ESSAY

Family Separation as Deterrent: Affected Refugee Rights in International Law and Remedies

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A central pillar of Donald Trump's presidential campaign was to make the United States' already inhospitable immigration system even less accessible to refugees and migrants. This policy has most notably been implemented by two policies of family separation – policies which have disproportionately impacted refugees. This Essay argues that family separation policies constitute clear violations of binding international law. More precisely: family separations constitute unlawful penalization of a refugee's illegal entry, in violation of the Refugee Convention, as well as unlawful and arbitrary interference with family unity, in violation of the Covenant on Civil and Political Rights and the American Declaration for the Rights and Duties of Man. The Essay concludes by canvasing potential remedies in international tribunals, and proposing a domestic litigation strategy which would argue, using the Charming Betsy *doctrine, that we should read a necessity defense into the statute criminalizing illegal entry.*

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I. INTRODUCTION

A central pillar of Donald Trump's presidential campaign was to make the United States' already inhospitable immigration system even less accessible to refugees and migrants. The Trump administration has sought to fulfill this aim in several ways, most extensively through two separate policies of forced migrant-family separations at the U.S.–Mexican border. To make matters worse, the great majority of the victims of such policies are likely not economic migrants, as political rhetoric often suggests, but rather refugees.[1] Although the international legal violations involved in longstanding mandatory detention policies and inaccessible asylum procedures have received significant scholarly attention,[2] little has yet been written about the application of international law to family separation policies. This may be partially explained by the greater relevance of domestic law and by the fact that the international treaty that most clearly addresses family separations—the Convention on the Rights of the Child—remains unratified. This Essay argues that family separations nevertheless constitute clear violations of binding international law. More precisely: family separations constitute unlawful penalization of a refugee's illegal entry, in violation of the Refugee Convention, as well as unlawful and arbitrary interference with family unity, in violation of the Covenant on Civil and Political Rights and the American Declaration for the Rights and Duties of Man.

This Essay proceeds in three parts. Part I provides factual background and illustrates the key differences between the two distinct family separation policies pursued by the Trump administration. Part II analyzes both policies under the Refugee Convention, the Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man, arguing that each policy violates all three sources of binding international law. Part III discusses available remedies; it briefly canvases options in international tribunals, but focuses on a domestic litigation strategy which proposes to

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1. This is clear from their countries of origin. For data on the origin of refugee children affected by the family separation policy, see AM. C.L. UNION, *Family Separation By the Numbers*, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation (last visited June 15, 2020) As this data shows, the overwhelming majority of separated families originated from Honduras or Guatemala. Those are precisely the nations at the core of the Central American refugee crisis. As the UN has noted, those same countries have experienced a dramatic escalation of extreme violence in recent years, causing large streams of vulnerable refugees. *See* USA FOR UNHCR, *Central America Refugee Crisis*, https://www.unrefugees.org/emergencies/central-america/ (last visited Aug. 22, 2020).

2. *See, e.g.*, B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91 (2017); Vanessa Woodman de Lazo, *The Morton Memo and Asylum Seekers: An Overview of the U.S. Mandatory Detention Policy*, 48 NEW. ENG. L. REV. 775 (2014); Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 270 (2008).

use Articles 31 and 1 of the Refugee Convention and the *Charming Betsy* doctrine to pursue an implied defense of necessity for refugees charged with illegal entry.

II. FACTUAL BACKGROUND

The Trump administration's forcible separation of migrant families along the U.S.–Mexico border has proceeded through two distinct policies, both of which will be addressed here. Directly after his inauguration, Trump issued an Executive Order emphasizing his commitment to strict enforcement of immigration law.[3] As a result, arrests for immigration violations increased by 30% and immigration detainers by as much as 65% in Trump's first year in office.[4] By 2018, zero-tolerance detention had become the official policy of the administration, stated in its April 6, 2018 memorandum.[5] That memorandum, issued by then-Attorney General Jeff Sessions, instructed prosecutors along the southern border to prosecute "to the extent practicable" all offenses under 8 U.S.C. §1325(a)—the statute rendering illegal entry a misdemeanor.[6] The indiscriminate and large-scale separation of families seeking asylum was an immediate, foreseeable, and intended consequence of its implementation. [7] The memorandum made no exception for refugees, and indeed the great majority of victimized families who came to the U.S. fled from violence in Guatemala, Honduras and El Salvador.[8]

Trump purportedly ended this policy by Executive Order ("EO") on June 20, 2018,[9] and the administration has been ordered to reunite affected families pursuant to a temporary restraining order issued by the United States District Court for the Southern District of California in *Ms. L. v. I.C.E.*[10] But both the EO and the judicial order in *Ms. L.* contained similarly worded exceptions permitting separations where it would be in the best

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3. Exec. Order 13768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

4. U.S. IMMIGR. AND CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT at 2, https://www.ice.gov/removal-statistics/2017#wcm-survey-target-id (arrests); *id.* at 8 (detainers).

5. U.S. DEP'T OF JUSTICE, *Attorney General Announces Zero-Tolerance Policy for Criminal Entry* (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry (last visited Oct. 25, 2020) [hereinafter *Zero Tolerance Memo*].

6. *Id.*

7. *See infra*, footnotes 21-25 and accompanying text; Am. Bar Ass'n Commission on Integration, *Background on Separation of Families and Prosecution of Migrants at the Southwest Border* (July 31, 2018), https://www.americanbar.org/groups/public_interest/immigration/resources/memo-on-family-separation/ (last visited Oct. 25, 2020).

8. AM. C.L. UNION, *supra* note 1.

9. Exec. Order 13841, 83 Fed. Reg. 29,435 (July 25, 2018).

10. Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

interest of the child. Thus, the EO allows separations where unification "would pose a risk to the child's welfare,"[11] and the *Ms. L* order permits them where "there is a determination that the parent is unfit or presents a danger."[12] The second family separation policy is the Department of Homeland Security (DHS) practice of applying these exceptions to continue family separations.

The legal basis of both policies is complicated by their inextricable link to the 1997 *Flores v. Reno* settlement.[13] In *Flores*, civil rights organizations challenged the constitutionality of the Immigration and Naturalization Service (INS) procedures for the detention of minors. After more than a decade of litigation, the parties settled; among other things, they agreed that children could not be detained with unrelated adults or in the same facility as delinquent offenders. Minors must be transferred out of detention within three to five days,[14] except in cases of emergency influx, where transfers must occur "as expeditiously as possible."[15] The agreement requires DHS to release minors to a parent, qualifying guardians, or a licensed program, so long as detention is not required to secure their appearance for immigration proceedings or to ensure their safety.[16]

When, more recently, the Obama administration attempted to detain refugee families together, the Ninth Circuit held that family detention centers violated *Flores*.[17] ICE may not detain minors—with or without their families. Those whose parents have been detained must therefore be placed in a licensed program unless they have a legal guardian or adult relative in the United States to whom they could be released.[18] In 2003, Congress transferred responsibility for unaccompanied minors to the new Office of Refugee Resettlement (ORR), which is a licensed program that can receive minors.[19]

It is in this context that the Trump administration began its "zero-tolerance" detention policy for illegal entry. Since, per *Flores*, children could not be detained with their parents, Trump's DHS classified minors with incarcerated parents as "unaccompanied" and placed them in the custody of

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11. Exec. Order 13841, 83 Fed. Reg. 29,435 (July 25, 2018).

12. *Ms. L.*, 310 F. Supp. 3d at 1149.

13. Stipulated Settlement Agreement, Flores v. Reno, Case No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0005.pdf.

14. *Id.* at V. §12(A).

15. *Id.* at §12(C).

16. *Id.* at VI. §14.

17. Flores v. Lynch, 828 F.3d 898 (9th Cir. 2016). In so holding, the Court rejected the Obama administration's defense that the settlement applied only to unaccompanied children as contrary to the plain language of the settlement.

18. *Id.* at 903.

19. 6 U.S.C. § 279 (2002).

ORR.[20] Because the detention policy was indiscriminate, mass separation of refugee families was its inevitable result. Indeed, family separations were explicitly conceived of as a deterrent for refugee-seekers. This was openly admitted by several administration officials. For instance, when asked about family separations, then-Chief of Staff Kelly remarked that "a big name of the game is deterrence;"[21] when in charge of Homeland Security he indicated he was "considering" family separations "in order to deter more movement."[22] The same view was expressed by several other officials, including Sessions himself,[23] the author of the policy at issue.[24] An internal DHS memorandum reveals that family separations were discussed as potential deterrent as early as 2017.[25] Combining this significant set of admissions with the legal background—which made family separations the logically necessary result of a zero-tolerance detention policy—there can be no doubt that the purpose of this family separation policy was to deter illegal immigration.

The end of the first policy directly marked the beginning of the second. This policy separates families pursuant to DHS's discretionary determination that the child's parents are "unfit or present a danger" to the child.[26] The U.S. government has indicated that DHS has only a "limited timeframe" to make such determinations.[27] Additionally, the Trump administration's own records and admissions in court show that DHS regularly determined separation was appropriate based on extremely minimal evidence. For instance, parents have been separated due to "traffic violations, DUI offenses, drug possession, and fraud or forgery offenses," where in many cases no distinction is drawn between criminal charges and convictions.[28] Similarly, unsubstantiated concerns about parentage and mere allegations of former gang membership have been the basis for

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20. For a brief description of this practice see, e.g., CIVIL RIGHTS LITIGATION CLEARINGHOUSE, M.G.U. v. Nielsen, https://www.clearinghouse.net/detail.php?id=16701 (last accessed Dec. 04, 2019).

21. *See* Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST, June 19, 2018, https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/.

22. *Id.*

23. *Id.*

24. *Zero Tolerance Memo*, *supra* note 5.

25. Ted Hesson, *Memo shows DHS considered stepped-up family separations in 2017*, POLITICO (Jan. 18, 2019), https://www.politico.com/story/2019/01/18/family-separations-border-dhs-memo-1115968.

26. *Ms. L.*, 310 F. Supp. 3d at 1154.

27. Defendants' Opposition to Plaintiffs' Motion to Enforce Preliminary Injunction at 10 Ms. L. v. ICE, 310 F. Supp. 3d 1133 (2018) (No. 18cv0428), 2019 WL 4600039 [hereinafter *Defendant's Motion*]; *Id.* at 13.

28. Memorandum in Support of Motion to Enforce Preliminary Injunction at 20-26, Ms. L. v. ICE, 310 F. Supp. 3d 1133 (2018) (No. 18cv0428), 2019 WL 3493903 (citing Government's chart of separated parents).

separation decisions.[29] DHS has admitted that many separations were based on ultimately incorrect information, arguing only that they were "reasonable" given the available evidence.[30] The second family-separation policy therefore continues to victimize migrant families.

III. FAMILY SEPARATION POLICIES AND BINDING INTERNATIONAL LAW

This Part evaluates both family separation policies under pertinent international law. Its first two sections apply the Convention and Protocol Relating to the Status of Refugees (Refugee Convention) and the Covenant on Civil and Political Rights (CCPR), both directly relevant sources of law to which the United States. is unambiguously bound.[31] Discussion of the applicability of the American Declaration of the Rights and Duties of Man (American Declaration) follows. Although the Convention for the Rights of the Child and the Convention on Economic, Social and Cultural Rights also address family unity, the U.S. has not ratified either treaty. Because they are therefore not binding and of little direct application in litigation, I do not address them here.[32] Both policies, this Part argues, are in plain violation of Article 31 of the Refugee Convention, Articles 17(1) and 23(1) of the CCPR, and Articles V and IX of the American Declaration.

A. Family Separations Unlawfully Penalize Illegal Entry In Violation of Art. 31 of the Refugee Convention

Article 31(1) of the Refugee Convention provides that "Contracting States *shall not* impose penalties, on account of their illegal entry or presence, on refugees" who act in good faith and present themselves to the authorities in a timely manner.[33] This absolute prohibition is limited only by Article 31(2), which permits limited restrictions on the freedom of movement when such restrictions are "necessary," and only until regularization of the

29. *Id.* at 10-15.

30. *Defendant's Motion*, *supra* note 27, at 11-13.

31. *See* Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]; International Covenant on Civil and Political Rights, Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR].

32. There is a duty in customary international law not to defeat the object and purpose of a signed but unratified treaty; but this is relevant only to violations which would render portions of the treaty inoperative or futile prior to ratification. It is therefore not relevant here. *See generally* MARK EUGEN VILLAGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 246-49 (2009) (discussing the scope of this duty).

33. Refugee Convention, *supra* note 31 (emphasis added).

refugee's status.[34] The prohibition on other penalties for the illegal entry of refugees is absolute on the plain language of the Article: States "shall not" impose them. The good-faith clauses are of little relevance here, where *everyone* is detained regardless of their claim to refugee status, including those who have reported themselves to be refugees.[35] The crucial question under the Refugee Convention is whether either of the family separation policies is a "penalty" within the meaning of Article 31. If it is, then it is strictly prohibited; if not, then not.

Although the French '*sanction pénales*' might suggest otherwise, the term "penalty" in Article 31 is inclusive and not limited to formal sanctions characterized as "punishments" by the state. As Manfred Nowak has pointed out in the related context of CCPR Article 15, the term 'penalty' covers any sanction "that has not only a preventive but also a retributive and/or deterrent character . . . regardless of its severity or the formal qualification by law and by the organ imposing it."[36] The United Nations Human Rights Committee (HRC) has explained in that context that "terms and concepts in the Covenant are independent of any national legal system,"[37] and held that penalties are not limited to criminal punishments.[38] There is every reason to suppose that a similarly general definition applies in the context of the Refugee Convention.[39] Unlike Article 31 of the Convention, Article 15 of the CCPR is specifically intended to prohibit retroactive application of criminal law. If a limiting definition is inappropriate in the CCPR context, as the HRC has held, it follows that in the context of Article 31 – whose purpose is unrelated to the criminal law – a definition of at least similar breadth must be intended.[40] The clear purpose of Article 31(1) is to encourage bona fide refugees to report to the proper

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34. *Id.* art. 31(2).

35. It is, of course, relevant whether the victims in fact have a credible claim to refugee status, and whether they acted in ways that might indicate bad faith. The evidence strongly suggests that they would have a credible claim. *See* AM. C.L. UNION, *supra* note 1. But analyzing the victims' claims to refugee status is beyond the scope of this Article.

36. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 363 (N.P. Engel, 2d ed. 2005).

37. Sayadi and Vinck v. Belgium, U.N. Hum. Rts. Comm'n. No. 1472/2006, at 10.11, U.N Doc. CCPR/C/94/D/1472/2006 (2008).

38. Van Duzen v. Canada, U.N. Hum. Rts. Comm'n. No. 50/1979, at 10.2, U.N. Doc. CCPR/C/15/D/50/1979 (1982).

39. For an argument to this effect, see JAMES C. HATHAWAY, RIGHTS OF REFUGEES IN INTERNATIONAL LAW (Cambridge University Press, 2d ed.) (forthcoming 2021) (manuscript at n.1086 and accompanying text) (on file with author).

40. *See* Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection* 194-196, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW (Feller et al. eds., 2003).

authorities without fear of penalization,[41] so as to promote the mutually beneficial process of productive integration that is at the heart of the entire Convention. Any sanction, systematically imposed on good-faith asylum seekers who understandably violate immigration laws, would directly contravene the Convention's central aims. A formalistic and narrow reading of 'penalty' would therefore rob Article 31 of one of its central functions. Such a reading should therefore be rejected. For these reasons, states' own characterization of the penalties imposed on refugees is not dispositive; states cannot circumvent Article 31 by recasting de facto penalties as something else.

There are two exceptions to Article 31(1)'s absolute ban on penalties: (1) expulsion is not a penalty; and (2) restrictions on freedom of movement are allowable under Article 31(2) if they are necessary in an individual case, though only before regularization of a refugee's status.[42] The first is irrelevant here; the second is relevant to the general detention policy causing the family-separations.

There can be no doubt that this detention policy violates the Convention. To comply with Article 31(2), detentions must be strictly necessary in each individual case, and the burden of showing such necessity is on the state.[43] Moreover, each restriction on freedom must be limited so that it is proportionate to a legitimate end.[44] The United States indiscriminately detains asylum-seekers without even an attempt at individualized determinations, in clear violation of Article 31(2).

Whether family separations additionally violate Article 31(1) is a separate question, focused not on questions of proportionality and necessity but on whether such separations constitute a penalty. The illegality of the detention-policy does not on its own show that the concomitant separations constitute distinct violations. But neither is it irrelevant that the separations were a direct corollary of an illegal blanket-detention policy. The language in the zero-tolerance memorandum is unequivocally punitive: "I warn you: illegally entering this country will not be rewarded, but will instead be met

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41. *See, e.g.*, Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.14 at 14 (Nov. 22, 1951) (stating the purpose of Art. 31 was to encourage refugees to present themselves to authorities); R v. Asfaw [2008] UKHL 31, 113 (May 21, 2008) (explaining that Art. 31 was "specifically designed to ensure that refugees regularize their position and obtain official assistance" rather than proceeding by illegal means).

42. *Refugee Convention*, *supra* note 31 at arts. 31(1)-(2). Expulsion is regulated under Articles 32 and 33. *Id* at arts. 32-33.

43. U.N. Human Rights Comm., A. v. Australia, Comm. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997) (concluding that detention was arbitrary because "the state Party [did not advance] any grounds *particular to the author's case*, which would justify his continued detention") (emphasis added).

44. *See, e.g.*, Velez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 208, ¶ 166 (Nov. 23, 2010); Namah v. Pato, Dec. No. SC1497 ¶ 69 (Apr. 26, 2016) (Papua N.G.).

with the full prosecutorial powers of the Department of Justice."[45] The first family separation policy was a necessary and direct result of this punitive approach; it cannot be plausibly characterized as an incidental consequence. Officials at DHS and elsewhere in the administration explicitly contemplated the use of family separations as a deterrent over and above detention.[46]

Moreover, it is clear that forced family separations are a serious "loss, disability, or disadvantage" such as are covered by the common language meaning of the term 'penalty.'[47] Indeed, the importance of family unity is emphasized in the Convention, which declares "that the unity of the family, the natural and fundamental group unit of society, *is an essential right of the refugee,*"[48] a principle also adopted in the CCPR, among other places.[49] Although this declaration is not binding on its own (though of course its equivalent in the CCPR is), it provides further evidence that family separations involve the kind of rights-deprivation that constitutes a penalty on even the most limiting reading of the term. When families are separated, they are deprived of "an essential right."

Accordingly, the first family separation policy deprived refugees of an essential right in order to deter them from illegally entering the border – or else for *no* stated purpose. To deprive someone of an essential right in the interest of deterrence is a penalty even on a narrow reading of that term. But even if one were to disregard the explicit admissions that family separations were intended to be a deterrent, this leaves no stated purpose other than those of the 'zero-tolerance' policy itself—all of which were explicitly punitive. Since 'penalty' is to be broadly construed, not to be limited only to those measures characterized by the State as punishments, the first family separation policy violated Article 31 on either reading of the facts.

The second policy differs from the first in two important ways: (1) separations are preceded by an individualized determination, and (2) at least on its face, that determination must consider the interests of the child. The first difference is immaterial for present purposes: aside from the exceptions discussed above, Article 31(1) prohibits all penalties for illegal entry, whether they are preceded by an individualized determination or not. The second difference may matter, insofar as it undercuts the punitive character of the policy. Separations intended to be in the best interest of the child are, it seems clear, nonpunitive and not the subject of Article 31. They are better

45. *Zero Tolerance Memo*, *supra* note 5.

46. *See supra* notes 21-24 and accompanying text.

47. *See* HATHAWAY, *supra* note 39, at n.1085 and accompanying text (citing Oxford English Dictionary, 2d ed., s.v. "penalty").

48. Refugee Convention, *supra* note 31, cmt. B (emphasis added).

49. ICCPR, *supra* note 31, art. 23(1) (emphasis added).

evaluated under the relevant clauses of the CCPR (and, where ratified, the Convention on the Rights of the Child). However, since whether something is a penalty for the purposes of the Refugee Convention is not determined by the way a contracting state classifies it, the policy's facial characterization is not dispositive. At minimum, Article 31 requires that there is a credible nonpunitive characterization of the policy as actually implemented.

Even a cursory look at the implementation of the second set of separations, as illustrated by the government's own admissions in court, demonstrates that they often have very little to do with the interests of the child. For instance: DHS admits wrongfully separating children from their parents because of (1) parentage concerns based exclusively on inconsistent statements during ICE interrogations, (2) prior traffic violations, and (3) mere allegations of gang-membership.[50] Some separations may even have occurred based only on the "criminal history" of the illegal entry itself.[51] As family-separation proceedings outside of the immigration context plainly illustrate, procedures genuinely aimed at securing the safety of the child would never be made on such minimal grounds, would not be purely discretionary, and would accord appropriate time and resources for a thorough review of the facts.[52] The second family-separation policy departs from such standards only because it is part of a zero-tolerance immigration regime which imposes constraints that would be elsewhere be plainly unacceptable. Indeed, it exists in its current form only because a broader and more explicitly punitive approach failed. As implemented, this policy cannot be credibly characterized as serving its stated purpose. A central purpose continues to be enforcement of the punitive zero-tolerance policy. For this reason, this policy likewise violates Article 31.

B. Both Family Separation Policies Constitute Unlawful and Arbitrary Interference With Family Unity in Derogation of the CCPR

Three Articles of the Covenant on Civil and Political Rights provide protection for families. First, Article 17(1) provides that:

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50. Plaintiff's Br. in Support of Motion to Enforce, 2019 WL 3493903, at §II(A) (traffic violations); Defendants' Br. in Opp. of Plaintiff's Motion to Enforce, 2019 WL 4600039, at *5-14, *Ms L. v. ICE* (S.D. Cal., Sept. 10, 2019) (parentage concerns and allegations of gang-membership).

51. *See, e.g.*, Jordan, *supra* note 4; Nila Bala & Arthur Rizer, *Trump's Family Separation Policy Never Really Ended*, July 1, 2019, NAT'L BROAD. CORP. https://www.nbcnews.com/think/opinion/trump-s-family-separation-policy-never-really-ended-why-ncna1025376.

52. *See, e.g.*, A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION at §2.02, §2.13-14) (2002) (setting out principles governing custodial arrangements and setting out court's factfinding abilities in family-law context).

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[53]

Second, Article 23(1) provides in relevant part: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Finally, Article 24(1) gives every child "the right to such measures of protection as are required by his status as a minor."[54]

Thus, the CCPR contains a tripartite scheme of protection for families. First, Article 17(1) explicitly prohibits "arbitrary or unlawful interference;" it represents a negative obligation of contracting states *not* to engage in the prohibited conduct, and to provide for a preventative legislative framework.[55] Articles 17(2) and 23(1) complement this obligation with its positive counterparts: States are obligated to provide a legislative framework adequate to protect the kinds of interferences contemplated by 17(1); more broadly still, "society and the State" must take affirmative steps to protect families beyond the mere prevention of harmful interferences.[56] The Human Rights Committee reads Articles 17 and 23(1) in conjunction with each other;[57] family rights claims are accordingly almost always brought under both articles.[58] Article 24(1) adds an additional affirmative duty to protect the interests of minors specifically.

The separation of parents from their children is perhaps the most basic case of interference with the family unit. Family separation policies are therefore most naturally analyzed under Article 17. Interference with family unity must pass muster under both the arbitrariness and the lawfulness prongs of the Article; as UN General Comment 16 makes clear, these represent distinct requirements.[59] First, "[i]nterference authorized by States can only take place on the basis of law, which itself must comply with the

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53. ICCPR, *supra* note 31, art. 17(1).

54. *Id.* at 179.

55. U.N. Human Rights Comm., General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), U.N. Doc. HRI/GEN/1 Rev. 6 (Apr. 8, 1988) [hereinafter *CCPR General Comment No. 16*].

56. On this distinction between Article 17's negative prohibition and Article 23's positive counterpart, see also SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 667 (2013).

57. *See, e.g.*, Maalem v. Uzbekistan, U.N. Human Rights Comm. No. 2371/2014 (July 17, 2018) at ¶ 11.2 (reading Article 17 in conjunction with 23(1)).

58. JOSEPH & CASTAN, *supra* note 56, at 667. The *travaux* suggest that Article 16(1) was expected to do most of the substantive work in protecting family rights. *See* M.J. BOSSUYT, GUIDE TO THE 'TRAVEAUX PRÉPARATOIRES' OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS" 442 (1987).

59. U.N. Human Rights Comm., *CCPR General Comment No. 16*, *supra* note 55, ¶ 3-4.

provisions, aims and objectives of the Covenant."[60] Such laws must, furthermore, specify "in detail the precise circumstances in which such interferences may be permitted."[61]

If a State party has formally passed a law meeting these requirements, it could still violate Article 17(1) if the interference it authorizes is "arbitrary." As General Comment 16 explains, "even interference provided for by law should be in accordance with the provisions, aims, and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[62] Committee jurisprudence in turn makes clear that for interference to be "reasonable in the particular circumstances" it must be (1) proportional to (2) a legitimate purpose and (3) necessary in the particular case.[63]

Both family separation policies plainly violate Article 17. First, neither policy is "lawful," for neither is based on a law in the formal sense. The legal basis for the first policy was (a) the 'zero-tolerance' memorandum, (b) the statute at 8 U.S.C. §1325(a) criminalizing illegal entry, (c) the *Flores* settlement, and (d) the rules and regulations governing DHS, ICE and ORR. Congress has not passed a law detailing the specific cases in which family separations may occur, as Article 17 requires; indeed, it has passed no law authorizing any such separations at all. Nor is the second policy any different in this respect; those family separations occur pursuant to discretionary judgments by DHS officials.[64] Both policies are therefore unlawful interferences with family unity in violation of the CCPR.

Since the absence of explicit Congressional authorization is beyond dispute, the analysis need not go any further. But even supposing either policy *had* been authorized by law, neither could be plausibly characterized as non-arbitrary. Under the first, family separations resulted because of a blanket-detention policy for illegal entry (itself a violation of international law). Lacking even a nominal attempt at individualized determinations, the government could not show that these separations were necessary in each individual case. The policy's purpose – to deter illegal immigration – was itself inconsistent with "the provisions, aims and objectives of the Covenant"[65] as well as those of the Refugee Convention. *A fortiori*,

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60. *Id.* ¶ 4.

61. *Id.* ¶ 8.

62. *Id.* ¶ 4.

63. *See* Rojas Garcia v. Colombia, UNHRC 687/1996 at §10.3 (interference must be proportional to the end and necessary in the particular case); Toonen v. Australia, UNHRC 488/1992 at §8.3 (same); *see also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS COMMENTARY (2005) 382-383.

64. Defendants' Br. in Opp. of Plaintiff's Motion to Enforce, 2019 WL 4600039, at *25, *Ms L. v. ICE* (S.D. Cal., Sept. 10, 2019).

65. U.N. Human Rights Comm., *CCPR General Comment No. 16*, *supra* note 55 ¶3.

separations could not have been proportional to a legitimate aim. This policy fails at each level of the analysis.

The second policy has a facially legitimate stated purpose – to prevent family unification where this "would pose a risk to the child's welfare."[66] But General Comment 16 leaves no doubt that what matters is "actual practice" and not simply the law – let alone the phrasing of an Executive Order.[67] As has already been argued, the actual practice consists of cursory evaluations based on minimal evidence. Such evaluations would stand very little chance of passing muster even if they were authorized by a specific and detailed law. Given the gravity of the interference, only suitably serious reasons, carefully investigated, could justify it.[68] As exercises of uncontrolled discretion by an administrative agency, they undeniably violate the Covenant. Indeed, as interferences with family unity unauthorized by law and without clear procedural safeguards, these policies represent precisely the kind of "abuse of power by public bodies" contemplated by the drafters when they decided to retain the word "arbitrary" in 17(1).[69]

Because both policies are clear violations of Article 17, further analysis under Articles 23(1) and 24(1) is unnecessary. Those articles place affirmative duties on States that go beyond the protections of Article 17. Since the policies at issue here do not pass muster even under 17, they necessarily fail under 23(1) and 24(1).

C. Family Separation Policies Are Abusive Attacks on Family Life under the American Declaration of the Rights and Duties of Man

The United States' participation in the inter-American justice system is limited, since it has not ratified the American Convention on Human Rights and does not recognize the authority of the Inter-American Court of Human Rights. The United States is, however, indirectly bound by the Convention's predecessor, the 1948 American Declaration of the Rights and Duties of Man ("American Declaration"). Standing alone, the American Declaration is nonbinding, but the Inter-American Court and the Inter-American Commission on Human Rights (IACHR) have long held it to be incorporated by the Charter of the Organization of American States'

66. Exec. Order 13841, 83 FR 29435 (2018).

67. U.N. Human Rights Comm., *CCPR General Comment No. 16*, *supra* note 55 ¶ 6 ("States should in their reports make clear the extent to which actual practice conforms to the law.")

68. For discussion of this point see, e.g., NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW 623 (2003); NOWAK, *supra* note 36, at 397-98.

69. *See* BOSSUYT, *supra* note 58, at 342.

reference to "human rights."[70] The United States recognizes the IACHR, though not the Inter-American Court, and the IACHR views the Court's rulings as binding on the United States.

Article V of the American Declaration, like Article 17(1) of the CCPR, protects against interference with family unity. It provides that "every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life."[71] The IACHR generally reads this article in conjunction with Article IX, which provides that "[e]very person has the right to the inviolability of his home," where 'home' is taken to include the intimate sphere of family-life.[72] As the IACHR has explained, the "the principal objective of [Art's V and IX] is to 'protect individuals from arbitrary action by State authorities which infringes in the private sphere.'"[73] The notion of arbitrariness in turn "refers to elements of injustice, unpredictability and unreasonableness."[74] The Commission has repeatedly emphasized that this right requires the United States to "protect migrant parents from losing custody of their children" and to factor the best interests of the child into immigration decisions.[75] Interferences with family unity are permissible under the American Declaration only if they are necessary.[76]

As interpreted by the IACHR, then, the American Declaration provides much the same protections of family unity as did CCPR Article 17(1). Neither policy could plausibly pass muster under an analysis that requires that the policies be necessary and comport with standards of justice, reasonableness, and predictability, as analysis under the Refugee Convention and CCPR already made clear. References to "justice" in the IACHR's analysis refer at minimum to established standards of justice in international law. The family separation policies fail to comport with such standards, if only by their direct contravention of the primary objectives of the Refugee Convention. Nor can they serve a legitimate aim even when the analysis is

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70. Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R., (ser. A) No. 10, ¶¶ 43-45 (July 14, 1989).

71. *American Declaration of the Rights and Duties of Man*, art. V, May 2, 1948, https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf.

72. *See* Inter-Am. Comm'n H.R., Report on Immigration in the United States, Detention and Due ¶¶ 96 & 97, [hereinafter *Detention and Due Process*] (citing IACHR, *María Eugenia Morales de Sierra* (Guatemala), Report No. 4/01 (Merits) Case No. 11.625, ¶ 47 (January 19, 2001)).

73. *Id.*

74. *Id.* (citing IACHR, X & Y (Argentina), Report No. 38/96 (Merits), Case No. 11.506, para. 96 (October 15, 1996)).

75. IACHR, Report on Refugees and Migrants in the United States: Families and Unaccompanied Children ¶ 94 (2015) [hereinafter *Refugees and Migrants*]; *see also* IACHR, *Detention and Due Process*, *supra* note 72 at ¶¶ 97-98.

76. IACHR, Detention and Due Process, *supra* note 72, ¶ 97.

strictly limited to the American Declaration. As the IACHR has emphasized, any detention of minors for immigration reasons is itself a violation in all but the "most extreme" cases.[77] The entire penalization regime of which family separations are part and parcel is as unlawful under the American Declaration as it is under the Refugee Convention. Indeed, the IACHR condemned U.S. border policy as "extreme" as early as 2010,[78] when circumstances were far less dire than they have been under the Trump administration. Moreover, the IACHR requires immigration measures to consider seriously the best interests of the child.[79] As the analysis under the CCPR made clear, neither policy does this. Both policies therefore fail to meet the standards set by the American Declaration.

IV. REMEDIES

As we have seen, the forcible separation of migrant families represents a clear violation of binding international legal standards. This Part canvases the legal options available to address those violations. These recommendations include a combination of domestic application and appeal to international bodies. Given widespread lack of receptiveness to international law in the current political climate, potential for domestic application of international law is limited. An attempt should nevertheless be made, for credible claims exist and international bodies are almost certain to find that U.S. policies violate international law. This likelihood of success on the merits must be balanced against the risk that such findings will be ignored, at the very least for the duration of this administration. After all, a victory in an international court has legal force in the United States only if a U.S. court decides to enforce its judgment.[80] For these reasons, litigation relying on international law should combine both approaches.

A. A Domestic Strategy: Charming Betsy, 8 U.S.C. 1325(a) and an Implied Necessity Defense

Neither the Refugee Convention nor the CCPR is self-executing.[81] Hence, neither is treated as an independent source of rights by American

77. Inter-Am. Comm'n H.R., *Refugees and Migrants*, *supra* note 75, ¶¶ 77-80.

78. Inter-Am. Comm'n H.R., *Detention and Due Process*, *supra* note 72, ¶ 107.

79. Inter-Am. Comm'n H.R., *Refugees and Migrants*, *supra* note 75, ¶ 94.

80. United States courts do not have a consistent approach to enforcing such judgments and often ignore them. For a thorough overview, see, e.g., Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA J. INT'L L. 675 (2003).

81. Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004) (CCPR is not self-executing); I.N.S. v. Cardozo-Fonseca, 480 U.S. 421, 429 n.22 (1984) (Refugee Convention not self-executing).

courts.[82] Both treaties can nevertheless be used indirectly, as sources of statutory interpretation. This is most clear where Congress intended the statute to implement international obligations.[83] For instance, the 1980 changes to the Immigration and Nationality Act ("INA") were intended to implement the Refugee Convention, making it of direct relevance to their interpretation.[84]

Second the *Charming Betsy* canon of construction requires that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[85] The Restatement (Fourth) of Foreign Relations Law likewise provides that "[w]here fairly possible, courts in the United States will construe federal statutes to avoid conflict with a treaty provision."[86] As the Restatement notes, jurisprudence since *Charming Betsy* has developed to allow Congress to override a treaty if "such purpose on the part of Congress has been clearly expressed."[87] But as the Supreme Court has held, Congress intended to *implement,* not abrogate, the Refugee Convention when it amended the INA in 1980.[88] Therefore (as the Ninth Circuit recently affirmed) the Refugee Convention serves as a constraint on permissible interpretations of the INA.[89]

Two statutory provisions are especially relevant to the policies at issue. First, 8 U.S.C. §1325(a) criminalizes illegal entry and is therefore the legal basis for blanket detentions which indirectly cause family separations. Second, 8 U.S.C. §1182 (5)(A) provides DHS with the discretion to "parole into the United States temporarily" aliens who might otherwise have been detained; this is the provision cited by the government as the statutory authority permitting DHS to continue the second family separation policy at its discretion.[90] This discretion, however, is explicitly limited with respect to refugees, who may *not* be paroled into the United States "unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled. . . ."[91]

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82. *Sosa*, 542 U.S. at 735 (CCPR did not create obligations enforceable in federal court because it was not self-executing).

83. *See, e.g.*, I.N.S. v. Cardozo-Fonseca, 480 U.S. 421, 429-33 (1987).

84. Negusie v. Holder, 555 U.S. 511, 520 (2009) (citing I.N.S. v. Aguirre-Aguirre, 526 U.S. 411, 427 (1999)).

85. Murray v. The Schooner Charming Betsy, 6 U.S. 64 (1804).

86. Restatement (Fourth) of Foreign Relations Law § 309 (Am. Law. Inst. 2018).

87. *Id.* cmt. b (quoting Cook v. United States, 288 U.S. 102, 120 (1933)).

88. *Negusie*, 555 U.S. at 520 (2009) (citing I.N.S. v. Aguirre-Aguirre, 526 U.S. 411, 427 (1999)).

89. Khan v. Holder, 584 F.3d 773, 784 (9th Cir. 2009) (INA should be interpreted in such a way as to avoid any conflict with the Protocol, if possible, including provisions not enacted with the protocol in mind).

90. Defendant's Brief in Opposition of Plaintiff's Motion to Enforce, Ms. L. v. ICE, 310 F. Supp. 3d 1133 (S.D. Cal., Sept. 10, 2019) (No. 3:18-cv-00428), 2019 WL 4600039 at *25.

91. 8 U.S.C. § 1182 (5)(B)

Regular admission of refugees is further limited by statute to a number to be determined by the President.[92]

The discretionary parole provisions do not lend themselves well to interpretation limited by international law. Insofar as refugees are concerned, the discretion is unambiguously limited to a determination to be made by the Attorney General. An appeal to international refugee law to challenge a discretionary separation pursuant to §1182(5)(A) risks doing more harm than good, since the section applicable to refugees provides DHS with *no* parole discretion. Challenges to discretionary separation decisions in the domestic courts are better left to the domain of substantive due process law, where they have met with significant success.[93]

This leaves 8 U.S.C. §1325 (a) as the other potential statutory avenue. This statute defines the elements of illegal entry by an alien as follows:

> [a]ny alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact[.]

Taken at face value, this statute seems to violate Article 31 of the Refugee Convention, since it renders every illegal entry punishable. There is no room to directly read in an exception for refugees: the term "alien" is defined elsewhere to include anyone "not a citizen or national of the United States."[94] Importantly, however, Article 31 does not require that general immigration laws be written with a general exemption for refugees built-in,[95] nor even that refugees are immunized from *prosecution* under such statutes.[96] What Article 31 forbids is the *conviction* of refugees for their illegal entry (it prohibits the *imposition* of penalties). Therefore, the statute criminalizing illegal entry is not *per se* in violation of the Convention. Instead, it can be

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92. 8 U.S.C. § 1157(a)(2).

93. Trump's Executive Order uses language similar to the international norm that family separations should be permissible only when in the best interests of the child. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 at 29435 (June 20, 2018). But the EO is not itself a source of any rights for migrants and it is not the legal authority undergirding the DHS determinations. The order in *Ms. L.*, which does limit DHS discretion at least for class-members, is explicitly couched in the language of existing substantive due process law. Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1143-44 (S.D. Cal. 2018).

94. 8 U.S.C. § 1101(a)(3).

95. *See* HATHAWAY, *supra* note 39, at n.1065 and accompanying text.

96. *See, e.g.*, R. v. Uxbridge Magistrates Court, *Ex parte Adimi*, [1999] 4 All. ER 520 (noting that although it is preferable that prosecution of refugees is avoided altogether, Art. 31 requires only that they not be prosecuted to conviction).

rendered consistent with U.S. treaty obligations by reading the statute to include an implied necessity defense limited to refugees who meet the criteria in Article 1 and the good faith requirements of Article 31. Indeed, the *travaux* demonstrate that such an approach to the application of Article 31 was explicitly considered by the drafters.[97]

It is an open question whether courts can recognize a necessity defense to a federal crime where it is not specified in the statute.[98] Whether such a defense could be available under a federal statute depends in important part on the particular crime at issue and whether Congress has made a value determination inconsistent with the recognition of such a defense in the particular case.[99] In *Gonzales v. Raich*, the Court also briefly addressed the possibility of a (medical) necessity defense, side-stepping the issue but noting that ideally such changes would be pursued through the democratic, legislative avenue.[100] Hence, Supreme Court jurisprudence suggests a federal necessity defense could be available where it is (1) not inconsistent with legislative determinations of value, (2) compatible with or supported by considerations of democratic process, and (3) suited to the nature of the particular crime.

Given those factors, the statute criminalizing illegal entry is uniquely suited to be construed as permitting a defense of necessity. First, it is doctrinally appropriate given the nature of the criminal conduct at issue– illegal entry. Reflecting the modern American legal consensus, the Model Penal Code provides that a defendant's otherwise criminal conduct is justifiable when she was faced with a choice of evils and believed her actions were necessary to avoid the greater of these evils, provided that the evil she sought to avoid was greater than that sought to be prevented by the relevant criminal provision.[101] Refugees who qualify for Article 31's protection *necessarily* meet these conditions, for they are built into the Refugee Convention. Qualifying refugees come from a territory where "their life or freedom" was threatened and therefore faced risk of great harm, to be avoided only by migration.

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97. For instance, see Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.14 (Nov, 22, 1951), at 10 (noting that courts should determine whether a particular refugee qualifies for the protection of Art. 31 immunity from penalization).

98. U.S. v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 490 (2001) (recognizing that the Court had previously discussed the possibility of a necessity defense), (citing United States v. Bailey, 444 U.S. 394, 410, 415(1980)). *See generally* Stephen S. Schwartz, Note, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259 (2008).

99. *See id.* at 491 ("the [necessity] defense cannot succeed when the legislature itself has made a 'determination of values'"). *Cf.* Model Penal Code 3.02(1)(c) (1962) (disallowing the defense where a legislative purpose to exclude the justification is plain).

100. Gonzales v. Raich, 541 U.S. 1, 33 (2005).

101. Model Penal Code §3.02 (1)(a) (1962).

Waiting for an opportunity to enter at a recognized point of entry is dangerous, as conditions at the border demonstrate. Thousands of migrants await processing in border regions which the Trump Administration itself describes as exceedingly dangerous. For instance, many asylum seekers wait at Matamoros, one of the largest migrant camps along the U.S.-Mexican border.[102] The State Department has issued a Level 4 travel advisory for the border region, due to "organized crime activity–including gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault."[103] And refugees whose illegal entry could cause serious harm – i.e. for whom it would be false that harm they sought to avoid was greater than the harm caused by their illegal entry – are excluded by definition in Article 1(F) of the Refugee Convention. Hence, not only would recognition of a limited necessity defense be sufficient to render this provision consistent with U.S. obligations under the Refugee Convention; both the criminal provision and the Convention's structure lend themselves well to this interpretation.

If this particular crime is well-suited to the recognition of a limited necessity defense, so too is the political process justifying such a recognition. The Refugee Convention's protections are relevant to this analysis only because a democratically elected Senate ratified it. This much cannot be said for the Trump policies at issue here, which were never explicitly authorized by Congress and currently hinge on the discretion of unelected DHS officials. Recognition of the suggested limited necessity defense in this context is not only consistent with but favored by the considerations of democratic process alluded to in *Raich*. Nor are they inconsistent with any *legislative* determination of value, since, as has already been noted, neither family separation policy is supported by statute. The Senate's ratification of the Refugee Convention was, on the other hand, a clear determination of value. Hence, recognition of a necessity defense is not only not countermanded by legislative intent; it is supported by it.

These considerations all count in favor of judicial recognition of a choice-of-evils necessity defense to a refugee's violation of 8 U.S.C. 1325 (a) independently of the *Charming Betsy* doctrine. They demonstrate that there is an available reading of that provision that would make it consistent with the U.S.' international treaty obligations. Certainly, this reading faces serious hurdles: it relies on a controversial and unresolved question of federal law

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102. *See, e.g.*, Michelle Hackman, *At Migrant Camp in Mexico, Crowds and Complaints Swell*, WASH. POST. (Nov. 23, 2019), https://www.wsj.com/articles/at-migrant-camp-in-mexico-crowds-and-complaints-swell-11574510400.

103. U.S. DEPT. OF STATE, *Mexico Travel Advisory*, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last updated June 17, 2020).

and is inconsistent with the DHS's reading of the statute. But, as briefly canvassed above, there are also credible doctrinal reasons in favor of adopting it. Indeed, at least one court has been willing to receive evidence of necessity in a case under this provision without reliance on international law.[104] *Charming Betsy* requires Courts to adopt the reading of a statute that makes it consistent with international law where this is "fairly possible."[105] Here, it is not only possible but desirable for reasons independent of *Charming Betsy*. What is more, to read the statute as applying even to qualifying refugees, as defined in the Refugee Convention, in the absence of a clear and explicit statement by Congress that it no longer considers itself bound by the Convention, amounts to a ruling that Congress intended to violate international law *sub silentio*. It is precisely to *avoid* such readings of statutes that *Charming Betsy* has most often been successfully applied.[106]

For these reasons, there is a credible, potentially promising domestic litigation strategy available to challenge the international legal violations involved in family separations. This is to argue that 8 U.S.C. §1325 (a) permits a federal necessity defense, the boundaries of which are taken from the conditions in Articles 1 and 31 of the Refugee Convention.[107]

B. International Remedies

Because the Refugee Convention does not have an enforcing body and the United States has not signed or ratified the first optional protocol to the CCPR (which would give individual claimants the right to make a complaint against the U.S. before the Human Rights Committee), the IACHR is the only international body which could hear an individual complaint. For victims who have challenged their separation in domestic courts and received a final, unfavorable judgment, the IACHR provides a promising body of review. As my earlier analysis and the IACHR's interpretation of the American Declaration suggests,[108] likelihood of success on the merits of such claims is high. An explicit judgment that current policy violates U.S.

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104. U.S. v. Fuentes-Flores, No. 2:14-cr-66-FtM-38CM, 2015 WL 248620, at *2 (M.D. Fla., Jan. 20, 2015)

105. Restatement (Fourth) of Foreign Relations Law § 309 (Am. Law. Inst 2018)

106. *See, e.g.*, Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1132 (1990).

107. Recently, some defendants have unsuccessfully attempted to raise the Convention to challenge their convictions under this statute. *See* United States v. Revolorio-Tambito, 2019 WL 5295086 at *10-11 (S.D. Cal., Oct. 19, 2019); United States v. Velasquez-Luna, 2019 WL 338947 at *1-2 (S.D. Cal, Jan. 28, 2019); U.S. v. Malenge, 294 F.App'x 642, 643-644 (2d Cir. 2008). In each of these cases, defendants sought direct relief and dismissal of their indictment, appealing only to the Convention directly, rather than relying on the application of *Charming Betsy* to the underlying statute. They are therefore distinguishable from the strategy here recommended.

108. *See supra* Part III(C).

treaty obligations under the American Declaration, though certain to be ignored by the current administration, may well have significant persuasive value in the future. Such merits-judgments should therefore be pursued when domestic remedies run out.[109]

It is worth noting that, although similar individual complaints cannot be made under the Refugee Convention directly, it is possible for another *state party* to bring suit against the United States before the International Court of Justice, pursuant to Article 38. However, given the obvious diplomatic costs of such an endeavor this seems rather unlikely.

Finally, although no individual complaints can be brought before the HRC, it is possible to submit a shadow report to supplement the information provided by the administration for its universal periodic review.[110] The American Civil Liberties Union has in the past used this mechanism with some success to bring human rights violations to the attention of the Committee.[111] Such observations attract significant attention and may prove of useful hortatory value to a different administration. Submission of a report with specific data on the ways in which the rights of families of migrants to the U.S. are being violated may therefore be helpful in ensuring that the issue is properly and fully addressed in the HRC's next Periodic Review.

V. CONCLUSION

This Essay has aimed to outline the international legal implications of the Trump administration's family separation policies, especially as they are applied to refugees—the policies' primary class of victims. As applied to refugees, both policies clearly represent serious violations of binding treaty obligations. First, they are illegal penalties under Article 31 of the Refugee Convention. Second, they constitute unlawful and arbitrary interference with family unity, in violation of the Articles 17(1) and 23(1) of the CCPR. Third, they violate the analogous requirements of Article's V and IX of the

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109. It is possible to request thematic hearings before the IACHR, but several such hearings have already been held on the rights of migrant families at the U.S. border, with the most recent hearing on the topic held during the 173rd Period of Sessions, on Tuesday, September 26, 2019. IACHR, 173 Sess., *Reports of Violations of the Human Rights of Migrant Children in Central America, Mexico, and United States* (Sept. 26, 2019). Requesting further thematic hearings seems therefore more appropriate when a significant policy change occurs. For a full list of relevant hearings *see* IACHR, *Hearings and Other Public Events*, http://www.oas.org/es/cidh/audiencias/advanced.aspx?lang=en (last visited June 29, 2020).

110. *See* U.N. Human Rights Comm., Article on the Relationship of the Human Rights Committee with National Human Rights Institutions, U.N. Doc. CCCPR/C/106/3 (2012).

111. *See* AM. C.L. UNION, *U.N. Human Rights Committee Criticizes U.S. Civil and Political Rights Record* (Mar. 27, 2014), https://www.aclu.org/press-releases/un-human-rights-committee-criticizes-us-civil-and-political-rights-record.

American Declaration. There are credible litigation strategies available to address these serious violations. In the international context, appeal to the IACHR would almost certainly result in a favorable determination. Domestically, *Charming Betsy* provides a promising and untried avenue to challenge family separations. Practitioners defending refugees facing separations should pursue such strategies vigorously in combination with the constitutional remedies already being sought.

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