crisis at our Border: A Review of the Government’s response to Unaccompanied Minors One Year Later,’ 2015

⁹⁴ Langlois, 2015.

⁹⁵ Bhabha, and Schmidt, 2006.

⁹⁶ Langlois, 2015.

⁹⁷ Kids In Need of Defense, ‘Chapter 5: Asylum and Related Relief,’ (website) <https://supportkind.org/wp-content/uploads/2015/04/Chapter-5-Asylum-and-Related-Relief.pdf> (accessed 29 April 2019).

a child does not file their application with USCIS before their initial hearing with an immigration judge, the judge instructs the child to file their application with USCIS. ICE attorneys the immigration judge can grant or deny relief during the generally request a continuance to provide the child with additional time to file their application with USCIS before their removal proceeding.⁹⁸ Once USCIS receives the asylum application, they obtain jurisdiction over the case; the judge cannot make a decision to remove the child or grant relief until USCIS has either granted relief or referred the case to the court.⁹⁹

2.2.2 Special Immigration Juvenile Status (SIJ)

The Immigration Act of 1990 established the Special Immigrant Juvenile Status (SIJS) visa that grants certain unaccompanied children lawful permanent residency.¹⁰⁰ The child must first ask a juvenile court judge in their state of residency to make findings to determine if the child is eligible for the SIJS visa.¹⁰¹ The court must find, among other requirements, that the child is unable to be reunified with their parents due to abuse, neglect, or abandonment and that it is not in the best interest of the child to be returned to his or her home country.¹⁰² Unaccompanied children who are in federal custody must first obtain permission from HHS, referred to as “specific consent,” before a juvenile court will take jurisdiction.¹⁰³ Observers have noted that DHS is not qualified to determine the best interests of a child and have found that it can be difficult for children to obtain this consent.¹⁰⁴

⁹⁸ Ataiants, et al., 2018; Langlois, 2015.

⁹⁹ Langlois, 2015.

¹⁰⁰ Bhabha, and Schmidt, 2006.

¹⁰¹ Bhabha, and Schmidt, 2006.

¹⁰² Ibid.

¹⁰³ Byrne, 2008.

¹⁰⁴ C. Nugent, “Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Immigrant Children,” *Boston University Public Interest Law Journal*, vol 15 2006, p. 219-235, <http://www.bu.edu/law/journals-archive/pilj/vol15no2/documents/15-2nugentarticle.pdf> (accessed 29 April 2019)

Having summarised the policies and laws related in unaccompanied children, I will now discuss how practices of these policies prior to 2017 impacted unaccompanied childrens' right to personal liberty, family, and non-refoulement.

3.0 Specific Rights in Policy and Practice (Prior to 2017)

This section will answer one of my research questions: What are the national obligations the United States has to unaccompanied children as it relates to their right to family, right to personal liberty, right to *non-refoulement*?

3.1 Right to Family

The Supreme Court as well as the Ninth Circuit have, “repeatedly and consistently,” found that all persons physically on U.S. soil, regardless of their status, have constitutional rights.¹⁰⁵ The Fifth Amendment of the U.S. Constitution states that no person shall be “deprived of life, liberty, or property, without due process of law.”¹⁰⁶ Similarly, the Fourteenth Amendment states that “nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.”¹⁰⁷ Court cases such as *Quilloin v. Walcott* (1978) as well as *Troxel v. Granville* (2000) established that the “liberty” clause includes a right to family integrity.¹⁰⁸ *Troxel v. Granville* found that parents have a right to the custody and care of their child and that the constitution protected parents from the government intruding on this liberty.¹⁰⁹ Courts have consistently identified that the right to family is “essential,”¹¹⁰ a “basic civil rights of man,”¹¹¹ and “far more precious...than property rights.”¹¹² The integrity of the family has been recognised as a protected right under the Due Process Clause of the

¹⁰⁵ *MS. L vs ICE* (2018), Case No.: 18cv0428 DMS (MDD) p. 13:14-19, <https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-part-and-denying-part-defendants-motion-dismiss> (accessed 29 June 2019)

¹⁰⁶ *Fifth Amendment*, The United States Constitution. 1791.

¹⁰⁷ *Fourteenth Amendment*, The United States Constitution, 1868.

¹⁰⁸ *MS. L vs ICE* (2018), Case No.: 18cv0428 DMS (MDD), p. 14:5-15

¹⁰⁹ *Troxel v. Granville* (2000) 530 U.S. 57.

¹¹⁰ *Meyer v. Nebraska*, (1923) 262 U.S. 390.

¹¹¹ *Skinner v. Oklahoma*, (1942) 316 U.S. 535.

¹¹² *May v. Anderson* (1953), 345 U.S. 528

Fourteenth Amendment¹¹³, the Equal Protection Clause of the Fourteenth Amendment¹¹⁴ and the Ninth Amendment.¹¹⁵ To conclude, it is well established that all persons physically present in the U.S. have a right to family and cannot be deprived this right without due process of law.

As required by the TVRPA, any federal agency that apprehends a UC must notify DHHS within 48 hours and the child must be transferred to DHHS within 72 hours of apprehension.¹¹⁶ The Department of Health and Human Services is required to make a prompt effort to reunify the child with parents or relatives and release the child from custody.¹¹⁷ After a UC has been taken into custody of ORR, the ultimate goal is family reunification, is if this is in the best interests of the child.¹¹⁸

Unaccompanied children's right to family is directly impacted by their time in ORR detention. Children held in ORR custody are withheld from their family members and rely on ORR to safely reunite them with their family members. A report in 2016 by the Government Accountability Office found that in 2012 ORR began removing policies, such as fingerprinting and notarisation requirements of documents that certify family relation, in order to quickly release children to sponsors and free up bed space in shelters.¹¹⁹ Although ORR staff stated that they did not believe this placed children in danger,¹²⁰ a 2016 Senate report found that in 2014 ORR had released a number of children to a ring of human traffickers.¹²¹ This report also found that ORR's system to identify a sponsor's identity and

¹¹³ *Meyer v. Nebraska*, (1923) 262 U.S. 390

¹¹⁴ *Skinner v. Oklahoma*, (1942) 316 U.S. 535.

¹¹⁵ *Griswold v. Connecticut*, (1965) 381 U.S., 496

¹¹⁶ *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*;

¹¹⁷ *Homeland Security Act of 2002*

¹¹⁸ American Immigration Council, 'A guide to children arriving at the border: Laws, policies and responses,' *Special Report*, 2015, <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> (accessed 1 July 2019)

¹¹⁹ United States Accountability Office, 'Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care,' *Report to Congressional Requesters*, 2016, <https://www.gao.gov/assets/680/675256.pdf> (accessed 29 April 2019).

¹²⁰ United States Accountability Office, 'Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care,' 2016.

¹²¹ Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs 'Protecting Unaccompanied Immigrant Children from Trafficking and other Abuses: The Role of the Office of Refugee Resettlement,' *Staff Report to the United States Senate*, 2016

relationship to the child was unreliable and subject to abuse.¹²² There were even cases where a sponsor deceived ORR in claiming they had a blood relation to a minor when in fact they did not.¹²³ Failing to adequately identify a sponsor's identity not only places a child at risk of exploitation and abuse, but also prevents reunification with a child's legitimate family.

3.2 Right to Personal Liberty

Unaccompanied children's right to personal liberty is codified in *Flores*, the TVPRA, and the HSA. Unaccompanied children can legally only be held in DHS custody for 72 hours, after which they must be transferred to ORR custody.¹²⁴ Under *Flores*, children are to be placed in the least restrictive setting and are required to be released from ORR custody "without unnecessary delay."¹²⁵ In response to the increased practice of detaining immigrant families under the Obama administration, a 2015 court case stated that children could only be legally held in family immigration detention for no longer than 20 days.¹²⁶ As a result, alternatives to detention were more often used. For example, in 2016, President Barack Obama created the Family Case Management Program (FCMP), an alternative to detention (ATD) program for immigrant families.¹²⁷

Advocates have raised concerns about the length of time UC spend in CBP custody and ORR custody as well as the conditions of these detention centres.¹²⁸ While advocates have acknowledged that conditions and treatment of UCs have improved since the transfer of custodial authority to ORR, concerns have remained about the length of time children spend in CBP immigration custody as well as conditions of ORR custody.¹²⁹ Reports

¹²² Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs 'Protecting Unaccompanied Immigrant Children from Trafficking and other Abuses,' 2016.

¹²³ Ibid.

¹²⁴ *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*.

¹²⁵ *Flores Settlement Agreement*, (1997).

¹²⁶ *Flores, et al., v. Lynch, et al.*, (2015) p. 10:6-17

¹²⁷ ICE, 'Fact Sheet: Stakeholder Referrals to the ICE/ERO Family Case Management Program,' 2016 <https://www.aila.org/infonet/ice-fact-sheet-family-case-management-program> (accessed 29 June 2019).

¹²⁸ Byrne, 2008.

¹²⁹ Byrne, 2008.

concerning the inhumane detention conditions and harsh treatment immigrants in CBP custody reveal why this prolonged detention is of particular concern.¹³⁰

In 2014, a group of six organisations including the National Immigration Justice Centre (NIJC) and the American Civil Liberties Union (ACLU) filed a joint complaint against DHS on behalf of 116 unaccompanied children who were abused and mistreated by CBP.¹³¹ Approximately 25% reported a form of physical abuse, including sexual assault and beatings, and more than 50% reported verbal abuse, including death threats, by CBP officials.¹³² Children reported that detention conditions were unsanitary and unsafe and 70% reported being held for longer in CBP custody for longer than the mandated 72 hours.¹³³ The organisations that filed the complaint concluded, “the sheer volume and consistency of these complaints reflects longstanding, systemic problems with CBP policy and practices... DHS has demonstrated a continuing disregard for the civil and human rights of unaccompanied children.”¹³⁴

There have also been reports of poor living conditions in ORR shelters and mistreatment by shelter staff. Reports have revealed a lack of access to required services, such as mental health services, in “temporary influx” shelters that house thousands of unaccompanied children.¹³⁵

¹³⁰ See: G. Cantor, ‘Hierleas (Iceboxes) in the Rio Grande Valley: Length Detention, Deplorable Conditions, and Abuse in CBP Holding Cells,’ *American Immigration Council Washington, D.C.*, 2015, <https://www.americanimmigrationcouncil.org/research/hieleras-iceboxes-rio-grande-valley-sector> (accessed 29 April 2019); Americans for Immigrant Justice, ‘The ‘Hieleras’: A Report On Human and Civil Rights Abuses Committed by Customs and Border Protection Agency,’ 2013, http://www.aijustice.org/the_hieleras_a_report_on_human_civil_rights_abuses_committed_by_u_s_customs_and_border_protection_agency (accessed 29 April 2019)

¹³¹ A. Huebner, et al., Letter to Megan H. Mack, Officer for Civil Rights and Civil Liberties, and John Roth, Inspector General of DHS, ‘RE: Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection,’ *D.C.*, 2014, <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/FINAL%20DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs%202014%2006%2011.pdf> (accessed 29 April 2019)

¹³² A. Huebner, et al., ‘RE: Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection,’ 2014.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ M. Jordan, ‘Trump Administration to Nearly Double Size of Detention Centre for Migrant Teenagers,’ *The New York Times*, 15 January 2019, <https://www.nytimes.com/2019/01/15/us/migrant-children-shelter-tent-city-tornillo-homestead.html> (accessed 2 April 2019)

3.3 Right to *Non-refoulement*

The 1980 Refugee Act grants the right for “any immigrant physically present in the United States or at a land border or port of entry, irrespective of such immigrant’s status, to apply for asylum.”¹³⁶ The Attorney General must establish this procedure to apply for asylum, and retains the power to grant asylum and terminate asylum status.¹³⁷ The Attorney General “shall not deport or return any immigrant to a country if the Attorney General determines that such immigrant’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion.”¹³⁸ Thus, any immigrant, regardless of whether they entered the U.S. at or between a port of entry (POE), has the right to apply for asylum and has the right to non-refoulement.

The majority of asylum claims made by unaccompanied children are denied.¹³⁹ Since the implementation of the TVPRA in 2009, USCIS received 13,004 UC asylum applications and granted asylum for 42.6%.¹⁴⁰ The vast majority (92%) of UC who filed these asylum claims with USCIS were from the Northern Triangle countries.¹⁴¹ When a USCIS officer does not grant asylum, the child can apply for asylum during their immigration removal hearing. Children are even more unlikely to be granted relief in immigration court; in 2014 only 2% of unaccompanied children were granted relief by an immigration judge.¹⁴² Unlike in criminal proceedings, the government is not required to provide legal counsel for persons in civil proceedings; persons in immigration proceedings either must hire an attorney or find a pro-bono legal service.¹⁴³ Under the HSA of 2002 and TVPRA of 2008, DHHS is required to ensure that unaccompanied children have access to

¹³⁶ *Refugee Act of 1980*, 8 USC Sec. 208 (a)

¹³⁷ *Refugee Act of 1980*. Sec 243 (h) (1)

¹³⁸ *Refugee Act of 1980*

¹³⁹ TRACImmigration Statistics, *Juveniles—Immigration Court Deportation Proceedings*, 2019, <https://trac.syr.edu/phptools/immigration/juvenile/> (accessed 29 June 2019).

¹⁴⁰ Langlois, 2015.

¹⁴¹ Langlois, 2015.

¹⁴² TRACImmigration Statistics, *Juveniles—Immigration Court Deportation Proceedings*, 2019.

¹⁴³ Ataiants, et al., 2018; *Homeland Security Act of 2002*; *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*

legal counsel to the greatest extent possible.¹⁴⁴ While DHHS is required to ensure “access,” they do not ensure that children obtain legal counsel nor do they assist in payment. The government assistance in ensuring access has been found to be unreliable; a report by the OIG in 2005 found that the lists of prop-bono legal services provided to children by CBP were not “consistently accurate.”¹⁴⁵ Researchers examined a list that was provided to children in three sectors and found that more than 50% of the attorneys listed were not available.¹⁴⁶

Legal representation is the single most important factor in asylum decisions; those without legal counsel are significantly more likely to be denied asylum.¹⁴⁷ The Executive Office for Immigration Review released data to the Congressional Research Service in regards to case completion by outcome and legal representation for unaccompanied children.¹⁴⁸ According to this data, 88.2% of children who did not have legal representation were ordered removed while only 13.4% with legal representation were ordered removed.¹⁴⁹ In 2006, Bhabha and Schmidt found an “utter inadequacy of the current legal network for representing children.”¹⁵⁰ The Obama administration took positive actions to respond to increasing numbers of UC and their needs. In FY2014 and FY2015, DHHS provided \$9 million to pro-bono legal service providers to support the unaccompanied children’s program.¹⁵¹ In 2014, the Justice Department granted \$1.8 million to enhance immigration court proceedings and provide legal counsel to unaccompanied children.¹⁵²

¹⁴⁴ Ataiants, et al., 2018; *Homeland Security Act of 2002*; *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*

¹⁴⁵ Department of Homeland Security, Office of Inspector General, ‘A Review of DHS’ Responsibilities for Juvenile Immigrants’ 2005, p. 12, https://www.oig.dhs.gov/assets/Mgmt/OIG_05-45_Sep05.pdf (accessed 29 April 2019)

¹⁴⁶ Department of Homeland Security, Office of Inspector General, ‘A Review of DHS’ Responsibilities for Juvenile Immigrants’ 2005, p. 12

¹⁴⁷ Byrne, 2008.

¹⁴⁸ Kandel, 2017.

¹⁴⁹ Kandel, 2017.

¹⁵⁰ Bhabha, and Schmidt, 2006.

¹⁵¹ American Immigration Council, ‘A Guide To Children Arriving at the Border: Laws, Policies, and Responses,’ *Special Report*, 2015,

¹⁵² American Immigration Council, ‘A Guide To Children Arriving at the Border: Laws, Policies, and Responses,’ 2015.

EOIR helped create the Justice Americorps program to provide UC with legal representation.¹⁵³ While this was a step in the right direction, many children still remain unrepresented; as of April 2015, there were 38,000 pending cases of UCs who did not have legal counsel.¹⁵⁴

4.0 Conclusion

U.S. Immigration and asylum laws offer protection for unaccompanied children, however this existing literature reveals the failure of the government to ensure that these rights are respected. In the following chapter, I will examine the international laws which require the U.S. to respect UC's right to family, personal liberty, and non-refoulement.

¹⁵³ American Immigration Council, 2015.

¹⁵⁴ Ibid.

Chapter III. International Obligations

The United States is a State Party to a number of treaties, including the International Covenant on Civil and Political Rights (ICCPR), the 1967 Refugee Convention and Protocol, and the Convention Against Torture (CAT). These international treaties are binding and require the United States to protect, respect, and fulfill the rights of all persons in the U.S., including refugees and asylum seekers. The Refugee Convention defines a refugee as an individual who,

“Owing to well-founded fear of persecution for reasons of race, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹⁵⁵

The Convention defines an asylum seeker as a person who has applied for asylum and is awaiting the decision for refugee status.¹⁵⁶ The 1967 Protocol, to which the U.S. is a state party, applies these rights and protections without the temporal and geographical limitation of the 1951 convention.¹⁵⁷ In 2004, The Human Rights Committee stated in General Comment No. 31 that the rights laid out in the Covenant apply not only to citizens of State Parties to the Covenant and Protocol, but to all individuals in the territory of a State Party, such as asylum seekers, refugees, and migrant workers.¹⁵⁸ All persons seeking asylum are entitled to these provisions; non-discrimination is emphasised as a fundamental principle of the convention.¹⁵⁹

¹⁵⁵ Convention and Protocol Relating to the Status of Refugees, (adopted 31 January 1967, entered into force 4 October 1967) Article 1.

¹⁵⁶ ‘Asylum Seekers,’ *UNHCR* (website) <http://www.unhcr.org/asylum-seekers.html> (accessed 10 June 2018)

¹⁵⁷ Convention and Protocol Relating to the Status of Refugees: In the 1951 Convention, the definition of a refugee only applied to persons who were refugees as a result of events occurring before 1 January 1951.

¹⁵⁸ Human Rights Committee, General Comment No. 31: (Nature of the General Legal Obligation on State Parties to the Covenant) (adopted 29 March 2004) <http://www.unhcr.org/protection/migration/4963237716/324-human-rights-committee-general-comment-31-nature-general-legal-obligation.html> (accessed 5 June 2019).

¹⁵⁹ Convention and Protocol Relating to the Status of Refugees, Introductory note and Article 3.

In this section I will answer one of my research questions: What are the legal international obligations the United States has to unaccompanied children as it relates to their right to family, right to personal liberty, right to *non-refoulement*?

1.0 Right to Family

There are several international instruments that recognise the right to family. At the drafting of the 1951 Convention relating to the Status of Refugees, twenty-six states, including the U.S., adopted a number of recommendations.¹⁶⁰ Recommendation B urged governments to ensure the unity of the refugees' family and ensure the protection of minor refugees, especially unaccompanied children. Members noted, "the unity of the family, the natural and fundamental group unit of society is an essential right of the refugee, and that such unity is constantly threatened."¹⁶¹ Additionally, the UNCHR Executive Committee, to which the United States is a party member, made a number of conclusions emphasising the right to family of asylum-seekers and refugees, including family unity, family reunification, and protection of the refugee family.¹⁶²

Article 16(3) of the Universal Declaration of Human Rights (UDHR) as well as article 23(1) of the International Covenant on Civil and Political Rights (ICCPR) recognise that the family is "the natural and fundamental group unit of society and is entitled to protection by society and the state."¹⁶³ Article 12 of the UDHR states: "No one shall be subjected to arbitrary interference with his privacy, family, home... Everyone has the right to the protection of the law against such interference."¹⁶⁴ Similarly article 17 of the ICCPR contains the provision that "no one shall be subjected to arbitrary or unlawful interference

¹⁶⁰ Convention and Protocol Relating to the Status of Refugees, accessed 1 July 2019)

¹⁶¹ Convention and Protocol Relating to the Status of Refugees, Recommendation B

¹⁶² UNHCR ExCom, Family Reunion, Conclusion No. 9 (XXVIII), 12 October 1977, <http://www.refworld.org/docid/3ae68c4324.html> (accessed 1 July 2019); UNHCR ExCom, Family Reunification, Conclusion No. 24 (XXXII), 21 October 1981, <http://www.refworld.org/docid/3ae68c43a4.html> (accessed 1 July 2019); UNHCR ExCom, Protection of the Refugee's Family, Conclusion No. 88 <https://www.unhcr.org/en-us/excom/exconc/3ae68c4340/protection-refugees-family.html> (accessed 1 July 2019);

¹⁶³ Universal Declaration of Human Rights, (adopted 10 December 1948) Article 16; available at: International Covenant on Civil and Political Rights, Article 23.

¹⁶⁴ Universal Declaration of Human Rights, Article 12

with his privacy, family, home.”¹⁶⁵ The UDHR is not legally binding, however it is considered to be the foundation of international human rights law.¹⁶⁶ The ICCPR is a legally binding treaty and as a state party the U.S. is required not to arbitrarily interfere with family life.¹⁶⁷

2.0 Right to Personal Liberty.

Provisions regarding the right to personal liberty are codified in several international human rights instruments including the 1951 Refugee Convention, International Covenant on Civil and Political Rights (ICCPR), and UNHCR Detention Guidelines.

As a state party, the United States is required to “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised,” in the ICCPR.¹⁶⁸ Article 9 (1) of the ICCPR states,

“ Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.”¹⁶⁹

Thus, if the U.S. were to deprive unaccompanied children of their liberty or subject them to arbitrary detention, they would be violating their obligation under the ICCPR. Refugees and asylum seekers cannot be detained for seeking asylum, even if they break immigration laws. Internationally, it is recognised that asylum seekers often must break national laws in order to seek asylum; one of the three founding principles of the Refugee Convention is non-penalisation for illegal entry or stay. Recognising that “seeking asylum can require refugees to breach immigration rules,” article 31 (1) prohibits states from charging asylum-seekers with criminal or immigration offenses and from arbitrarily detaining an individual

¹⁶⁵ International Covenant on Civil and Political Rights, Article 17.

¹⁶⁶ ‘Human Rights Law,’ *United Nations* (website) <https://www.un.org/en/sections/universal-declaration/human-rights-law/> (accessed 8 July 2019).

¹⁶⁷ International Covenant on Civil and Political Rights.

¹⁶⁸ International Covenant on Civil and Political Rights, Article 2.

¹⁶⁹ International Covenant on Civil and Political Rights, Article 9.

solely for seeking asylum.¹⁷⁰ Therefore, detaining an asylum-seeker purely on illegal entry or stay amounts to arbitrary detention and violates Article 31 (1) of the Convention.

The UNHCR Guidelines on Detention state that the detention of asylum seekers should only be a measure of last resort and must be made on individual assessments.¹⁷¹ States cannot detain asylum seekers based on illegal entry and/or to deter migration; these are purposes that are not based on individual assessment and therefore, “without such purpose, detention will be considered arbitrary.”¹⁷² Guideline 9.2 addresses additional safeguards for children, who should “in principle not be detained at all.” Specially, “unaccompanied or separated children should not be detained. Detention cannot be based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.” In cases where children accompany their parents, states should consider alternative care arrangements due to the harmful effects of detention on the child.¹⁷³ Unaccompanied or separated children should be released to family members in the country of asylum when possible, and when this is not possible they should be placed in alternative care made by competent child-care authorities.¹⁷⁴ To conclude, under international law there are very few circumstances in which the United States can legally detain unaccompanied children.

3.0 Right to *Non-refoulement*

The right to non-refoulement is perhaps the most fundamental right of a refugee. Article 33 (1) of the Convention reads,

“No one shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on

¹⁷⁰ Convention and Protocol Relating to the Status of Refugees, 2010 Introductory note; Article 31.

¹⁷¹ UNHCR Detention Guidelines, Guideline 4.1

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

account of his race, religion nationality, membership of a particular social group or political opinion.”¹⁷⁵

The Executive Committee of UNHCR has affirmed that this right applies to anyone who meets the 1951 definition of a refugee; a person does not need to be formally recognised by a state as a refugee in order to meet the definition or be protected by the right to non-refoulement. Thus, the right to non-refoulement also extends to asylum seekers who have not been granted formal refugee status by a state.¹⁷⁶

The U.S. is also a state party to the Convention Against Torture (CAT), which prohibits states from expelling, returning, or extraditing any person to a state in which there her or she may be subjected to torture.¹⁷⁷ Thus, the U.S. cannot deport an unaccompanied minor back to their country of origin if the child fears a threat to life, freedom, or fears they may be subject to torture.

4.0 Conclusion

To conclude, the U.S. has several international obligations to respect and protect the right to family, personal liberty, and non-refoulement of unaccompanied children seeking asylum, regardless of illegal entry or stay. The following chapter discusses the methodology of my research project.

¹⁷⁵ Convention and Protocol Relating to the Status of Refugees, Article 33.

¹⁷⁶ UNHCR, ‘Advisory Opinion on the Extraterritorial Application of *Non-refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,’ Conclusion No. 6, p. 2 <https://www.unhcr.org/4d9486929.pdf> (accessed 8 July 2019).

¹⁷⁷ Convention Against Torture (adopted 10 December 1985, entered into force 26 June 1987), Article 3

Chapter IV. Methodology

In this chapter, I explain my research methods, measures, and data. I explain how I conducted my analysis of my primary and secondary data and provide the statistical results of my primary data.

1.0 Research Design

I used both primary and secondary data to evaluate how the policies of the Trump administration challenge unaccompanied children's right to family, personal liberty, and non-refoulement. For my primary data, I used LinkedIn to reach out to individuals who work with UC in a number of different capacities and was able to complete 19 interviews. Participants were given the option of a phone interview, Skype interview or a questionnaire sent over email. Thirteen interviews were conducted over the phone, two over Skype, and four participants chose to answer a questionnaire. Before conducting each interview, I provided participants with informed consent and a brief description of my research project.

Interviews varied in length and topic, depending on the job position of the interviewee (i.e. lawyers had more legal insights while case managers shared more about ORR policies). While some questions varied, the main concept of each interview was the same: Participants were asked to discuss how the policies and practices of the Trump administration have interfered with unaccompanied children's right to family, personal liberty, and non-refoulement. All but two participants (the CBP officer and an attorney for a legal services NGO) worked with unaccompanied children under previous administrations and were asked to think about how their answers have changed since Trump's inauguration. Some phone or skype interviews, in which participants simply listed a policy or practice and brief explanation, lasted only thirty minutes. Others lasted approximately an hour as respondents went into depth and used their personal experiences to explain how specific practices of the administration impacted the children they worked with. Notes were taken during phone and Skype interviews; all participants granted consent for these notes.

As I was only able to conduct 19 interviews, I relied on secondary data in order to adequately understand the background, content, and national consequences of the three policies most commonly cited by respondents as challenges to the three rights of UC. I read

each policy and summarised their content for the reader. In combination with the interviews, I used statistics, government memos, and news reports to show how these policies have impacted UC and challenged their right to family, personal liberty, and non-refoulement. Additionally, I cited class action lawsuits filed in the U.S. as well as responses from United Nations experts and working groups to show how the national and international reaction to these policies.

2.0 Participants

I surveyed 19 individuals who work with unaccompanied children in a number of different capacities—including immigration attorneys, case managers, child advocates at NGOs, a Customs and Border Patrol officer, post-release and home study case workers, and case managers for the Unaccompanied Refugee Children (URM) program—to gain perspective on how Trump Administrations policies and practices have impacted children's right to personal liberty, family, and non-refoulement. Initially, I planned to limit my search to three states: New York, California, and Texas due to their large population of immigrants. To increase sample size, I expanded my search to the entire United States. I contacted over 300 people and was able to conduct 19 interviews from people who worked in 10 different states across the U.S. during May and June of 2019. Employees of organisations that receive government funding were unable to speak with me. The Vera Institute of Justice, Kids in Need of Defense, several immigration judges, and caseworkers at shelters such as Southwest Key informed me that they could not discuss this topic.

Many participants requested that their name and organisation remain anonymous and noted that their responses were not representative of the views of the organisation. Below is a breakdown of participants surveyed based on their organisation (for those who did not request anonymity) job title, the state in which they work and the form of the interview conducted. In the following section of this chapter, I explain how I analyzed the information obtained in the interviews.

Table 4. Participant Demographics					
#	Experience working with refugees/immigrants	Organisation	Job Title	State	Interview
1	1 year	The Young Centre for Immigrant Children	Staff Attorney	Arizona	Phone 16. 05. 2019
2	3 years	Anonymous, NGO for legal services	Legal Director	Florida	Phone 17.05.2019
3	3 years	Esperanza Immigrant Rights Project	Supervising Attorney	California	Phone 13.05.2019
4	3 years	NGO, Unaccompanied Refugee Children program	Case worker	Massachusetts	Phone 23.05.2019
5	2 years	US Conference of Catholic Bishops/Migration and Refugee Services	Policy Consultant	D.C.	Email questionnaire, 03.07.2019
6	8 years	Anonymous, NGO	Home Study and Post Release Services Case Manager	Virginia	Phone 21. 05. 2019
7	1.5 years	Anonymous, NGO for legal services	Case management associate	California	Phone 21. 05. 2019
8	5 years	Human Rights Initiative of North Texas (prior job with Kinds in Need of Defense in LA)	Asylum Program Attorney	Texas	Email questionnaire 20. 05. 2019
9	4 years	Human Rights Initiative of North Texas	Children's Program Attorney	Texas	Email questionnaire 20. 05. 2019
10	13 years	Anonymous, NGO that provides Home Studies and Post Release Services	Director of Post Release Services Department	New York	Phone 28.05.2019
11	4.5 years	Anonymous, NGO that provides legal services to immigrants	Director of Unaccompanied Children Program	New York	Phone 14.05.2019
12	2.5 years	Has worked at several NGOs that provide legal services to UC	Staff Attorney	Louisiana (current), Texas, Florida	Skype 29. 05.2019
13	3 years	Safe Passage Project	Staff Attorney	New York	Phone 30.05.2019
14	Unknown	Capital Area Immigrants' Rights Coalition (CAIR)	Senior Program Director	Virginia	Phone 06.06.2019
15	25 years	Provides consultation and expert witness to various groups, including Physicians for Human Rights	Psychologist	Southern State	Phone 06.06.2019
16	29 years	Department of Justice	Retired Immigration Judge (9/30/18)	Arizona	Email questionnaire 03.06.2019
17	32 years	Department of Justice	Immigration Judge	California	Email questionnaire 30.06.2019
18	11 years	Department of Homeland Security (DHS): United States Citizen and Immigration Services (USCIS)	Refugee Officer	D.C.	Email questionnaire 50.06.2019

19	One month	Department of Homeland Security (DHS): Customs and Border Patrol (CBP)	Customs and Border Patrol Agent	California	Skype 22.05.2019
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3.0 Qualitative Data: Analysis of Interviews

This small sample of interviews is analyzed with a qualitative content analysis. Each interview was person-specific, as their work with unaccompanied children differed. I created a table to track policies and practices that posed challenges to each specific right. Once all interviews were conducted, I analyzed their observations to identify the most common themes and policies that posed challenges to each specific right. Respondents identified several challenges that the Trump administration has created to several rights of unaccompanied children. For purposes of length I chose three rights (right to family, personal liberty, and non-refoulement) and three policies posed by the administration based on the number of participants who identified these policies as challenges to these rights. The interview with the CBP officer is not included in the statistical analysis as she did not know about internal policies; instead, her interview was used for context and evidence that asylum seekers were being refused at a port of entry.¹⁷⁸

The three most consistently identified policies were: the Memorandum of Agreement (MOA) between DHS and DHHS, the zero-tolerance policy and resulting family separations, and judicial changes to the EOIR made by Attorney Jeff Sessions. Over half of participants (66%) identified the MOA as a challenge to UC's right to family. The majority of participants (75%) also identified the MOA as a challenge to UC's right to personal liberty. The zero-tolerance and family separation policy was consistently identified as a challenge to UC's right to family (88%), right to personal liberty (62%), and right to non-refoulement (61%). A significant number of participants (88%) linked the judicial decisions and policy changes by Attorney General Jeff Sessions as a challenge to children's right to non-refoulement. There were four judicial changes that were identified by participants that fall into this category: the introduction of production quotas and time-

¹⁷⁸ Interview #19.

based deadlines (38%), *Matter of A-B* (77%), *Matter of Castro* and *Matter of L-A-B-R* (27%)

Table 5. Interview Results: Trump administration policies identified by participants as challenges to specified rights. Note: Percentages do not add to 100% because participants were not limited to identifying one policy						
Poses a challenge to:	Zero-tolerance/Family separation	MOA	Judicial Changes	Quotas and Deadlines	Matter of A-B	Matter of L-A-B-R, Matter of Castro-Tum
Right to family	16/18 *= 88.88%	12/18= 66.67%	-----	-----	-----	-----
Right to personal liberty	10/16**= 62.5%	12/16= 75%	-----	-----	-----	-----
Right to <i>non-refoulement</i>	11/18= 61.11%	6/18= 33.33%	16/18= 88.88%	7/18= 38.89%	14/18= 77.77%	5/18= 27.77%

* 18 out of the 19 participants interviewed were used in the statistical analysis. The CBP interview was not used as the content of the interview did not cover these questions.

** 16 out of the 19 participants interviewed were used in the statistical analysis. The CBP interview was not used as the content of the interview did not cover these questions. Two service providers chose not to answer the question regarding children's right to personal liberty.

3.1 Measures

In this section, I will describe how I coded for my measures: the zero-tolerance and family separation policy, the memorandum of agreement, judicial changes, introduction of quotas and deadlines, *Matter of A-B*, and *Matter of Castro* and *Matter of L-A-B-R*.

3.1.1 Zero-Tolerance and Family Separation Policy

The zero-tolerance policy and family separations were consistently identified to pose a threat to UC's right to family (88%), right to personal liberty (62%), and *non-refoulement* (61%). When identifying challenges to UC's rights in interviews, service providers treated the zero-tolerance policy and family separations interchangeably. Thus, when coding for identified policies I treated the zero-tolerance policy and practice of family separations as one policy.

Some participants did not use the term “zero-tolerance,” when describing a challenge to a right of a UC, however their description of the challenge described the zero-tolerance policy. For example, some service provider stated that the government’s policy of prosecuting all illegal entrants threatened the rights of UC. Although they did not use the term “zero-tolerance” this “government policy of prosecuting all illegal entrants,” is a description of zero-tolerance policy and thus was coded as such. I also coded the “increased use of detention for children” as the zero-tolerance policy, as this was the direct result of the zero-tolerance policy. This policy directly increased the population of detained children and therefore was included in the zero-tolerance code.

3.1.2 Memorandum of Agreement

More than half of individuals interviewed identified the Memorandum of Agreement as a threat to UC’s right to family (66%), right to personal liberty (75%), and right to non-refoulement (33%). Individuals did not always use the term “Memorandum of Agreement,” but it was clear in their terms that this was the policy they were describing. For example, individuals stated that “fingerprinting delays,” “fingerprinting requirements,” “information sharing between DHS and ORR,” “arrests of sponsors,” “prolonged detention due to lack of willing sponsor to come forward,” threatened UC’s rights. These terms were all coded as “Memorandum of Agreement,” as they described the content and impacts of this policy. The MOA, also referred to as the Memorandum of Understanding, changed ORR’s sponsor requirements. All sponsors and adults living in the same house as sponsors were required to submit fingerprints and undergo background checks in order to have a child released to them. The MOA requires ORR to share all this information with DHS, making sponsors and adult household members, easy targets for ICE to arrest. This will be further discussed in the next chapter.

3.1.3 Judicial Changes to EOIR

The majority of interviewed individuals (88%) stated that judicial changes to the EOIR significantly threatened UC’s right to non-refoulement. Participants often directly

named Attorney General Jeff Sessions as the person who made these changes and those who did not use his name still referred to changes he made. Some individuals simply stated that changes to the immigration court and the new restrictions placed on judges' threatened UC's right. This was only coded as "judicial changes," as they did not specifically state the policy change.

Other participants specifically identified policy changes, such as the introduction of quotas and deadlines (38%) or decisions such as *Matter of A-B* (77%), *Matter of L-A-B-R* and *Matter of Castro-Tum* (27%). The measure "quotas and deadlines," is coded to include the terms, "quota" and "deadline," as well as the description of the policy such as "judges are forced to rush through cases to meet new requirements and close cases in a certain amount of time." The measure *Matter of A-B* is coded to include the term "*Matter of A-B*" as well as the description of this decision such as "restriction of domestic violence and gang violence as grounds for asylum. The measure "*Matter of L-A-B-R* and *Matter of Castro-Tum*," is coded to include any identification of "continuances" or "closures," as a challenge to UC's rights. These two changes were coded together because nearly all participants grouped these two decisions together. Any participant that identified a change to the immigration court was coded as identifying "judicial changes." If they also identified a specific change, such as *Matter of A-B* then there were additionally included in the statistic for "*Matter of A-B*."

4.0 Secondary Data

In order to gain a complete understanding of the policies and impacts of the administrations' policies, I analyzed secondary data. While the interviews provided me with the on-ground impact of the policies, I was interested in how children were impacted on the national level. To provide background of the zero-tolerance policy and evidence of the impacts on the rights of UC, I relied on statements from administration officials, statistics from CBP and ORR, legal documents from the *Ms. L v. ICE* class action lawsuit, news articles, and reports from non-partisan research organisations such as the U.S. Government Accountability Office (GAO) and the Office of the Inspector General (OIG).

When evaluating the Memorandum of Agreement and its impacts, I relied on a U.S State Senate report, a survey conducted by the Women's Refugee Commission (WRC) and the National Immigrant Justice Centre (NIJC), and a press release from the American Civil Liberties Union of New York. I additionally used statistics from DHHS, a leaked draft administration memo regarding the MOA, news articles, a class-action lawsuit, Transactional Records Access Clearinghouse (TRAC) Data regarding immigration court outcomes, and testimony of the President of the National Association of Immigration Judges to the Senate Judiciary Committee. I also used this testimony, as well as news reports, the policy memos, USCIS data on asylum cases, and the legal documents relating to the court cases, as evidence when analyzing the impacts of the judiciary changes to the EOIR. The next chapter will be divided into sections based on these three policies. Using evidence from the interviews as well as secondary data, I will analyze how these policies have impacted the rights of unaccompanied children.

5.0 Limitations

There are a number of limitations to this research, both in my primary and secondary data. This project focuses on only three rights and three policy changes, however there are a number of policies and practices that have impacts on a number of rights of unaccompanied children. The survey sample of service providers is small due to the limited number of people who would speak with me on the issue. As many organisations receive funding from the government, they were not comfortable speaking publicly in regards to unaccompanied children. I was only able to interview participants in 10 out of 50 U.S. states. As I learned from these interviews, the situation of unaccompanied children and the impacts of the administration's policies vary from state to state. Therefore, this is a significant gap in my research. Additionally, many statistics are inconsistent and incomplete due to a lack of government tracking and recording, such as the total number of separated children and the total number of children reunited with their parents. This limitation is further discussed in the following chapter.

One of the most significant limitations is the way that the EOIR tracks UC cases in immigration court. Statistics regarding immigration court proceedings are not fully representative of all unaccompanied children in immigration court proceedings. In 2018, EOIR changed the way they track juvenile cases so it is no longer possible to distinguish between an unaccompanied minor and a child who arrives in a family unit. Prior to this change, once DHS designated a child as unaccompanied the court maintained this classification even if the child was released to a sponsor or family member. In 2018, the EOIR restricted the definition of an unaccompanied minor to children who were in the ORR custody and did not have a sponsor available.¹⁷⁹ As the majority of unaccompanied children are released to family members, this had led to a significant decrease in UC cases entering the court despite an increase in UC crossing the US border.¹⁸⁰ Since it is no longer possible to accurately distinguish between UC cases and children who arrive in a family unit, it is no longer possible to compare the number of and the outcomes of UC cases in 2018 and 2019 with prior years.

It is also important to note that since the completion of these interviews in June 2019, the administration has enacted policies and practices that interfere with the rights of unaccompanied children, such as restricting the definition of a UC in the USCIS office¹⁸¹ and cutting legal aid for UC.¹⁸²

6.0 Conclusion

This chapter has summarised the methodology of my research, the demographics of the participants interviewed, the sources used, and the limitations of this study. The following chapter will analyze my findings.

¹⁷⁹ TRACImmigration, 'Distinguishing Unaccompanied Children from Children in Family Units,' *TRAC* 8 June 2018, <https://trac.syr.edu/phptools/immigration/juvenile/note.html> (accessed 20 July 2019).

¹⁸⁰ TRACImmigration, 'Distinguishing Unaccompanied Children from Children in Family Units,' 2018.

¹⁸¹ L. Miller, 'New Trump policy may strip unaccompanied migrant children of protected status,' *Los Angeles Times*, 28 June 2019 <https://www.latimes.com/politics/la-me-ln-unaccompanied-children-uscis-determination-20190628-story.html> (accessed 1 July 2019)

¹⁸² V. Romo and J. Rose, 'Administration Cuts Education and Legal Services for Unaccompanied Minors,' *NPR*, 5 June 2019, <https://www.npr.org/2019/06/05/730082911/administration-cuts-education-and-legal-services-for-unaccompanied-children> (accessed 20 July 2019)

Chapter V: Findings

This chapter answers my primary research question: How have the Trump administration's policies contributed to the situation of unaccompanied minor children in regards to their right to family, right to personal liberty, and right to *non-refoulement*?

Participants consistently indicated that the administration was trying to drastically reduce all forms of immigration, including asylum. I was interested in researching the specific policies the Trump administration had implemented which interfere with three specific rights of unaccompanied children seeking asylum at the Southern Border: the right to family, right to personal liberty, and right to non-refoulement. This chapter includes the policies most commonly identified by participants that pose a threat to these rights. First, I give a brief overview of the policies themselves to provide the reader with background and context. The policies identified were the zero-tolerance policy, the Memorandum of Agreement (MOA) between DHS and ORR, and the judicial changes to the Executive Office of Immigration Reform. There were three specific changes to the EOIR that were commonly identified, and thus reviewed in this paper: the introduction of quotas and deadlines, *Matter of A-B*, *Matter of Castro-Tum*, and *Matter of L-A-B-R*.

I then divide the paper into sections where I analyze how each individual right is impacted by the each policy identified by participants. In the right to family section, I discuss the impacts that the zero-tolerance policy and the MOA have on UC's right to family, citing my primary and secondary data and referring to the previously discussed international and national laws. In the right to personal liberty section, I similarly analyze how the zero-tolerance policy and the MOA interfere with UC's right to personal liberty by increasing and prolonging detention. In the non-refoulement section, I briefly describe how the zero-tolerance and MOA pose a threat to this right. The majority of this section focuses on the most commonly identified challenge to UC's right to non-refoulement: the judicial changes to the EOIR.

1.0 Policy Overviews

1.1 Zero Tolerance and Family Separation Policy Overview

Prior to the Trump administration, DHS typically did not refer immigrants who were not deemed an enforcement priority to the DOJ for criminal prosecution; immigrants without a criminal record were typically placed in civil removal hearings.¹⁸³ Asylum seekers who entered the U.S. at or between ports of entry were typically not held in immigration detention if they passed the credible fear interview and DHS did not deem them to be a public safety threat.¹⁸⁴ Instead, they were often released into the US while they awaited their immigration removal hearing.¹⁸⁵ Detaining family unit solely for illegal entry became even less frequent in 2015 after a federal judge ruled that under *Flores* children could not be held in immigration detention for more than 20 days.¹⁸⁶ After 20 days, children have to be released or transferred to a licensed facility. As ICE detention centres are not licensed to hold children, family units were typically placed in an alternate to detention program.¹⁸⁷

In April 2018, Attorney General Jeff Sessions announced that he had implemented a “zero-tolerance policy” at the Southwest border: “If you cross this border unlawfully, we will prosecute you. It’s that simple.”¹⁸⁸ Between FY2010 and FY2016 DHS referred only 21% of illegal border crossings to DOJ for criminal prosecution.¹⁸⁹ All immigrants who entered the U.S. illegally, including asylum-seekers and family units, are now subject to arrest, detention, and possible deportation under the zero-tolerance policy.¹⁹⁰ The policy directed DHS to refer all illegal border crossings to the DOJ for criminal prosecution and

¹⁸³ Kandel, 2019. pp. 6-7.

¹⁸⁴ Kandel, 2019. pp. 6-7.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Attorney General Jeff Sessions, ‘Memorandum for Federal Prosecutors along the Southwest Border: Zero-Tolerance for Offenses Under 8 U.S.C. 1325 (a)’ *Office of the Attorney General*, 6 April 2018 <https://www.justice.gov/opa/press-release/file/1049751/download> (accessed 28 July 2019)

¹⁸⁹ Kandel, 2015, p. 7.

¹⁹⁰ CRS zero tolerance pdf

for the DOJ to prosecute to the fullest extent possible.¹⁹¹ When family units are apprehended and CBP refers the adults for criminal prosecution, the adults are detained in a facility operated by the U.S. Marshals Service.¹⁹² These facilities cannot hold children; they do not meet the child detention standards required by the HSA of 2002, TVPRA of 2008, and the *Flores* Settlement Agreement.¹⁹³ Any accompanying child is then deemed “unaccompanied” and subsequently transferred to ORR custody.

Although the zero-tolerance policy did not result in *all* illegal immigrants being criminally prosecuted for improper entry, it did result in increased criminal prosecutions; between March and April 2018, criminal prosecutions for illegal entry increased by 30 percent.¹⁹⁴ In April and May of 2018, CBP apprehended 8,994 adults with children.¹⁹⁵ CBP reported between May 7 and 21 of 2018, approximately 658 children were separated from 638 adults due to their referral for criminal prosecution.¹⁹⁶ Since children cannot be detained in the facilities their parents are sent to, they are separated, designated as unaccompanied children, and transferred to ORR custody.¹⁹⁷ Thus, this policy has rendered thousands of children unaccompanied. Later in this chapter, I will describe how these children’s right to family, personal liberty, and non-refoulement are threatened by this policy.

¹⁹¹ Attorney General Jeff Sessions, ‘Memorandum for Federal Prosecutors along the Southwest Border: Zero-Tolerance for Offenses Under 8 U.S.C. 1325 (a)’.

¹⁹² Kandel, 2015, p.4.

¹⁹³ U.S. Government Accountability Office, ‘Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border,’ *GAO-19-163*, 2018, <https://www.gao.gov/reports/GAO-19-163/#fnref4> (accessed 20 July 2019).

¹⁹⁴ TRACImmigration, ‘Criminal Prosecutions for Illegal Border Crossers Jump Sharply in April,’ *TRAC*, 2018 <https://trac.syr.edu/immigration/reports/515/> (accessed 21 July 2019).

¹⁹⁵ TRACImmigration, ‘Zero-Tolerance at the Border: Rhetoric vs. Reality,’ *TRAC*, 2018.

¹⁹⁶ Kandel, 2015, p.13.

¹⁹⁷ U.S. Government Accountability Office, ‘Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border,’ 2015.

1.2 Memorandum of Agreement

In 2016, a Senate report revealed that in 2014 ORR had released several unaccompanied children to sponsors who trafficked and exploited the children.¹⁹⁸ The report concluded that this was a direct result of their failure to properly vet sponsors and household members.¹⁹⁹ In order to better ensure the safety of released children, ORR revised their sponsorship vetting process.²⁰⁰ ORR began fingerprinting and conducting background checks on sponsors who were neither parents nor legal guardians and in cases where the child had a documented risk to their safety.²⁰¹ These background checks were typically complete in three to five days. The Office of Refugee Resettlement did not share information that it obtained about potential sponsors and household members of unaccompanied children with DHS.²⁰² Biological parents and legal guardians were not subject to fingerprints.²⁰³

This policy changed in May 2018 when the Office of Refugee Resettlement, Immigration and Customs Enforcement, and Customs and Border Patrol entered into a Memorandum of Agreement (MOA).²⁰⁴ This agreement mandates that these three agencies continuously share information about unaccompanied children from the moment of apprehension through the release to sponsors. Under this agreement, ORR began conducting background checks, including on immigration status, and fingerprinting not only all potential sponsors but all adults who lived in the same residence as a potential sponsor. This information sharing policy requires ORR to provide DHS with the names,

¹⁹⁸ Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs ‘Protecting Unaccompanied Immigrant Children from Trafficking and other Abuses,’ 2016.

¹⁹⁹ Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs ‘Protecting Unaccompanied Immigrant Children from Trafficking and other Abuses,’ 2016.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ ‘Memorandum of Agreement Among ORR of DHHS and ICE of DHS Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters’ 13 April 2018, <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf> (accessed 30 July 2019).

biographic information, immigration status, and fingerprints of all potential sponsors and all adult household members.²⁰⁵

In combination with the zero-tolerance policy directive to arrest all immigrants who entered illegally, the MOA has had serious consequences for unaccompanied children and interferes with their right to family, personal liberty and non-refoulement. These interferences are detailed later in this chapter.

1.3 Judicial Changes to EOIR Overview

The majority of respondents (88%) identified significant challenges in the courtroom that were implemented by the Trump administration. Attorney General Jeff Sessions has made a number of judicial decisions to limit the independence of immigration judges and twist the court into a law enforcement agency.²⁰⁶

In FY 2014, the “surge” of unaccompanied children coming to the US resulted in 56,691 new child cases filed in immigration court. By August 2017, the number of pending unaccompanied children cases hit an historic high of 88,069.²⁰⁷ To respond to this backlog, the Attorney General announced a number of changes to the immigration court system, which in the words of Immigration Judge Tabbador, are “based on a completely unsupported assertion that this action will help solve the Court’s backlog.”²⁰⁸ Unlike federal judges, immigration judges are hired and can be fired by the federal government. The immigration court system is structured within the DOJ and judges are considered by the DOJ to be government employees, thus subject to DOJ policies.²⁰⁹ Across the entire U.S.,

²⁰⁵ Memorandum of Agreement Among ORR of DHHS and ICE of DHS Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters’ 2018.

²⁰⁶ Interview #16

²⁰⁷ TRACImmigration, ‘Children: Amid a Growing Court Backlog Many Still Unrepresented,’ *TRAC*, 2017, <https://trac.syr.edu/immigration/reports/482/> (accessed 20 July 2019).

²⁰⁸ Tabbador, ‘Statement of Judge A. Ashley Tabbador, President of National Associate of Immigration Judges’ 2018.

²⁰⁹ Tabbador, ‘Statement of Judge A. Ashley Tabbador, President of National Associate of Immigration Judges’ 2018.

there are only 400 immigration judges, 63 immigration courts, and two adjudications centres.²¹⁰

As a result of these new policies, the court has become another arm of immigration enforcement. Judge Tabaddor told news outlets, “The job has become exceedingly more difficult as the court has veered even farther away from being administered as a court rather than a law enforcement bureaucracy.”²¹¹ Former Immigration Judge John Richardson stated, “The timing of my retirement was a direct result of the draconian policies of the Administration, the relegation of [judges] to the status of ‘action officers’ who deport as many people as possible as soon as possible with only token due process.”²¹² The administration has undermined the legal duty of immigration judges to exercise independent judgment and discretion in each case. I have chosen four judicial changes that were identified by respondents as the greatest challenges to unaccompanied children’s rights.

The introduction of quotas and time-based deadlines as well as the decisions of *Matter of A-B*, *Matter of Castro-Tum* and *Matter of L-A-B-R* directly impact unaccompanied children’s right to non-refoulement. These are discussed in detail below.

1.3.1 Introduction of Quotas and Time-based Deadlines

In October 2018, Sessions announced that immigration judges’ performance reviews would be based on the number of cases they closed each fiscal year.²¹³ Performance reviews are divided into three categories: satisfactory, needs improvement, and unsatisfactory.²¹⁴ There are a number of requirements to receive a “satisfactory” review, including closing a minimum of 700 cases each year by either ordering removal or

²¹⁰ Department of Justice, ‘Office of the Chief Immigration Judge,’ *DOJ*, 26 July 2019 <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios> (accessed 29 July 2019)

²¹¹ R. Frazin, ‘Immigration judges say they’re leaving jobs because of Trump policies,’ *The Hill*, 13 February 2019, <https://thehill.com/latino/429940-immigration-judges-say-theyre-leaving-jobs-because-of-trump-policies> (accessed 5 May 2019).

²¹² Frazin, ‘Immigration judges say they’re leaving jobs because of Trump policies,’ 2019.

²¹³ ‘EOIR Performance Plan: Adjudicative Employees,’ <http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf> (accessed 20 July 2019).

²¹⁴ EOIR Performance Plan: Adjudicative Employees.’

granting relief.²¹⁵ Another rule requires that judges take no more than three days from a merit hearing to a case completion in 85% of removal cases for a non-status, detained immigrant.²¹⁶ When a judge is reviewing a credible or reasonable fear case, 100% of these cases must be completed on the initial hearing date.²¹⁷ Failure to meet these quota requirements would result in a less than satisfactory performance review and could potentially lead to job termination.²¹⁸

1.3.2 *Matter of A-B*

Sessions used *Matter of A-B* to unilaterally decide that, “generally, claims...pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”²¹⁹ This sweeping claim is not legally binding, however it continues to influence court decisions and asylum office decisions.²²⁰ It is previously established that social group determinations are evaluated by adjudicators and decided on a case-by-case basis.²²¹ Thus, some immigration judges and asylum officers can choose to continue to grant asylum on the PSG membership that relates to domestic violence or gang violence.²²²

1.3.3 *Matter of Castro-Tum* and *Matter of L-A-B-R*

In May 2018, Attorney General Jeff Sessions decided in *Matter of Castro-Tum* that judges no longer had the broad authority to administratively close immigration proceedings. Judges are only permitted to administratively close a case where a previous regulation or settlement authorises the close.²²³ An administratively closed case is not permanently closed but is removed from the active docket and is placed on pause until one of the parties

²¹⁵ ‘EOIR Performance Plan: Adjudicative Employees.’

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ ²¹⁸ Tabbador, ‘Statement of Judge A. Ashley Tabbador, President of National Association of Immigration Judges’ 2018.

²¹⁹ *Matter of A-B*.

²²⁰ The majority of interviewed participants (77%) indicated this.

²²¹ NIJC, ‘Asylum Practice Advisory: Applying for Asylum After *Matter of A-B*,’ 2018, https://www.immigrantjustice.org/index.php/admin_policy/blog/practice-advisory-and-training-regarding-matter-b (accessed 20 July 2019).

²²² NIJC, ‘Asylum Practice Advisory: Applying for Asylum After *Matter of A-B*,’ 2018.

²²³ *Matter of Castro-Tum* 27 I&N Dec. 271 (A.G. 2018)

moves to reactivate the case.²²⁴ Immigration judges have used administrative closures to manage their overwhelmed dockets and to use their limited resources on high priority cases.²²⁵ Between 2014 and 2016, judges granted 144,258 administrative closures to control their docket and handle the “surge” of immigration across the Southwest Border.²²⁶ Under the Obama administration, ICE attorneys agreed to administrative closures when they decided to issue prosecutorial discretion.²²⁷ ICE agents could decide not to prosecute an immigrant who did not pose a risk to the US, such as a child, so that they could focus their efforts on prosecuting immigrants who posed national security threats to the US.²²⁸ As a result of the zero-tolerance policy, ICE agents are directed to “go hard after every case.”²²⁹ Under direction from the Attorney General, judges and ICE attorneys are no longer able to exercise this discretion and are must “proceed ‘expeditious[ly]’ to resolve the case.”²³⁰ In FY 2019, less than 5,000 cases have been administratively closed.²³¹

In August 2018, Sessions issued another decision, in *Matter of L-A-B-R*, that constrained immigration judges’ ability to grant continuances only “for good cause shown.”²³² When a judge grants a continuance, the hearing is paused and moved to a future date, often allowing time for the individual to find a lawyer and prepare their case.²³³ This decision does not overturn previous case law that establishes a multifactor test to establish “good cause” for a continuance, however it does discourage the use of continuances.²³⁴ Sessions argued that immigrants use continuances to delay deportation and remain in the

²²⁴ *Matter of Castro-Tum* 27 I&N Dec. 271

²²⁵ NIJC, ‘New Attorney General Decision Eliminates Administrative Closure in Immigration Proceedings,’ 22 May 2018 (website), https://www.immigrantjustice.org/index.php/admin_policy/blog/new-attorney-general-decision-eliminates-administrative-closure-immigration (accessed 20 July 2019)

²²⁶ TRACImmigration, ‘Immigration Court Processing Time By Outcome’ 2019 (website) https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php

²²⁷ Interview # 11, 14 May 2019.

²²⁸ Interview # 11, 14 May 2019.

²²⁹ Interview # 11, 14 May 2019.

²³⁰ *Matter of Castro-Tum*

²³¹ TRACImmigration, ‘Immigration Court Processing Time By Outcome’ 2019.

²³² *Matter of L-A-B-R et al.*, 27 I&N Dec. 405 (A.G. 2018) <https://www.justice.gov/eoir/page/file/1087781/download>

²³³ Interview # 11, 14 May 2019.

²³⁴ *Matter of L-A-B-R et al.*, (A.G. 2018).

U.S. for longer.²³⁵ While recognising that continuances are a “case management tool,” Sessions ordered judges to only issue continuances in exceptional circumstances and to expedite the resolution of removal proceedings and streamline the deportation process.²³⁶

2.0 Right to Family

2.1 Zero-Tolerance and Family Separation Policy

The vast majority of service providers (88%) indicated that the zero-tolerance policy and resulting mass family separations was a significant threat to unaccompanied children’s right to family. As violence in the Northern Triangle persists, greater numbers of families have fled to the U.S. seeking safety; between FY2017 and FY2018, the number of family unit apprehensions at the Southwest Border increased by 42%.²³⁷ By criminally prosecuting all illegal immigrants, many of whom have custody of minor children, the administration has *created* thousands of unaccompanied children.²³⁸

Data is not available on the number of families who were separated under prior administrations as a result of improper entry.²³⁹ However, there is some data on the number of families separated under the Trump administration prior to the enactment of the zero-tolerance policy.²⁴⁰ In the summer of 2017 (June to September), the Lutheran Immigration and Refugee Service (LIRS), an organisation which partners with ORR to provide services to UC, reported that they had received 19 cases of children separated from their parents at

²³⁵ *Matter of L-A-B-R et al.*

²³⁶ Ibid.

²³⁷ United States Customs and Border Patrol Statistics, ‘U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018,’ 2018 <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> (accessed 20 July 2019)

²³⁸ Kandel, 2015.

²³⁹ Kandel, 2015, p. 7.

²⁴⁰ WRC, Letter to DHS, ‘Re: The Separation of Family members Apprehended by or Found Inadmissible while in U.S. Customs and Border Protection (CBP) Custody at the U.S. Mexico Border,’ 11 December 2017 <https://www.womensrefugeecommission.org/images/zdocs/Family-Separation-Complaint-FINAL-PUBLIC-12-11-17.pdf> (accessed 20 July 2019).

the border.²⁴¹ LIRS had not received any information regarding allegations of child abuse of neglect in any of these 19 cases that would warrant separation.²⁴²

According to CBP standards, CBP agents must “maintain family unity to the greatest extent operationally feasible, absent a legal requirement or an articulable safety or security concern that requires separation.”²⁴³ In FY 2017, CBP separated 1,065 family units out of the 75,622 family units they apprehended.²⁴⁴ After the implementation of the zero-tolerance policy, separations skyrocketed. CBP separated 1.4% of family units in the 365 days of fiscal year of 2017 and separated 10.4% of family units in just 43 days under the zero-tolerance policy.²⁴⁵ From April 19 to May 31 of 2018, nearly 2,000 children were separated from their parents.²⁴⁶

On 26 February 2018 Ms. L, an asylum seeker from the Democratic Republic of Congo, filed a class action lawsuit against ICE, DHS, CBP, USCIS, HHS, and ORR (hereafter referred to as the Defendants) for forcibly separating her from her six year-old-daughter, citing violations of the Due Process clause of the Fifth Amendment, the Asylum Statue, and the Administrative Procedure Act.²⁴⁷ Ms. L and her daughter arrived at the U.S. through a legal Port of Entry near San Diego, California. Ms. L told CBP that her and her daughter were seeking asylum.²⁴⁸ Ms. L was interviewed by an asylum officer and passed the credible fear interview, making her eligible for release from detention on parole. Instead, Ms. L was taken to a detention centre in San Diego, and her daughter was sent to

²⁴¹ WRC, Letter to DHS, ‘Re: The Separation of Family members Apprehended by or Found Inadmissible while in U.S. Customs and Border Protection (CBP) Custody at the U.S. Mexico Border.’

²⁴² Ibid.

²⁴³ U.S. Customs and Border Protection, ‘National Standards on Transport, Escort, Detention, and Search,’ D.C., 2015.

²⁴⁴ WRC, Letter to DHS.

²⁴⁵ Calculated with statistics from Kandel, 2015 and United States Customs and Border Patrol Statistics, *Southwest Border Migration FY2018*, 2018\

²⁴⁶ U.S. Customs and Border Protection, ‘National Standards on Transport, Escort, Detention, and Search.’ 2015 <https://www.cbp.gov/document/directives/cbp-national-standards-transport-escort-detention-and-search> (accessed 20 July 2019)

²⁴⁷ *Ms. L vs. ICE* (2018) Case No. ‘18CV0428 DMS MDD. <https://www.aclu.org/legal-document/ms-l-v-ice-complaint> (accessed 20 June 2019).

²⁴⁸ *Ms. L vs. ICE* (2018).

an ORR facility in Chicago.²⁴⁹ When CBP separated Ms. L from her daughter, her daughter was screaming and crying not to be taken from her mother.²⁵⁰ Ms. L was neither accused of nor found to be an unfit parent.²⁵¹ Plaintiffs argued that forcibly separating a parent and child without justification or a hearing violated the Due Process Clause of the Fifth Amendment.²⁵² Under the Fifth Amendment, Ms. L and her daughter have a liberty interest to maintain family unity.²⁵³ Ms. L and her daughter were reunited after five months, during which they were only permitted to speak on the phone on six occasions.²⁵⁴

On 9 March 2018 the complaint was amended to include Ms. C and her son.²⁵⁵ Unlike Ms. L, Ms. C and her son entered the U.S. illegally between ports of entry.²⁵⁶ Ms. C and her son were apprehended by CBP, and told the Border Patrol agents they were seeking asylum.²⁵⁷ Ms. C passed her credible fear screening but was charged with illegal entry and was sent to a detention centre.²⁵⁸ Her 14 year-old-son was subsequently designated as an unaccompanied minor and was sent to an ORR facility²⁵⁹. Ms. C was convicted of misdemeanor illegal entry and completed her 25-day criminal sentence.²⁶⁰ After serving her sentence, she was returned to immigration custody while awaiting her removal proceeding and asylum claim but was not reunited with her son.²⁶¹ Ms. C never faced any allegations of being unfit of posing a danger to her child.²⁶² After eight months of separation, Ms. C and her son were reunited.²⁶³

²⁴⁹ *Ms. L vs. ICE* (2018).

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ms. L vs. ICE* (2018) Case No. 18-cv-00428-DMS-MDD, <https://www.aclu.org/legal-document/ms-l-v-ice-amended-complaint> (accessed 21 July 2019).

²⁵⁶ *Ms. L vs. ICE* (2018) Case No. 18-cv-00428-DMS-MDD.

²⁵⁷ *Ms. L vs. ICE* (2018).

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

On 9 March, Plaintiffs also motioned for a class certification for similarly situated individuals.²⁶⁴ On 6 June 2018 the court found that separating parents from their children, without any determination that the parent was unfit or a danger to the child, was a violation of the Fifth Amendment due process clause.²⁶⁵ The Supreme Court as well as the Ninth Circuit have, “repeatedly and consistently,” found that all persons physically on U.S. soil, regardless of their status, have constitutional rights.²⁶⁶ The judges cited *Quilloin v. Walcott* (1978) as well as *Troxel v. Granville* (2000) as evidence that it is well established that the Fifth Amendment “liberty” clause includes a right to family.²⁶⁷ The court ultimately found that the conduct of the government violated the Plaintiffs’ right to family integrity. The Judge presiding over the case, Judge Dana Sabraw, concluded that,

“These allegations sufficiently describe government conduct that arbitrarily tears at the sacred bond between parent and child, and is emblematic of the ‘exercise of power without any reasonable justification in the service of an otherwise legitimate governmental objective.’”²⁶⁸

Judge Sabraw agreed with the Plaintiffs’ claim that, “a policy of family separation to serve ‘ulterior law enforcement goals’ admittedly would be ‘antithetical to the child welfare values’ imposed on government actors by the TVPRA.”²⁶⁹ Judge Sabraw expressed concern that the government was using the practice of family separation to deter further migration into the U.S. She was especially concerned that this practice was being used on asylum seekers; she explained why asylum seekers were of particular concern in regards to family separation:

“Plaintiffs allegedly came to the United States seeking shelter from persecution in their home countries, and are seeking asylum here. For Plaintiffs, the government actors responsible for the ‘care and custody’ of migrant children have, in fact, become their persecutors.”²⁷⁰

²⁶⁴ Ibid.

²⁶⁵ *Ms. L vs. ICE* (2018) pp.13-23, <https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-part-and-denying-part-defendants-motion-dismiss> (accessed 20 July 2019).

²⁶⁶ *Ms. L vs. ICE* (2018) pp.13-14.

²⁶⁷ *Ms. L vs. ICE* (2018) pp.13-14.

²⁶⁸ *Ms. L vs. ICE* (2018),p.23

²⁶⁹ *Ms. L vs. ICE* (2018),p. 22

²⁷⁰ *Ms. L vs. ICE* (2018),p. 22

On June 26, 2018 the court approved the Plaintiff's motion for class certification and preliminary injunction. The court certified the class as:

All adults who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.”²⁷¹

For this class of individuals, the court stated that there was sufficient legal basis to claim that separation while a parent is contesting their removal, without first determining that the parent is unfit or presents a danger to their child, is a due process violation of the Fifth Amendment.²⁷² The court noted that the Ninth Circuit has consistently found that separating families is an “irreparable harm,” and thus class members were eligible for injunctive relief.²⁷³ The court ordered the Defendants and their employees to end the practice of detaining class members in DHS custody apart from their minor children and to reunify all class members with their minor children.²⁷⁴ The government was ordered to reunite children under five within two weeks and children between five and seventeen within 30 days, unless a determination was made that the parent is unfit or poses a danger to the child.²⁷⁵

After the June 26, 2018 court order, ORR initially identified 2,737 children and later updated the number to 2,816 children in their care.²⁷⁶ However, the total number of separated children is unknown.²⁷⁷ In 2018, DHHS reported that between May 5 and June 9

²⁷¹ *Ms. L vs. ICE* (2018), p.5

²⁷² *Ms. L vs. ICE* (2018),

²⁷³ *Ms. L vs. ICE* (2018), p.3 <https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-plaintiffs-motion-classwide-preliminary-injunction> (accessed 29 July 2019)

²⁷⁴ *Ms. L vs. ICE* (2018).

²⁷⁵ *Ms. L vs. ICE* (2018).

²⁷⁶ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ *Staff Report, U.S. House of Representatives*, 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf> (accessed 20 July 2019)

²⁷⁷ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ 2019; K. A. Larin and R. Gambler, ‘Unaccompanied Children: Agency Efforts to Identify and Reunify Children Separated from Parents at the Border,’ *Testimony before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives*, 7 February 2019, <https://www.gao.gov/assets/700/696788.pdf> (accessed 20 July 2019); U.S. Department of Health and Human

approximately 2,342 children were forcibly separated from their parents under the zero-tolerance policy.²⁷⁸ ORR notes the *Ms. L* class of 2,816 separated children does not include the thousands of other separated children that ORR had previously released to sponsors.²⁷⁹ While the total number of separated children is unknown, HHS officials have confirmed that “thousands more” children than the 2,816 identified were separated from their parents or legal guardians.²⁸⁰ Separated children not included in the 2,816 statistic were not required to be reunited with their parents; the court order only required that the 2,816 identified children be reunited.²⁸¹ Thus, it is unknown if these children who were released to sponsors were reunited with their parents or remain separated.

In response to public outrage, Trump signed executive order (EO) “Affording Congress on Opportunity to Address Family Separation” to keep family units detained together on June 20, 2018.²⁸² The EO instructed DHS to keep families detained together during their criminal or immigration proceedings to the extent that the law allows.²⁸³ While the EO keeps families together, it interferes with children’s right to personal liberty as children remain in detention.²⁸⁴ Additionally, this EO has not ended all family separations nor has it reunified all families separated by the policy. As of October 2018, 125 children had been permanently separated from their parents; their parents were deported back to

Services, Office of Inspector General, ‘Separated Children Placed in Office of Refugee Resettlement Care,’ HHS OIG Issue Brief, OEI-BL-18-00511, January 2019.

<https://oig.hhs.gov/testimony/docs/2019/maxwellUC-020719.pdf>

²⁷⁸ Kandel, 2019.

²⁷⁹ U.S. Department of Health and Human Services, Office of Inspector General, “Separated Children Place in Office of Refugee Resettlement Care,” HHS OIG Issue Brief, OEI-BL-18-00511, January 2019

<http://cdn.cnn.com/cnn/2019/images/01/17/oei-bl-18-00511.pdf>

²⁸⁰ U.S. Department of Health and Human Services, Office of Inspector General, “Separated Children Place in Office of Refugee Resettlement Care,” HHS OIG Issue Brief, OEI-BL-18-00511, January 2019.

²⁸¹ Larin and Gambler, ‘Unaccompanied Children: Agency Efforts to Identify and Reunify Children Separated from Parents at the Border,’ 2019.

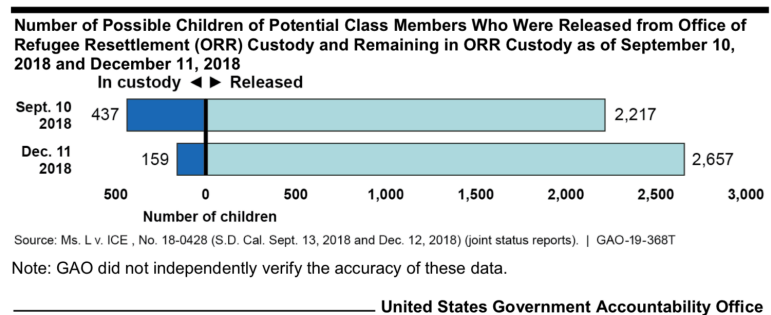
²⁸² President Donald Trump, ‘Executive Order: Affording Congress an Opportunity to Address Family Separation,’ 20 June 2018, <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/> (accessed 20 July 2019).

²⁸³ President Donald Trump, ‘Executive Order: Affording Congress an Opportunity to Address Family Separation,’ 2018.

²⁸⁴ President Donald Trump, ‘Executive Order: Affording Congress an Opportunity to Address Family Separation.’

their country of origin and the children decided to pursue their asylum claim in the U.S.²⁸⁵ In July 2019, Ann Maxwell, the Assistant Inspector General of DHHS, told Congress: “ORR has continued to receive children who have been separated since the June Court order, and DHS has provided limited information to ORR about those separations.”²⁸⁶ While the government is able to separate children from parents if they are unfit or pose a danger to the child, DHS has not provided this information to ORR.²⁸⁷ Despite the court order ending family separations, the administration has separated over 900 more children between 28 June 2018 and 29 June 2019.²⁸⁸

Figure 4.²⁸⁹



In February 2019, the Committee on Oversight and Reform subpoenaed documents from the DOJ, DHS, and DHHS relating to the separations.²⁹⁰ The report by the Committee concluded that “The Trump Administration’s child separations were more harmful, traumatic, and chaotic than previously known.”²⁹¹ Of these 2,648 children, at least 18 were under two years old and were kept apart from their parents between 20 days and 6 months.²⁹² As of May 2019, more than 700 children had been separated from their parents

²⁸⁵ ACLU, ‘Family Separation: By the Numbers.’

²⁸⁶ A. Maxwell, ‘HHS-OIG Oversight of the Unaccompanied Alien Children Program,’ *Testimony Before the United States House Committee on Oversight and Reform*, 12 July 2019, <https://oig.hhs.gov/testimony/docs/2019/maxwellUC-020719.pdf> (accessed 29 July 2019).

²⁸⁷ Maxwell, ‘HHS-OIG Oversight of the Unaccompanied Alien Children Program,’ 2019.

²⁸⁸ *Ms. L v. ICE*, (2019)p. 2 <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi>

²⁸⁹ Larin and Gambler, 2019.

²⁹⁰ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ *Staff Report U.S. House of Representatives*, 2019,

²⁹¹ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ *Staff Report U.S. House of Representatives*, 2019.

²⁹² *Ibid.*

since June 2018.²⁹³ Of the 2,648 separated children, ICE has deported 545 parents, of which at least 158 were deported without their children.²⁹⁴ As of February 2019, at least 30 children separated under the zero-tolerance policy remained in ORR custody.²⁹⁵

The Committee found that many child separations were unnecessary as the parents were not criminally prosecuted, but instead charged with misdemeanor improper entry and then returned to immigration detention pending removal.²⁹⁶ The Committee report found that some parents who were separated from their children were never sent to criminal custody and some parents only remained in custody for a day or two.²⁹⁷ The Committee concluded, “These child separations were not required by law and were not in the best interest of the children. Instead, the policy of separating children from their parents appears to be a deliberate, unnecessary, and cruel choice by President Trump and his Administration.”²⁹⁸

The purpose of criminally prosecuting all illegal entries was to deter immigration; it was not for the safety of the children. Attorney General Jeff Sessions stated that enforcing immigration laws should, “aim to accomplish the goal of deterring first-time improper entrants.”²⁹⁹ Other administration officials have specifically cited the zero-tolerance policy and family separations as a tool to deter illegal immigration. When Secretary of Homeland Security John F. Kelly was asked in an interview in 2017 if DHS was planning on separating children from their parents, he responded, “Yes, I am considering, *in order to deter* more movement along this terribly dangerous network.”³⁰⁰ In 2018, Kelly asserted in

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Attorney General Jeff Sessions, ‘Memorandum for all Federal Prosecutors: Renewed Commitment to Criminal Immigration Enforcement,’ *Office of the Attorney General*, 11 April 2017, <https://www.justice.gov/opa/press-release/file/956841/download> (accessed 20 July 2019).

³⁰⁰ Diaz, ‘Kelly, DHS is considering separating undocumented children from their parents at the border,’ *CNN*, 7 March 2017, (emphasis added)

an interview that family separation “would be a tough deterrent. A much faster turnaround on asylum seekers.”³⁰¹ When the interviewer asked Kelly if it was “cruel and heartless to take a mother away from this children,” his response was:

“I wouldn’t put it quite that way. The children will be taken care of—put into foster care *or whatever*. But the big point is that they elected to come illegally into the United States and this is a *technique* that no one hopes will be used extensively or for very long.”³⁰²

This “technique” is tearing children, many under the age of five, from their parents with no plan or system to reunited them.³⁰³

2.2 Memorandum of Agreement

More than half (66%) of the service providers I interviewed identified the MOA as a serious challenge to children’s right to family. Due to fear or being arrested or deported, fewer sponsors are coming forward, thus perpetuating family separation. Additional studies and reports support my findings. During November and December of 2018, the Women’s Refugee Council (WRC) and the National Immigrant Justice Centre (NIJC) surveyed individuals involved in the sponsorship process to assess the impacts of the MOA.³⁰⁴ They found that sponsors were withdrawing from the vetting process and fewer sponsors were willing to come forward for fear that ICE would obtain their information and would arrest them.³⁰⁵ In 97% of these cases, sponsors who did not come forward or withdrew from the process did so because of a fear related to immigration status of the sponsor, household member, or another family member.³⁰⁶ Sponsors and family members are forced to choose between the child’s safety and the safety of themselves.³⁰⁷ This is this is a decision no family should ever have to make and it creates a new trauma for both parent and child.

³⁰¹ Diaz, ‘Kelly, DHS is considering separating undocumented children from their parents at the border,’

³⁰² Diaz, ‘Kelly, DHS is considering separating undocumented children from their parents at the border’ ; emphasis added

³⁰³ *Ms. L vs. ICE*

³⁰⁴ NIJC and WRC, ‘Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement,’ 2019.

³⁰⁵ NIJC and WRC, ‘Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement,’ 2019.

³⁰⁶ Ibid.

³⁰⁷ Interview # 1, 16 May 2019.

Their fear of apprehension is well-founded; 42% of respondents to the WRC-NIJC survey knew of specific cases where CBP and ICE arrested adults based on the information they received from ORR.³⁰⁸

In cases where sponsors do agree to come forward and provide the required information, the fingerprinting requirement has resulted in weeks and months of delay.³⁰⁹ A director of the unaccompanied children program at a non-profit in New York detailed the impact this had on children in New York: “It violates prompt reunification with family. The fingerprinting process is very lengthy; not just for the government to process the prints, but even just to get an appointment to have their fingerprints done.”³¹⁰ As a result of this lengthy process, biological parents have had to wait up to 6 months for their children to be released to them.³¹¹ In November 2018, the ACLU filed a lawsuit on behalf of six children who had been waiting between two weeks and four months for their sponsor’s fingerprints to be processed.³¹²

In December 2018, ORR announced that it would limit the fingerprint requirement to only sponsors, not all household adults.³¹³ While this a positive change to the policy, it is only a small step in the right direction. Sponsors who do not have legal status still cannot come forward without risk of arrest and deportation. Adult household members are no longer required to submit fingerprints, however they still must submit biographical data and background checks and this information is still shared with DHS. Many of the persons I interviewed reported that this policy, amongst others, had fostered a culture of fear and a distrust of the government amongst immigrants. One case manager reported, “Everything in regards to immigration has been more and more unpredictable. They get scared and ask

³⁰⁸ NIJC and WRC, ‘Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement,’ 2019.

³⁰⁹ NYCLU, ‘Under Pressure, Trump Administration Reverses Key Aspect of Policy Delaying Release of Migrant Children,’ *NYCLU*, (website) 18 December 2018 <https://www.nyclu.org/en/press-releases/under-pressure-trump-administration-reverses-key-aspect-policy-delaying-release> (accessed 14 July 2019).

³¹⁰ Interview #11, 14 May 2019.

³¹¹ NIJC and WRC, ‘Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement,’ 2019

³¹² NYCLU, ‘Lawsuit: Trump Administration Using Fingerprint Checks to Delay Release of Immigrant Children,’ *NYCLU*, (website), 6 November 2018 <https://www.nyclu.org/en/press-releases/lawsuit-trump-administration-using-fingerprint-checks-delay-release-immigrant> (accessed 14 July 2019).

³¹³ NYCLU, ‘Under Pressure, Trump Administration Reverses Key Aspect of Policy Delaying Release of Migrant Children,’ *NYCLU*, 2018.

‘what is going to happen to my family? Am I safe here? Am I going to get deported?’³¹⁴

This fear directly interferes with the family reunification process. A staff attorney at an NGO in Arizona described the situation as of May 2019:

“This policy has made it really difficult for a child to find a sponsor. I’ve had more than one case where the parent has been deported. Adults are afraid of home studies and fingerprints because many are undocumented, which means that sponsors won’t come forward because someone in the house is afraid of being detained or deported. This has an emotional toll on the children; I’ve had kids struggle with feeling abandoned or betrayed. I’ve had kids say about their parent, ‘He doesn’t want me.’”³¹⁵

Sponsors and the adult household members must choose between their own safety and the child. A case manager who conducts home studies for potential sponsors was extremely frustrated with this policy, in particular the requirement for the adult household members. She explained that most of these families are not wealthy and are living with informal roommates:

“These aren’t the kinds of roommates that you see in sitcoms like *Friends*. They often don’t share any living spaces or eat meals together. So it’s very difficult to get them to agree to submit their fingerprints or information for a background check.”³¹⁶

If any adult household member refuses to submit the required information, the child will remain in ORR custody until another sponsor is found, they are transferred to long-term foster care, or they age out of the program. This can have serious consequences for children. In one case detailed in the survey conducted by WRC and NIJC, a 17 year old child in ORR custody had a family member who would not come forward to sponsor him due to fear of retaliatory enforcement. On his 18th birthday, he was picked up by ICE and transferred to an adult detention centre.³¹⁷

³¹⁴ Interview #4, 23 May 2019.

³¹⁵ Interview #1, 16 May 2019.

³¹⁶ Interview #10, 28 May 2019.

³¹⁷ NIJC and WRC, ‘Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement,’ 2019.

3.0 Right to Personal Liberty

3.1 Zero –Tolerance and Family Separation Policy

More than half of respondents (62%) reported that the zero-tolerance policy threatened UC's right to personal liberty. The zero-tolerance policy has resulted in the increased and prolonged detention. ORR custody is detention; while some shelters are better than others, all still deprive children of their right to personal liberty.³¹⁸ I spoke with a psychologist who evaluates unaccompanied children seeking asylum and has visited shelters in several states across the U.S. He explained that any kind of detention is detrimental for kids, especially when they are separated from their parents.³¹⁹ He described the shelters as “sterile” and that many shelters were comparable to concentration camps.³²⁰ While there are safeguards in place to protect the children, he observed that often they were not followed.³²¹ Guards often used punitive approaches rather than understanding and working with the children to understand their trauma.³²² Due to the trauma these children faced in their home countries as well as the additional trauma of being separated from their parents and placed in detention, many children exhibited behavioral problems. In many shelters, guards responded by placing children in prolonged solitary confinement, placing children in restraints for several hours and physically abusing the children.³²³ Even in centres where punitive approaches are not used, children's right to personal liberty is still violated; children are unable to leave ORR custody until they are released to sponsor or turn 18.³²⁴

Under the zero- tolerance policy, children are separated from their parents, designated as “unaccompanied children,” and placed in ORR custody.³²⁵ Over 8,000 more UC were referred to ORR from DHS in FY2018 than in FY 2017.³²⁶ Between March and

³¹⁸ Interview #1, #15. 7 June 2019

³¹⁹ Interview #15, 7 June 2019

³²⁰ Ibid.

³²¹ Ibid.

³²² Ibid.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ Kandel, 2019.

³²⁶ Office of Refugee Resettlement Statistics, *Facts and Data: General Statistics*, 2019.

May 2018, the number of unaccompanied minor referrals to ORR grew by 76%.³²⁷ Children separated under the zero-tolerance policy have been held in ORR custody past the legal standard; under *Flores* and the TVPRA 2008, children are required to be released from ORR custody “without unnecessary delay.”³²⁸ As of October 2018, 291 separated children were still in ORR care and had been held in detention for an average of 154 days.³²⁹ In December 2018, 159 children of the identified 2,657 were still in ORR detention.³³⁰ Approximately 1,033 children out of 2,654 separated children were under the age of ten and sent to “tender-age” shelters.³³¹ Children were sent to 121 different ORR shelters or detention centres in 17 states throughout the U.S. Children were placed in shelters based on bed space; thus many children were sent to shelters across the country from where their parents were detained.³³²

The administration initially identified 2,648 separated children as a result of a *Ms. L* vs. *ICE*. These children are henceforth referred to as the *Ms. L* class children. On average, *Ms. L* class children spent 90 days in ORR custody.³³³ To compare, the average time for all unaccompanied children in ORR care was 60 days in 2018.³³⁴ A graph below, taken from the report from the Committee on Oversight, shows the length of time a subset of *Ms. L* separated children spent in ORR care.³³⁵

³²⁷ USCCB and LIRS, ‘Serving Separated and Reunited Families: Lessons Learned and the Way Forward to Promote Family Unity,’ 2018 https://justiceforimmigrants.org/wp-content/uploads/2018/10/Serving-Separated-and-Reunited-Families_Final-Report-10.16.18-updated-2.pdf (accessed 5 June 2019).

³²⁸ *Flores* Settlement Agreement, 1997; *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*

³²⁹ ACLU, ‘Family Separation: By the Numbers.’

³³⁰ Larin and Gambler, 2019.

³³¹ ACLU, ‘Family Separation: By the Numbers.’

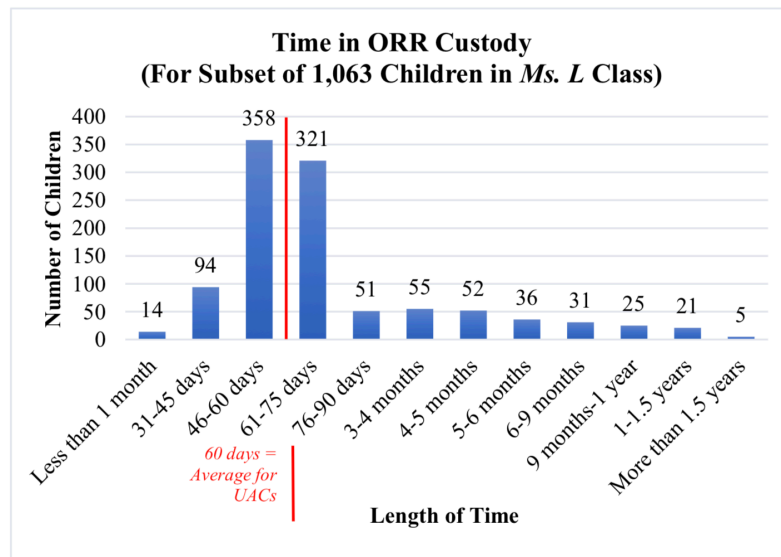
³³² ACLU, ‘Family Separation: By the Numbers.’

³³³ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ *Staff Report U.S. House of Representatives*, 2019.

³³⁴ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ *Staff Report U.S. House of Representatives*, 2019.

³³⁵ *Ibid.*

Figure 5: Time in ORR Custody



On 26 June 2018 the U.S. District Court for the Southern District of California ordered the immediate halt of the practice of family separation and the reunification of separated families.³³⁶ The administration’s response to the court order to end family separations was not to rescind the zero tolerance policy. Instead, Trump’s executive order addressing family separation ordered the Department of Defense to construct facilities that could be used for family detention.³³⁷ The EO also directed the DOJ to seek exceptions to the *Flores* Agreement 20-day legal limit that children can be held in family detention.³³⁸ When children were reunited with their parents as a result of the court order, many were placed in ICE detention with their parents past the 20-day legal limit set by the *Flores* Agreement (see, Figure 3).³³⁹ The zero-tolerance policy has resulted in thousands of children remaining in detention, whether in ORR detention or ICE detention, for periods well past the legal requirements.

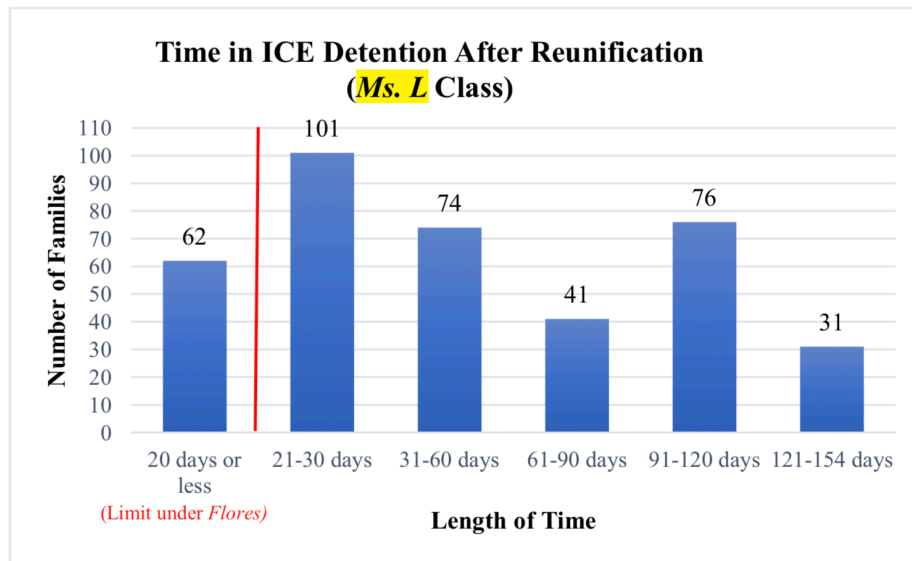
³³⁶ *Ms. L vs. ICE* (2018)

³³⁷ President Donald Trump, ‘Executive Order: Affording Congress an Opportunity to Address Family Separation,’ 20 June 2018.

³³⁸ President Donald Trump, ‘Executive Order: Affording Congress an Opportunity to Address Family Separation,’ 20 June 2018.

³³⁹ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ *Staff Report U.S. House of Representatives*, 2019.

Figure 6: Time in ICE Detention after Reunification³⁴⁰



3.2 Memorandum of Agreement between ORR and DHS

The majority of respondents (75%) stated that the MOA posed a challenge to UC's right to personal liberty. In the words of one caseworker, "Once they [DHS] had this information on potential sponsors and adult household members, it was low hanging fruit for ICE to go after them."³⁴¹ Between July and November 2018, ICE arrested 170 immigrants with the information provided by this information sharing policy.³⁴² When sponsors are detained, the children must remain in ORR custody until another sponsor is found, they are placed in long-term foster care, or the child ages out of the program and is at risk of being transferred to an adult detention centre.³⁴³ As a result, children are spending more time in detention.

³⁴⁰ Committee on Oversight and Reform, 'Child Separations by the Trump Administration,' *Staff Report U.S. House of Representatives*, 2019.

³⁴¹ Interview #10, 28 May 2019.

³⁴² USSCB, 'The ORR and DHS Information Sharing Agreement and its Consequences,' *Justiceforimmigrants*, <https://justiceforimmigrants.org/what-we-are-working-on/unaccompanied-children/orr-and-dhs-information-sharing-agreement-its-consequences/> (accessed 20 July 2019)

³⁴³ Flores Settlement Agreement, 1997; *William Wilberforce Trafficking Victims Protection Reauthorisation Act of 2008*

A leaked draft memo by administration officials indicates that this was in fact the intent of the MOA.³⁴⁴ The memo, titled “Policy Options to Respond to Border Surge of Illegal Immigration,” directed officials to “Complete the MOU between ICE and HHS to conduct background checks on sponsors of UCs and subsequently place them into removal proceedings.”³⁴⁵ This indicates that DHS was preparing to arrest sponsors once they obtained their information. Officials even admitted that the MOA policy would require “HHS to keep the UCs in custody longer,” and hoped that this would deter illegal immigration.³⁴⁶ A caseworker explained how the public frame of the administration’s policy differed greatly from the reality of its purpose and consequences:

“They way that they’ll frame it policy wise is, ‘this is in the best interest of the child.’ You want to quickly get the kids through the process and out of care—you would think. Instead there is a massive backlog and kids are stuck waiting in shelters. They are targeting families. They are turning the Office of Refugee Resettlement—which is supposed to be a social service organisation with the best interest of the child—into something else. They are twisting their policies to bend them into an enforcement mindset.”³⁴⁷

During the six months that this policy was fully implemented, the number of immigrant children held in federal custody and length of time in custody hit historic highs; 15,000 immigrant children were held for an average of three months in ORR custody.³⁴⁸ In November 2018, the New York Civil Liberties Union (NYCLU), American Civil Liberties Union, the National Centre for Youth Law, and the Morrison & Foerster law filed a class-action, civil rights lawsuit on behalf of children held in ORR custody.³⁴⁹ Plaintiffs argued that these “egregious delays” resulting from “unwarranted fingerprint checks” violated the

³⁴⁴ ‘Draft Memorandum –Policy Options to Respond to Border Surge of Illegal Immigration,’ December 2017, <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html> (accessed 20 July 2019)

³⁴⁵ ‘Draft Memorandum –Policy Options to Respond to Border Surge of Illegal Immigration,’ December 2017.

³⁴⁶ ‘Draft Memorandum –Policy Options to Respond to Border Surge of Illegal Immigration,’ December 2017,

³⁴⁷ Interview #10, 28 May 2019.

³⁴⁸ NYCLU, ‘Under Pressure, Trump Administration Reverses Key Aspect of Policy Delaying Release of Migrant Children,’ *NYCLU*, 2018.

³⁴⁹ *Duchitanga et al., vs. Lloyd et. Al.* (2018)

https://www.nyclu.org/sites/default/files/field_documents/20181106_ecf_1_class_complaint_and_petition_for_habeas_corpus_2018.pdf (accessed 20 July 2019)

TVPPRA of 2008 and the Due Process clause of the Fifth Amendment.³⁵⁰ In December 2018, ORR amended their fingerprinting policy, requiring only parents and not all adult household members to submit fingerprints.³⁵¹

As sponsors fail to come forward, children remain in custody for longer periods and are placed at greater risk of trafficking, mental health issues, further trauma and abuse, and unsafe placements.³⁵² Shelters have become so overcrowded that thousands of children have been transferred to temporary tent shelters and emergency shelters that are not licensed by child welfare authorities.³⁵³ In June 2019, the administration announced that 1,400 migrant children would be placed at Fort Still, a military base that was used as a Japanese internment camp during World War II.³⁵⁴ Additionally, the Office of Refugee Resettlement has begun to cut funding for activities not deemed necessary for the safety of children, including education, recreation, and legal aid due to budget constraints.³⁵⁵

As children are held in ORR for longer periods, they are at risk of aging out of the program.³⁵⁶ Once children turn 18, they are legally adults and are not eligible to remain in ORR care. Previously, case managers worked to find sponsors for a child so that the child would not turn 18 while in care. As finding a sponsor has become more difficult due to the MOA, many children are turning 18 while in care. While lawyers try to seek relief for children before turning 18, the backlogs in immigration court and the asylum office add to the risk of a child turning 18 before being granted relief. As a result of the zero-tolerance policy, these children, now legally adults, are viable for arrest and detention on the basis on illegal entry. In two-thirds of cases from April 2016 to February 2018, government data

³⁵⁰ *Duchitanga et al., vs. Lloyd et. Al.*, (2018)

³⁵¹ NYCLU, 'Under Pressure, Trump Administration Reverses Key Aspect of Policy Delaying Release of Migrant Children.'

³⁵² NIJC and WRC, 'Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement,' 2019.

³⁵³ G. Kates, 'Migrant children in U.S. are being held in unlicensed shelters, lawyers say,' *CBS News* (website) 23 January 2019 <https://www.cbsnews.com/news/migrant-children-in-u-s-are-being-held-in-unlicensed-shelters-lawyers-say/> (accessed 20 July 2019)

³⁵⁴ W.J. Hennigan, 'Trump Administration to Hold Migrant Children at Base that Served as WWII Japanese Internment Camp,' *Time*, 11 June 2019, <https://time.com/5605120/trump-migrant-children-fort-sill/> (accessed 20 July 2019).

³⁵⁵ Romo and J. Rose, 'Administration Cuts Education and Legal Services for Unaccompanied Minors,' *NPR*, 2019.

³⁵⁶ Interview #1, #10, #5.

shows that ICE picked up UC from ORR on their 18th birthday and transferred them to an adult detention centre.³⁵⁷

Prolonged detention can lead to further trauma and further behavioral problems, which can have a direct impact of a child's right to non-refoulement. This will be discussed further in a later section.

4.0 Right to *Non-Refoulement*

4.1 Zero –Tolerance and Family Separation Policy and Memorandum of Agreement

The zero-tolerance policy and MOA have the same consequences—prolonged family separation and prolonged detention—and these impacts have a serious effect on a child's case for asylum. The trauma inflicted by keeping children separated from their families and remaining in detention and can have serious consequences for the case for relief.³⁵⁸ Respondents consistently indicated that the zero tolerance policy and family separation (61%) as well as the increased detention and prolonged family separation resulting from the MOA (33%) posed a challenge to children's right to non-refoulement. I spoke with a psychologist who has worked with unaccompanied children since 2004, conducting mental health evaluations on detained children throughout the country and working with lawyers who file suits for immigrants who are abused in detention.³⁵⁹ He expressed that any kind of detention is bad for kids, no matter what services they are provided in the shelters.³⁶⁰ The Dr. has visited numerous shelters where children are detained, and while he said that some were better than others that these were not “summer camps” as many media outlets have stated.³⁶¹ He reported that,

“Children's experiences in detention are not good. It's like being in a concentration camp in many ways. They are sterile environments, they are not

³⁵⁷ J. Burnett, 'Migrant Youth Go From a Children's Shelter to Adult Detention on their 18th Birthday,' *NPR*, 22 February 2019, <https://www.npr.org/2019/02/22/696834560/migrant-youth-go-from-a-childrens-shelter-to-adult-detention-on-their-18th-birth> (accessed 1 July 2019).

³⁵⁸ Interview #15, 7 June 2019

³⁵⁹ Interview #15, 7 June 2019

³⁶⁰ Interview #15, 7 June 2019

³⁶¹ Ibid.

aesthetically pleasing or child friendly, the kids are given very basic food and they don't feel safe. Often they are not treated well and face discrimination.”³⁶²

Many of these kids have faced trauma in their home country, were further traumatised by being separated from their parents, and are then traumatised again by being detained.³⁶³

Children often display behavioral issues as a result of this trauma, and the response of the shelter workers and guards is not always appropriate.³⁶⁴ The Dr. explained,

“The workers often use punitive approaches rather than understanding and using a trauma-based approach. It leads to a vicious cycle—when a child acts out and they are met with punitive measures, they are further traumatised, and this leads to increased bad behavior.”³⁶⁵

The Dr. cited examples of children being placed in solitary confinements for hours, being kept in restraints for several hours, of a teacher punching a child in the face, and guards using tasers on children.³⁶⁶ He explained that guards often were not understanding of behavior caused by trauma:

“I had one case where a boy had been abused by his father in his home country. He told me that the way one of the guards spoke to him reminded him of his father and this led him to act out. The guard sees it as aggression and that the child needs to be punished, but the child has PTSD from his prior trauma and the guard is his trigger.”³⁶⁷

This trauma can have serious consequences on a child's right to non-refoulement. In order to be granted relief, children must prove past persecution by sharing their experiences. This can be difficult for any child to put into words and significantly more difficult for traumatised children.³⁶⁸ One lawyer who represents unaccompanied children reported that it can take up to eight or nine sessions for a child to tell him their story.³⁶⁹ Another lawyer explained why this attorney-client relationship is so important: “If they

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Interview #3. 13 May 2019

don't reveal the things that happened to them that could qualify for them for asylum, they could be deported without ever having a fair shot.”³⁷⁰ A child who has experienced trauma and is suffering from mental health consequences is even more unlikely to properly recall their past experiences to prove they qualify for relief and is more likely to have behavioral outbursts.³⁷¹ For the few fortunate children who have legal representation, lawyers can help children tell their story and can try to get a mental health professional to explain that their behavior is a result of their trauma.

Unfortunately, very few children have access to legal services and mental health evaluations. It is rare that a child without legal counsel is able to make a case for asylum; according to EOIR data, 88.2% of children who did not have legal representation were ordered removed.³⁷² These children fled violence and trauma in their home country, are further traumatised in the U.S. by this policy, and face potential future trauma if they fail to open up about their past.

Overall, detention has a significant impact on a child's right to non-refoulement. Children in prolonged detention are more likely to request voluntary departure, even if it not in their best interest, because they can no longer handle detention.³⁷³ If their parents or family members were deported as a result of the MOA, they may want to be returned to their country to reunite with their family, even if they are reunited in a country where they could face persecution. Children who do have family members in the U.S., but who are afraid to come forward as sponsors, may choose voluntary departure over being placed in foster care with strangers.³⁷⁴

In the next section, I will discuss how the administrations policies regarding the immigration court system have failed to handle the increased number of cases and how these policies violate children's right to non-refoulement.

³⁷⁰ Interview #11

³⁷¹ Interview #15

³⁷² Kandel, 'Unaccompanied Alien Children: An Overview,'

³⁷³ Interview # 15, #14 6 June 2014

³⁷⁴ interview # 3

4.2 Judicial Changes to EOIR

4.2.1 Introduction of Quotas and Deadlines

Several respondents (38%) reported that production quotas and time-based deadlines on immigration judges threatened due process and children's right to non-refoulement. Respondents reported this policy has stripped judges of the freedom to control their docket, has made the court even less child-friendly and has placed children who are eligible for protection in danger of being deported.³⁷⁵ Judges are forced to rush through cases that require complex, lengthy legal analysis and quickly issue decisions that can have life-or-death consequences for asylum seekers.³⁷⁶

Over a decade ago, the EOIR agreed that performance evaluations would not be based on number or time based productions standards, as this would interfere with a person's right to a full and fair hearing.³⁷⁷ Judge Tabaddor testified before the Senate Judiciary Committee regarding this new policy change, "The havoc that this decision will wreak cannot be understated or underestimated."³⁷⁸ New policies should increase the efficiency of the court, not wreak havoc. Judge Tabaddor argued that immigration judges handle diverse caseloads and that a singular case completion quota and deadlines are "inconsistent with the Department's professed commitment to due process."³⁷⁹ She further explained how this policy encroached on judge's authority to make independent decisions:

"Immigration judges taken an oath of office to be impartial decision makers bound by the Constitution and laws of the United States. Immigration Judges must make decisions based on facts and the law of the case. To impose a 95 percent rule that all trial must be initiated and completed on a single initial trial date is in direct conflict with the oath of office, divorced from the realities of our

³⁷⁵ Interview # 1, #3, #11, #12, #13.

³⁷⁶ Interview # 1, #3, #11, #12, #13.

³⁷⁷ Tabaddor, 'Statement of Judge A. Ashley Tabaddor, President of National Associate of Immigration Judges'

³⁷⁸ Tabaddor, 'Statement of Judge A. Ashley Tabaddor, President of National Associate of Immigration Judges'

³⁷⁹ Ibid.

day to day working conditions, and is not only indefensible but counterproductive.”³⁸⁰

Cases in which children are applying for asylum are complicated and lengthy; placing quotas and deadlines on judges poses a serious challenge for children’s ability to prove a need for protection. All persons deserve a fair trial in an independent court and impartial judge. Judges now face a conflict of interest in “honouring her oath of office or risking her source of livelihood.”³⁸¹ Judges who do not meet the “satisfactory” requirements may be terminated from their position.

One recently retired immigration judge agreed to answer a few of my questions. I asked how the Trump administration impacted his worked with unaccompanied children. He responded that,

“The pressure for Immigration Judges to quickly conclude proceedings and return people to their homelands at the expense of Due Process is a constant. There is no exception for children. It is all about statistics with minimal human considerations.”

He also stated that “an unsympathetic legal system interested primarily in statistics” was one of the greatest challenges that children face in immigration court.³⁸²

The introduction of quotas and deadlines interacts with further policy changes Sessions has made to the immigration court to further increase barriers to relief. Sessions has made pathways to relief more difficult, as the administration believes that asylum is a loophole exploited by immigrants. These policies make cases for relief more difficult to prove and judges no longer have the time to hear these cases. The immigration judge (IJ) explained, “With the pressure on IJs to quickly hear and decide cases it is sometimes easier to deny relief and order removal.” In the following sections, I discuss three judicial decisions that further limit the independence of immigration judges and threaten children’s right to non-refoulement.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Interview #16, 3 June 2019

4.2.2 *Matter of A-B*

More than half (77%) of respondents stated that Attorney General Jeff Session's decision in the *Matter of A-B* in June 2018 was one of the biggest challenges to unaccompanied children's right to non-refoulement. Respondents throughout the US indicated that the *Matter of A-B* decision threatens children's right to non-refoulement. In some states, the impact has been greater than others. An attorney in New York stated that while he has not had a chance yet to face this issue in court, the skepticism towards any kind of claim based on community violence was a one of the greatest challenges for children seeking asylum.³⁸³ In California, an attorney reported that although it was still possible for a judge to grant relief on these grounds, judges and asylum officers were issuing fewer approvals of domestic violence and gang violence.³⁸⁴ In Orlando, Florida an attorney has found that it was now impossible for children to be granted asylum based on domestic violence or gang violence. The attorney explained the situation in Orlando:

"The standard is now higher to prove that the government is unable or unwilling to control the persecutors. Domestic violence and gang issues are now seen as private concerns, as persecution that is not done by the government. We used to be able to argue that the government doesn't address domestic violence issues, but now they are claiming that their governments are doing something to solve those issues—and this is not true. All social groups in regard to domestic violence are no longer a valid social group here."³⁸⁵

Prior to *Matter of A-B*, this lawyer was able to secure asylum for children based on social groups who experienced domestic violence, such as "Guatemalan girls viewed as property" or "Guatemalan children unable to leave family relationship."³⁸⁶ After *Matter of A-B*, this attorney has not had won a single case for asylum based on domestic violence.³⁸⁷

In New Orleans, an attorney reported that while the asylum office was still open to the argument, the court was no longer considering domestic violence or gang violence as

³⁸³ Interview #11.

³⁸⁴ Interview #1

³⁸⁵ Interview #2

³⁸⁶ Interview #2

³⁸⁷ Ibid

grounds for asylum. Prior to the *Matter of A-B* decision, he estimated that the court had a 70% grant rate for domestic or gang violence claims.³⁸⁸

Similarly, two attorneys reported the impact of this decision has caused for children seeking asylum in Texas:

“Judges do not treat gang violence as a ground for asylum. Several years ago, asylum officers in specific regions were more likely to grant gang-based asylum cases. However, even at the asylum office level, those cases have become more difficult to win.”³⁸⁹

The current administration’s disbelief of these claims is especially concerning for children originating the Northern Triangle. An attorney from New York expressed his concern in regards to the administrations stance on gang violence:

“These are not small street gangs. These are transnational criminal organisations. They are similar to ISIS in how they take over a territory, set up a rogue state, and charge taxes. This unwillingness to see these gangs for what they really are was a problem that was brewing under Obama and has come to fruition under Trump.”³⁹⁰

Unaccompanied children escaping from domestic or gang violence are now at a greater risk of being deported back to their country where they face possible persecution. Attorneys are struggling to win asylum cases for children who are in need of protection. In the words of one lawyer, “our level of stress has skyrocketed. We are dealing with the overarching worry that our clients will be deported. It’s happening—more kids are being ordered removed.”³⁹¹ If attorneys are struggling to prove persecution based on community based violence, it is difficult to imagine that the children without legal representation can prove persecution on this ground. Unfortunately, most children do not have legal

³⁸⁸ Interview #13

³⁸⁹ Interview #8, #9 20 May 2019

³⁹⁰ Interview #11.

³⁹¹ Interview #3

representation and the Trump administration has begun to cut funding for legal programs for unaccompanied children.³⁹²

The effects of the *Matter of A-B* decision will range depending on the particular judge or asylum officer. In general, respondents reported that judges and asylum officers were much more likely to treat domestic violence or gang violence as grounds for asylum prior to *Matter of A-B*.³⁹³ Former IJ reported in the interview that because IJs were under pressure to quickly decide cases to meet the quota deadline, it sometimes was easier to deny relief instead of taking the time to fully evaluate asylum on a domestic or gang violence claim.³⁹⁴ Asylum officers tend to grant relief at higher rates than immigration judges, however rates of relief granted are still very low. In FY 2016, 66.3% of children who applied for asylum with USCIS were granted relief.³⁹⁵ Two years later, this rate has dropped significantly; in FY 2018, only 42% of asylum applications issued by children were approved by USCIS.³⁹⁶ USCIS cannot order deportation; when relief is not approved, the case continues in immigration court. Under the Trump administration, rates of removal orders in juvenile court are increasing; in FY2016, 12,528 unaccompanied children were ordered removed, compared with 76,018 children ordered removed in FY2018.³⁹⁷ The rate of asylum denials is also increasing; in FY2016, 54.6% of asylum cases were denied compared to 65% in FY 2018 and 68.8% in FY 2019.³⁹⁸

This decision is one of many changes to the immigration court system that interferes with children's right to non-refoulement. The next section will discuss another challenge the administration has posed for children.

³⁹² Romo. and Rose, 'Administration Cuts Education and Legal Services for Unaccompanied Minors,' *NPR*, 5 June 2019, <https://www.npr.org/2019/06/05/730082911/administration-cuts-education-and-legal-services-for-unaccompanied-children> (accessed 20 July 2019)

³⁹³ Interview #2, 3, #4, #6, #7, #8, #9, #10, #11, #12, # 13, #14, #15, #16, #17, #18, #19;

³⁹⁴ Interview # 16

³⁹⁵ USCIS, Bureau of Citizenship and Immigration Services, 'Refugees, Asylum and Parole System, MPA and PRL Report' 2016 <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/MPAandPRLReport.pdf> (accessed 29 July 2019)

³⁹⁶ USCIS, Bureau of Citizenship and Immigration Services, 'Refugees, Asylum and Parole System, MPA and PRL Report' 2016

³⁹⁷ TRACImmigration Statistics, *Juveniles—Immigration Court Deportation Proceedings*, 2019,

³⁹⁸ TRACImmigration Statistics, *Asylum Decisions*, <https://trac.syr.edu/phptools/immigration/asylum/>

4.2.3 *Matter of Castro-Tum and Matter of L-A-B-R*

The majority (88%) of respondents broadly identified judicial changes and 27% of service providers specifically noted that the end of administrative closures and Administrative closures and continuances allowed judges to control their docket and prioritise cases. As judges are now pushed to close every case on their docket, the backlog has increased from 629, 051 pending cases in 2016 to 908, 552 pending cases in 2019.³⁹⁹

The DOJ has previously recognised that judges needed the freedom to maintain their docket and prioritise cases to ensure that each case had adequate time to be heard. Prior to these administrations' policies, immigration judges could exercise discretion in granting children a continuance or administrative closure, which would allow children more time to find legal representation and properly develop their case with their lawyer. This was a positive practice that protected children from being forced to face court alone, especially in cases where the "last-in, first-out" policy is applied. The decision to strictly limit continuances and administrative closures directly interferes with a child's right to a full and fair hearing and increases the risk that they will be returned to a place of persecution.⁴⁰⁰

According to TRAC data, 5,600 unaccompanied children had their case closed for "other closures" and 90 had their cases closed due to prosecutorial discretion in 2016.⁴⁰¹ The "other closures" category includes when a judge decides not to remove the child for unspecified reasons, the case is administratively closed, or the child is granted temporary protected status.⁴⁰² To compare, only 1,715 children had their case closed for "other closures" and only 6 cases were closed due to prosecutorial discretion in 2019.⁴⁰³ This decrease in closed cases has been accompanied by a significant increase in the number of removals. Over the course of fiscal years 2014-2016, approximately 40,264 unaccompanied

³⁹⁹ TRACImmigration, 'Immigration Court Backlog Tool,'

https://trac.syr.edu/phptools/immigration/court_backlog/ (accessed 20 July 2019)

⁴⁰⁰ V. Nielson, 'DOJ requires immigration judges to meet quotas,' <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas> (accessed 20 July 2019).

⁴⁰¹ TRACImmigration Statistics, *Juveniles—Immigration Court Deportation Proceedings*, 2019, <https://trac.syr.edu/phptools/immigration/juvenile/> (accessed 29 June 2019).

⁴⁰² TRACImmigration Statistics, *Juveniles—Immigration Court Deportation Proceedings*, 2019.

⁴⁰³ Ibid.

children were ordered removed.⁴⁰⁴ From Trump's inauguration in 2017 through April 2019, approximately 111,000 children have been denied asylum and ordered removed.⁴⁰⁵

An attorney who has worked with unaccompanied children for several years in three states across the U.S. expressed that the limit on continuances posed a serious threat for children pursuing a Special Immigrant Juvenile Visa (SIJ).⁴⁰⁶ Only 10,000 SIJ visas are issued every year and each country has a cap of about 700. In March 2019, approximately 33,000 SIJ visas were pending and in 2018 only 5,000 SIJ visas were granted. The attorney explained children were now waiting up to 5 years to receive an SIJ visa and that the SIJ backlog would continue extending for years. Previously, judges granted continuances based on a pending SIJ application and whether or not the case was likely to be adjudicated within the next few years. However, as the SIJ backlog increases and judges are encouraged to close cases, judges are more likely to issue a deportation order. The attorney explained:

“USCIS has jurisdiction over the SIJ application. Meanwhile, unaccompanied children have court hearings and can ask for a continuance while they wait for USCIS to grant their visa. The court does not issue the SIJ visa and cannot continue the case forever based on something that it has no control over. In order to move cases along, the judge has to resolve the case. Judges are going to start issuing deportations just to make sure they reach their quotas and deportation goal.”⁴⁰⁷

Sessions policies work together to make pathways for relief increasingly difficult for children. As the administration views asylum and SIJ as “loopholes”, these policies are used in order to limit forms of relief and increase orders of deportation.⁴⁰⁸ Sessions' policies interfere with judicial independence and threaten due process rights.

5.0 Conclusion

This chapter has answered my research question: How have the Trump administration's policies and practices contributed to the situation of unaccompanied minor children in regards to their right to family, right to personal liberty, and right to *non-*

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid

⁴⁰⁶ Interview #12, 30 May 2019

⁴⁰⁷ Interview #12

⁴⁰⁸ Interview #12; Interview 11.

refoulement? Using my primary and secondary data as evidence, I have shown how these policies have impacted these rights of unaccompanied children. The next chapter reiterates my research questions and answers each individually based on my findings analyzed alongside the national and international obligations the U.S. has to the rights of unaccompanied children.

Chapter VI: Conclusion

In this chapter, I will refer to my previously discussed findings to answer my research questions: How have the Trump administration's policies and practices contributed to the situation of unaccompanied minor children in regards to their right to family, right to personal liberty, and right to *non-refoulement*? Are the administrations' policies in accordance with national law in regards to these three rights? Are the administrations' policies in accordance with international law in regards to these three rights?

1.0 How have the Trump administration's policies and practices contributed to the situation of unaccompanied minor children in regards to their right to family, right to personal liberty, and right to *non-refoulement*?

1.1 Right to Family

The Trump administration's zero-tolerance policy and Memorandum of Agreement between DHS and ORR have facilitated and prolonged family separation. As a result of the zero-tolerance policy, thousands of children were separated from their parents when they were criminally prosecuted for illegal entry and thus were rendered unaccompanied. In combination with the zero-tolerance policy to arrest and deport all illegal immigrants, the MOA has discouraged parents from coming forward to sponsor their children, leaving children in ORR care and separated from their families.

1.2 Right to Personal Liberty

The zero-tolerance policy and MOA have resulted in greater numbers of unaccompanied children being detained for longer periods of time. In FY2018, the average time spent in ORR care was 60 days compared to an average of 34 days in FY2015.⁴⁰⁹ Additionally, there are reports of poor conditions, including insufficient mental health services and physical abuse in shelters that house thousands of unaccompanied children.⁴¹⁰ Shelters licensed to hold children have become so overcrowded that "temporary influx"

⁴⁰⁹ Kandel, 'Unaccompanied Alien Children: An Overview,' *Congressional Research Service*, 18 January 2017; Office of Refugee Resettlement Statistics, *Facts and Data: General Statistics*, 2019.

⁴¹⁰ M. Jordan, 'Trump Administration to Nearly Double Size of Detention Center for Migrant Teenagers,' *The New York Times*, 15 January 2019, <https://www.nytimes.com/2019/01/15/us/migrant-children-shelter-tent-city-tornillo-homestead.html> (accessed 2 April 2019)

shelters are being used to detain children. The administration's policies have placed greater number of children in detention and have prolonged the time spent in detention, often in inappropriate placements.

1.3 Right to *Non-refoulement*

The prolonged family separation and detention of unaccompanied children resulting from the zero-tolerance policy and MOA pose a threat to their right to *non-refoulement*; the trauma inflicted by keeping children separated from their families and remaining in detention and can have serious consequences for a case for relief. Prolonged detention and family separation can lead to long term psychiatric and physical symptoms, which can make it more difficult for a child to discuss their prior persecution, which is necessary to prove their need for protection. The judicial changes to the EOIR also make it significantly more difficult for a child to receive relief. These policies have stripped judges of the freedom to control their docket, have made the court even less child-friendly and have placed children who are in need of protection in danger of being deported.

2.0 Are the administrations' policies and practices in accordance with national law in regards to these three rights?

2.1 Right to Family

The family separations resulting from the Trump Administration's zero-tolerance policy and the MOA are not in accordance with national law and both practices have been challenged in court. Court cases *Quilloin v. Walcott* (1978) as well as *Troxel v. Granville* (2000) have established that the constitutional "liberty" clause includes a right to family integrity.⁴¹¹ *Troxel v. Granville* found that parents have a right to the custody and care of their child and that the constitution protected parents from the government intruding on this liberty.⁴¹² Under the *Flores* agreement, children are to be released without unnecessary delay to a parent or sponsor.⁴¹³ The court case regarding the MOA is still pending and

⁴¹¹ *Ms. L v. ICE*

⁴¹² *Troxel v. Granville*, 530 U.S. 57 (2000)

⁴¹³ *Ibid.*

challenged this practice prolonging family separation, claiming it violates *Flores* and TVPRA requirements to release children “without unnecessary delay.”⁴¹⁴

In 2018, a federal judge found that the practice of separating families without cause was a violation of the due process clause of the Fifth Amendment and ordered the government to reunite the families. The court ordered that the 2,816 children be reunified with their parents before 26 July 2018. More than a year later, 30 children remain in ORR custody and thus separated from their families.⁴¹⁵ Several hundred other children were unable to be reunified with their parents as they had already been deported before the court injunction.⁴¹⁶ Despite this ruling, 900 more children have been separated from their parents as of 29 June 2019.⁴¹⁷

The Trump administration argued that the family separations were a result of “enforcing immigration laws” by prosecuting all persons who crossed the border illegally. Judge Sabraw found that the decision in *Rodriguez*, 715 F.3d at 1146 which stated, “While ICE is entitled to carry out its duty to enforce the mandates of Congress, it must do so in a manner consistent with out constitutional values” applied in this situation.⁴¹⁸ When Judge Sabraw issued her decision to grant the preliminary injunction on 26 June 2019 she reiterated that,

“the constitutional liberty interest ‘of parents in the care, custody, and control of their children[,]’ which ‘is perhaps the oldest of the fundamental liberty interests recognised by’ the Supreme Court, *Troxel v. Granviells* U.S. 57, 65 (2000).”⁴¹⁹

Additionally, the Committee on Oversight found that many of these separations were unnecessary since the parents were charged with misdemeanor unlawful entry and were not held in criminal detention centers. Plaintiffs in the *MS. L vs. ICE* case did not argue that a

⁴¹⁴ NYCLU, ‘Lawsuit: Trump Administration Using Fingerprint Checks to Delay Release of Immigrant Children,’

⁴¹⁵ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ *Staff Report, U.S. House of Representatives*, 2019,

⁴¹⁶ Committee on Oversight and Reform, ‘Child Separations by the Trump Administration,’ *Staff Report, U.S. House of Representatives*, 2019,

⁴¹⁷ *Ms. L vs ICE*

⁴¹⁸ *Ms. L vs ICE*

⁴¹⁹ *Ms. L v. ICE*

child could not be temporarily separated from a criminally prosecuted parent while they served their time in detention. In cases such as Ms. C who were criminally charged, parents served their time for illegal entry and then were sent back to immigration detention but still remained separated from their children. These separations thus serve no legitimate purpose. Additionally, for family units requesting asylum, as in the cases of Ms. L and Ms. C, the 1980 Refugee Act states that asylum seekers cannot be criminally prosecuted for illegal entry. A Customs and Border Patrol agent who I spoke with confirmed that asylum seekers were being turned away at ports of entry, thus leaving asylum seekers with no choice but to illegally cross the border.⁴²⁰ Several administration officials confirmed that the purpose of the zero-tolerance policy and practice of family separations was to deter immigration. Under prior administrations, apprehended family units who did not pose a risk to public safety were not criminally prosecuted and were often placed in alternative to detention programs while they awaited their removal hearing.⁴²¹

Under the *Flores* agreement, the government is required to “expeditiously process” unaccompanied children and release them from government custody “without unnecessary delay” to a parent or sponsor. The Committee on Oversight stated that the failure of the administration to reunite children with their parents in a timely way may violate standards set in the *Flores* settlement agreement and the TVPRA of 2008.⁴²²

2.2 Right to Personal Liberty

No, these policies and practices are not in accordance with national law regarding UC’s right to personal liberty. By interfering with instead of respecting this right, the U.S. is failing to uphold its national legal obligations in the TVPRA of 2008 and the *Flores* settlement agreement. The government is required to place UC in the “least restrictive setting” and to release the children “without unnecessary delay.” Children in custody are required to be treated with “dignity, respect, and special concern for their particular

⁴²⁰ Interview #19

⁴²¹ Kandel, 2019.

⁴²² Ibid

vulnerability as children.”⁴²³ According to *Flores* and the TVPRA, children cannot be held in a secure facility unless the child is a danger to self or others or has been charged with a criminal offense.⁴²⁴ Instead, these policies have led to children being held in secure detention facilities for nearly twice as long as they were in FY2015 in conditions that have been reported to resemble concentration camps. T

This policy is in direct conflict with national laws and policies. On their website, the Office of Refugee Resettlement states that their Unaccompanied children’s program “provides a safe and appropriate environment to children and youth” and that they work to ensure that “children are released timely and safely from ORR custody to parents, other family members, or other adults (often referred to as sponsors).”⁴²⁵ In practice, the information that ORR shares with DHS is used to arrest sponsors and household members.⁴²⁶ Sharing sponsor information with DHS directly prevents children from being released in a “timely and safely” manner to their parents or guardians and leads to an overcrowding of ORR shelters, resulting in a less than “safe and appropriate” environment.⁴²⁷

On March 5, 2018 the National Immigrant Justice Centre filed a lawsuit against DHS and ICE for arresting unaccompanied children who reached their 18th birthdays while in ORR custody, as it violates “least restrictive setting” standard of the TVPRA.⁴²⁸ In August 2018, the court rejected ICE’s motion to dismiss the case and granted the motion for class certification for all former UC who are and would be detained by ICE after turning 18 in ORR care.⁴²⁹ The case is still pending.

⁴²³ *Flores* Settlement Agreement

⁴²⁴ *Ibid*

⁴²⁵ Office of Refugee Resettlement, ‘Children Entering the United States Unaccompanied: Introduction,’ 30 January, 2015 <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-0> (accessed 1 July 2019).

⁴²⁶ NIJC and WRC, ‘Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement,’ 2019; confirmed by

⁴²⁷ Office of Refugee Resettlement, ‘Children Entering the United States Unaccompanied: Introduction,’ 30 January, 2015

⁴²⁸ *Wilmer Garcia Ramirez et al. v. U.S. Immigration and Customs Enforcement et al.* (2018).

https://www.immigrantjustice.org/court_cases/garcia-ramirez-et-al-v-ice-et-al (accessed 29 July 2019)

⁴²⁹ *Wilmer Garcia Ramirez et al. v. U.S. Immigration and Customs Enforcement et al.* (2018).

2.3 Right to *Non-refoulement*

No, the Trump Administrations' policies and practices are not in accordance with U.S. obligations to ensure the right to *non-refoulement* of asylum seeking unaccompanied children encoded in the 1980 Refugee Act. The law reads requires the U.S. to allow all individuals, regardless of illegal entry, to apply for asylum and established the right to *non-refoulement*.⁴³⁰

The policies enacted by the Trump administration have made it more difficult for unaccompanied children to prove their case for asylum. The zero-tolerance policy and MOA have resulted in prolonged family separation and detention, both of which inflict unnecessary trauma that can impact a claim to asylum in several ways. Traumatized children are more likely to exhibit behavioral problems and are less likely to be able to express their past in a way that proves their need for protection. Additionally, children held in detention are more likely to give up on their asylum claim and agree to voluntary return.

The judicial changes to the EOIR significantly threaten a child's right to *non-refoulement*. The introduction of quotas and deadlines and restriction of continuances and closures puts pressure on immigration judges to quickly conclude proceedings and return people to their country of origin at the expense of Due Process. The decision in *Matter of A-B*, although not legally binding, has made it more difficult, and in some states impossible, for children to be granted asylum based on domestic violence and gang violence. As the majority of children from the Northern Triangle are fleeing due to violence in the home and/or from gangs, many children will be, and have been, denied asylum and returned to a country where they face threats to their life or freedom.⁴³¹ To conclude, these policies are not in accordance with the right to non-refoulement codified in the 1980 Refugee Act.

⁴³⁰ 1980 Refugee Act

⁴³¹ Interview #3, interview #2.

3.0 Are the administrations' policies and practices in accordance with international law in regards to these three rights?

3.1 Right to Family

No, the Trump Administration's policies and practices are not in accordance with the internationally recognised right to family of unaccompanied children seeking asylum. By interfering with unaccompanied children's right to family, the U.S. government is failing to uphold its international obligations under the UDHR, 1951 Refugee Convention and Protocol, article 16(3) of the UDHR and article 23(1) of the ICCPR.

Article 16(3) of the UDHR as well as article 23(1) of the International Covenant ICCPR recognise that the family is "the natural and fundamental group unit of society and is entitled to protection by society and the state."⁴³² Article 12 of the UDHR states, "No one shall be subjected to arbitrary interference with his privacy, family, home... Everyone has the right to the protection of the law against such interference."⁴³³ Similarly article 17 of the ICCPR contains the provision that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home."⁴³⁴ The UDHR is not legally binding, however it is considered to be the foundation of international human rights law.⁴³⁵ The ICCPR is a legally binding treaty and as a state party the U.S. is required not to arbitrarily interfere with family life.

Under the zero-tolerance policy, 2,816 children were identified to as separated on June 26, 2018. More than a year later, 30 children still had not been reunited with their families.⁴³⁶ Several hundred other children were unable to be reunified with their parents as they had already been deported before the court injunction.⁴³⁷ Zeid Ra'ad Al Hussein, the UN Human Rights chief told the Human Rights Council that separating migrant children

⁴³² Universal Declaration of Human Rights, Art 16 International Covenant on Civil and Political Rights, 23

⁴³³ Universal Declaration of Human Rights,

⁴³⁴ International Covenant on Civil and Political Rights,

⁴³⁵ <https://www.un.org/en/sections/universal-declaration/human-rights-law/>

⁴³⁶ Committee on Oversight and Reform, 'Child Separations by the Trump Administration,' *Staff Report, U.S. House of Representatives*, 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-2019.%20Immigrant%20Child%20Separations-%20Staff%20Report.pdf> (accessed 20 July 2019)

⁴³⁷ *ibid*

from their parents was “government-sanctioned child abuse,” that would have “lifelong consequences,” for children.⁴³⁸ On June 22, 2018 a group of 11 UN experts released a statement in which they were “deeply concerned at the long-term impact and trauma, including irreparable harm that these forcible separations will have on the children.” The experts called on the US to reunite the families and release them from immigration detention to comply with the best interests of the child and the right to family.⁴³⁹ Family separations are continuing to occur; 900 more children were separated from their parents between 28 June 2018 and 29 June 2019.⁴⁴⁰ To conclude, the administration’s policies do not adhere to international law regarding unaccompanied children’s right to family.

3.2 Right to Personal Liberty

The policies and practices of the Trump Administration are not in accordance with the internationally recognised right to personal liberty of unaccompanied children seeking asylum, which are encoded in the ICCPR, 1967 Refugee Protocol, and the CAT.

Unaccompanied children seeking asylum cannot be detained solely for seeking asylum, even if they break immigration laws in the process. One of the three founding principles of the Refugee Convention and Protocol is non-penalisation for illegal entry or stay. Recognising that “seeking asylum can require refugees to breach immigration rules,” article 31 (1) prohibits states from charging asylum-seekers with criminal or immigration offenses and from arbitrarily detaining an individual solely for seeking asylum.⁴⁴¹ Therefore, detaining an asylum-seeker purely on illegal entry or stay amounts to arbitrary detention and violates Article 31 (1) of the Convention.

The UNHCR issues guidelines to “provide legal interpretative guidance for governments, legal practitioners decision makers and the judiciary.”⁴⁴² UNHCR Guidelines

⁴³⁸ UN News, ‘US migrant children policy reversal, still ‘fails’ thousands of youngsters: UN rights experts,’ *UN News*, 22 June 2018, <https://news.un.org/en/story/2018/06/1012832>, (accessed 1 July 2019)

⁴³⁹ UN, ‘UN experts to US: ‘Release migrant children from detention and stop using them to deter irregular migration,’ 22 June 2018, <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>

⁴⁴⁰ *Ms. L vs. ICE*

⁴⁴¹ Convention and Protocol Relating to the Status of Refugees; 2010 introductory note; Article 31.

⁴⁴² UNHCR, ‘UNHCR Guideline on International Protection,’

on Detention state that the detention of asylum seekers “should normally be avoided and be a measure of last resort.” Detention cannot be arbitrary; every case must be individually assessed in order to determine if detention is necessary.⁴⁴³ Guideline 4.1 states, “detention is an exceptional measure and can only be justified for a legitimate purpose.” States cannot detain asylum seekers based on illegal entry and/or to deter migration; these are purposes that are not based on individual assessment and therefore, “without such purpose, detention will be considered arbitrary.”⁴⁴⁴

Administration officials stated that the zero-tolerance policy and MOA, and resulting increased detention, were used to deter further immigration. In 2018, DHS Secretary John Kelly asserted in an interview that family separation “would be a tough deterrent. A much faster turnaround on asylum seekers.”⁴⁴⁵ Additionally, a leaked administration draft memo suggested that the administration increase prosecution of family unit parents and transfer children to DHHS custody because, “the increase in prosecutions will be reported by the media and it would have substantial deterrent effect.”⁴⁴⁶ This memo also indicates that the administration used the MOA as a deterrent for further immigration. The memo suggested that DHS,

“Complete the MOU between ICE and HHS to conduct background checks on sponsors of UACs and subsequently place them into removal proceedings as appropriate. This would result in a deterrent impact....However, there would be a short term impact on HHS...requiring HHS to keep the UACs in custody longer.”

Under the UNHCR Detention Guidelines, detention of children as a means of deterrence is arbitrary. The U.S. is prohibited from arbitrarily detaining all persons, including asylum seekers and unaccompanied children, under Article 9 (1) of the ICCPR. A group of 11 UN experts released a statement on family separations and resulting increased detention of children declaring, “Detention of children in punitive, severely hampers their development,

⁴⁴³ UNHCR Detention Guidelines, Guideline 4.1

⁴⁴⁴ UNHCR Detention Guidelines, Guideline 4.1

⁴⁴⁵ Transcript: White House Chief of Staff John Kelly’s Interview with NPR, *NPR*, 11 May 2018, <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>

⁴⁴⁶ Draft Memorandum –Policy Options to Respond to Border Surge of Illegal Immigration,’ December 201.

and in some cases may amount to torture.”⁴⁴⁷ As a state party to the Convention Against Torture, the U.S. is prohibited from torturing in all and any circumstances.⁴⁴⁸

Psychologists have documented the mental pain and suffering of both parent and child when forcibly separated.⁴⁴⁹ The purpose of many of these separations and resulting detention of children, as admitted by administration officials, was to intimidate persons from migrating to the United States. While separations are lawful when parents are placed in criminal detention facilities, it was previously discussed that even after parents were released from criminal detention they remained separated from their children and children remained in ORR detention.

In 2017, the Working Group on Arbitrary Detention released a report about their visit to the U.S in which they were “deeply disturbed by information relating to the detention of unaccompanied child immigrants.”⁴⁵⁰ The Working Group concluded that regardless of conditions of detention, “children should not be deprived of liberty, except as a measures of last resort and for the shortest appropriate period of time.”⁴⁵¹ Zeid Ra’ad Al Hussein, the UN Human Rights chief told the Human Rights Council that separating migrant children from their parents was “government-sanctioned child abuse,” that would have “lifelong consequences,” for children.⁴⁵² On June 22, 2018 a group of 11 UN experts released a statement in which they were “deeply concerned at the long-term impact and trauma, including irreparable harm that these forcible separations will have on the children.” The experts called on the US to reunite the families and release them from immigration detention to comply with the best interests of the child and the right to

⁴⁴⁷UN, ‘UN experts to US: ‘Release migrant children from detention and stop using them to deter irregular migration,’ 22 June 2018

⁴⁴⁸ Convention Against Torture, Article 2.

⁴⁴⁹ Interview #15, *Ms. L vs ICE*

⁴⁵⁰ UN General Assembly, ‘Report of the Working Group of Arbitrary Detention on its visit to the United States of America,’ *Human Rights Council 36th Session*, 2017.

⁴⁵¹ Human Rights Committee, General Comment No. 35 (2014) on liberty and security of person, para. 18.

⁴⁵² UN News, ‘US migrant children policy reversal, still ‘fails’ thousands of youngsters: UN rights experts,’ *UN News*, 22 June 2018, <https://news.un.org/en/story/2018/06/1012832>, (accessed 1 July 2019)

family.⁴⁵³ To conclude, the administration's policies of increasing and prolonging detention of unaccompanied children are not in accordance with international law.

3.3 Right to *non-refoulement*

The Trump administration's policies and practices are not in accordance with the internationally recognised right to non-refoulement of unaccompanied children seeking asylum. All three policy changes present a significant threat to this right, often resulting in children being returned to a country of persecution. This is in direct conflict with the international laws that ensure this fundamental right to asylum seekers and refugees, specifically the Convention Against Torture and the 1967 Refugee Protocol. Article 33 (1) of the Convention states that:

“No one shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴⁵⁴

The Convention Against Torture offers the same protection without the limitation of being persecuted on account of race, religion, nationality, membership of a particular social group, or political opinion. Article 3(1) of the Convention reads, “No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴⁵⁵

As previously discussed, the policies enacted by the Trump administration have made it more difficult for unaccompanied children to prove their case for asylum. The zero-tolerance policy and MOA have resulted in prolonged family separation and detention, both of which inflict unnecessary trauma that can make it more difficult for a child to make a case for asylum. The judicial changes to the EOIR make it more challenging for a child to be granted asylum. As the majority of children from the Northern Triangle are fleeing due

⁴⁵³ United Nations, ‘UN experts to US: ‘Release migrant children from detention and stop using them to deter irregular migration’ *UN News*, 22 June 2018.

<https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>

⁴⁵⁴ Convention and Protocol Relating to the Status of Refugees. Article 33.

⁴⁵⁵ Convention Against Torture, Article 3

to violence in the home and/or from gangs, many children will be denied asylum and returned to a country where they face possible persecution.

4.0 Relevance and Concluding Remarks

The UNHCR has reported that the world has now reached the highest levels of displacement on record.⁴⁵⁶ Globally, 70.8 million people have been forced from their homes.⁴⁵⁷ The UNHCR has recognised 29.5 million as refugees and reports that over half are children. Fillippo Grandi, the United Nations High Commissioner for Refugees, reported, “What we are seeing in these figures is further confirmation of a longer-term rising trend in the number of people needing safety from war, conflict, and persecution.”⁴⁵⁸

In regards to the Northern Triangle countries, the UNHCR has reported that there has been a,

“dramatic escalation in violence by organised criminal groups. Current Homicide rates are the highest ever recorded in the region and are as deadly as many contemporary armed conflicts. Sexual violence is also prevalent, with the overwhelming majority of victims being girls between the ages of 10 and 19 years. Disappearances, forced recruitment into gangs, and the sexual exploitation of girls and women also form part of the pattern of violence. The *extraordinary epidemic of violence* is compelling a diverse range of people to flee their homes and seek international protection.”⁴⁵⁹

President Trump’s response to this humanitarian crisis has been to introduce policies to deter migration, such as tearing children from their parents, increasing the detention and deportation of all immigrants without status regardless of criminal history, limiting access to asylum, and increasing border security. The USCIS officer I interviewed stated, “I have not seen a single humane policy come out of this administration....Unaccompanied immigrant children face huge struggles with this administration, along with almost any other category of immigrant.”⁴⁶⁰ The administration has pursued a rhetoric that immigrants exploit asylum as a loophole in order to gain entry to the United States. A Customs and

⁴⁵⁶ UNHCR, *2018 in Review: Trends at a glance*, 2018, <https://www.unhcr.org/globaltrends2018/> (accessed 31 July 2019).

⁴⁵⁷ UNHCR, *2018 in Review: Trends at a glance*, 2018.

⁴⁵⁸ Ibid,

⁴⁵⁹ Ibid, emphasis added

⁴⁶⁰ Interview # 18.

Border Patrol Agent working at the San Ysidro, the largest POE, was very open with her disbelief of asylum seekers and the widespread practice of agents turning away asylum seekers. When I asked if unaccompanied children seeking asylum were ever turned away at the border, she responded:

“People don’t know what it means to claim asylum. They think they will show up and everything will be rainbows and daisies. It’s been on the news so people think, ‘Oh, I can claim asylum.’ But I’m thinking... if you’re ‘so poor’ and you’re ‘so scared’ then how did you make it all the way to the border? Everybody just claims asylum as their way to get in. But we don’t see asylum seekers here anymore, they got the idea that this port isn’t processing asylum seekers so they try to sneak through the desert. They think ‘it’s so complicated now, let me just sneak through.’”⁴⁶¹

Although claiming that he would “stop all illegal immigration,” President Trump has incentivised illegal entry by limiting access to legal entry.⁴⁶²

For the 2020 budget, President Trump has requested \$51.7 billion for DHS,⁴⁶³ a significant increase from the \$38.2 billion requested by Obama in FY2015.⁴⁶⁴ Of this \$51.7 billion, \$2.7 billion is allocated for 54,000 detention beds including 2,500 beds for family units. While the budget allocated \$5 billion for a border wall, only \$209.9 million is granted to ICE’s Alternative to Detention Program, which enables ICE to monitor immigrants pending their removal hearing without placing them in detention.

Trump administration policies which separate families, detain children and limit access to asylum are not only inhumane but also are contradictory to national law, international law, and fundamental American values. The United States was founded by refugees fleeing the oppressive government of Great Britain and was founded upon the idea that all persons were created equal and born with inalienable rights, including the right to

⁴⁶¹ Interview #19

⁴⁶² Presidential Candidate Donald Trump, ‘Campaign Rally,’ speech to Bayfront Park Amphitheater in Miami, Florida, 2 November 2016, <https://www.c-span.org/video/?417864-1/donald-trump-campaigns-miami-florida>, (accessed 31 July 2019)

⁴⁶³ U.S., ‘FY2020 Budget in Brief,’ *Budget Report*. https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf (accessed 29 July 2019)

⁴⁶⁴ U.S. DHS, ‘Budget in Brief, Fiscal year 2015,’ *DHS*, 2015 <https://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>

life, liberty, and the pursuit of happiness.⁴⁶⁵ The Statue of Liberty, a celebration of the freedom of peoples and international friendship, was placed in the New York City Harbor in 1885 to welcome refugees and asylum seekers.⁴⁶⁶ The “Mother of Exiles,” inscribed on the statue reads,

“Give me your tired, your poor, your huddles masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!”⁴⁶⁷

Instead of opening their arms to vulnerable unaccompanied children and offering refuge and safety, the Trump administration has become their persecutors by inflicting life-long trauma young children, many of whom are under the age of 5.⁴⁶⁸ Instead of enforcing protection for asylum seekers and particularly vulnerable unaccompanied children, the administration has implemented a zero-tolerance policy towards all immigrants at the border, regardless of their age, vulnerability, and protection needs. Instead of upholding the U.S. Constitution, the administration is violating due process and liberty rights, two fundamental rights upon which the United States was founded. It is the responsibility of the government to uphold and protect these rights of people, to which it the government is nationally and internationally bound. When a government fails to uphold these rights, it is the responsibility of the people to stand up and fight against policies and practices that are antithetical to law and fundamental human rights. It is necessary to highlight these policies, to reveal that they are not, as the administration claims, the enforcement of existing immigration laws, but instead are inhumane and immoral strategies in an attempt to deter migration.

⁴⁶⁵ ‘Statue History,’ *The Statue of Liberty- Ellis Island* [website], <https://www.libertyellisfoundation.org/statue-history> (accessed 1 June 2019)

⁴⁶⁶ ‘Statue History,’ *The Statue of Liberty- Ellis Island* [website], <https://www.libertyellisfoundation.org/statue-history> (accessed 1 June 2019)

⁴⁶⁷ ‘Statue History,’ *The Statue of Liberty- Ellis Island*.

⁴⁶⁸ *Ms. L vs. ICE*

Abstract: English

Violence and instability in the Northern Triangle countries—El Salvador, Guatemala, and Honduras—have led to increasing numbers of unaccompanied minors and family units seeking asylum at the Southern border of the United States (U.S.). Since his inauguration, U.S. President Donald Trump and his administration have enacted several policies and practices to crack down on all forms of immigration, including asylum. The legal framework and situation of unaccompanied minors in the U.S. under prior administrations is briefly discussed to provide context and comparison. Using a mixed-method design, three policies of the administration are analyzed to have impacted unaccompanied children's rights that are codified in national and international law. The zero-tolerance policy, Memorandum of Agreement, and judicial changes to the immigration court were identified in interviews with service providers as challenges to unaccompanied children's right family, personal liberty, and/or *non-refoulement*. Secondary data such as class action lawsuits, news reports, and statistics provide additional evidence to reveal how these policies have threatened these rights. Findings are analyzed alongside national and international obligations the U.S. government has to respect the rights of unaccompanied immigrant children seeking asylum. The analyzed policies are found to interfere with unaccompanied children's right to family, personal liberty, and *non-refoulement* codified in national and international law including the Fifth Amendment of the U.S. Constitution, the 1980 Refugee Act, the 1951 Refugee Convention and 1967 Protocol, the International Covenant on Civil and Political Rights, and the Convention Against Torture.

Keywords: Immigration, Unaccompanied Minors, Asylum, Family Unity, Personal Liberty, *Non-refoulement*

Abstract: German

Gewalt und Instabilität im Norddreieck Zentralamerikas – El Salvador, Guatemala und Honduras – führen zu einer steigenden Zahl von unbegleiteten minderjährigen Flüchtlingen und Familieneinheiten, die an der südlichen Grenze der Vereinigten Staaten (USA) Asyl suchen. Seit seiner Amtseinführung erließen der US-amerikanische Präsident Donald Trump und seine Regierung mehrere Richtlinien und Praktiken, um hart gegen jegliche Form der Immigration, inklusive Asyl, vorzugehen. Um dem Sachverhalt einen Kontext zu geben und Vergleiche ziehen zu können, wird zunächst der rechtliche Rahmen und die Situation unbegleiteter minderjähriger Flüchtlinge während früherer US-amerikanischer Regierungen kurz erläutert. Mit einem gemischten Methodenansatz werden dann drei Politiken analysiert, die sich auf die Rechte von unbegleiteten Kindern, festgeschrieben in nationalem und internationalem Recht, auswirken. Die Null-Toleranz-Politik, die Absichtserklärung sowie juristische Änderungen in Bezug auf das Einwanderungsgericht wurden in Interviews mit Dienstleistern als Herausforderungen für

das Recht auf Familie, persönliche Freiheit und/oder das *non-refoulement* Prinzip identifiziert. Sekundärquellen wie Sammelklageverfahren, Zeitungsartikel und Statistiken liefern weitere Beweise dafür, wie die Richtlinien diese Rechte bedrohen. Neben den Ergebnissen werden auch die nationalen und internationalen Staatenpflichten der USA, Rechte von unbegleiteten minderjährigen Asylsuchenden zu respektieren, erläutert. Als Resultat wird gezeigt, dass die betrachteten Richtlinien und politischen Maßnahmen einen Eingriff in das Recht auf Familie, persönliche Freiheit und *non-refoulement* der unbegleiteten Minderjährigen darstellen. Diese Rechte sind festgeschrieben in nationalem und internationalem Recht, inklusive dem 5. Amendment der US-Verfassung, dem US-Flüchtlingsgesetz von 1980 sowie der Genfer Flüchtlingskonvention von 1951 und dem Protokoll von 1967, dem Zivilpakt und der Antifolterkonvention.

Schlagworte: Immigration, unbegleitete minderjährige Flüchtlinge, Asyl, Familieneinheit, persönliche Freiheit, Non-refoulement

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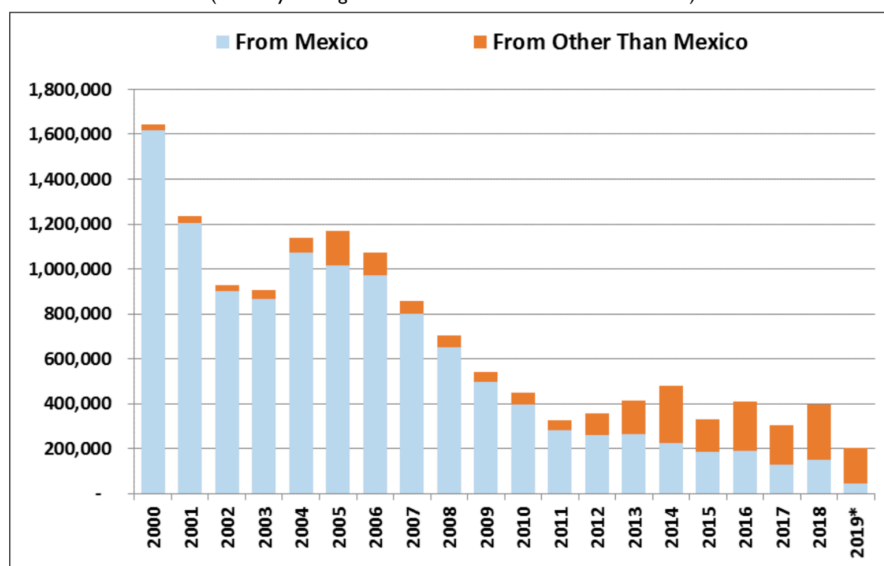
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Appendices: Tables and Figures

Table 1. Children at the Border	FY15	FY16	FY 17	FY2018	FY19 (10/18-06/19)
UC apprehended by CBP ¹	39,970	59,692	41,435	50,036	63,624
Family Units apprehended by CBP	39,838	77,674	75,622	107,212	390,308
OFO UC Inadmissibles	----	----	7,246	8,642	3,542
OFO Family Unit Inadmissibles	-----	----	29,375	53,901	37,573
UC Referrals to ORR ¹	33,726	59,170	40,810	49,100	61,000 ¹

Figure 1. Children at the Border. Apprehensions by CBP are the number of individuals arrested and temporarily detained by CBP for crossing the border illegally. The Office of Field Operations (OFO) Inadmissibles refers to persons who present themselves at a port of entry but are deemed inadmissible, persons seeking humanitarian protection, and persons who withdraw their application for admission and return to their country of origin. Data for OFO Inadmissibles was not made available for FY 2015 and FY 2016. Family units are the number of individuals who come to the U.S. with a family member. UC referrals to ORR are the number of unaccompanied children that DHS refers to the Office of Refugee Resettlement (ORR) for custody and care. Any unaccompanied child from a non-contiguous country (any country aside from Mexico or Canada) must be transferred to ORR.

Figure 1:⁴⁶⁹ Total Alien Apprehensions at the Southwest Border by Country of Origin, FY2000-FY2019*
(Country of origin is either Mexico or other-than-Mexico)

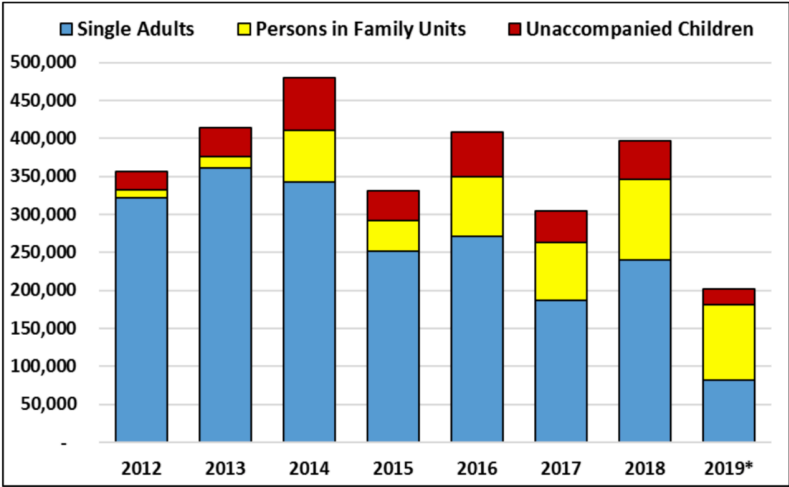


Source: FY2000-FY2017: U.S. Department of Homeland Security, United States Border Patrol, "Stats and Summaries," <https://www.cbp.gov/newsroom/media-resources/stats>; FY2018-FY2019: CRS presentation of unpublished data received from CBP Leg Affairs.

Notes: *FY2019 includes October 2018 through January 2019, or one-third of the fiscal year.

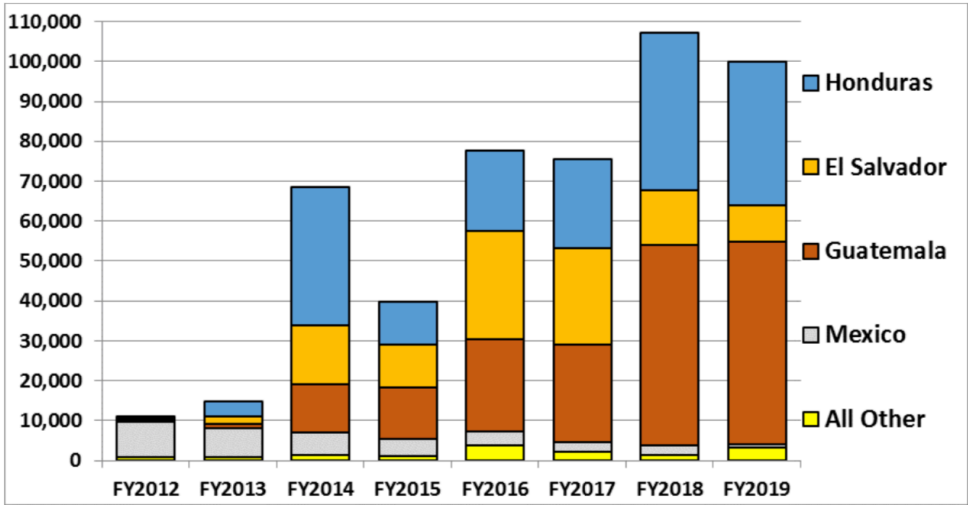
⁴⁶⁹ Kandel, p. 22

Figure 2:⁴⁷⁰ Total Alien Apprehensions at the Southwest Border, by Demographic Classification, FY2012-FY2019*



Source: For FY2008-FY2013: U.S. Department of Homeland Security, United States Border Patrol, "Juvenile and Adult Apprehensions—Fiscal Year 2013." For FY2014-FY2016, "Customs and Border Protection, Southwest Border Unaccompanied Alien Children." For FY2017-FY2019, "U.S. Border Patrol Southwest Border Apprehensions by Sector FY2017," <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions>.
Notes: *FY2019 includes October 2018 through January 2019, or one-third of the fiscal year. Family unit apprehensions represent apprehended individuals in family units, not apprehended families.

Figure 3.⁴⁷¹ Total Alien Family Unit Apprehensions at the Southwest Border FY2012-2019*



Source: For FY2008-FY2013: U.S. Department of Homeland Security, United States Border Patrol, "Juvenile and Adult Apprehensions—Fiscal Year 2013." For FY2014-FY2016, "Customs and Border Protection, Southwest Border Unaccompanied Alien Children." For FY2017-FY2019, "U.S. Border Patrol Southwest Border Apprehensions by Sector FY2017," <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions>.
Notes: *FY2019 includes October 2018 through January 2019, or one-third of the fiscal year. Family unit apprehensions represent apprehended individuals in family units, not apprehended families.

⁴⁷⁰ Kandel, 23.
⁴⁷¹ Kandel, 23.

Table 2. Agencies involved with Unaccompanied Immigration Children	
Customs and Border Patrol (DHS)	Initially apprehend and designate child as unaccompanied. Legally can hold UC in custody for no more than 72 hours; Screen children from Mexico and Canada for protection, remove those who do not meet grounds
Immigration and Customs Enforcement (DHS)	Transfer UC from CBP custody to ORR custody; Can arrest and detain UC suspected of criminal activity; Deport UC ordered for removal; Arrest and detain UC when they turn 18.'
Office of Refugee Resettlement (DHHS)	Place UC in licensed shelters; Refer special cases to unaccompanied refugee minor program; Release UC to sponsors or foster homes.
United States Citizenship and Immigration Services (DHS)	Process UC asylum applications; Conduct asylum interview for UC; Grant relief or refer to immigration judge.
Executive Office of Immigration Review/Board of Immigration Appeals (DOJ)	Conduct removal hearings; Grant asylum, other form of relief, or order removal.

Table 3. National Legislative Framework	
<i>Flores v Reno</i> Settlement Agreement	<p>Children are to be placed in the least restrictive setting and are released from custody without unnecessary delay;</p> <p>Children must be released within five days to: a parent, a legal guardian, an adult relative, an adult or entity who has been designated by the parent or legal guardian, a licensed program, or an adult or entity seeking custody;</p> <p>If a licensed shelter is not immediately available, a child can temporarily be placed in an INS detention facility for 3 to 5 days;</p> <p>Children cannot be held in a secure facility, except in special cases;</p> <p>Children must be treated with dignity, respect, and special concern for their particular vulnerability as children;</p> <p>Laid down minimum standards for treatment and conditions of children in custody.</p>
Homeland Security Act of 2002	<p>Created the Department of Homeland Security (DHS);</p> <p>Custodial authority of children transferred to Office of Refugee Resettlement (ORR) in the branch of Department of Health and Human Services (DHHS);</p> <p>ORR responsible for care and custody of UC;</p> <p>ORR must ensure that the interests of the child are considered when making decisions in regards to the UC;</p> <p>ORR must ensure that legal counsel is appointed to represent the interests of the child.</p>
Trafficking Victims Reauthorisation Act of 2008	<p>Codified existing policies from <i>Flores</i> into law;</p> <p>Children cannot be held in a secure facility unless the child is a danger to self or others or has been charged with a criminal offense;</p> <p>All agencies required to notify DHHS within 48 hours of apprehension of a UC and to transfer the UC to DHHS within 72 hours;</p> <p>DHHS required to ensure to the greatest extent practicable that all unaccompanied children have legal representation;</p> <p>Children from contiguous countries screened by CBP to assess whether they meet grounds for protection within 48 hours of apprehension;</p> <p>CBP returns children to home country who do not meet grounds;</p> <p>ICE transfers those who meet grounds for protection do to ORR custody;</p> <p>Children from a non-contiguous country must be transferred to ORR within 72 hours;</p> <p>USCIS has initial jurisdiction over an asylum applications filed by a UC;</p>

Table 4. Participant Demographics					
#	Experience working with refugees/immigrants	Organisation	Job Title	State	Interview Method and Date
1	1 year	The Young Centre for Immigrant Children	Staff Attorney	Arizona	Phone 16. 05. 2019
2	3 years	Anonymous, NGO for legal services	Legal Director	Florida	Phone 17.05.2019
3	3 years	Esperanza Immigrant Rights Project	Supervising Attorney	California	Phone 13.05.2019
4	3 years	NGO, Unaccompanied Refugee Children program	Case worker	Massachusetts	Phone 23.05.2019
5	2 years	US Conference of Catholic Bishops/Migration and Refugee Services	Policy Consultant	D.C.	Email questionnaire, 03.07.2019
6	8 years	Anonymous, NGO	Home Study and Post Release Services Case Manager	Virginia	Phone 21. 05. 2019
7	1.5 years	Anonymous, NGO for legal services	Case management associate	California	Phone 21. 05. 2019
8	5 years	Human Rights Initiative of North Texas (prior job with Kinds in Need of Defense in LA)	Asylum Program Attorney	Texas	Email questionnaire 20. 05. 2019
9	4 years	Human Rights Initiative of North Texas	Children's Program Attorney	Texas	Email questionnaire 20. 05. 2019
10	13 years	Anonymous, NGO that provides Home Studies and Post Release Services	Director of Post Release Services Department	New York	Phone 28.05.2019
11	4.5 years	Anonymous, NGO that provides legal services to immigrants	Director of Unaccompanied Children Program	New York	Phone 14.05.2019
12	2.5 years	Has worked at several NGOs that provide legal services to UC	Staff Attorney	Louisiana (current), Texas, Florida	Skype 29. 05. 2019
13	3 years	Safe Passage Project	Staff Attorney	New York	Phone 30.05.2019
14	Unknown	Capital Area Immigrants' Rights Coalition (CAIR)	Senior Program Director	Virginia	Phone 06.06.2019
15	25 years	Provides consultation and expert witness to various groups, including Physicians for Human Rights	Psychologist	Southern State	Phone 06.06.2019
16	29 years	Department of Justice	Retired Immigration Judge (9/30/18)	Arizona	Email questionnaire 03.06.2019
17	32 years	Department of Justice	Immigration Judge	California	Email questionnaire 30.06.2019
18	11 years	Department of Homeland Security (DHS): United States Citizen and Immigration Services (USCIS)	Refugee Officer	D.C.	Email questionnaire 50.06.2019

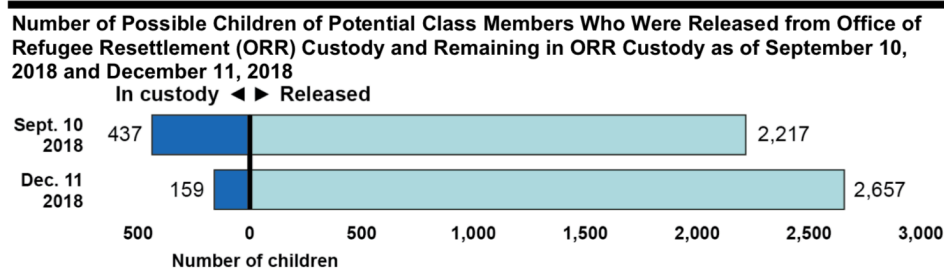
19	1 month	Department of Homeland Security (DHS): Customs and Border Patrol (CBP)	Customs and Border Patrol Agent	California	Skype 22.05.2019
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Table 5. Interview Results: Trump administration policies identified by participants as challenges to specified rights. Note: Percentages do not add to 100% because participants were not limited to identifying one policy						
Poses a challenge to:	Zero-tolerance/Family separation	MOA	Judicial Changes	Quotas and Deadlines	<i>Matter of A-B</i>	<i>Matter of L-A-B-R, Matter of Castro-Tum</i>
Right to family	16/18 *= 88.88%	12/18= 66.67%	-----	-----	-----	-----
Right to personal liberty	10/16**= 62.5%	12/16= 75%	-----	-----	-----	-----
Right to <i>non-refoulement</i>	11/18= 61.11%	6/18= 33.33%	16/18= 88.88%	7/18= 38.89%	14/18= 77.77%	5/18= 27.77%

* 18 out of the 19 participants interviewed were used in the statistical analysis. The CBP interview was not used as the content of the interview did not cover these questions.

** 6 out of the 19 participants interviewed were used in the statistical analysis. The CBP interview was not used as the content of the interview did not cover these questions. Two service providers chose not to answer the question regarding children's right to personal lib

Figure 4.⁴⁷²



Source: Ms. L v. ICE, No. 18-0428 (S.D. Cal. Sept. 13, 2018 and Dec. 12, 2018) (joint status reports). | GAO-19-368T

Note: GAO did not independently verify the accuracy of these data.

United States Government Accountability Office

⁴⁷² Larin and Gambler, 'Unaccompanied Children: Agency Efforts to Identify and Reunify Children Separated from Parents at the Border,' *Testimony before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives*, 2019.

Figure 5: Time in ORR Custody⁴⁷³

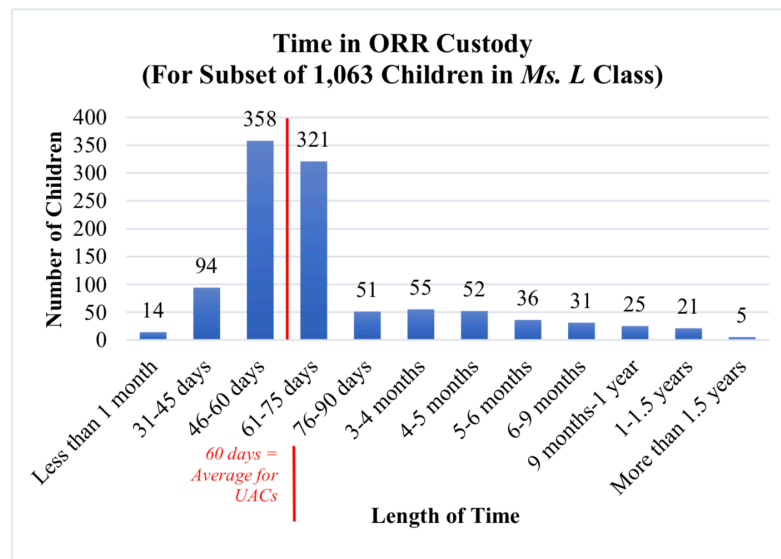
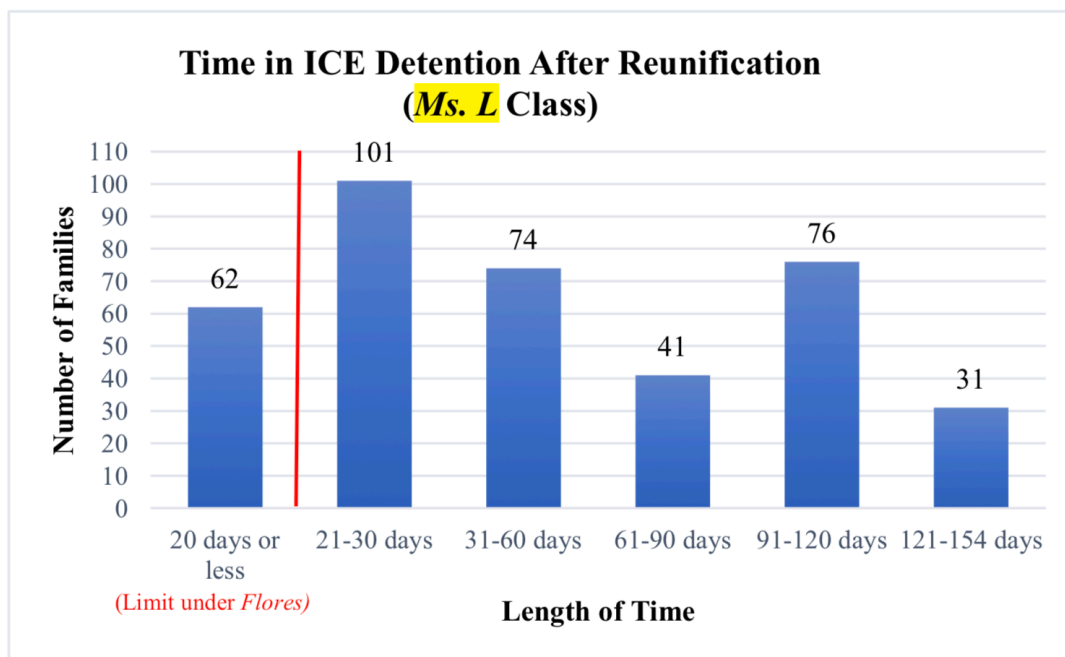


Figure 6: Time in ICE Detention after Reunification⁴⁷⁴



⁴⁷³ Larin and Gambler, 2019.

⁴⁷⁴ Ibid.

Table 6: National International Laws regarding UC vs Trump administration policies		
Right of UC	National Law and International Law	Trump Administration Policies
Right to Family	<p>Fifth Amendment: liberty clause includes constitutional liberty interest of parents in the care, custody, and control of their children, <i>Troxel v. Granville</i>;</p> <p>Fifth Amendment and Fourteenth Amendment “cannot be deprived of life, liberty, or property without due process of law,”;</p> <p><i>Flores</i>: children released “without necessary delay in order of preference to: a parent, legal guardian...”;</p> <p><i>Ms. L vs. ICE</i>: government prohibited from “detaining Class Members in DHS custody without and part from their minor children, absent a determination that the parent is unfit or presents a danger to the child”</p> <p>Article 16(3) of the UDHR and article 23(1) of the International Covenant ICCPR: The family is “the natural and fundamental group unit of society and is entitled to protection by society and the state.”</p> <p>Article 12 of the UDHR and Article 17 of the ICCPR: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home.”</p>	<p>Zero-tolerance: thousands of children forcibly separated from their parents, reunification process takes months. Despite <i>MS. L</i> decision, 900 children separated between 28 June 2018 and 29 June 2019.</p> <p>MOA: Fingerprinting delays and information sharing cause excessive delays, prolong family separation</p>
Right to Personal Liberty	<p>TVPPRA: children to be “promptly placed in the least restrictive setting that is in the best interest of the child”, a child “may not be placed in a secure facility,”</p> <p><i>Flores</i>: children must be placed in shelters that are “safe and sanitary”, “released without necessary delay” from government custody.</p> <p>Article 31 (1) of the 1967 Refugee Protocol prohibits states from charging asylum-seekers with criminal or immigration offenses and from arbitrarily detaining an individual solely for seeking asylum.</p>	<p>Zero-tolerance: Separated children from <i>Ms. L</i> spent on average 60 days in ORR custody</p> <p>MOA: Fingerprinting delays and information sharing cause excessive delays, prolong detention for weeks and months. Average time spent in ORR more than doubles in largest care provider in New York.</p> <p>MOA and Zero-tolerance resulted</p>

	<p>UNHCR Detention Guideline 4.1 states, “detention is an exceptional measure and can only be justified for a legitimate purpose.” Detention of asylum seekers solely for illegal entry or to deter further migration is arbitrary.</p> <p>UNHCR Detention Guideline 9.2 “children, who should in principle not be detained at all.” Specially, “unaccompanied or separated children should not be detained. Detention cannot be based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.”</p> <p>Article 9 (1) of the ICCPR: “No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty,”</p> <p>CAT: article 2(1): “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture”</p>	<p>in the highest number of UC in government custody; has led to overcrowding and the use of shelters unlicensed to hold children. Separated children from Ms. L spent on average 60 days in ORR custody</p> <p>11 UN experts state, “Detention of children is punitive, severely hampers their development, and in some cases may amount to torture,” in response to zero-tolerance policy.</p>
Right to <i>non-refoulement</i>	<p>1980 Refugee Act: Attorney General must establish a procedure for an alien physically present in U.S., at land border, or POE to apply for asylum “irrespective of such an alien’s status”; A refugee cannot be returned to a country where there is a threat to their life or freedom based on their race, nationality, religion, membership of a PSG, of political opinion.</p> <p>Article 33 (1) of the Refugee Convention and Protocol :“No one shall expel or return (“<i>refouler</i>”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”</p> <p>Article 3(1) CAT: “No “No State Party shall expel, return (“<i>refouler</i>”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”</p>	<p>Zero-tolerance and MOA: prolonged detention and family separation further traumatise children, making it more likely their asylum claim will be denied. Reports of asylum seekers being penalized for illegal entry.</p> <p><i>Matter of A-B</i>: Gang violence and domestic violence no longer credible for asylum claim; Asylum seekers denied asylum and returned to their country of origin where they face possible persecution</p> <p>Judicial limitations (end of continuances and administrative closures, introduction of quotas and time-based deadlines): Judges forced to adjudicate complicated cases quickly, making it more likely a child’s claim for relief will be denied.</p>

