

Católica Global School of Law – Universidade Católica Portuguesa

Migrant Detention Centers in the United States and the Treatment of Children – Do the Practices Violate International Conventions and National Law?

Candidate: Nina Ivanovna Patrikyan

Master of Transnational Law

Supervisor: Ana Rita Gil

Date of Submission: 30 June 2020

Table of Contents

Title Page.....	1
Table of Contents.....	2
Abstract and Key Words.....	3
Introduction.....	4
Methodology.....	5
Chapter One: Literature Review.....	6
1. <i>United Nations Conventions</i>	6
1.1 <i>Convention of the Rights of the Child</i>	6
1.2 <i>Convention against Torture</i>	7
2. <i>United Nations Commentaries and Reports</i>	9
2.1 <i>Definition of Torture</i>	9
2.2 <i>Cruel, Inhuman, and Degrading Treatment</i>	12
2.3 <i>The Havana Rules</i>	16
2.4 <i>Effect of International Law on United States Law</i>	17
3. <i>United States Case Law and Policies</i>	17
3.1 <i>US Case Law on Cruel and Unusual Punishment</i>	18
3.2 <i>Flores Settlement History</i>	21
3.3 <i>TEDS Policies (Standards on Transport, Escort, Detention, and Search)</i>	23
3.4 <i>Refugee Law and Asylum</i>	24
3.5 <i>Zero Tolerance Policy and Family Separation</i>	25
Chapter Two: Findings.....	27
1. <i>Introduction</i>	27
1.1 <i>Why Children are Fleeing</i>	27
2. <i>Reports and Complaints</i>	28
2.1 <i>ACLU Report</i>	28
2.2 <i>DHS Administrative Complaint</i>	29
2.3 <i>United Nations Global Study</i>	31
3. <i>Flores Litigation</i>	32
3.1 <i>Flores v. Sessions</i>	32
4. <i>Zero Tolerance Policy</i>	33
4.1 <i>Office of Inspector General Report</i>	33
5. <i>Psychological Effects</i>	34
Chapter Three: Discussion and Conclusion	36
1. <i>International Law</i>	36
2. <i>United States Cruel and Unusual Punishment</i>	39
3. <i>Conclusion</i>	41
Index.....	42
References.....	43

Abstract

This paper examines the migrant detention centers in the United States through the lenses of the Convention Against Torture (CAT), and relevant United States law, such as the Supreme Court's case law on the Eighth Amendment (cruel and unusual punishment). Specifically, we will address the treatment of children by the government while they are entering the United States in an attempt to claim asylum (either accompanied by their parents or unaccompanied). Additionally, the "zero tolerance policy" enacted by the US government in 2018, which forced the separation of children from their parents is examined. Both of these situations are studied to determine whether any of the treatment the children received violates the CAT and is considered to be either torture or cruel, inhuman or degrading punishment. Similarly, we will also analyze whether this treatment violates the Eighth Amendment of the United States Constitution. Looking at factual findings from complaints filed over the years against U.S. agencies responsible for immigration and detention, as well as reports studying migrant detention centers, multiple allegations of ill-treatment have been reported. Taking into consideration these factual findings with the case law and legal interpretations of torture and cruel, inhuman or degrading treatment, it is argued that this treatment of children could be qualified as torture and/or cruel, inhuman or degrading treatment under international law. Under United States law, it is also argued that these treatments constitute cruel and unusual punishment.

Key Words: migrants, migration, detention centers, unaccompanied minors, children, children's rights, human rights, torture, cruel inhuman and degrading treatment, ill-treatment, international law, United States, immigration law, immigration policy

Introduction

The United States has a long history with refugees as well as with unaccompanied minors. Over the last decade, there has been a significant increase in the numbers of migrant children entering the United States, particularly from Central America. These migrants are fleeing their homes to escape severe poverty and gang violence. All in search of a better life. However, when they arrive in the United States, they are faced with a different horror. They may be held in detention centers, which offer little or no response to their no basic needs, and they will severely suffer once again. The conditions of these migrant detention centers gained attention two years ago due to media reports revealing the extremely poor conditions children were living in, such as severe overcrowding and inadequate protection from the cold. However, the poor treatment of children was already taking place several years before it finally caught the attention of the international community.

There are international conventions that protect individuals from cruelty such as torture. The United States has these laws in place, and it also has an Amendment to its Constitution that prevents cruel and unusual punishment. According to International Human Rights Law, no country is allowed to torture individuals, nor inflict cruel, inhuman and degrading treatment. This dissertation will examine whether the United States has breached the prohibition against torture and cruel, inhuman or degrading treatment, either against international laws and conventions, or against the Eighth Amendment prohibition of cruel and unusual punishment.

Methodology

Due to the complicated nature of the subject of this dissertation, the method with which data can be found and compiled will differ slightly. Findings will be through reports done by various organizations, describing the environment and situations within the several migrant detention centers in the United States. Though being second-hand sources, these reports are the next best to interviewing children in these detention centers. Access to these detention facilities is extremely limited, and access to the children can be equally limited without proper qualifications. Nevertheless, the factual findings from the various reports will provide adequate qualitative and quantitative information necessary for the purpose of legal analysis for this dissertation.

Chapter One: Literature Review

1. UN Conventions

The United Nations Human Rights system has adopted several Conventions. However, two of them are the most pertinent to this subject: The Convention on the Rights of the Child (CRC), and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It is important to note that the United States has signed, but not ratified the CRC, making it the only country that is part of the United Nations which does not apply the CRC.¹ Nevertheless, the CRC has some important sections that can be useful as support. And, although the United States has not ratified the CRC, it does have laws that protect children in its Federal Statutes, and state-level laws as well. The CAT, on the other hand, is a Convention the United States has ratified - therefore it is a State Party to this Convention.² In Article 17 section 1, the CAT establishes a Committee against Torture.³ Article 21 grants this Committee competence to receive and consider communications when there are claims that State Parties are not fulfilling their obligations under the Convention.⁴

1.1 Convention of the Rights of the Child

This Convention bestows certain rights to children simply because they are human beings who deserve dignity and respect that “the rhetoric of human rights signals”.⁵ Due to the fact the United States is not a State Party to this Convention, relevant Articles of the CRC will be looked at through a conditional lens. That is to say that we should think on which potential effect the ratification of this Convention would have on U.S. treatment of children in migrant detention centers. The following are some of the most applicable sections of the CRC as applied in the context of children in migrant detention centers:

¹ <https://indicators.ohchr.org/> - Convention of the Rights of the Child

² <https://indicators.ohchr.org/> - Convention Against Torture

³ <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

⁴ *Id.*

⁵ Thronson, David B. “Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law”, *Ohio State Law Journal*, n.º 63, pgs. 979-1016, (2002) at 989
<https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1329&context=facpubs>

Article 3, section 1: All actions concerning children, whether done through public or private institutions, “courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁶

Article 37: State Parties will ensure: subsection (a): “No child shall be subjected to torture or other cruel, inhuman, or degrading punishment or treatment.”⁷ Subsection (b): “...The arrest, detention or imprisonment of a child shall be in conformity of the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”⁸ Subsection (c): “Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person...”⁹ Lastly, Subsection (d): Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance...”^{10/11}

If this Convention were to be finally ratified by the United States, it could provide greater protection to children. At the very least, it would make it possible to have complaints submitted to the Committee of the Rights of the Child. The United States does have laws that prohibit torture, and in situations such as child custody, the best interest of the child is a primary consideration. However, the CRC explicitly protects and grants several other rights to children, such as prohibition of torture and of arbitrary separation from their parents. Having this Convention ratified could make it more explicit that children should not be subjected to torture or other ill-treatment.¹²

1.2 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Article 1 of this Convention provides the definition of torture.¹³ It states, in what is relevant in this context: “...the term “torture” means any act by which severe pain or

⁶ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ For more on the CRC, see Detrick, Sharon *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff Publishers, 1992

¹² For other potential impacts of the CRC in other areas, see Mower Jr., Glenn A, *The Convention on the Rights of the Child: International Law Support for Children*, Greenwood Press (1997) pgs. 6-9

¹³ While drafting this convention, many countries submitted their own versions of what the definition should be. See Burgers, J. Herman and Danelius, Hans, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Kluwer Academic Publishers (1988) at 41-44.

suffering, whether physical or mental, is intentionally inflicted on a person...for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁴

Article 10 of the CAT states that every State Party will ensure that education and information regarding the prohibition of torture is given during training of law enforcement, public officials, civil or military, or other personnel “who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”¹⁵

Article 16 section 1 of the CAT states: “Every State Party shall undertake to prevent...other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁶

The United States did ratify this Convention, subject to some understandings advised by the United States Senate relating to the definition of torture. In the United States, to constitute torture, “an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from...the intentional infliction or threatened infliction of severe physical pain or suffering.”¹⁷ For the definition of cruel, inhuman or degrading treatment, the United States is only bound to Article 16 of the CAT “insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution of the United States.”^{18/19/20} Some case law, which will be discussed in detail further below, shed some

¹⁴ <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ M Novak, *The United Nations Convention Against Torture and Its Optional Protocols (2nd Edition): A Commentary*, Oxford Commentaries on International Law, Oxford University Press, section 2.3 para. 61 (hereinafter M Novak, *UN CAT Commentary, 2nd Edition*)

¹⁸ *Id.* at Appendix A4 Understandings by the United States of America upon ratification (21 October 1994).

¹⁹ The Fourteenth Amendment to the United States Constitution incorporates portions of the Bill of Rights to the States: it is applicable both on a State level and at the Federal. Thus, through its Equal Protection Clause, the Fourteenth Amendment also requires states to practice equal protection.

²⁰ The Fifth Amendment states, in relevant part: “No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Though it originally only applied to the federal government, it has been partially incorporated to the States through the Due Process Clause of the Fourteenth Amendment. The Fifth Amendment also requires the Federal government to practice equal protection. https://www.law.cornell.edu/wex/fifth_amendment

light on what shall be considered as cruel or unusual and inhumane treatment or punishment. First, however, the United Nations definitions and interpretations will be examined.

2. United Nations Bodies' Commentaries and Reports

2.1 Definition of Torture

In 2010, the Office of the United Nations High Commissioner for Human Rights published a manual on the definition of “torture”, based on “the practice and jurisprudence of various international bodies.”²¹ It is generally agreed that there are four elements of torture. Three important introductory points to note. One, torture is traditionally connected to cruel, inhuman and degrading treatment.²² Two, torture is “the legal qualification of an event or behavior, based on the comprehensive assessment of this event or behavior. Therefore, the difference between...torture, cruel, inhuman and degrading treatment...depends on the specific circumstances of each case and is not always obvious.” [original underlining]²³. There are, in some situations, factors that make the victim more vulnerable (age, gender, status), the environment, and the cumulative effect of various factors should be taken into account in determining whether the event or behavior may be qualified as torture, or cruel, inhuman or degrading treatment.²⁴ It is important to make the distinction because there are three levels of ill-treatment. The most severe being torture, followed by cruel and inhuman treatment, and, finally, by degrading treatment.²⁵

As already said, the definition of torture stemming from Article 1 of the Convention against Torture, for the relevant purposes in this dissertation, encompasses: any act by which either severe physical or mental pain or suffering is intentionally inflicted on a person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any other person

²¹ *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf, pg.2 (hereinafter *Interpretation of Torture*)

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ For an example of how to distinguish the three levels of treatment, as well as examples of the last two types of treatment, see Kolb, Robert. *La jurisprudence internationale en matière de torture et de traitements inhumains ou dégradants*, *Revue Universelle des Droits de l'Homme*, vol. 15, n.° 7, 2003, p. 254-287, at 256 <https://archive-ouverte.unige.ch/unige:44890>

acting in an official capacity.^{26/27} From this definition, we may identify four elements that must be present as to qualify an act as torture: the specific nature of the act, the intention of the perpetrator, the purpose, the involvement of public officials or assimilated.²⁸ Each element will be now analyzed.

Regarding the nature of the act, the legal definition includes both “acts and omissions that inflict severe pain or suffering.”²⁹ The meaning of “severe pain or suffering” is open to legal interpretation. Some court cases provide some insight. The UN Committee Against Torture has recognized rape, as well as other gender-based violence, as torture.³⁰ Often, the decision can be based on the specific circumstances of each case.³¹

The next element is the intention of the perpetrator. Currently, pure negligence is not sufficient to be considered, for international law purposes, as an act of torture, because of the lack of “intention”.³² It is not necessary that the perpetrator acted with intent to cause severe pain or suffering, considering degrees of pain and suffering can be subjective; however, it is sufficient that the perpetrator’s act was voluntary, and then has resulted in severe pain and suffering.³³ The United States, on the other hand, adopted the Convention “with the explicit ‘understanding’ that, ‘in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.’”³⁴

Another element is the purpose of the act. The following five purposes must be fulfilled in order to constitute torture: extracting a confession, obtaining information, punishment, intimidation or coercion, *or* for discrimination.³⁵ This is not an exhaustive list, but rather indicative.³⁶ All purposes refer to scenarios where the person is either a detainee, or

²⁶ <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

²⁷ “Acts which fall short of this definition, particularly acts without the elements of intent or acts not carried out for the specific purposes outlined, may comprise CIDT under article 16 of the Convention.” UN Doc. E/CN.4/2006/6 para. 35 <https://undocs.org/en/E/CN.4/2006/6>

²⁸ *Interpretation of Torture*, supra at 3.

²⁹ *Id.*

³⁰ *CT and KM v Sweden*, No 279/2005, UN Doc CAT/C/37/D/279/2005, 17 November 2006, para 7.5. <https://www.refworld.org/cases,CAT.47975b00c.html> (“...the Committee considers that the first named complainant was repeatedly raped in detention and as such was subjected to torture in the past.”)

³¹ M Novak, *UN CAT Commentary*, 2nd Edition section 3.1.2.2. para. 89

<https://opil.ouplaw.com/view/10.1093/law/9780198846178.001.0001/law-9780198846178-chapter-3#law-9780198846178-chapter-3-div1-15>

³² *Interpretation of Torture* at 4.

³³ *Id.* at 54, para. 105

³⁴ M Novak, *UN CAT Commentary*, 2nd Edition at 53 section 3.1.3, para. 101

<https://opil.ouplaw.com/view/10.1093/law/9780198846178.001.0001/law-9780198846178-chapter-3#law-9780198846178-chapter-3-div1-15>

³⁵ *Interpretation of Torture* at 4. [italics added]

³⁶ *Id.*

at the least, under factual power or control of another person.³⁷ This term is known as powerlessness. Powerlessness for this context means that “someone has come under the direct physical or equivalent control of the perpetrator and has lost the capacity to resist or to escape from the infliction of pain or suffering.”³⁸ The United States defined torture to apply only to “acts directed against persons in the offender’s custody or physical control.”³⁹ There is an underlying premise that one element of torture is the deprivation of liberty, due to the fact of being under control of the offender.⁴⁰

The last full element is the involvement of a public official. The first thing to resolve concerns who may qualify as a public official. One situation can arise where a State will argue its representatives are not responsible for torture nor ill-treatment of individuals.⁴¹ In the case *EN v Burundi*, the State argued his police officers’ actions were not planned nor were they practiced under any orders, so, such acts in question could not be classified as torture.⁴² However, in this case the Committee Against Torture noted that the officers were in uniform with rifles and belts, and the beating in this case took place in the police station itself.⁴³ Therefore, the abuse inflicted on the Complainant was done by agents acting in an official capacity.⁴⁴ In a similar case, the Committee found that a complainant, who was held in pretrial investigation with the Ministry of Internal Affairs in Astana when his injuries were inflicted, had also been a victim of torture.⁴⁵ This case demonstrates that pretrial investigation is still considered under official custody. It can be concluded that “a State party is responsible for the acts committed by its public officials, such as police, for any acts of ill-treatment that happen within its premises and that such acts amount to torture,” once the other elements are met.⁴⁶ For in what concerns the phrase “other person acting in an official capacity”, the

³⁷ M Novak, *UN CAT Commentary, 2nd Edition* at 56 section 3.1.5 para. 114.

³⁸ SRT (Melzer) ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (2017) UN Doc A/72/178, para. 31 <https://undocs.org/A/72/178>

³⁹ M Novak, *UN CAT Commentary, 2nd Edition* at 1144 Understandings by the United States of America upon ratification (21 October 1994).

⁴⁰ See the Rome Statute of the International Criminal Court, Article 7(2)(e): “‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused;...” UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6 <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

⁴¹ *EN v Burundi*, No 578/2013, UN Doc CAT/C/56/D/578/2013, 25 November 2015 para. 7.3 <https://www.atlas-of-torture.org/en/document/hecskbouz3khmi45hrpvw8kt9?page=10>

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Oleg Evloev v Kazakhstan*, No 441/2010, UN Doc CAT/C/51/D/441/2010, 5 November 2013, para 9.2 http://www.worldcourts.com/cat/eng/decisions/2013.11.05_Evloev_v_Kazakhstan.pdf

⁴⁶ M Novak, *UN CAT Commentary, 2nd Edition* at 60 section 3.1.6.1 para. 124

Committee against Torture has included *de facto* authorities, whose power is comparable to government authority.⁴⁷ The definition of “instigation” is generally accepted and is much less ambiguous than the phrase “consent or acquiesce”.⁴⁸ In the United States, the term “acquiesce” requires that the public official is aware of the activity that constitutes torture before it occurs. Therefore, the official breaches his or her legal responsibility to intervene to prevent it.⁴⁹

The Committee against Torture commented that personnel in a privately owned or run detention centers, for example, are acting in an official capacity due to the responsibility for carrying out a State function.⁵⁰ Furthermore, the failure of a State to exercise due diligence where it knows, or has reasonable grounds to believe, that acts of torture or ill-treatment are committed by non-State officials or private actors (acting on their behalf), means that the State is enabling these actors to inflict these ill-treatments; therefore, the State’s indifference or inaction provides a form of *de facto* permission.⁵¹ This reasoning has been applied to the failure to prevent and protect victims from gender-based violence, such as rape, trafficking, domestic violence.⁵²

2.2 Cruel, Inhuman and Degrading Treatment

There are elements with which to distinguish between torture, and cruel, inhuman and degrading treatment. It is important to analyze and interpret the meaning and application of cruel, inhuman and degrading treatment. The decisive criteria to distinguish torture from cruel, inhuman and degrading treatment is the purpose of the conduct, the intention of the offender, and the powerlessness of the victim.⁵³

One of the decisive features in distinguishing cruel, inhuman and degrading treatment from torture, is the purpose.⁵⁴ In other words, the difference between torture and other cruel,

⁴⁷ *Interpretation of Torture* at 5.

⁴⁸ See M Novak, *UN CAT Commentary, 2nd Edition* at 61 section 3.1.6.3. para 128 “The term ‘instigation’ means incitement, inducement, or solicitation and as such requires the direct or indirect involvement and participation of a public official. The terms ‘consent and acquiesce’...can be interpreted to cover a wide range of actions...”

⁴⁹ *Id.* at 1144

⁵⁰ CAT, ‘General Comment No 2 on the Implementation of Article 2 by States Parties’ (2008) UN Doc CAT/C/GC/2, para 17 <https://undocs.org/CAT/C/GC/2>

⁵¹ *Id.* at para. 18

⁵² *Id.*

⁵³ SRT (Nowak) ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (2010) UN Doc A/HRC/13/39, para. 60 (hereinafter Nowak, UN Doc A/HRC/13/39) <https://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-39.pdf>

⁵⁴ *Interpretation of Torture, supra* at 8

inhuman and degrading treatment is that “the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the offence of torture.”^{55/56} Treatment not inflicted for any of the prohibited purposes may still constitute cruel, inhuman and degrading treatment. Cruel, inhuman and degrading treatment “means the infliction of pain or suffering without purpose or intention and outside a situation where a person is under the de facto control of another.”⁵⁷

Another element to distinguish the two types of treatment is the severity of the treatment. An act of cruel and inhuman treatment must reach a minimum level of severity.⁵⁸ This is evaluated on a case by case basis, and the Court considers the following elements: the duration of the treatment, the physical effects of the treatment, the mental effects of the treatment, and the sex, age and state of the victim, as well as his or her health.⁵⁹

It is therefore important that the proportionality test is used to determine if the infliction of pain and suffering reaches the level of cruel, inhuman and degrading treatment.⁶⁰ If the use of force is not necessary and in the specific circumstances of the case were not proportional with the purpose achieved, it amounts to cruel or inhuman treatment.⁶¹ This can also be applied to the third difference, the powerlessness of the victim. Once a person is powerless, or under direct physical or equivalent control of the perpetrator, and he/she has lost the capacity to resist or escape the infliction of pain or suffering, the proportionality test is no longer applicable. Thus, due to powerlessness, the treatment is considered torture.⁶² Another way to phrase the powerlessness of the victim is whether they have been deprived of their liberty. The critical question whether their liberty has been deprived is whether the victim is free to leave or not.⁶³ Cruel, inhuman and degrading treatment can occur whether or not the victim is detained.

⁵⁵ Lene Wendland, *A Handbook on State Obligations under the UN Convention against Torture*, Association for the Prevention of Torture (2002) at 28

https://www.apr.ch/content/files_res/A%20Handbook%20on%20State%20Obligations%20under%20the%20UN%20CAT.pdf

⁵⁶ See also Sifris, Ronli, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture*, Routledge (2014) at pg. 242.

⁵⁷ Wendland, *supra*, at 28.

⁵⁸ European Court of Human Rights, *Ireland v. United Kingdom*, para 162

<https://www.refworld.org/cases,ECHR,3ae6b7004.html>

⁵⁹ *Id.*

⁶⁰ M Novak, *UN CAT Commentary, 2nd Edition* at 444 para. 7

⁶¹ *Id.*

⁶² *Id.* at pg. 444

⁶³ Melzer, N, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2018) UN Doc A/HRC/37/50 para.17 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/347/27/PDF/G1834727.pdf?OpenElement> (hereinafter UN Doc A/HRC/37/50).

In the legal context, there is no specific definition of the words “cruel” and “inhuman” besides the standard understandings of these words.^{64/65} Degrading treatment or punishment is more easily defined: it needs to have an element of humiliation.⁶⁶ Cruel, inhuman and degrading treatment can also be committed by public officials through instigation, consent and acquiescence.⁶⁷ The United States only considers itself bound to Article 16 insofar as cruel, unusual and inhumane treatment or punishment as prohibited by the Fifth, Eighth, and Fourteenth Amendments of the Constitution.^{68/69}

Another definition for cruel, inhuman and degrading treatment can be as follows: “the infliction of severe pain or suffering, whether physical or mental, by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁷⁰ The conduct does not require a purpose, can be both intentional or negligent, and does not require the specific situation of detention.⁷¹

In one case, the Committee concluded that while prolonged detention ranging from one month to just over three, in a temporary confinement ward, without bedding, toilet, sink, shower, and light always on did not amount to “severe pain and suffering”, it amounted to cruel, inhuman or degrading treatment.⁷²

An important circumstance to highlight concerns the conditions of detention. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noted that, in detention centers, the combined deprivation and non-fulfillment of rights to food, water, clothing, health care, and a minimum of space, hygiene, privacy, and security

⁶⁴ *Id.* pg. 444 para. 8

⁶⁵ In the Oxford English Dictionary, “cruel” is defined as: (1) ‘disregarding or taking pleasure in the pain or suffering of others’ or (2) ‘causing pain or suffering’. “Inhuman” is defined as (1) ‘lacking positive human qualities’; ‘cruel and barbaric’ or (2) ‘not human in nature or character’

⁶⁶ M Novak, *UN CAT Commentary, 2nd Edition* at 444 para. 9

⁶⁷ *Id.* para. 10

⁶⁸ *Id.* at 445 para. 12

⁶⁹ See *infra*: § *United States Case Law on Cruel and Unusual Punishment*

⁷⁰ M Novak, *UN CAT Commentary, 2nd Edition* at 443 section 3.1 para. 6

<https://opil.ouplaw.com/view/10.1093/law/9780198846178.001.0001/law-9780198846178-chapter-18#law-9780198846178-chapter-18-div1-112>

⁷¹ *Id.*

⁷² *Sergei Kirsanov v Russian Federation*, UN Doc CAT/C/52/D/478/2011, 14 May 2014

No 478/2011 para 11.2.

http://www.worldcourts.com/cat/eng/decisions/2014.05.14_Kirsanov_v_Russian_Federation.pdf (“...some of the facts relating to the complainant’s prolonged detention in the temporary confinement ward are not disputed...he was not provided with bedding or toiletry items, that there was no table, toilet or sink in the cell, that showers were seldom allowed and then only with cold water, and that no walks outside the cell were allowed. The Committee also notes that the State party has disputed other allegations made by the complainant, namely that there were insects in the cell, that the light was always on, that there was no ventilation and that he was only fed once a day...the Committee considers that, even without taking the disputed facts into consideration, the conditions of detention in the temporary confinement ward amounted to cruel, inhuman or degrading treatment within the meaning of article 16 of the Convention.”)

necessary for a humane and dignified existence, amounts to a systematic practice of inhuman and degrading treatment or punishment.⁷³

Although the difference between torture and cruel, inhuman and degrading treatment can vary depending on the jurisdiction, two important points are to be remembered. First, is that both torture and cruel, inhuman and degrading treatment are “absolutely prohibited and therefore cannot be justified under any circumstance.”⁷⁴ Second, torture is more serious than cruel, inhuman and degrading punishment.⁷⁵ The consequences of the treatment vary in intensity depending on various factors (duration, age, sex, context, vulnerability) and these factors must be analyzed in each situation.⁷⁶

In the context of migrant detention to determine whether a treatment amounts to torture or cruel, inhuman and degrading treatment there are a few more guidelines to help shed some light. Any detention system that either deliberately or consequently, through negligence or impunity, puts migrants to conditions that are grossly beneath universally recognized standards, does not comply with the prohibition of torture and ill-treatment.⁷⁷ Ill-treatment or grossly inadequate detention conditions can amount to torture if they are intentionally imposed, encouraged, or tolerated for discrimination of any kind, including based on immigration status, for the purposes of deterring or punishing migrants, or to coerce into withdrawing an asylum application or agreeing to voluntary return.⁷⁸ Similarly, prolonged or indefinite detention can be used for the same purposes. By keeping migrant detention seemingly indefinite, it could lead to frustrated migrants withdrawing their applications, or “voluntarily” choosing to return to their country.⁷⁹ If they do not “choose” to drop asylum claims, migrants then remain in detention facilities and continue to be at risk for further cruel and inhuman treatment.

There are many provisions, regulations, and legal decisions regarding what constitutes torture, as well as cruel, inhuman and degrading treatment. The definitions for both have gone through a very thorough legal interpretation. Due to the subjective nature of some of the elements, it is not always clear whether there is ill-treatment and second, what is the type of treatment; that is to say, whether it amounts to torture, or cruel, inhuman and degrading

⁷³ Nowak, UN Doc A/HRC/13/39, *supra* para. 64

⁷⁴ UN Doc A/72/178, *supra*, para. 27.

⁷⁵ *Id.* para. 28

⁷⁶ *Id.*

⁷⁷ UN Doc A/HRC/37/50 para. 19; *See Also* The “Nelson Mandela Rules” The United Nations Standard Rules for the Treatment of Prisoners https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

⁷⁸ *Id.*

⁷⁹ UN Doc A/HRC/37/50 para. 20

treatment. These doubts can sometimes only be solved on a case by case basis. For this reason, it is important to look at all of the facts and take all relevant circumstances into account. Furthermore, accusing a party or a person of torture or cruel, inhuman and degrading treatment is not an allegation to be thrown around lightly, therefore it is equally important for this reason to thoroughly and properly examine all the facts against all applicable international and national standards.

2.3 *The Havana Rules*

Rules and jurisprudence that were developed regarding detention of children in juvenile criminal justice may be helpful to our analysis. The United Nations released a document outlining rules for the protection of juveniles deprived of their liberty. The deprivation of liberty is defined as “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or any other public authority.⁸⁰ Additionally, the deprivation should be done in both conditions and circumstances that ensure respect for the child’s human rights.⁸¹ In the detention facilities, juveniles should have access to sleeping accommodations, sanitary stations and products, quality food and appropriate quantities, all of which meet the requirements of health and human dignity.⁸² Instruments of force should only be used in exceptional cases, only as explicitly permitted by law, and ensuring the instruments do not cause humiliation or degradation.⁸³ Furthermore, “no member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture, or any form of harm, cruel, inhuman or degrading treatment, punishment, correction, or discipline under any pretext or circumstance whatsoever.”⁸⁴ Finally, personnel should ensure protection from physical, sexual, and emotional abuse or exploitation.⁸⁵ These are all human rights’ protections afforded to children who have committed crimes. However, offences relating to irregular entry or staying in a country cannot have similar consequences to committing a crime.⁸⁶ Detaining children based only on their irregular immigration status

⁸⁰ UNGA, ‘United Nations Rules for the Protection of Juveniles Deprived of Their Liberty’, Res 45/113 of 14 December 1990 (Havana Rules), pg. 205 <https://www.refworld.org/docid/3b00f18628.html>

⁸¹ *Id.* at 206

⁸² *Id.* at 207

⁸³ *Id.* at 208

⁸⁴ *Id.* at 209

⁸⁵ *Id.*

⁸⁶ UN Doc A/HRC/37/50 para. 22

or that of their parents has been found to be arbitrary.⁸⁷ It follows that detaining children as a matter of last resort in an immigration proceeding is not in line with the CRC principles of the best interest of the child and the right to the child's development.⁸⁸

2.4 *Effect of International Law on United States Law*

For a treaty to be binding on the United States, the Senate must provide advice and consent, and approve of the treaty by a two-thirds majority vote.⁸⁹ Some provisions of the treaty may require to be implemented through domestic legislation, in order to be judicially enforceable in the US.⁹⁰ There is also a difference between self-executing and non-self-executing agreements. If an agreement is found to be self-executing, it has the same force as domestic law without the need for any subsequent congressional action.⁹¹ Provisions that are not self-executing, on the contrary, require legislation to provide U.S. agencies with the legal authority foreseen in agreement or to make it enforceable in courts.⁹² The Supreme Court has held that a provision is not self-executing when the text demonstrates an intent that the provision is not to be directly enforceable in U.S. courts.⁹³ The Senate may also give its advice and consent with the understanding that provisions are not self-executing.⁹⁴ Regarding the CAT, one of the reservations was that Articles 1-16 were not self-executing, thereby requiring domestic legislation implemented.^{95/96} It is important to understand how the United States implements any international treaty it ratifies to see what the scope of the treaty's application to the country.

3. United States Relevant Case Law and Policies

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Mulligan, Stephen P., *International Law and Agreements: Their Effect on U.S. Law*, Congressional Research Service, September 2018, at 1. <https://fas.org/sgp/crs/misc/RL32528.pdf>

⁹⁰ *Id.*

⁹¹ *Id.* at 15

⁹² *Id.*

⁹³ *Id.*, citing *Medellin v. Texas*, 552 U.S. 491, 507-08 (2008).

⁹⁴ *Id.*

⁹⁵ Garcia, Michael John, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, Congressional Research Service, January 2009, at 3. <https://fas.org/sgp/crs/intel/RL32276.pdf>

⁹⁶ For more on United States treaty reservations, see Byers, Michael & Nolte, Georg, *United States Hegemony and the Foundations of International Law*, Cambridge University Press (2003) Chapter 14: US Reservations to human rights treaties: all for one and none for all? 392-416

3.1 United States Case Law on Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution is part of the Bill of Rights, a list of ten amendments that added constitutional rights to the citizens of the United States. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁹⁷ One important distinction between how the US and the international community define cruel treatment is the wording used. The US phrases it as “cruel and unusual”, while the international community uses “cruel and inhuman”. The United States is a common law country; meaning that case law and judicial opinions are binding. This is different from a civil law system, which relies primarily on statutes and codified laws. Because of this qualification as a common law system, it is important to look at relevant case law to see how the Eighth Amendment has been interpreted.

There are some cases on sentencing on the death penalty that are worth mentioning. In an early case, *Gregg v. Georgia*, the Supreme Court highlighted that when the country was first founded, cases regarding the death penalty were primarily focused on how barbaric the executions were.⁹⁸ The Court determines that an assessment of contemporary values over a challenged sanction is relevant; specifically, the Court states that objective indicia that reflect public opinion should be looked at.⁹⁹

In a landmark case, the Supreme Court ruled that the death penalty is unconstitutional for children younger than eighteen years old.¹⁰⁰ The Court outlines three general differences between minors and adults as reasoning for why such a severe punishment should be prohibited. The first difference is the level of maturity. As the Court states, a lack of maturity is more understandable among the youngsters.¹⁰¹ The second reason is that children are more vulnerable to outside pressures. Specifically, children have less control over their environments and may not be able to remove themselves from dangerous or criminal situations.¹⁰² The last reason is that a child’s character is not formed; their personality traits are not yet fixed.¹⁰³ The ruling also mentions the international community’s role in providing

⁹⁷ https://www.law.cornell.edu/constitution/eighth_amendment

⁹⁸ 428 U.S. 153, 170 (1976).

⁹⁹ *Id.* at 173, *see also Trop v. Dulles* 356 U.S. 86, 101 (1958) “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society...”

¹⁰⁰ *Roper v. Simmons*, 543 U.S. 551, 14 (2005) <https://www.law.cornell.edu/supct/pdf/03-633P.ZO>

¹⁰¹ *Id.* at 15

¹⁰² *Id.* at 15-16

¹⁰³ *Id.* at 16

insights to legal issues that the Supreme Court has confronted. Though it is not controlling, the Court has referred to laws of other countries and international authorities as instructive for its interpretation of the term “cruel and unusual punishment.”¹⁰⁴ Following *Roper*, the Supreme Court delivered two opinions on sentencing juveniles to life in jail without the possibility of parole. In *Graham v. Florida*, the Court held that sentencing a juvenile to life without the possibility of parole for a non-homicidal crime is unconstitutional.¹⁰⁵ In a follow up case, the Court held that a sentence of mandatory life in jail without the possibility of parole for homicidal crimes for juveniles is unconstitutional.¹⁰⁶ The same rationale and reasoning was extended to these two scenarios.

Another Supreme Court case dealing specifically with the Eighth Amendment and children is *Ingraham v. Wright*. Here the Court held that the Eighth Amendment does not apply to paddling children in a public-school setting in order to maintain discipline.¹⁰⁷ The Court explains that the history of opinions makes it clear that the Eighth Amendment banning cruel and unusual punishment was meant to protect people convicted of crimes.¹⁰⁸ Court decisions point out that the cruel and unusual punishment clause limits the criminal process in three ways. The first way is that it limits the types of punishments that can be imposed on those convicted of a crime.¹⁰⁹ The second way forbids punishment that is grossly disproportional to the severity of the crime.¹¹⁰ The final way is the clause that places substantive limits on what can be criminalized, and therefore punished as such; this limitation is not to be used often.¹¹¹ They reason, in this case, that the openness of a public school and the fact that there is generally community supervision, safeguards it from the types of abuse that the Eighth Amendment protects a prisoner from.¹¹² As put by the Court, “as long as the schools are open to public scrutiny, there is no reason to believe that the common law constraints will not effectively remedy and deter excesses such as those alleged in this case.”¹¹³

¹⁰⁴ *Id.* at 21

¹⁰⁵ *Graham v. Florida*, 560 U.S. at 23-24 (2010) <https://www.supremecourt.gov/opinions/09pdf/08-7412.pdf>

¹⁰⁶ *Miller v. Alabama*, 567 U.S. at 27 (2012) <https://www.supremecourt.gov/opinions/11pdf/10-9646g2i8.pdf>

¹⁰⁷ 430 U.S. 651, 664 (1977)

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 667 (see also *Estelle v. Gamble*, 429 U.S. 97 (1976); *Trop v. Dulles*, *supra*)

¹¹⁰ *Id.* (see also *Weems v. United States* 217 U.S. 349 (1910))

¹¹¹ *Id.* (see also *Robinson v. California*, 370 U.S. 660 (1962)).

¹¹² *Id.* at 670

¹¹³ *Id.*

The next line of cases deals with defining the term “cruel and unusual punishment”. The first case is *Estelle v. Gamble*.¹¹⁴ This case took place in a prison and established the “deliberate indifference” standard. This standard is that, no matter how it is shown, a deliberate indifference to a prisoner’s serious illness or injury states a cause of action under §1983, civil action for deprivation of rights, and constitutes cruel and unusual punishment.¹¹⁵ Giving an example, that “an accident, though it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.”¹¹⁶ Continuing its reasoning, the Court adds that after incarceration, “only the ‘unnecessary and wanton infliction of pain,’ constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”¹¹⁷

The next case is *Whitley v. Albers*.¹¹⁸ In this case, the Court makes clearer the “mens rea” (mental state) needed, for a treatment to constitute cruel and unusual. “To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety...It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.”¹¹⁹ Applying it to the facts of the case, the Court held that inflicting pain in the form of a prison security measure does not amount to cruel and unusual punishment, simply because it may appear in retrospect that the degree of force was unreasonable, and hence unnecessary in the strict sense.¹²⁰ In determining further situations, the Court states that determining if the measure taken inflicted wanton pain ultimately turns on “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”¹²¹

The next case is *Wilson v. Seiter*.¹²² Here the Court looks at if pain comes as a result of something other than a punishment foreseen in a statute or decided by a judge. If the pain does not formally come from one of these two sources, “some mental element must be attributed to the inflicting officer before it can qualify.”¹²³ The issue turned on what mental state should be applied to prison conditions. Cases state that the offending conduct must be

¹¹⁴ 429 U.S. 97 (1976)

¹¹⁵ *Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 103 (see also *Gregg v. Georgia, supra*, at 173)

¹¹⁸ 475 U.S. 312 (1986):

¹¹⁹ *Id.* at 319 (1986)

¹²⁰ *Id.*

¹²¹ *Id.* at 320-321

¹²² 501 U.S. 294 (1991)

¹²³ *Id.* at 300

wanton; however, the definition of wanton does not have just one meaning, and should be looked at with all the facts of the case.¹²⁴ The issue of whether a conduct can be characterized as wanton depends upon the constraints facing the official.¹²⁵ Here, the Court found that the deliberate indifference standard was applicable.¹²⁶

In terms of excessive physical force used against a prisoner, the Court held that it may constitute cruel and unusual punishment, even though there is no serious injury suffered.¹²⁷ When looking at other prison conditions, the Court held that the Constitution does not mandate comfortable prisons, and only those deprivations denying “minimal civilized measure of life’s necessities” are sufficiently serious to form a basis for an Eighth Amendment violation.¹²⁸

We may find some guidelines for what constitutes cruel and unusual from the highlighted cases. The Eighth Amendment only applies to punishment after incarceration. The treatment cannot be an accident or a mistake. The treatment needs to be wanton, or deliberate and unprovoked; applied maliciously or sadistically. The term “wanton” is not fixed; it must be looked at in relation to what conduct brought about the alleged Eighth Amendment violation. Additionally, sentencing opinions provide that juveniles are different than adults in some respects, and that international bodies and court opinions can prove insightful on some issues. These guidelines can be useful in analyzing the treatment children receive while being held in migrant detention centers.

3.2 Flores Settlement History

The *Flores Settlement* was a settlement ending the case of a class action lawsuit between two organizations representing immigrant children and the former Immigration and Naturalization Service (INS) of the United States.¹²⁹ The INS was a former United States’ government agency, which was reformed in 2003 following a government reorganization after the 9/11 attacks.¹³⁰ The INS was split in to three new, separate federal agencies which

¹²⁴ *Id.* at 302 (see also *Whitley, supra*, at 320)

¹²⁵ *Id.* at 303

¹²⁶ *Id.*

¹²⁷ *Hudson v. McMillan*, 503 U.S.1, 5-12 (1992).

¹²⁸ *Rhodes v. Chapman*, 452 U.S. 337, 347-349 (1981).

¹²⁹ *Fact Sheet: October 2018, The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, Human Rights First, pg. 1

¹³⁰ *Overview of INS History*, USCIS Office and Library, U.S. Citizenship and Immigration Services, pg. 11 <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>

would all serve under the Department of Homeland Security, a new department formed through the Homeland Security Act of 2002.¹³¹ These new three agencies were: the Customs and Border Protection (CBP), the Immigration and Customs Enforcement (ICE), and the U.S. Citizenship and Immigration Services (USCIS).¹³²

The most relevant parts of the *Flores Settlement* concern placement in facilities, favoring release, and child welfare. In general, the INS agreed to “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”.¹³³ Furthermore, when the INS would take a minor into custody 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.”¹³⁴ It was agreed that facilities would provide “access to toilets and sinks, drinking water and food as appropriate, medical assistance...adequate temperature control and ventilation...to protect minors from others, and contact with family members that were arrested with the minor.”¹³⁵ If children are in INS custody for more than 72 hours, the INS Juvenile Coordinator shall maintain a record of these minors.¹³⁶ Children should be released without unnecessary delay to the care of certain adults, or to a program within five days.¹³⁷ Licensed programs that work in conjunction with the INS must comply with all relevant child welfare laws and regulations, as well as provide suitable living conditions, appropriate medical and dental care, educational services, and leisure time.¹³⁸ This agreement is still in effect, but it is currently binding on DHS and ORR (Office of Refugee Resettlement).¹³⁹ The DHS was one of the new departments created after the 9/11 attacks, when the INS was dissolved. The ORR is an office under the Department of Health and Human Services, which works together with DHS on refugee and migrant placement. Because the INS no longer exists, the *Flores Settlement* now applies to these departments instead of INS.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Stipulated Settlement Agreement, 7, *Flores et al v. Reno*, No. CV 85-4544-(RJK)Px (Cent. Dist. Ct. Cal.)

¹³⁴ *Id.*

¹³⁵ *Id.* at 7-8

¹³⁶ *Id.* at 16

¹³⁷ *Id.* at 8.

¹³⁸ *Id.* Exhibit 1, 1-2.

¹³⁹ ACLU San Diego, *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection*, May 2018, at 7 <https://www.aclusandiego.org/civil-rights-civil-liberties/> (hereinafter ACLU San Diego, *Neglect and Abuse*)

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 was passed with some of the *Flores Settlement* protections included.¹⁴⁰ The TVPRA distinguishes children from Mexico and Canada (contiguous countries) *versus* children from other countries.¹⁴¹ If a child is found from either Canada or Mexico, he or she is not to be deported before being interviewed by a government official to determine if the child is a victim of trafficking of human beings, has a credible fear of persecution, or is unable to make an independent decision about their immigration application.¹⁴² Children who fall under these categories should not be immediately deported, but rather transferred to ORR custody.¹⁴³ Children from all other countries do not go through this screening process and are placed in ORR custody within 72 hours.¹⁴⁴ This relates to the principle of non-refoulement, which is the obligation of a State from forcibly removing an individual to another state where he/she might be ill-treated.¹⁴⁵

In 2019, the current administration of the United States published new regulations that would, in essence, revoke the *Flores Settlement* and its requirements, and allow the government to hold children and their parents in detention for an indefinite amount of time.¹⁴⁶ A federal judge has blocked these regulations, arguing that this is a legislative issue that belongs to the competence of the Congress, not the executive branch.¹⁴⁷ The *Flores Settlement* has been an important case providing rules and guidelines that must be followed in the context of detaining immigrant children.

3.3 TEDS Policies (*Standards on Transport, Escort, Detention, and Search*)

The U.S. Customs and Border Protection (CBP) has a manual outlining national standards on various stages of the immigration process.¹⁴⁸ Juveniles are considered to be part of the at-risk population and should be treated with special concern for their vulnerability.¹⁴⁹

¹⁴⁰ *Flores v. Lynch*, 828 F. 3d 898, 904 (2016)

¹⁴¹ ACLU San Diego, *Neglect and Abuse*, at 8.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Hamdan, Eman, *The Principle of Non-Refoulement Under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Koninklijke Brill NV (2016) pg. 9

¹⁴⁶ <https://edition.cnn.com/2018/09/06/politics/trump-administration-immigrant-families-children-detention/index.html> See also <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-19052.pdf> Sections IV. (B) and (C) at 20 – 38.

¹⁴⁷ <https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html>

¹⁴⁸ U.S. Customs and Border Protection, *National Standards on Transport, Escort, Detention, Search* (October 2015)

¹⁴⁹ *Id.* at 19

In terms of hygiene, basic personal hygiene items must be provided, and juveniles specifically must be provided with clean bedding.¹⁵⁰ CBP employees must speak and act with integrity, and there is a zero-tolerance sexual abuse policy.¹⁵¹ There is a limit to CBP custody. The maximum amount of time children can be in CBP custody is 72 hours, except for special circumstances.¹⁵² After this, children are transferred to the custody of the Office of Refugee Resettlement (ORR) which is an office under the Department of Health and Human Services (HHS) of the federal government.¹⁵³

3.4 Refugee Law and Asylum

The 1951 Refugee Convention and the supplemental 1967 Protocol defines a refugee as “a person unable or unwilling to return to his or her home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of being persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion”,¹⁵⁴ The United States has used this definition since 1980, in its Refugee Act.¹⁵⁵ One way to obtain refugee status is applying for asylum, which is available to people who either are already present in United States territory or who are seeking entry at a point of entry.¹⁵⁶ A migrant may submit an affirmative application when they are not being subject to removal proceedings. Or, a migrant may submit a defensive application to asylum as a defense against deportation during removal proceedings.¹⁵⁷ To be granted asylum, the applicant must establish that he or she is in fact a refugee under the Refugee Convention definition, and the testimony must demonstrate a credible fear of persecution, and be and persuasive, considering all circumstances.¹⁵⁸ Despite having this law in place for decades, the United States has nevertheless adopted a policy that goes against the true meaning and objectives of the Refugee Convention.

¹⁵⁰ *Id.* at 17

¹⁵¹ *Id.* at 4

¹⁵² Lutheran Immigration and Refugee Service. At the Crossroads for Unaccompanied Migrant Children: Policy, Practice, and Protection. Baltimore, MD: Lutheran Immigration and Refugee Service; 2015 <http://lirs.org/wp-content/uploads/2015/07/LIRSRoundtableReportWEB.pdf>; *see also* 8 U.S.C. § 1232

¹⁵³ *Id.* at 3

¹⁵⁴ <https://www.unhcr.org/3b66c2aa10.html>

¹⁵⁵ ACLU San Diego, *Neglect and Abuse* at 6.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ § 8 U.S.C. 1158(1)(b)

3.5 Zero Tolerance Policy and Family Separation

On the 6th of April 2018, the Attorney General of the United States issued a memorandum for federal prosecutors. In it, the US Attorney's Office is directed to adopt a "zero tolerance policy" for all offenses referred for prosecution under § 8 U.S.C. § 1325(a).¹⁵⁹ This section of U.S. Code concerns improper entry by an alien in the territory. Improper in this context means without legal authority to enter, namely with no visa or residence permit. The section states, in its relevant part, that "any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers...shall, for the first commission of any such offense, be fined...or imprisoned not more than 6 months, or both..."^{160/161}

As a result of this memorandum, all persons who entered illegally the United States were to be detained and criminally prosecuted, including those who were entering to seek asylum.¹⁶² The purpose of this policy was to act as a deterrent for migrants from entering the country.¹⁶³ Essentially this caused the forced separation of families and the placement of accompanying children in separate detention facilities, because of a US law that prohibits detaining children in federal jail.¹⁶⁴ This policy goes against the strong international legal norm protecting the right to family unity.¹⁶⁵ These measures were objects of strong international condemnation. The UN Office of the High Commissioner for Human Rights issued a press release, explaining that detaining children is punitive, and can result in torture in some instances.¹⁶⁶ In June 2018, the President of the US signed an executive order, determining the end of the child separation policy.¹⁶⁷ However, this has proven difficult for a few reasons. This policy was implemented with zero or little warning and preparation, which lead to a lack of record-keeping of intakes and child placement.¹⁶⁸ There was no system

¹⁵⁹ <https://www.justice.gov/opa/press-release/file/1049751/download>

¹⁶⁰ <https://www.law.cornell.edu/uscode/text/8/1325>

¹⁶¹ A "alien" is defined as any person who is not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3)

¹⁶² Wood, Laura C N *Impact of punitive immigration policies, parent-child separation and child detention on the mental health and development of children*. BMJ Pediatrics Open (2018) at pg. 1

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6173255/pdf/bmjpo-2018-000338.pdf>

¹⁶³ Karamouzian, M., *Trump's Zero-tolerance Policy: Would a Political Response to a Humanitarian Crisis Work?* Int. J Health Policy Manag. 2018;7(11) 1070-1072 at 1070

https://www.ijhpm.com/?_action=showPDF&article=3531&_ob=40871e863533678ec424a021ad61b4c1

¹⁶⁴ *Id.*

¹⁶⁵ Bhabha, Jacqueline, *More than their Share of Sorrows» International Migration Law and the Rights of Children*, *St. Louis University Public Law Review*, vol. 22, n.º 2, 2003, p. 253-275, at 263

<https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1336&context=plr>

¹⁶⁶ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>

¹⁶⁷ Wood, *supra*, pg. 2

¹⁶⁸ *Id.*

established to track families who were separated, so reunification became much more difficult and it was more complicated to identify separated children.¹⁶⁹ Second, children were placed in detention centers all across the country.¹⁷⁰ As a result, there was litigation from various courts across the country, each imposing different requirements, which also hindered the government's ability to reunite families.^{171/172} This zero-tolerance policy created more chaos in a system that was already overwhelmed from high numbers of immigrants entering the country.

¹⁶⁹ United States Department of Health and Human Services, Office of Inspector General, *Communication and Management Challenges Impeded HHS's Response to the Zero-Tolerance Policy*, March 2020, pg. 2 OEI-BL-18-00510 (hereinafter *Communication and Management Challenges*)

¹⁷⁰ Wood, *supra*, pg. 2

¹⁷¹ *Communication and Management Challenges*, pg. 2

¹⁷² For more on immigration law and families in the United States, generally, see Thronson, David B. "You Can't Get Here from Here: Toward a More Child-centered Immigration Law", *Virginia Journal of Social Policy & the Law*, vol. 14, 2006, n. °1, p. 58-86

<https://pdfs.semanticscholar.org/2fa1/481f4028cede0dc07d1bcdde365b7ef0f0dd.pdf>

Chapter Two: Findings

1. Introduction

Due to the challenges of visiting migrant detention centers in the United States, findings for the purposes of this dissertation will be based on factual results stemming from various reports. We will analyze reports that have been produced by non-profit organizations, governmental departments, and factual findings from cases regarding the *Flores Settlement*.

1.1 Why Children are Fleeing

It is important to first understand why these children are fleeing from their homes and their countries. In the last decade or so, most of the children entering the United States were from El Salvador, Guatemala, Honduras, and Mexico.¹⁷³ El Salvador, Guatemala, and Honduras are considered of the most violent regions in the world, ranking, respectively, as fourth, fifth, and first countries with more homicides for per capita in the world.¹⁷⁴ Two overarching themes have emerged for a main reason that children are fleeing: organized violence and violence in the home.¹⁷⁵ Several children shared that they had either experienced or been threatened with serious harm both from state actors and from members of organized crime networks, or as a result of the lack of protection from the State.¹⁷⁶ Regarding violence in the home, there are several reports of abuse, including physical, sexual and emotional abuse, intimate partner violence, and abandonment. These acts can be committed by parents, siblings, caregivers, and partners.¹⁷⁷ At the core, their countries suffer from deep-rooted poverty coupled with lack of education and employment opportunities.¹⁷⁸ The effects of long civil wars, violence, and increase in drug cartel and gang violence add fuel to the fire.¹⁷⁹ In addition to wanting to flee from danger, children are at the same time in pursuit of a better life. Thus, many children claim better economic opportunities as reasons for coming to the United States.¹⁸⁰

¹⁷³ United Nations High Commissioner for Refugees, *Children on the Run*, at 5 <https://www.unhcr.org/56fc266f4.html> (hereinafter UNHCR *Children on the Run*)

¹⁷⁴ ACLU San Diego, *Neglect and Abuse*, at 2.

¹⁷⁵ UNCHR *Children on the Run*, at 6.

¹⁷⁶ *Id.* at 26.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 24

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

2. Reports and Complaints

2.1 *ACLU Report of U.S. Customs and Border Protection*

The ACLU (American Civil Liberties Union) published a report in 2018 describing the conditions at migrant detention centers.¹⁸¹ This report was based on thousands of documents released by the government through the Freedom of Information Act.¹⁸² Customs and Border Patrol saw a dramatic increase in number of staff. One of the ways this occurred was due to hiring surges, in which the agency raised the age limit, and allowed new officers to complete training without full background checks.¹⁸³ Border Patrol also promoted inexperienced officers to supervisor positions. These two actions led to an increase in the use of force, prompting some senior officials to claim that around 10% of the workforce was corrupt and had “integrity problems”.¹⁸⁴ During President Obama’s first year of presidency, officials of DHS and CBP changed the definition of corruption to lower the number of cases. There were two “levels” of corruption: “mission compromising corruption” which included bribery, drug or human smuggling, and “non-mission compromising corruption” which included employees sexually assaulting detainees.¹⁸⁵ Under this new definition, only mission compromising corruption situations would be reporting, cutting the numbers of cases by one-third.¹⁸⁶

The complaints and alleged mistreatment of children is extensive, particularly while in detention. The complaints are consistent with human rights reports documenting appalling CBP conditions.¹⁸⁷ Children were repeatedly subjected to threats and to verbal and physical abuse.¹⁸⁸ Although children in custody must have safe and clean facilities, there were multiple reports of unsanitary conditions, such as used toilet paper on the floors, and no diapers or blankets for babies.¹⁸⁹ Children reported agents deliberately denying food, or

¹⁸¹ ACLU San Diego, *Neglect and Abuse* <https://www.aclusandiego.org/civil-rights-civil-liberties/>

¹⁸² <https://www.aclu.org/press-releases/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>

¹⁸³ ACLU San Diego, *Neglect and Abuse*, at 5

¹⁸⁴ *Id.*

¹⁸⁵ https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220_full.html#.VEKb48mkP-s

¹⁸⁶ *Id.*

¹⁸⁷ See AIC, *Former Detainees Describe Horrific Conditions in CBP Detention* (June 2015)

https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/doe_v_johnson_former_detainees_describe_horrific_conditions_in_cbp_detention.pdf

¹⁸⁸ ACLU San Diego, *Neglect and Abuse*, at 17-18.

¹⁸⁹ *Id.* at 18-19.

receiving food that was rotten.¹⁹⁰ Despite the 72-hour maximum period of time allowed for detention, it was reported that at one point, the minimum length of time children spent in CBP detention was one week.¹⁹¹ Several complaints were made about the freezing temperatures in the detention centers, with the children being denied blankets or forced to stay in to cold rooms with minimal clothing as punishment.¹⁹² Lastly, reports of sexual abuse and assault were common. Despite legislation to protect all people in custody from sexual abuse, and a CBP “zero tolerance” policy for sexual abuse and assault, there was a failure to protect migrants from such treatment.¹⁹³

2.2 DHS Administrative Complaint

In June 2014, a complaint was filed with the Office of Civil Rights and Civil Liberties, and the Office of the Inspector General regarding the abuse of unaccompanied children by U.S. Customs and Border Protection.¹⁹⁴ It begins by stating that multiple complaints have been filed previously with similar allegations, with little to no action taken as a result.¹⁹⁵ There has been a consistent history of abuse within CBP. In a report from 2009, out of 124 unaccompanied minors, eighty five percent reported the holding cells were extremely cold, one quarter did not offered water, and almost a half denied the opportunity to call to the family or attorney.¹⁹⁶ The complaint report highlights several individual complaints from children and minors. These complaints include treatments such as sexual and physical abuse, verbal abuse, failure to provide medical treatment, mistreatment of infants, pregnant and nursing minors, and inhumane detention conditions.

Sexual and physical abuse was proven. One child, D.G., stated that during her search, the officials spread her legs and touched her genitals forcefully.¹⁹⁷ One boy, J.P., was sexually molested by two men after he had fallen asleep multiple nights in a row, with CBP

¹⁹⁰ *Id.* at 20.

¹⁹¹ *Id.* at 23.

¹⁹² *Id.* at 23-24.

¹⁹³ *Id.* at 24-25.

¹⁹⁴ Huebner, A. et al., *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Custom and Border Protection*, June 2014 (hereinafter DHS Complaint)

<https://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>

¹⁹⁵ *Id.* at 2.

¹⁹⁶ Florence Immigrant and Refugee Rights Project, *Seeking Protection, Enduring Prosecution: The Treatment and Abuse of Unaccompanied Undocumented Children in Short-term Immigration Detention*, (2009) (hereinafter Florence Project *Seeking Protection, Enduring Prosecution*) at 13-14.

<https://www.firrp.org/media/BPAAbuseReport.pdf>

¹⁹⁷ DHS Complaint at 8-9.

officials allegedly ignoring the boy’s reports of abuse.¹⁹⁸ Another boy, E.G. complained that an officer forced him to walk without shoes and subsequently pushed and screamed at him as he walked. He stated the holding cells were cold and lights were always on.¹⁹⁹ One boy, S.M., was frequently kicked awake anytime he tried to sleep.²⁰⁰ There are multiple statements that the children were physically punished for laughing.²⁰¹ Many children said they were often placed in handcuffs or shackles that were too tight.²⁰²

Verbal abuse was also widespread. One child was told upon arrive, “Welcome to hell.”; when the girl was transferred to ORR custody, the same officer said to her, “We’re going to put you on a plane, and I hope it explodes. That would be the happiest day of my life.”²⁰³ There are repeated reports of officials telling children that they hope the plane they are on crashes and they all die.²⁰⁴ Officials repeatedly told one girl, “You’re the garbage that contaminates this country.”²⁰⁵ Another reported being called other dehumanizing terms such as “parasites” and “dogs”.²⁰⁶ This same child was pressured to sign a deportation order, being told she would be deported anyway.²⁰⁷

Medical treatment and treating infants and mothers poorly were also quite evident. Many children report being denied medical help when they asked for it, whether it was medication or seeing a medical professional.²⁰⁸ Nursing mothers were denied milk for their children, and were not given blankets to keep their children warm in the “hielera” or ice box as the detainees called the holding cells.²⁰⁹ One young mother reported not given sufficient diapers, only getting some on the third day of being detained.²¹⁰

Lastly, the conditions of the detention center were inhuman. Multiple children report inadequate water, and still-frozen food, or rotten food.²¹¹ Many children also report that if any of them interacted or engaged with one another, they were punished.²¹² There are also

¹⁹⁸ *Id.* at 9-10.

¹⁹⁹ *Id.* at 10

²⁰⁰ *Id.*

²⁰¹ *Id.* at 9, 10.

²⁰² *Id.* at 9-10.

²⁰³ *Id.* at 11.

²⁰⁴ *Id.* at 11, 12.

²⁰⁵ *Id.* at 11.

²⁰⁶ *Id.* at 12

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 12-13.

²⁰⁹ *Id.* at 13, 14.

²¹⁰ *Id.* at 14

²¹¹ *Id.* at 15-16. Examples include water that tasted “strongly of bleach”, a “foul-smelling burrito with rotten beans”, bread with frozen bologna, and eating cold soup with bare hands.

²¹² *Id.*

many reports of either the lights left on all hours of the day, and/or children being suddenly woken up by the guards.²¹³

2.3 United Nations Global Study on Children Deprived of Liberty

A general consensus was formed that detaining children primarily for migration related reasons does not meet the best interest of the child standard. It could also be in violation of two articles of the CRC. The two articles are Article 6, which is the right to life, survival and development, and Article 37(a) which prohibits torture and cruel, inhuman or degrading treatment.²¹⁴ The UN has stated that detaining migrant children very clearly violates children's rights.²¹⁵ Furthermore, the detention of children cannot be based solely on their migrant or resident status.²¹⁶ The problem is, as mentioned previously, the United States is not a Party to the CRC. Finding violations of this Convention proves difficult against the one member of the United Nations to not ratify this Convention. So, while these provide helpful examples, they are not applicable to the United States due to its status regarding the CRC. The United States is, however, a party to the CAT; it is possible to bring a complaint to the Committee against Torture.

The Inter-American Court of Human Rights (IACHR), in an advisory opinion, found that detaining children based on migration status exceeds the requirement of necessity, therefore children should not be deprived of their liberty based on their or their parents' migration status.²¹⁷ Regarding the IACHR and the United States, the US never ratified the main Organization of American States' human rights treaty, nor joined the IACHR. Therefore, the US considers these decisions merely as recommendations.²¹⁸ On the other hand, the United States has ratified the International Covenant on Civil and Political Rights

²¹³ *Id.*

²¹⁴ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

²¹⁵ See General Comment 6, *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, Committee of the Rights of the Child, September 2005, para 61, CRC/GC/2005/6, <https://www.refworld.org/docid/42dd174b4.html> (hereinafter CRC/GC/2005/6)

²¹⁶

²¹⁷ Nowak, Manfred, *The United Nations Global Study of Children Deprived of Liberty*, November 2019, at 449

²¹⁸ <https://www.thedialogue.org/analysis/the-inter-american-human-rights-system-in-the-trump-era/>

(ICCPR).^{219/220} Article 7 of the ICCPR prohibits torture, and cruel, inhuman and degrading treatment.²²¹

3. Flores Litigation

3.1 *Flores v. Sessions*

Several challenges were brought against the US Government in 2017 regarding the inadequate conditions in detention centers. In the civil minutes of this case, five different categories are described: inadequate food, inadequate access to clean drinking water, inadequate hygiene and supplies, cold temperatures and inadequate sleeping conditions.²²² Regarding access to food, Transport, Escort, Detention, and Search Policies for the Customs and Border Patrol (TEDS) standards state that minors have, among other snacks and beverages, a meal at least every six hours, with food in an edible condition.²²³ Despite these requirements, multiple detainees reported either receiving food that was not edible or not receiving the appropriate number of meals during their stay.²²⁴ The government argued that it has standards in place, but the court rejected this argument, stating that the existence of policies does not prove their implementation.²²⁵ As to the access of clean drinking water, the plaintiffs stated that the water tasted dirty, or of chlorine, and told that they had to share drinking cups.²²⁶ This is once again disregards TEDS standards to have clean water and clean cups.

The court describes a disconnect between TEDS standards and what the plaintiffs experienced in terms of the hygiene and sanitary conditions. All plaintiffs depict the facilities as unsanitary, with no privacy while using the bathroom, no access to clean bedding, and no

²¹⁹ ACLU San Diego, *Neglect and Abuse*, at pg. 7

²²⁰ However, the “United States ratified the ICCPR on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

²²¹ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

²²² *Flores v. Sessions*, Case: CV 85-4544 DMG (AGRx) U.S. Dist. Ct. Cent. Cal. (2017) <https://www.aila.org/File/Related/14111359v.pdf>

²²³ *Id.* at 8.

²²⁴ *Id.* at 8-9.

²²⁵ *Id.* at 9. The Government also presented electronic food records, which highlighted some discrepancies in the plaintiffs’ testimonies, it only showed a relatively small number in comparison to the large number of complaints about the inadequacy of the food.

²²⁶ *Id.* at 11-12.

toothbrushes, soap or towels.²²⁷ Furthermore, there was a lack of opportunity to shower.²²⁸ Here the Government argued that specifics such as soap, towels, showers, dry clothing, and toothbrushes are not mentioned in the Flores Settlement; the court did not find this argument convincing at all, as these items are commonly understood as basic safe and sanitary conditions, as per the agreement.²²⁹

Children continue to refer to holding cells as hieleras, or ice boxes, signaling that the holding facilities are extremely cold.²³⁰ This once again is against TEDS standards to maintain reasonable temperatures.²³¹ There are multiple accounts of children crying from the cold and unable to sleep as a result.²³² These cold temperatures, combined with overcrowding, no proper bedding such as blankets pillows or mattresses, and constant lighting all led to many children to suffer from sleep deprivation.²³³ Plaintiffs described attempting to sleep on concrete floors with a thin foil blanket to keep warm.²³⁴ Due to the high influx of minors, a twenty day period for release was agreed in lieu of the five day period.²³⁵

There have been numerous court cases regarding the Flores Settlement. However, the factual findings are consistent in nearly all of them. In most cases, the government has been holding children in detention facilities that are violating numerous standards put in place for the wellbeing and safety of children.²³⁶

4. Zero Tolerance Policy Under Sessions

4.1. *Office of Inspector General Report*

The Office of the Inspector General, part of the Department of Homeland Security, visited a facility in June 2019 and observed severe overcrowding and prolonged detention of

²²⁷ *Id.* at 12.

²²⁸ *Id.* at 12-13.

²²⁹ *Id.*

²³⁰ *Id.* at 15.

²³¹ *Id.*

²³² *Id.* at 16.

²³³ *Id.* at 16-17.

²³⁴ *Id.* at 17.

²³⁵ *Id.* at 30.

²³⁶ For further reading and examples, *See Flores v. Johnson*, Civil Minutes Cent. Dist. Ct. Cal. (2015) AILA Doc. No. 15072500 <https://www.aila.org/infonet/district-court-finds-dhs-breach-flores-agreement> and *Flores v. Sessions*, Civil Minutes Cent. Dist. Ct. Cal. (2018) AILA Doc. No. 14111359 <https://www.aila.org/File/Related/14111359ae.pdf>

migrants, specifically unaccompanied minor children and families, which are considered “at risk” under TEDS standards.²³⁷ Officials found that thirty percent of children were detained longer than the allowed 72 hours.²³⁸ Three of the five facilities did not have showers, with little access to spare clothes.²³⁹ Two of the five did not give hot meals to children.²⁴⁰ On the other hand, it should be noted that from the beginning of June 2019 to the end of the month, the numbers of unaccompanied minors in detention facilities dropped from nearly 2,800 to under 1,000.²⁴¹

5. Psychological Effects of Detention and Separation on Children

Although there are no empirical studies, qualitative studies have been done assessing the effects of detention in immigration facilities.²⁴² These reports demonstrate high levels of PTSD, anxiety, depression, and suicidal thoughts.²⁴³ Being placed in detention itself can interfere with the child-parent relationship, because it can cause confusion of the parent’s authority. Parents are unable to take care of their child’s needs simply because of the inherent nature of being in detention.²⁴⁴

Experiencing traumatic events as a child can potentially have both neurological and physical damage.²⁴⁵ Children’s brains have high levels of neuroplasticity; meaning, a strong ability to form connections in the brain.²⁴⁶ As a result, the brain will adapt to a way that focuses primarily on protecting life, and less on learning and relationships.²⁴⁷ Children can potentially develop two patterns: hyperreactive or hyporeactive. Hyperreactive children will

²³⁷ Office of Inspector General, *Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (Redacted)* OIG-19-51 (2019) https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf (hereinafter OIG – *Management Alert*) at 2-3.

²³⁸ *Id.* at 6.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 12.

²⁴² Baily, Charles et al., *The Psychosocial Context and Mental Health Needs of Unaccompanied Children in United States Immigration Proceedings*, Graduate Student Journal of Psychology Vol. 13 (2011), at 7 https://www.tc.columbia.edu/publications/gsjp/gsjp-volumes-archive/gsjp-volume-13-2011/19225_V13_1_Baily.pdf

²⁴³ *Id.*

²⁴⁴ Linton, Julie M. et al., *Detention of Immigrant Children*, American Academy of Pediatrics Vol. 139, No. 4 (2017) DOI: 10.1542/peds.2017-0483

²⁴⁵ Wood, *supra*, at 3

²⁴⁶ *Id.*

²⁴⁷ *Id.*

display signs of hypervigilance, agitation, and flashbacks.²⁴⁸ Hyporeactive children will display dissociative responses, emotional numbness and poor cognitive function.²⁴⁹

Separating children also has an adverse effect on child attachment to the parent. Child-parent attachment is an enduring emotional bond that begins from birth and is essential to a child's sense of safety.²⁵⁰ This subsequently has an effect affects the brain's development for forming physical, emotional, and cognitive maturity.²⁵¹ There are typically three phases how a child can react to being separated from his or her parent. The first is a stage of protest, with signs of fear and distress.²⁵² Second, is a phase of despair, where children can reject the approach of other adults.²⁵³ After prolonged separation, children can become submissive, signifying that they have detached from their parents.²⁵⁴ Detached children, if they are reunited with their parents, treat them as strangers.²⁵⁵ Living with such high levels of stress for a prolonged period of time, and at such high levels, can increase the risk for future problems for the child as an adult.²⁵⁶

Children, whether accompanied or not, are typically fleeing from terrible living conditions in their home countries. Adding such extreme trauma to already difficult situations could have harmful effects on children. In the context of inflicting ill-treatment, or cruel and inhuman treatment, it is certainly possible that separating children from their parents can fall under this category.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 3-4

Chapter Three: Discussion and Conclusion

1. International Laws

Taking first international laws and guidelines, legal analysis can be done to determine whether the conditions migrant children have been put through rise to the level of either torture, or cruel, inhuman and degrading treatment.

Beginning with one distinction between torture and ill-treatment, torture is a legal term for an event or behavior, based on the comprehensive assessment of said event or behavior. The difference between torture and cruel, inhuman and degrading treatment can depend on specific circumstances of each situation and it is not always obvious. Certain factors, such as age and gender can make victims more vulnerable. And it is important to look at the totality of the circumstances. Torture is the act or omission that causes severe pain or suffering, done intentionally to the victim, for any reason based on discrimination of any kind, done either by instigation, with the consent, or acquiesce of a public official or any other person acting in an official capacity. Torture requires the intentional and purposeful infliction of pain and suffering. The definition implies that the victim has been deprived of his or her liberty and is under the control of the perpetrator. This is because all of the purposes listed in the definition under Article 1 of the CAT refer to a situation in which the victim is a detainee, or is at least under the factual control of the punisher.

Cruel, inhuman and degrading punishment does not have to be inflicted for one of the purposes that is an element for torture. This type of punishment does not require a purpose, can be both intentional or negligent, and it does not require the specific situation of detention. Severe pain and suffering, whether physical or mental, inflicted by someone acting in an official capacity would qualify as such. Cruel, inhuman and degrading treatment includes any unlawful infliction of pain and suffering by State agents.²⁵⁷ As the Special Rapporteur noted, however, a detention system that allows migrants to live under conditions that are obviously beneath universal standards does not comply with the prohibition of torture and ill-treatment. Using these international laws and guidelines with the facts and statements given in the various reports and court filings, the treatment of children in these detention centers is certainly cruel, inhuman and degrading treatment. Furthermore, this ill-treatment and

²⁵⁷ United Nations General Assembly, Note by the Secretary-General, *Extra-custodial use of force and the prohibition of torture, and other cruel, inhuman and degrading treatment or punishment*, UN Doc A/72/178, July 2017 at pg. 13-14.

completely inadequate conditions can amount to torture if they are intentionally imposed, encouraged, or tolerated for purposes of discrimination, as deterring or punishing migrants, or coercing migrants into withdrawing asylum applications or voluntarily returning to the country of origin.

One important point to remain aware of is age. According to Article 1 of the Convention on the Rights of the Child, a child is a person who is under the age of eighteen. In the US for child abuse and welfare purposes under federal law, a child is defined as a person younger than eighteen years.^{258/259} Age has been constantly mentioned as a reason for which children are to be treated differently than adults. It is in Supreme Court rulings, that separate the death penalty and life sentences for juveniles, in the Flores Settlement agreement, in the TEDS standards for border patrol officers, and it is in the CRC (for informative purposes only). By natural extension, the age of children should be applicable to determine the type of treatment or punishment.

Taking the factual findings together, the treatment we have analyzed falls certainly into the cruel, inhuman and degrading treatment. The basic understanding of the word inhuman can be used to describe the way the officers treated the children. To scare a child, who is already scared and in an uncomfortable situation, by saying they wish they die in a plane crash is heartless. Calling a child words that are dehumanizing, such as a parasite or a dog, is degrading. A defendant can argue that this type of treatment is not intended to cause severe pain and suffering. However, to be cruel and inhuman the pain and suffering does not need to be caused intentionally. Negligence would suffice. An officer should have known that speaking to a child in an abusive manner would cause pain and suffering. Inappropriately touching a child in a sexual manner would cause severe pain and suffering. Additionally, to be considered cruel, inhuman, and degrading the treatment does not need to have a purpose. Restraints that are too tight and cause physical pain, combined with lack of proper food, sleep deprivation, kept in consistently cold cells, all could have been done without intent, and with no specific purpose to harm the children. However, looking at the totality of the circumstances, combined with the young ages of the children, the treatment of the officers constitutes cruel, inhuman and degrading treatment.

The issue of detention is one that arguably raises this treatment from cruel, inhuman and degrading to torture. There are many ways to phrase it, but detention, deprivation of

²⁵⁸ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

²⁵⁹ <https://www.childwelfare.gov/topics/can/defining/federal/>

liberty, custody, under control of the perpetrator, are all one in the same. A person is not allowed to voluntarily leave. Such is the situation when children are placed in the holding centers. They are not free to leave the centers, and the only options for them are to be sent back to the country of origin or transferred either to a parent or further in governmental custody.

Another factor that lends to the argument that this treatment is considered torture is the last element of the legal definition, the act was done by an official or through acquiescence of an official. The border patrol officers were acting in their official capacity. In the case *EN v Burundi*, the court there found that one supporting reason the officers were acting in an official capacity was that they were in their uniforms. Similarly, the officers here were in their official green uniforms. This shows that the officers were acting in their official capacity as government employees. Additionally, the DHS complaint was sent in 2014, stating that, at that point already, there were multiple attempts to contact the department regarding the mistreatment. The CBP even had to change the definition of the type of corruption that was mandatory to report, with abuse of detainees not qualifying. These two facts coupled together demonstrate an acquiescence by government officials to allow this mistreatment to continue. As a final point, the Flores litigation and consistent proof of not following the standards agreed upon is another example of governmental acquiescence.

As for the element of intent, this element can be satisfied when done as discrimination of any kind. In this instant, the discrimination would be ethnicity, nationality, and immigrant status. This is evidenced by the verbal abuse the children were put through, such as being called garbage that contaminates the country. It can also be argued that these horrid conditions are done intentionally to deter migrants from entering the country. The zero-tolerance policy was, after all, enacted in the hopes of such deterrence. This could satisfy the element of intent. Lastly, though the element of severe pain and suffering is subjective, it is again important to consider factors such as age, vulnerability, and the uncertainty of being in a foreign country. Severity does not require physical proof; psychological trauma could be sufficient here.

Based on the legal definitions and the examples of the treatment in the detention centers, the treatment of children is quite certainly cruel, inhuman or degrading treatment. However, there is a strong argument for the conclusion that the treatment of the children rises to the level of torture under international law. Factors such as how the children are deprived of their liberty, and the intent with which the officers verbally abuse the children, sexually

abusing the children, their vulnerability or discrimination against them because of their ethnicity and national origin arguably make this treatment inflicted on the children torture.

2. United States Cruel and Unusual Punishment

The United States could argue that the articles in the CAT do not apply, because the country has ratified the convention with the reservation that it was not self-executing. However, there are peremptory norms of international law (*jus cogens*), and torture is one of them.^{260/261} A peremptory norm is a norm that accepted and recognized by the international community from which no derogation is permitted.²⁶² Additionally, peremptory norms delegitimizes any administrative act that authorizes or condones torture.²⁶³ Still, it is important to also analyze the treatment of children in migrant detention centers under the Eighth Amendment cruel and unusual punishment clause. This would appear to be a case of first impression.

Cruel and unusual punishment can be defined as conduct that is wanton, or deliberate, unnecessary and unprovoked infliction of pain; applied maliciously or sadistically. The Eighth Amendment only applies to punishment after incarceration. The treatment in question cannot be an accident or a mistake. The definition of wanton is not fixed and depends on the circumstances of the situation. Additionally, the punishment should be looked at in relation to what led up to the punishment in question.

Applying this definition of cruel and unusual punishment to the treatment at the detention centers, there is a strong argument that this treatment does qualify as cruel and unusual treatment.

One issue to consider is whether the Eighth Amendment applies, hinging on whether children are incarcerated. This would depend on the definition of incarceration. It could refer specifically to situations where someone is imprisoned after committing a crime. It could also refer to the general situation of depriving someone of their liberty – which could occur without having committed a crime before. Here, choice of words could be influential. The

²⁶⁰ De Wet, Erika, *The Prohibition of Torture as an International Norm of jus cogens and its Implications for National and Customary Law*, EJIL (2004), Vol. 15 No. 1, 97-121, at 98 <http://www.ejil.org/pdfs/15/1/349.pdf>

²⁶¹ For more on *jus cogens*, see A. Cassese et al., *International Criminal Law*, Third Edition, Oxford University Press (2013), Part 1.1 Fundamentals of International Criminal Law, pgs. 3-22.

²⁶² Article 53 of the 1969 Vienna Convention <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

²⁶³ Farrell, Michael, *The Prohibition of Torture in Exceptional Circumstances*, Cambridge University Press (2013) pg. 41

centers that migrant children are placed in once crossing the border are called processing and detention centers. Children are being detained in these facilities. Additionally, children are not free to leave without clearance from the U.S. government. If the term incarceration is used synonymously with the word detention or deprivation of liberty, the Eighth Amendment would likely be applicable to prevent cruel and unusual punishment. The U.S. government's decision to criminally prosecute any and all migrants that enter, even to apply for asylum, may be a reason to argue that children are really being incarcerated for having committed a crime. By claiming that it is a criminal offense, this would suggest that migrants are placed in holding centers as part of a criminal process. Being incarcerated is part of a criminal proceeding when somebody is being charged under any criminal statute. Despite the UN position on detaining children based on immigrant status or the status of their parents, the United States is treating it as a criminal offense. Regardless, the key issue is that the children are deprived of their liberty when they are held in the detention centers. For this reason, the Eighth Amendment would apply in these scenarios, because the children should be considered as incarcerated for Eighth Amendment purposes.

When comparing the way in which the children were treated in relation to what they did leading up to it, we may agree that the ends do not justify the means. Punishing children for laughing with each other or playing, otherwise engaging in normal child-like behavior, does not warrant being shackled uncomfortably or yelled at. This treatment could potentially be a cause of some of the psychological trauma that occurs in detention facilities. Furthermore, based on the common definition of malicious and sadistic treatment, it is not a far stretch to say that abusing children physically, verbally, and sexually, are examples of these types of treatments.

Another issue that could arise is the issue of citizenship. The children are not U.S. citizens when they are in these detention facilities. Therefore, one argument could be that since they are not U.S. citizens or residents, they do not have the right to enjoy protections afforded by the Constitution. However, the Supreme Court has held that even undocumented children have the right to free public education that is provided to legal children and unequal treatment violated the Equal Protection Clause.²⁶⁴ Aliens are considered "persons" in this instance, and this same reasoning can be extended to apply Eighth Amendment protection to undocumented children in the migrant detention centers.

²⁶⁴ See *Plyler v. Doe*, 457 U.S. 202 (1982).

Based on the definition that has emerged from the case law on what is cruel and unusual punishment, there is a strong argument that the treatment of children in the migrant detention centers qualifies as cruel and unusual punishment. After crossing the border, children are put into detention centers while they await the next step in their immigration case. During this time, they are deprived of their liberty and under the government's control. The treatment they have received there has caused a deliberate and unnecessary infliction of pain, and there is a strong argument this pain was applied sadistically.

3. Conclusion

Immigration has become a particularly polarizing issue. However, there should not be a debate on how a child, any child, should be treated, or whether they should be ill-treated.

The prohibition of torture, as well as cruel, inhuman or degrading punishment has been in place for many years, and yet it is arguably still occurring today, particularly in the context of migrants in detention. Children who have fled their homes and everything they know in the hopes of a better, more stable life in the United States are greeted with terrible treatment. A child should not be subjected to torture, nor cruel, inhuman or degrading treatment for any reason. Though some progress has been made in the context of children in migrant detention centers, it is not over.

One important point to note is that since the widespread media coverage and international condemnation of this shocking reality, the number of children being detained has decreased significantly. The average length of time during which children remain detained has also been reducing. However, it does not take away from the horrors so many children have experienced while in these detention centers. It is important that their voices are heard, and changes are made to prevent further abuse. If the problem is related to corrupt patrol officers, there needs to be a strong vetting system to remove those who are corrupt and replace them with different staff. There needs to be greater accountability from the bottom up in terms of how children are treated in the detention facilities. Some small measures that could be implemented could be more frequent visitation by top officials, NGOs, more media coverage, prosecution of officers for abusing children, providing victim's assistance for children to have an advocate there if they need to report abuse. Ultimately, what must be remembered is that migrant children are, first and foremost, children, and the prohibition of torture is absolute.

Index

Abuse	27, 28-30, 38
Child Separation	25, 35
Convention Against Torture (CAT)	6, 7-8, 9, 31, 36
Convention on the Rights of the Child (CRC)	6-7, 31, 37
Cruel, inhuman or degrading treatment	12-16, 36
Cruel and unusual punishment	18-21, 35, 39
Detention	15, 16, 28, 31, 34, 37-38, 39-40
Eighth Amendment	18-21, 39-40
Flores Settlement	21-23, 32-33
Immigration	16-17, 21
International law	9, 10, 16, 17, 36-38, 39
Migrants	15, 27, 31
Refugees	22, 24
TEDS	23-24, 32, 33, 34
Torture	9-12, 36, 38
United Nations (UN)	6, 9, 25, 31
United States law	7, 8, 14, 17, 18-23, 24-26, 33-34

References

Doctrine:

ACLU San Diego. *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection*, (May 2018)

AIC. *Former Detainees Describe Horrific Conditions in CBP Detention* (June 2015)

Baily, Charles et al. *The Psychosocial Context and Mental Health Needs of Unaccompanied Children in United States Immigration Proceedings*, Graduate Student Journal of Psychology Vol. 13 (2011)

Bhabha, Jacqueline, *More than their Share of Sorrows» International Migration Law and the Rights of Children*”, *St. Louis University Public Law Review*, vol. 22, n.º 2, (2003) p. 253-275

Burgers, J. Herman and Danelius, Hans. *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Kluwer Academic Publishers (1988)

Byers, Michael & Nolte, Georg, *United States Hegemony and the Foundations of International Law*, Cambridge University Press (2003) Chapter 14: US Reservations to human rights treaties: all for one and none for all?

Cassese, A. et al. *International Criminal Law, Third Edition*, Oxford University Press (2013)

De Wet, Erika. *The Prohibition of Torture as an International Norm of jus cogens and its Implications for National and Customary Law*, EJIL, Vol. 15 No. 1, 97-121, (2004)

Detrick, Sharon *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff Publishers, 1992

Farrell, Michael, *The Prohibition of Torture in Exceptional Circumstances*, Cambridge University Press (2013)

Florence Immigrant and Refugee Rights Project. *Seeking Protection, Enduring Prosecution: The Treatment and Abuse of Unaccompanied Undocumented Children in Short-term Immigration Detention*, (2009)

Garcia, Michael John. *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, Congressional Research Service, (January 2009)

Hamdan, Eman. *The Principle of Non-Refoulement Under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Koninklijke Brill NV (2016)

Huebner, A. et al. *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Custom and Border Protection*, (June 2014)

- Human Rights First. *Fact Sheet: October 2018, The Flores Settlement and Family Incarceration: A Brief History and Next Steps* (2018)
- Karamouzian, M. *Trump's Zero-tolerance Policy: Would a Political Response to a Humanitarian Crisis Work?* *Int. J Health Policy Manag.* 7(11) 1070-1072, (2018)
- Kolb, Robert. *La jurisprudence internationale en matière de torture et de traitements inhumains ou dégradants*, *Revue Universelle des Droits de l'Homme*, vol. 15, n.º 7, 2003, p. 254-287
- Linton, Julie M. et al. *Detention of Immigrant Children*, *American Academy of Pediatrics* Vol. 139, No. 4 (2017)
- Lutheran Immigration and Refugee Service. *At the Crossroads for Unaccompanied Migrant Children: Policy, Practice, and Protection*. Baltimore, MD: Lutheran Immigration and Refugee Service (2015)
- Mower Jr., Glenn A, *The Convention on the Rights of the Child: International Law Support for Children*, Greenwood Press (1997)
- Mulligan, Stephen P. *International Law and Agreements: Their Effect on U.S. Law*, Congressional Research Service, (September 2018)
- Novak, M. *The United Nations Convention Against Torture and Its Optional Protocols (2nd Edition): A Commentary*, Oxford Commentaries on International Law, Oxford University Press (2019)
- Office of the High Commissioner for Human Rights. *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, (2011)
- Office of Inspector General. *Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (Redacted)* OIG-19-51 (2019)
- Sifris, Ronli. *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinization of Torture*, Routledge Publishers (2014)
- Thronson, David B. *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, *Ohio State Law Journal*, n.º 63, pgs. 979-1016 (2002)
- Thronson, David B. *You Can't Get Here from Here: Toward a More Child-centered Immigration Law*, *Virginia Journal of Social Policy & the Law*, vol. 14, n.º 1, p. 58-86 (2006)
- United States Department of Health and Human Services. Office of Inspector General, *Communication and Management Challenges Impeded HHS's Response to the Zero-Tolerance Policy*, (March 2020)
- U.S. Customs and Border Protection. *National Standards on Transport, Escort, Detention, Search* (October 2015)

USCIS Office and Library. U.S. Citizenship and Immigration Services *Overview of INS History* (2012)

Wendland, Lene. *A Handbook on State Obligations under the UN Convention against Torture*, Association for the Prevention of Torture (2002)

Wood, Laura C N. *Impact of punitive immigration policies, parent-child separation and child detention on the mental health and development of children*. *BMJ Pediatrics Open* (2018)

Case Law:

United Nations Committee Against Torture:

CT and KM v. Sweden, No 279/2005, UN Doc CAT/C/37/D/279/2005, 17 November 2006

Oleg Evloev v. Kazakhstan, No 441/2010, UN Doc CAT/C/51/D/441/2010, 5 November 2013

Sergei Kirsanov v. Russian Federation, No 478/2011, UN Doc CAT/C/52/D/478/2011, 14 May 2014

EN v. Burundi, No 578/2013, UN Doc CAT/C/56/D/578/2013, 25 November 2015

European Court of Human Rights:

Ireland v. United Kingdom, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977

United States District Court: California:

Flores et al v. Reno, No. CV 85-4544-(RJK)Px (Cent. Dist. Ct. Cal.) (1997)

Flores v. Sessions, Case: CV 85-4544 DMG (AGRx) U.S. Dist. Ct. Cent. Cal. (2017)

Flores v. Sessions, Civil Minutes U.S. Dist. Ct. Cent. Cal. (2018) AILA Doc. No. 14111359

United States Federal Appeals Court:

Flores v. Lynch, 828 F. 3d 898 (2016)

Supreme Court of the United States:

Estelle v. Gamble, 429 U.S. 97 (1976)

Gregg v. Georgia 428 U.S. 153 (1976)

Ingraham v. Wright, 430 U.S. 651 (1977)

Rhodes v. Chapman, 452 U.S. 337 (1981)

Plyler v. Doe, 457 U.S. 202 (1982)

Whitley v. Albers, 475 U.S. 312 (1986)

Wilson v. Seiter, 501 U.S. 294 (1991)

Hudson v. McMillan, 503 U.S. 1 (1992)

Roper v. Simmons, 543 U.S. 551 (2005)

Graham v. Florida, 560 U.S. 48 (2010)

Miller v. Alabama, 567 U.S. 460 (2012)

UN Documents:

Committee of the Rights of the Child:

Committee of the Rights of the Child, General Comment 6, *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, (September 2005)

Committee Against Torture:

Committee Against Torture, 'General Comment No 2 on the Implementation of Article 2 by States Parties' UN Doc CAT/C/GC/2 (2008)

Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment:

SRT (Nowak) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' UN Doc A/HRC/13/39 (2010)

Melzer, N, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment UN Doc A/HRC/37/50 (2018)

SRT (Melzer) 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' UN Doc A/72/178 (2017)

United Nations:

United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969

UN Commission on Human Rights:

UN Commission on Human Rights, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to China*, UN Doc. E/CN.4/2006/6 (March 2006)

United Nations General Assembly:

United Nations General Assembly, 'United Nations Rules for the Protection of Juveniles Deprived of Their Liberty', Res 45/113 of 14 December 1990

United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, (17 July 1998)

United Nations General Assembly, Note by the Secretary-General, *Extra-custodial use of force and the prohibition of torture, and other cruel, inhuman and degrading treatment or punishment*, UN Doc A/72/178, (July 2017)

United Nations High Commissioner for Refugees:

United Nations High Commissioner for Refugees (UNHCR), *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, 13 March 2014

Websites:

<https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-19052.pdf>

<https://www.childwelfare.gov/topics/can/defining/federal/>

<https://edition.cnn.com/2018/09/06/politics/trump-administration-immigrant-families-children-detention/index.html>

<https://indicators.ohchr.org/>

<https://www.justice.gov/opa/press-release/file/1049751/download>

https://www.law.cornell.edu/constitution/eighth_amendment

https://www.law.cornell.edu/wex/fifth_amendment

<https://www.law.cornell.edu/uscode/text/8/1325>

<https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html>

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

<https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220_full.html#.VFKb48mkP-s

<https://www.thedialogue.org/analysis/the-inter-american-human-rights-system-in-the-trump-era/>

<https://www.unhcr.org/3b66c2aa10.html>