

**Submission to the Special Rapporteur
on the Human Rights of Migrants:
Ending Immigration Detention of Children and Seeking
Adequate Reception and Care for Them**

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This submission relates to the United States. We are former students of the International Human Rights Clinic at Santa Clara University Law School. The Clinic has done extensive work in the area of immigrant detention in the United States. This includes submitting a stakeholder report regarding detention of immigrant children in the United States to the United Nations Human Rights Council in the context of the Third Cycle of the Universal Periodic Review. The Clinic has also submitted a report to the UN Human Rights Committee highlighting human rights violations stemming from the Trump Administration’s “zero tolerance” policy of forced separation and prolonged detention of immigrant children detained at the southern border and has written a report on the conditions in private immigrant detention centers in the United States, which was submitted to California legislators. These reports are attached.

**Questionnaire of the Special Rapporteur on the human rights of migrants:
Ending immigration detention of children and seeking adequate reception
and care for them**

Questions:

- 1. Please provide information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in your country. Grateful if you could kindly submit the original text of the legislation or policy, accompanied by an English translation if it is in a language other than English, French or Spanish.**

Flores Agreement

Beginning in 2018, the Trump administration began enacting a series of “zero tolerance” immigration policies that have resulted in human rights violations of family separation and prolonged detention of children.ⁱ In response, the administration moved to abolish a court decision (the Flores Settlement Agreement of 1997), which mandates a 20-day detention limit with a basic standard of care for detained migrant children, and replace it with a new rule that would allow for the indefinite detention of families who illegally cross the border.ⁱⁱ The original text of the Flores Agreement is attached; of note are excerpts from Sections IV, V, and VI:

IV. STATEMENTS OF GENERAL APPLICABILITY

11. The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors. The INS shall place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with its interests to ensure the minor’s timely appearance before the INS and the immigration courts and to protect the minor’s well-being and that of others. Nothing herein shall require the INS to release a minor to any person or agency whom the INS has reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.

V. PROCEDURES AND TEMPORARY PLACEMENT FOLLOWING ARREST

12.A. Whenever the INS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights, including the right to a bond redetermination hearing if applicable. Following arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS’s concern for the particular vulnerability of minors. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor. [. . .] Every effort must be taken to ensure that the safety and well-being of the minors detained in these facilities are satisfactorily provided for by the staff. . . [.]

VI. GENERAL POLICY FAVORING RELEASE

14. Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others, the INS shall release a minor from its custody without unnecessary delay . . . [.]

The President has rationalized that abolishing the Flores Agreement, in addition to responding to public outcry against forced family separation, would act as a deterrent to other immigrants and asylum seekers.ⁱⁱⁱ These “zero tolerance” policies continue to be challenged in court.^{iv}

Trafficking Victims Protection Reauthorization Act

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 codified some of the protections of the Flores Settlement. In part, it provides that unaccompanied children (with some exceptions) cannot be held by Customs and Border Patrol (CBP) for more than 72 hours. CBP must then transfer custody to the Department of Health and Human Services (HHS), who must place the children in the “least restrictive setting” possible.^v The original text of the TVPRA is attached; of note are excerpts from Section 235:

(b)(c) TRANSFERS OF UNACCOMPANIED ALIEN CHILDREN

Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.

(c)(2) SAFE AND SECURE PLACEMENTS

Subject to section 462(b)(2) of the Homeland Security Act of 2002 (6 U.S.C. 279(b)(2)), an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight. Placement of child trafficking victims may include placement in an Unaccompanied Refugee Minor program, pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)), if a suitable family member is not available to provide care. A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be

reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.

AB 32 – California Ban On Private Prisons As Immigration Detention Centers

Additionally, in October 2019 the State of California passed legislation to ban all private prisons within the state, including for use as immigrant detention centers.^{vi} The law expressly prohibits the Department of Corrections and Rehabilitation from entering into any new contract, or renewing an existing contract, with a private prison to house state prison inmates.^{vii} This policy helps restrict family detention by prohibiting the use of private prison facilities as detention centers whereby disincentivizing detention altogether.

2. Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.

Although not currently implemented, the United States government has previously used well-established alternatives to detention, which are less costly, more humane, and widely effective at ensuring families appear for their immigration hearings.^{viii} The following programs or methods have been used in the past and have been shown to be effective methods outside of detention:

- ICE’s Family Case Management Program, a widely successful and highly endorsed program that provided support to families released from detention,^{ix}
- conducting all custody and release decisions *after* assessing an individual’s public safety and flight risk ^x and allowing families to be released on their own recognizance and bonds where appropriate;^{xi}
- applying humane and legal policies where parents and children are kept together and then released to community-based sponsors, and^{xii}
- investing financial resources into programs which ensure legal representation and access to community-based support organizations rather than increasing the budget for detention centers,^{xiii} where this support increases the rate of court appearance and compliance and minimizes the mental and/or physical health damage caused by detention.^{xiv}

3. Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education(e.g. by ensuring effective access to inter alia adequate reception, healthcare, education, legal advice, family reunion).

The Flores Settlement mandates a 20-day detention limit with a basic standard of care for

detained migrant children. Specifically, minors must be held in facilities which are “safe and sanitary” with access to toilets and sinks, drinking water and food, medical assistance, and proper temperature control and ventilation.^{xv} The Settlement also provides that the minor in custody shall be provided with “a notice of rights, including the right to a bond redetermination if applicable.”^{xvi} While the Settlement is far from perfect, it at least demands that detained migrant children are treated with a basic standard of care.

The TVPRA further limits the detention of unaccompanied children to 72 hours before Customs and Border Patrol must transfer custody to the Department of Health and Human Services. Children in HHS’s custody, under the TVPRA, must be placed in the “least restrictive setting that is in the best interest of the child.”^{xvii} Before an unaccompanied child is placed with a custodian, the HHS must make a determination that the proposed custodian “is capable of providing for the child’s physical and mental well-being.”^{xviii} Custodians are to receive legal orientation presentations from HHS which “shall address the custodian’s responsibility to attempt to ensure the child’s appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.”^{xix} The Act further provides that HHS shall attempt to ensure that unaccompanied children who have been in their custody “have counsel to represent them in legal proceedings” and shall “make every effort to utilize the services of pro bono counsel” to obtain representation for the children without charge.^{xx}

The U.S. Commission on Civil Rights issued a report in October 2019 recommending that immigrant detention centers in the United States meet certain requirements. In addition to providing “minimum safe, sanitary and human detention conditions,” the Commission also recommends that detention facilities provide adequate medical care, access to schooling for children while detained, and allow children to “interact with one another on a humane level, including actions such as hugging and comforting one another.”^{xxi} The Commission also recommends that Congress “provide sufficient funding” for the purposes of “ensur[ing] asylum seekers and other immigrants are accorded full due process.”^{xxii} Additionally, the report called for Congress to pass legislation to allow Congressmembers and members of the Commission on Civil Rights to “conduct independent inspections of detention facilities” and for the Department of Homeland Security to “conduct greater oversight and inspection of detention centers, specifically those relating to child detention centers” to increase accountability in immigrant detention.^{xxiii}

4. Please indicate any challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families.

The United States government argues that strategies such as the “zero-tolerance” policy disincentivize the alleged habitual “catch and release”^{xxiv} phenomenon, where undocumented migrants abandon their immigration court hearings upon release from detention centers. However, experts counter that indefinite detention neither compensates for the few cases in which this phenomenon occurs nor deters further instances from happening.^{xxv} In fact, immigration courts reported that about 25% of people in removal proceedings failed to appear in the 2016 fiscal

year,^{xxvi} while additional research indicates 86% of families and 96% of asylum-seeking families appear at all hearings.^{xxvii}

Aggressive immigration policies in the United States have resulted in the detention and separation of more than 2,700 children from their parents, where at least seven children have died either in custody or after being detained by federal immigration agencies at the border. The indefinite detention of immigrant children and forced family separation is torture and violates immigrant children’s rights to life, movement, and health. According to government experts, children who experience forced separation and detention exhibit symptoms of trauma and increased risk of health issues.^{xxviii} These adverse childhood experiences cause developmentally detrimental consequences which can ultimately create a “weak foundation for later learning, behavior, and health.”^{xxix} A report conducted by the inspector general’s office in the U.S. Department of Health and Human services stated, “these children, many already distressed in their home countries or by their journey, showed more fear, feelings of abandonment and post-traumatic stress symptoms than children who were not separated.”^{xxx} Prolonged detention of immigrant children will lead them to “experience toxic stress —intense, repetitive or prolonged adversity without an adult’s intervention — a situation that’s usually seen when a child is placed in an orphanage, survives a natural disaster or lives in poverty, a war zone or a refugee camp.”^{xxxi}

Children in immigrant detention facilities are held in cages under inhumane conditions.^{xxxii} According to the American Civil Liberties Union, “[c]hildren are being asked to use the restroom on piles of feces. One woman . . . described her child who kept throwing up, and trying to use the restroom, and throwing up . . . it’s really horrifying.”^{xxxiii} Detainees are then transferred to “the Icebox,” facilities intentionally kept very cold as a deterrent, similar to those used by law enforcement for purposes of interrogation, without any access to blankets.^{xxxiv} In recent months, at least seven children have either died in custody or after being detained by federal immigration agencies at the border.^{xxxv}

The United States’ federal government publicly acknowledged that the purpose and motive behind the “zero tolerance” policy and overall approach towards immigration is to deter potential migrants from entering the country illegally. Thus, the immediate, lasting detrimental effects on migrant children as a result of family separation and indefinite detention were, in fact, an explicitly intended consequence of the “zero tolerance” policy. Evidence proves that detention is ineffective in deterring illegal immigration or reducing the number of cases where individuals fail to appear at their court hearings, and the effects of “zero tolerance” on vulnerable children constitutes cruel, inhuman, degrading, and unnecessary treatment.

5. What support could other stakeholders (other than your Government) provide to strengthen the development and/or implementation of non-custodial alternatives to immigration detention of children and their families that enhance the protection of their rights?

Children, no matter their country of origin, comprise a particularly vulnerable group which mandates protection by governments, not the infliction of torture and ill-treatment. The Trump administration’s “zero-tolerance” policy is not only an ineffective method for deterring illegal

immigration, it amounts to torture. The United States’ government must be held accountable for the human rights violations it has committed against immigrant children, and its policies must be put to end before any child endures further irreparable harm.

The United States’ immigration policies, namely the “zero tolerance” policy and proposed changes to the Flores Settlement Agreement, have failed to achieve their intended goals. Stakeholders should demand that the United States federal government implement non-custodial alternatives (which have already been utilized successfully in the past) to drastically reduce the number of people and families in detention centers; at bare minimum, families with children should be released. Stakeholders must also ensure that the Flores Agreement remain in effect to prevent minors from being placed in detention at all or for any length of time beyond the minimum necessary to process their claims and release them to their families.

The United States is the only country worldwide to have not ratified the Convention on the Rights of the Child. The Convention contains obligations for the State to care for the health, safety, and well-being of children, regardless of their immigration status. Article 37(b) is especially important, providing that detention of a child “shall be used only as a measure of last resort and for the shortest appropriate period of time.” Stakeholders should demand that the United States ratify this convention, and uphold the obligations contained within.

ⁱ Congressional Research Service, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy* (February 2019), <https://fas.org/sgp/crs/homesec/R45266.pdf>

ⁱⁱ New York Times, *Migrant Families Would Face Indefinite Detention Under New Trump Rule* (August 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html?action=click&module=RelatedLinks&pgtype=Article>

ⁱⁱⁱ *Id.*

^{iv} New York Times, *Judge Blocks Trump Administration Plan to Detain Migrant Children* (September 27, 2019) <https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html?auth=login-google&login=google>

^v [Trafficking Victims Protection Reauthorization Act](#), Section 25(c)(2).

^{vi} Office of the Governor, *Governor Newsom Signs AB 32 to Halt Private, For-Profit Prisons and Immigration Detention Facilities in California*, (Oct 11, 2019) <https://www.gov.ca.gov/2019/10/11/governor-newsom-signs-ab-32-to-halt-private-for-profit-prisons-and-immigration-detention-facilities-in-california/>.

^{vii} California Assembly Bill No. 32: Detention facilities: private, for-profit administration services. (Passed Oct. 11, 2019) https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=20192000AB32.

^{viii} American Immigration Lawyers Association [hereinafter “AILA”], Lutheran Immigration and Refugee Service, National Immigrant Justice Center, and Women’s Refugee Commission, *The Real Alternatives to Detention, Immigration Justice Campaign*, (last visited October 24, 2018), <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%202006.17.pdf>.

^{ix} Dept. of Homeland Security Advisory Committee on Family Residential Centers, *Report of the DHS Advisory Committee on Family Residential Centers*, (Sept. 30, 2016), available at <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

^x AILA, *supra* note viii.

^{xi} Eleanor Acer, *Studies: Mass Detention of Migrant Families is Unnecessary, Inefficient*, Just Security, (July 5, 2018), <https://www.justsecurity.org/58897/studies-show-mass-detention-family-migrants-unnecessary-inefficient>.

^{xii} Amnesty International, *Kids Deserve Safety and Freedom, Not Jail!*, (last visited Oct. 24, 2018), <https://act.amnestyusa.org/page/32656/action/1?locale=en-US>

^{xiii} Detention Watch Network, *Alternative Detention*, (last visited Oct. 31, 2018), <https://www.detentionwatchnetwork.org/issues/alternatives>.

- ^{xiv} ACLU, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-Up*, (last visited Oct. 31, 2018), https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf.
- ^{xv} Flores Settlement, Section V(12)(A).
- ^{xvi} *Id.*
- ^{xvii} Trafficking Victims Protection Reauthorization Act, Section 235 (3)(c)(A).
- ^{xviii} *Id.*
- ^{xix} *Id.*, Section 235 (4).
- ^{xx} *Id.*, Section 235 (5).
- ^{xxi} U.S. Commission on Civil Rights, *Trauma at the Border: The Human Cost of Inhumane Immigration Policies*, (Oct. 2019), Page 127, <https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf>.
- ^{xxii} *Id.*
- ^{xxiii} *Id.*, p. 128.
- ^{xxiv} Dara Lind, “Catch and Release,” explained: the heart of Trump’s new border agenda, Vox, (Apr. 9, 2018), <https://www.vox.com/2018/4/9/17190090/catch-release-loopholes-border-immigrants-trump>.
- ^{xxv} Beth Van Schaak, *What is the Flores Agreement, and What Happens If The Trump Administration Withdraws From It?* Just Security, (Oct. 18, 2018), <https://www.justsecurity.org/61144/flores-agreement-trump-administration-withdraws-it>.
- ^{xxvi} U.S. Dept. of Justice, Office of Planning, Analysis, and Statistics, *FY 2016 Statistics Yearbook*, (March 2017), available at <https://www.justice.gov/eoir/page/file/fysb16/download#page=49>.
- ^{xxvii} Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, (2018), 106 Cal. L. Rev. 785, DOI: <https://doi.org/10.15779/Z38WH2DF26>.
- ^{xxviii} Center for Disease Control (“CDC”), *About the CDC-Kaiser ACE Study, National Center for Injury Prevention and Control*, (last updated June 14, 2016), <https://www.cdc.gov/violenceprevention/acestudy/about.html>. International Human Rights Clinic, Santa Clara University School of Law, *Suggestions for List of Issues Prior to Reporting Regarding the United States of America*, 14 January 2019, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_ICJ_USA_33414_E.pdf
- ^{xxix} Jack P. Shonkoff & Andrew S. Garner, *Lifelong Effects of Early Childhood Adversity and Toxic Stress*, J. of Amer. Academy of Pediatrics, 129:1, (Jan. 2012), <http://pediatrics.aappublications.org/content/129/1/e232.long>. International Human Rights Clinic, Santa Clara University School of Law, *Suggestions for List of Issues Prior to Reporting Regarding the United States of America*, 14 January 2019, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_ICJ_USA_33414_E.pdf
- ^{xxx} *Id.*
- ^{xxxi} Laura Santhanam, *How the Toxic Stress of Family Separation Can Harm a Child*, Jun. 18, 2018, <https://www.pbs.org/newshour/health/how-the-toxic-stress-of-family-separation-can-harm-a-child>.
- ^{xxxii} *Id.*
- ^{xxxiii} *Id.*
- ^{xxxiv} *Id.*
- ^{xxxv} American Civil Liberties Union, *Immigrant Kids Keep Dying in CBP Detention Centers, and DHS Won’t Take Accountability*, (June 24, 2019), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/immigrant-kids-keep-dying-cbp-detention>