

# DISAPPEARED CHILDREN

## - Applying International Law Regarding Enforced Disappearances to United States Family Separation Policy -

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## I . Introduction

When those in power desire to silence political dissent or obscure a mounting politically damaging problem, human rights are often eroded. In some cases they are completely destroyed. Historically and today as well, oppressive governments have targeted journalists and political activists; subjecting them to intimidation, harassment and in the most extreme cases, disappearances and/or murder. These actions are often not domestically prosecuted, as those committing the acts are also in charge of the enforcement of laws. Therefore, in order to protect human rights,

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international policies have been created to stop these acts.

This article will focus on the policies that have been developed to stop targeted destruction of those that are deemed counterproductive to governmental aims, specifically those international human rights laws that address enforced disappearances. Through this international framework, the Article will then examine the Trump administration's policy of forced family separations at the Mexico/US border.<sup>1)</sup>

Trump's stated goal of the family separation policy was as part of a "zero tolerance" plan to stop illegal immigration and force Democrats to agree to immigration demands.<sup>2)</sup> This policy which was begun in July 2017, nearly a full year before it was formally announced,<sup>3)</sup> was implemented by systematically breaking apart migrant families as they attempted to cross the border. This forced separation was done with no means of tracking and reuniting the families that had been captured by the government.<sup>4)</sup> According to US immigration authorities, who were ordered to provide records of the children separated after a lengthy court battle with the American Civil Liberties Union (ACLU), the number of children separated since July 2017 is more than 5,400.<sup>5)</sup>

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1) In this Article, I will use the term "migrant" to describe those who enter the United States by way of crossing an international border. This category will include asylum-seekers, who are entitled to protection under domestic and international law. It does not include refugees whom have been granted asylum and resettled in the United States.

2) Michael Scherer, Josh Dawsey, Trump cites as negotiating tool his policy of separating immigrant children from their parents, *The Washington Post*, June 16, 2018. [https://www.washingtonpost.com/politics/trump-cites-as-a-negotiating-tool-his-policy-of-separating-immigrant-children-from-their-parents/2018/06/15/ade82b80-70b3-11e8-bf86-a2351b5ece99\\_story.html](https://www.washingtonpost.com/politics/trump-cites-as-a-negotiating-tool-his-policy-of-separating-immigrant-children-from-their-parents/2018/06/15/ade82b80-70b3-11e8-bf86-a2351b5ece99_story.html).

3) Editorial Board, *Only now do we understand the true cruelty of Trump's family separation*, *The Washington Post*, October 30, 2019. [https://www.washingtonpost.com/opinions/only-now-do-we-understand-the-true-cruelty-of-trumps-family-separation/2019/10/29/8294ef9e-f9cf-11e9-ac8c-8eced29ca6ef\\_story.html](https://www.washingtonpost.com/opinions/only-now-do-we-understand-the-true-cruelty-of-trumps-family-separation/2019/10/29/8294ef9e-f9cf-11e9-ac8c-8eced29ca6ef_story.html).

4) *Id.*

5) Associated Press, More than 5,400 children split at border, according to new count. *NBC News*, October 25, 2019. <https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791>.

This Article will focus initially on the international human rights community's attempts to address enforced disappearances. Enforced disappearances have been used to further political goals and gains by authoritarian governments in many regions. This political action, which silences any response has been treated differently than assassinations due to the the nebulous nature of the evidence available. Simply put, when someone has been "disappeared" it is unknown what happened to them and therefore it is hard to prove wrongdoing.

With that framework in mind, due to inadequate tracking systems, lack of care for the children, and inhumane treatment, which will all be fully discussed below, it is hard to have an exact number of children separated by current administration, but we know that at a minimum 5,400 children were separated since July, 2017, but that in the past year alone, 69,550 migrant children have been held in US government custody.<sup>6)</sup> The absence of adequate tracking systems and the unknown location of some of the forcibly separated children leads to clear cases of a disappeared child. In addition to that disappearance, the fact that many of these children are too young to reliably narrate their treatment or path in detention lends this situation to a comparison to the enforced disappearance framework.<sup>7)</sup>

This Article will outline how international law attempts to limit enforced disappearances and harm to children, respectively. It will then show that the forced separation policy by this administration is an attempt to accomplish a political goal by silencing or eradicating people. Specifically, the policy dehumanizes these children by disregarding their rights, by stripping them of their familial bonds and by incarcerating them in inhumane manners without regulation or documentation, completely outside of the eye of the public or the judicial system. This silencing or disappearing of a group

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6) *UN Expert corrects claim on children in US Migration detention*, Al Jazeera and News Agencies, November 20, 2019. <https://www.aljazeera.com/news/2019/11/world-highest-rate-children-detention-study-191118175923071.html>.

7) Elizabeth S. Barnert, et al., *Long Journey Home: Family Reunification Experiences of the Disappeared Children of El Salvador*, 37 HUM. RTS. Q. 492, 493 (2015).

people to accomplish a political goal is the same tactic that has been used by governments with enforced disappearances of political rivals, journalists, or activists.

## II. Forcible Separation of Children from Parents

Since March 2017, a minimum of 5,400 children were separated from their caregivers by the United States Government. This section will explain the policy and how it was implemented, the conditions of imprisonment for the children, and the litigation that occurred to reunite families and obtain records on the policy.

### 1. President Trump's Plan to Separate Families

While campaigning in 2016, a main platform of the Trump campaign was to limit immigration and to stop the entrance of Central American migrants into the United States via the Mexican border.<sup>8)</sup> This policy, to accomplish a political promise of limiting immigration and to build a wall to stop illegal immigration, started to focus on more immediate ways to curb immigration when building a wall was not immediately feasible. It is then, that the Trump administration directed US attorneys to initiate criminal prosecution for all cases of people entering the US without authorization used family separation as a tool of negotiation and also as a deterrent

In April 2018, in the United States, the Trump administration, through

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8) Nick Corasaniti, *A Look at Trump's Immigration Plan, Then and Now*, New York Times(August 31, 2016).  
<https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigrationchanges.html>;  
 Don Gonyea, *Trump's Plan to Make Mexico Pay for the Wall*, NPR (April 5, 2016) <https://www.npr.org/2016/04/05/473109475/trumpsplan-to-make-mexico-pay-for-the-wall>.

their Attorney General Jeff Sessions at the time, announced a “zero tolerance” policy for illegal entry at the southwest border of the United States. Although this was the first formal announcement, it was later disclosed that the Trump administration had shifted policy almost a full year prior, starting to plan the separation in March, 2017 and implementing in October, 2017.<sup>9)</sup> During the first six months, 700 families were separated at the border, including at least 100 children under age 4.<sup>10)</sup> During this time period, a Department of Homeland Security spokesman told the New York Times that the agency does not separate families at the border as a means to deter illegal immigration.<sup>11)</sup> This is contradictory to an interview given by the secretary of homeland security, John Kelly in March 2017.<sup>12)</sup>

Once the April 2018 policy was announced, Attorney General Jeff Sessions was clear that it was his plan to separate children from parents and prosecute all illegal border crossers. It should be noted that in the past, there were migrant children who were detained, those that entered alone, but there was no policy to separate children from caregivers when they crossed the border.<sup>13)</sup>

This policy started continued enforcement that purposefully separated families as a “deterrent.”<sup>14)</sup> After the April 2018 policy was overtly

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9) U.S. House of Reps., Committee on Oversight and Reform, Child Separations by the Trump Administration, 10 (July, 2019), See also, Joshua Barajas, *How Trump's family separation policy became what it is today*, PBS News Hour, June 21, 2018, <https://www.pbs.org/newshour/nation/how-trumps-family-separation-policy-has-become-what-it-is-today>.

10) *Id.*

11) *Id.*

12) John Haltiwanger, *John Kelly proposed separating children from their parents to deter illegal immigration last year, and now the Trump administration can't get its story straight*, Business Insider, June 19, 2018, <https://www.businessinsider.com/kelly-proposed-family-separation-to-deter-illegal-immigration-in-2017-2018-6>.

13) Alex Wayne, *President Trump Falsely Claims Obama Began Migrant Family Separations*, Time, June 23, 2019, <https://time.com/5612868/trump-obama-family-separation/>

14) William Cummings, John Kelly Defends Separating Immigrant Families, Saying ‘Name of the Game Is Deterrence,’ USA TODAY (May 11, 2018), <https://www.usatoday.com/story/news/politics/2018/05/11/john-kelly-splitting-migrantfamilies-laws-trump/602982002/>.

implemented, the number of families separated increased greatly. From mid-April 2018 to the end of May 2018, according to a DHS spokesperson, 1,995 children were separated from their adult caregivers and by June 9, 2018, the number of children separated increased to 2,342.<sup>15)</sup>

By this time, some members of DHS were denying that the administration had a policy of separating families at the border, but on June 18, photos of children kept in cages and audio recordings of children between four and ten in detention centers were published.<sup>16)</sup> The public outcry reached the White House and on June 19, 2018, President Trump issued an executive order that claimed to end family separation, instead allowing for detention of families.<sup>17)</sup> Despite this order violating laws on how to detain juveniles, this order did not stop family separations. In addition to President Trump's order, the American Civil Liberties Union successfully obtained a nationwide injunction in June 2018 blocking the child separation. But, by December 2018, DHS listed 2,737 children who had been separated from their caregivers and in January 2019, an Office of Inspector General Report concluded that the administration did not know the total number of families it had separated.<sup>18)</sup> In October, 2019, the Trump administration, under court order, turned over information that 1,556 additional children had been forcibly separated since December 2018, bringing the total number to more than 5,400 children.<sup>19)</sup>

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15) *1,995 minors separated from adults during 6-week period, DHS says*, CBS News (June 17, 2018), <https://www.cbsnews.com/news/1995-minors-separated-from-adults-during-six-week-period-dhs-says/>.

16) Zachary Mueller, *An Ongoing Timeline of Trump's Separation of Families*, America's Voice (Aug. 8, 2018), <https://americasvoice.org/blog/family-separation-timeline/>

17) Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018)

18) *See generally*, Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction, *Ms. L v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

19) Chantal Da Silva, *More than 5,400 Children were separated from their parents by the Trump administration, 'shocking' new tally shows*, Newsweek, October 25, 2019 <https://www.newsweek.com/trump-administration-family-separation-policy-aclu-1467715>

## 2. Withholding Information and Deplorable Conditions

During the numerous law suits filed by non-profits on behalf of the migrant families and separated children more information about how poorly this policy was implemented. Whether purposeful or neglectful, this lack of information creates an environment of uncertainty, anxiety and fear.

In June 2018, Judge Sabraw of the Southern District of California recognized the asylum protections of migrant families and held that provided a right to family integrity.<sup>20)</sup> The court then issued a series of deadlines ordering family reunification, starting with children ages zero to five and then children over five within fourteen and thirty days respectively. The court also ordered phone contact within ten days, if a child had not yet had the opportunity. The court then stated:

The practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence.... Certainly this cannot satisfy the requirements of due process.<sup>21)</sup>

The Trump administration failed to meet the first two deadlines and by the second deadline, fewer than half of the children separated had been reunited. In July 2019, the House of Representatives issued a report after holding public hearings. This report found that “Hundreds of additional children have been separated from their parents since the end of the Administration’s zero tolerance policy.” In some cases, (at least 25) children had been detained for over a year.<sup>22)</sup>

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20) *Ms. L. v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 1133, 1142–44 (S.D. Cal. 2018).

21) *Id.* at 1144.

In addition to the lack of transparency and lack of bureaucratic safeguards, the conditions of these places of detention are truly deplorable and inhumane. One physician who visited a CPB facility stated in a sworn declaration, “The conditions within which [these children] are held could be compared to torture facilities. That is, extreme cold temperatures, lights on 24 hours a day, no access to medical care, basic sanitation, water or adequate food.”<sup>23)</sup>

Reports that the children were not being provided adequate food, blankets and toothbrushes led to a law suit in California. In July 2017, US District Court held that the Trump administration had breached the 1997 Flores agreement, which set standards for migrant child detention by not providing the children with food or hygienic supplies and housing them in cold facilities with no beds.<sup>24)</sup> The Department of Justice appealed that ruling and in June 2019 argued that the government did not have to provide means to sleep or wash to the children. In August 2019, a three-judge panel of the 9th U.S. Circuit rejected that appeal.<sup>25)</sup> Humane treatment of the children is a fatal issue, as of May 24, 2019, six migrant children have died in U.S. custody since this family separation policy was implemented. Three of these six children died from the influenza virus, which is normally non-fatal.<sup>26)</sup>

This strategic policy of isolation and neglect takes away autonomy, attempts to provide little to no due process and exposes children to

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22) U.S. House of Reps., Committee on Oversight and Reform.

23) Declaration of Dolly Lucio Sevier, MD, at 56, *Flores v. Sessions*, EX 13, Pages 56-103 (C.D. Cal. Jun. 26, 2019).

24) *Are US Child Migrant Detainees Entitled to Soap and Beds?*, BBC News, June 20, 2019, <https://www.bbc.com/news/world-us-canada-48710432>.

25) Maura Dolan, *Court Upholds Ruling that Children Held at Border Must have Adequate Food, Bedding, Sanitation*, Los Angeles Times, August 15, 2019, <https://www.latimes.com/california/story/2019-08-15/children-border-sanitary-conditions-flores-agreement-9th-circuit>.

26) Graham Kates, *Doctors call for investigation after 3 migrant children in custody die of flu*, CBS News, Aug. 1, 2019, <https://www.cbsnews.com/news/doctors-call-for-investigation-after-3-migrant-children-in-custody-die-of-flu/>.



potentially deadly situations. The lack of transparency and the lack of regard for the well-being of these children is akin to enforced disappearances. Once the person is captured (or separated), the government can do what they want to them, in the case of enforced disappearance, because no one will know what happened if the person is gone and in the case of family separation, many of these children are too young to understand what is going on.

### 3. Lasting Effects on Children and Parents

The long term effects of these policies are still unknown. The Trump Administration is still not agreeing to stop detentions, in fact, in August, 2019, they released a regulation that would end the Flores agreement on migrant children detentions. This is an attempt to remove time limits on how long children can be detained.

Dr. Jack Shonkoff, the Director of Harvard University's Center on the Developing Child testified before Congress that detaining children away from parents or primary caregivers is bad for their health. A report from the Department of Health and Human Services has found that children that have been separated under this policy already show signs of Post-Traumatic Stress Disorder (PTSD)<sup>27)</sup> The report further states that some children were under the delusion that their parents had been killed and they would be killed next.

All of these factors, being taken from your family, having no idea how long or where you are going, being denied adequate food, clothing, beds, hygiene accoutrements, and most likely including the reasons why their caregivers felt the need to take such a perilous journey to find a safer place to live, have significant adverse effects on the child. These consequences

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27) Associated Press, *'I can't feel my heart': children separated under Trump show signs of PTSD, watchdog finds*, The Guardian, September 5, 2019, <https://www.theguardian.com/us-news/2019/sep/04/child-separation-ptsd-trump-zero-tolerance>.

could range from depression, to PTSD, to behavioral problems, to death.

### Ⅲ. Forced Child Separation is a violation of International Human Rights Law

There are numerous domestic lawsuits currently being fought, some of which have provided information which would have never been disclosed but for the legal battles. This article acknowledges the merit, jurisdiction and necessity of those domestic legal actions. In addition to that litigation, the severity of this governmental action necessitates international involvement.

There are multiple possible international human rights instruments that could be applied to the Trump policy of forced family separation. The Convention on the Rights of the Child (CRC) is the most obvious protection for the children who have been and are being forcibly separated from their families. Unfortunately, the United States, although a signatory to that Convention, has not ratified the CRC<sup>28)</sup>, an argument can be made for the application of this Convention despite the lack of ratification, but that is not the argument made in this article. This section will discuss potential use of the concept of enforced disappearances, torture, and eventually crimes against humanity as applied to the Trump administration's policy of forced family separation.

#### 2. Enforced Disappearances and Human Rights Law

Although it had certainly happened previously in history, the first formal decree authorizing enforced disappearances was by Adolf Hitler, in

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28) The United States is the only country other than Somalia that has not ratified this treaty.

December, 1941.<sup>29)</sup> This policy, “Nacht und Nebel Erlass” or the Night and Fog Decree, allowed seizure of people in Nazi occupied territories that were “endangering German security” and the authority to make them “disappear.” In carrying out these seizures, no information was given to victim’s families or the public. These governmentally mandated disappearances also were common in the 1960s in the military dictatorships in Latin America, as well as more recently in Iraq, Sri Lanka and the former Yugoslavia.<sup>30)</sup>

Enforced disappearances, like lynching, are meant to terrorize. The systematic occurrence of state sponsored disappearances instills a culture of fear, insecurity and dread. Unlike lynchings, which were done in public purposefully, the fear of the unknown is added to cruelty. In that respect, to “vanish” someone is also much different than to imprison someone. While imprisoned, presumably, the outside world is aware of their whereabouts, a person can still potentially send or receive communications, and if constitutional mandates are followed, imprisonment is monitored by a judicial process.

International criminal law, international humanitarian law and human rights law all cover the issue of enforced disappearances.<sup>31)</sup> The Inter-American Court on Human Rights<sup>32)</sup> has linked enforced disappearances to the right to personal liberty, also recognizing that “the forced disappearance of human beings is a multiple and continuous violation of many rights...”<sup>33)</sup> Due to this expansive scope of potential regulation, it is best understood first, as a basic human rights violation. Any act leading to a disappearance is a violation of multiple rights outlined in the International Covenant on Civil and Political (ICCPR)<sup>34)</sup> rights: (potentially) the right to

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29) Dalia Vitkauskaitė-Meurice, Justinas Zilinskas, *The Concept of Enforced Disappearances in International Law* Jurisprudencija 2.120 (2010).

30) Id.

31) Id.

32) The United States has signed but never ratified the American Convention on Human Rights.

33) I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*, *op. cit.*

34) The United States ratified this Covenant on June 8, 1992.

life (art. 6); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7); the right to liberty and security of person (art. 9); and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10).<sup>35)</sup>

While not named explicitly in many of the human rights jurisprudence, enforced disappearances have been also been defined as acts of torture, cruel, inhuman or degrading punishment or treatment. <sup>36)</sup> The European Court of Human Rights held, while examining a case under Article 3 of the European Convention of Human Rights, that the act of “disappearance” of the person did *not* in itself constitute torture and inhuman or degrading treatment or punishment, which is prohibited under the Article, but rather the reactions and attitudes of the authorities’ when the family attempted to locate their loved one were a violation of the Article.<sup>37)</sup> It was the manner in which the remaining family member was treated that was the prohibited inhuman behavior.

In 2006, the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED) was adopted by the UN General Assembly. This legally binding instrument entered into force in December 2010. As of October 2019, 98 states have signed the convention, with 62 completing the ratification process, the United States, however has not signed.

Despite the lack of binding jurisdiction on the United States of this Covenant, other international instruments protect and are binding against governmental enforced disappearances. Such as the International Covenant on Civil and Political Rights, which as referenced above, does not list “enforced disappearances” but has been applied to such cases, utilizing numerous different articles. While drafting the ICPPED,<sup>38)</sup> the United

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35) *Id.* at p. 199.

36) Vitkauskaite-Meurice at 201.

37) *Id.* see also *Bazorkina v. Russia*, no. 69481/01, ECHR-2006; §139.

Nations Convention against Torture (CAT)<sup>39)</sup> was a source of reference. Notably, in the requirement for criminalization of torture<sup>40)</sup> domestically with appropriate punishment for and the attempt to eliminate impunity for perpetrators. This obligation of the State Party to prevent, investigate and punish perpetrators in cases of enforced disappearances under ICPPED and torture under CAT are explicit in the jurisprudence of both the European Court of Human Rights and the Inter-American Court on Human Rights.<sup>41)</sup>

Enforced disappearance by the government is analogous to the separation of children at the border. The lack of knowledge as to where and how long a child will be taken away from parents (and conversely, taking parents away from children without any information or assistance for those children) results in the same harm that taking a person from their family and community in enforced disappearances causes. Enforced disappearance can be classified as both torture and a crime against humanity and therefore this policy of separating children as their parents attempt to seek asylum and/or immigrate to the United States can also.

The purposeful separation of children (1/5 under five years of age, one confirmed to be merely four months old), without any justification, is clearly

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38) The ICPPED defines enforced disappearance as: The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

39) The United States has signed and ratified this Convention, with reservations, understandings and declarations.

40) CAT defines torture as: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or 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 other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

41) Vitkauskaite-Meurice at 202, *see also* I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*.

cruel. When it is done for the purpose of creating a more advantageous negotiation strategy with your political opponents regarding immigration policy, or as a deterrent to convince others not to attempt to migrate, it is done as merely a political act. Without reason or cause, the act of separating children and imprisoning them indefinitely is torturous to both the child and the family members. More specifically, the action of taking children without any plan for reunification, without allowing information to be released regarding their whereabouts, without proper supervision, hygiene, protection and without a clear plan is a campaign that instills anguish, uncertainty and terror. This premeditated segregation and purposeful obscuring of the possibilities as to what will happen to the child comes from the same intent and has the same effect as someone's loved one being taken in an enforced disappearance does. To take a family member away with no information, no legal recourse, and no plan to reunite is to make them vanish. Therefore, the same instruments used to protect people from enforced disappearances and those that punish the perpetrators should be utilized in this instance.

## 2. Crimes Against Humanity

The Rome Statue of the International Criminal Court allows for prosecution of certain crimes against humanity, when certain actions are committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. The relevant crimes, listed in Article 7, are (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, (f) torture, (i) enforced disappearance of persons and (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health.<sup>42)</sup>

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42) Rome Statute of the International Criminal Court. UN. Doc. A/CONF.183/9/1998.

The Trump forced family separation policy was a systematic plan to utilize children as pawns in order to get the Democrats to allow President Trump to gain funding for the wall he wanted to build.<sup>43)</sup> In addition, it was a concerted effort to create a never before seen campaign of terror that would deter any other migrants from attempting to come to the United States.<sup>44)</sup> This systematic policy was directed at the children of those who dared to migrate to the United States and the Trump administration saw a benefit in forcibly separating over 4,000 children with no intention of reuniting them. It took litigation and a court order to begin reunification of the children that were separated.<sup>45)</sup>

As described above, the fundamental rules of international law are applicable to Trump's forceful family separation. Imprisonment of the children is in violation of both enforced disappearance law and laws prohibiting torture, along with violations of the rights of a child.

## IV. Conclusion

President Trump has strategically used these children as disposable pawns in an effort to gain support from his anti-immigration supporters and to pressure Democrats into giving him funding for a wall. In addition to the deliberate separation of children from their caregivers, the fact that there were no plans to reunify families or keep track of the children in the government custody shows the combination of deprivation of liberty and withholding information that is present in the crime of enforced

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43) Scherer at 2.

44) See Carrie Cordero, Heidi Li Feldman, Chimene Keitner, *The Law Against Family Separation*, Columbia Human Rights Law Review, Forthcoming 2020. "As far as we know, until 2018, the U.S. government had not previously implemented a policy and practice of intentionally separating migrant and asylum-seeking families as a means of deterrence."

45) *Id.*

disappearance. There are still at least 25 children separated and in custody. These children have had their identities, their safety, their families, their education and their freedom taken away for no reason other than to obtain a political advantage for President Trump. Even more egregious are the reports of children being lost in the system due to forcible separations happening without adequate, traceable records.<sup>46)</sup>

Children are being erased by this policy and the international enforcement of ICCPR, the one human rights treaty that the United States has signed and ratified is a way to stop this inhumane policy. In addition, prosecution under the Rome Statue for crimes against humanity due to this systematic oppression and torture of both the children and their parents should occur. The argument should be made on behalf of the rights of the child, the prohibitions against torture and also the psychological effects caused by the conditions of confinement and prolonged or indefinite detention show the lasting damage caused by this policy.

투고일 : 2019.12.3. / 심사완료일 : 2019.12.12. / 게재확정일 : 2019.12.16.

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46) Dara Lind, The Trump Administration's Separation of Families at the Border, Explained, VOX (Aug. 14, 2018), <https://www.vox.com/2018/6/11/17443198/childrenimmigrant-families-separated-parents>.



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[국문초록]

## 사라진 아이들

- 미국의 가족분리정책에 대한 강요된 실종 관련 국제법의 적용 -

에린머피\*

미국의 도널드 트럼프 행정부의 연방 법무장관이었던 제프 세션스는 2018년 4월 미국의 남서부 국경을 통한 불법이민에 대한 무관용(zero tolerance) 정책을 발표하였다. 이 무관용 정책에 따라 불법이민에 대한 일종의 억제책의 일환으로 자녀들을 그들의 부모로부터 강제적이고 고의적으로 격리시키는 방식의 지속적인 불법이민 단속이 개시되었다. 그러나 이 정책은 이민 또는 피난처를 모색하는 부모들로부터 자녀들을 고의적으로 격리시키는 것에 그칠 뿐 추후에 가족을 다시 합치게 하거나 정부의 구금 하에 있는 자녀들을 추적하고, 관리하는 문제에 관하여는 아무런 고려가 없었다. 이러한 강요된 격리 때문에 발생한 실종된 아이들과 관련된 보고 및 기약 없는 구금 기관과 구금 조건들 때문에 발생한 정신적 충격 문제는 이 정책이 초래한 문제점들을 여실히 보여준다.

이 논문은 우선 이러한 가족 구성원 간의 격리 문제가 과거에는 국제법에 따라 어떻게 처리되어 왔는지 살펴보고, 이어서 미국 정부의 고의적이고 강요된 자녀 격리 정책이 어떠한 점에서 정부에 의한 강요된 실종과 사실상 마찬가지로 되는 것인지 분석하고자 한다. 강요된 실종에 대한 과거 사례 및 위와 같은 정책에 적용 가능한 현행 국제법을 살펴봄으로써 가족 구성원을 격리시키는 정책을 억지하는 추가적이고 국제적인 개입방법을 모색하는 것이 가능할 것이다.

주제어 : 가족 격리, 이민자 구금, 인권, 강요된 실종, 미국의 이민 정책

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[Abstract]

## DISAPPEARED CHILDREN

– Applying International Law Regarding Enforced Disappearances to  
United States Family Separation Policy –

Erin Murphy\*

In April 2018, in the United States, the Trump administration, through their Attorney General Jeff Sessions at the time, announced a “zero tolerance” policy for illegal entry at the southwest border of the United States. This policy started continued enforcement that purposefully, forcibly, separates children from their parents as a “deterrent.” In addition to the deliberate separation of children from migrant and asylum seeking parents, when this policy was devised and implemented, there were no plans to reunify families or keep track of the children in the government custody. Reports of children being lost in the system due to forcible separations happening without adequate, traceable records, and the psychological effects caused by the conditions of confinement and prolonged or indefinite detention show the lasting damage caused by this policy.

This Article will outline briefly how international law has addressed the issue of family separation in the past and additionally analyze how the policy of governmental forced, intentional separation of children from their parents is similar to enforced disappearances perpetrated by the government. By looking at the history of enforced disappearances and the current international human rights laws to address the practice, additional methods of international intervention are possible to stop the policy of family separation.

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Key words : family separation, migrant detention, human rights, enforced disappearance, United States immigration policy