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Family Separation Under the Trump Administration: Applying an International Criminal Law Framework

Reilly Frye

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FAMILY SEPARATION UNDER THE TRUMP ADMINISTRATION: APPLYING AN INTERNATIONAL CRIMINAL LAW FRAMEWORK

REILLY FRYE*

In April 2018, former Attorney General Jeff Sessions announced the “Zero Tolerance Policy.” The policy significantly increased criminal prosecution of immigrants entering the United States without inspection. Increased adult prosecution directly led to family separation. Parents were sent to federal jail and their children went to the Office of Refugee Resettlement. Neither institution communicated with the other, and the United States government lost track of parents and children. The government separated nearly 3,000 children from their parents, going as far as deporting over 400 parents to their countries of origin while their children remained in the United States. Many of these separated families were seeking asylum.

Domestic litigation is ongoing regarding the family separation policy. Yet international litigation could also be an avenue of justice for these parents and their children. Recently, in a September 6, 2018 decision regarding the deportation of the Rohingya people from Myanmar to Bangladesh, the International Criminal Court (ICC) found that the crime against humanity of deportation has a start point and an end point. If just one of these points is within a State Party of the Rome Statute, then the ICC can exercise jurisdiction over the entire crime—even if the crime involves a country that is not a signatory of the Rome Statute like the United States.

In the case of the U.S. government’s family separation policy, the starting point is the United States, and the end point is the Central American countries that are State Parties to the ICC, like Mexico, Honduras, El Salvador, and Guatemala. Because these Central American countries are

* Northwestern Pritzker School of Law, J.D./LL.M. 2021. I would like to thank Professor Destiny Peery for her help in exploring the “what’s next” behind this Comment, Dan McCord for his edits, Professors Uzoamaka Emeka Nzelibe and Amy Martin for helping me understand the constantly (!) changing immigration system and, especially, Professor David Scheffer for helping me formulate the idea that led to all of it.

members of the ICC, the crime against humanity of deportation can theoretically invoke ICC jurisdiction over U.S. officials. In short, the ICC could prosecute U.S. government officials for the crime against humanity of deportation that occurred during the Trump Administration’s family separation policy, despite the U.S. not being a signatory of the Rome Statute.

Since the U.S. is not a member of the ICC, there would be no obligation for the government to surrender any official indicted by the Court. Indeed, considering former National Security Adviser John Bolton’s recent attack against the ICC regarding the Situation in Afghanistan, it is likely that the U.S. government would do everything possible to delegitimize or ignore any ICC decision concerning the Trump Administration. U.S. government retaliation could come in the form of sanctions, an increase in the number of bilateral treaties, or lack of cooperation. More likely than the government exercising complementarity—arguably the simplest way to avoid an ICC prosecution—the Trump Administration could also use its status as a permanent member of the United Nations Security Council to defer the prosecutor’s investigation.

Nonetheless, despite the barriers to enforcement, should the ICC prosecute top U.S. officials for the Zero Tolerance Policy, international criminal law still has a place in denouncing the family separation that occurred in summer 2018. The international community’s perception of a country’s stance on human rights has wide-reaching impacts, even for a global power such as the U.S. The ICC’s reach has grown exponentially due to its recent jurisdictional decision regarding the Rohingya. Any decision regarding ICC prosecution of U.S. officials for the Trump Administration’s family separation policy would have wide-reaching impacts for the world.

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INTRODUCTION

Children representing themselves in court. Mothers frantically calling government agencies in order to find their missing kids. Rows of children sleeping on mats in warehouse-like facilities surrounded by wire fences. Wailing fathers pleading with immigration agents. Hundreds of thousands of people marching nationwide with signs that read, “Where are the children?” These are the images that dominated news cycles in the United States and abroad in summer 2018 during what some called the Trump Administration’s “Family Separation Policy.”¹ The U.S. government separated more than 2,800 immigrant children from their parents, and the public outrage was palpable.²

Some domestic legal organizations managed to channel their rage into federal lawsuits.³ The American Civil Liberties Union even brought a case that got a federal ruling ordering the Trump Administration to reunite the children with their parents.⁴ The facts of the class action concerned a mother and her seven-year-old daughter, who were detained thousands of miles apart from one another after seeking asylum in the U.S. from violence in the Democratic Republic of the Congo.⁵ Despite the court order⁶ to reunite eligible families by July 12, however, some children were still separated from their parents months later.⁷ Others are not allowed to be reunited based on

¹ Maya Rhodan, *Here Are the Facts about President Trump’s Family Separation Policy*, TIME (June 20, 2018), <http://time.com/5314769/family-separation-policy-donald-trump> [perma.cc/XXG5-RP5J]. As of March 8, 2019, the “Family Separation Policy” has been legally expanded to include “all adult parents who entered the United States at or between designated ports of entry on or after July 1, 2017” because a recent report from the Office of the Inspector General at the Department of Health and Human Services revealed that the Department of Justice and the Department of Homeland Security “began separating families as early as July 1, 2017.” *Ms. L. v. U.S. Immigration & Customs Enf’t*, 18cv0428 DMS (MDD), 2019 U.S. Dist. LEXIS 38882, at *1–25, *5, *24 (S.D. Cal. Mar. 8, 2019). As this ruling is a brand-new development, the scope of this paper will cover only April through June 2018 of the “Family Separation Policy.” Nevertheless, the same analysis applies regardless of the dates of the policy.

² *Ms. L.*, 2019 U.S. Dist. LEXIS 38882, at *4.

³ See *Trump’s Family Separation Crisis: How You Can Help*, ACLU, <https://www.aclu.org/families-belong-together> [perma.cc/2YU5-4Z54].

⁴ *Ms. L. v. U.S. Immigration Customs & Enf’t*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

⁵ *Id.*

⁶ *Id.*; Laura Jarrett, *Federal Judge Orders Reunification of Parents and Children, End to Most Family Separations at Border*, CNN (June 27, 2018), <https://www.cnn.com/2018/06/26/politics/federal-court-order-family-separations/index.html> [perma.cc/35Y3-N48K].

⁷ Catherine E. Shoichet, *171 Kids from Separated Families are Still in Custody. Most Won’t be Reunited with Their Parents*, CNN (Nov. 8, 2018), <https://www.cnn.com/2018/11/08/politics/separated-families-reunification-update/index.html> [perma.cc/2CM5-WLY8].

their parents' alleged criminal histories.⁸ The problem of family separation is still ongoing—and it will likely continue for months, perhaps years.

Nonetheless, domestic law is not the only legal method to fight the Trump Administration's 2018 policy. After all, the international response to family separation occurring in the United States was nearly equally as powerful. Renowned world leaders such as former British Prime Minister Theresa May, Canadian Prime Minister Justin Trudeau, and Pope Francis all publicly denounced family separation.⁹ International bodies like the United Nations also condemned the practice. The former United Nations High Commissioner for Human Rights, Zeid Ra'ad al-Hussein, publicly declared the policy "unconscionable" days after his office released a press briefing stating, "the practice of separating families amounts to arbitrary and unlawful interference in family life"¹⁰ International law, specifically international criminal law, also has a role to play in denouncing the Trump administration's policy.

This Comment will propose a theoretical international criminal law response to the family separation that occurred in summer 2018. In particular, the analysis will focus on the potential response of the International Criminal Court (ICC)—a permanent intergovernmental organization and autonomous international tribunal that prosecutes individuals for atrocity crimes¹¹—to the United States' Zero Tolerance

⁸ *Ms. L. v. U.S. Immigration Customs & Enf't*, 310 F. Supp. 3d 1133, 1139 (S.D. Cal. 2018); Jonathan Blitzer, *The Government has Decided that Hundreds of Immigrant Parents Are Ineligible to Be Reunited with Their Kids. Who Are They?*, NEW YORKER (July 26, 2018), <https://www.newyorker.com/news/news-desk/the-government-has-decided-that-hundreds-of-immigrant-parents-are-ineligible-to-be-reunited-with-their-kids-who-are-they> [perma.cc/R889-UDRE]. Judge Sabraw's decision not to reunite children with parents who have alleged criminal histories is discussed under Part III of this Comment.

⁹ See Fionnuala Ní Aoláin, *Global Responses to President Trump's Family Separation Via 'Zero-Tolerance' Detention Policy*, JUST SECURITY (June 30, 2018), <https://www.justsecurity.org/58783/global-responses-president-trumps-family-separation-zero-tolerance-detention-policy/> [perma.cc/758G-2UXC].

¹⁰ *Id.*; Press Release, United Nations Human Rights Office of the High Commissioner, Press Briefing Note on Egypt, United States, and Ethiopia, U.N. Press Release (June 5, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174> [perma.cc/TVP5-JB8T].

¹¹ *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> [perma.cc/5PNE-97P4]. The mechanics of the International Criminal Court will be further addressed in the background section of this Comment. Although established by United Nations treaty, the ICC is an independent body; it is not an office or an agency of the United Nations. *Id.* The ICC has jurisdiction over the following crimes: genocide, crimes against humanity, war crimes, and crimes of aggression. *Id.* This Comment will discuss deportation as a crime against humanity.

Policy, announced in April 2018 by former Attorney General Jeff Sessions.¹² The Comment will conclude that the ICC could theoretically prosecute Trump Administration officials for crimes against humanity due to their involvement with the Zero Tolerance Policy and its effects of family separation.

I. BACKGROUND

In April 2018, former Attorney General Jeff Sessions announced the Zero Tolerance Policy.¹³ The policy significantly increased criminal prosecution of immigrants entering the United States without inspection.¹⁴ Increased adult prosecution directly led to family separation.¹⁵ Adults entering the U.S. without inspection were detained by Immigration and Customs Enforcement (ICE) within the Department of Homeland Security (DHS) and sent to the Department of Justice for prosecution instead of going to family detention centers with their children, as previously was the custom under civil law alternatives.¹⁶ The children could not be held with their parents in federal jail, so they were sent to the Office of Refugee

¹² Press Release, Department of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018) (on file with the Journal of Criminal Law & Criminology).

¹³ *Id.*

¹⁴ *Id.* Entry without inspection (EWI) refers to immigrants who cross the U.S. border avoiding designated ports of entry without being inspected by an immigration or a border patrol officer. *Basics of Immigration Law*, PROTECTING IMMIGRANT NEW YORKERS (Mar. 17, 2019), <https://protectingimmigrants.org/resources-for-law-enforcementgovernment/immigration-law/basics-of-immigration-law/> [perma.cc/74MU-BSR4].

¹⁵ *Ms. L. v. U.S. Immigration Customs & Enf't*, 310 F. Supp. 3d 1133, 1139 (S.D. Cal. 2018) (noting that “[w]hen a parent is charged with a criminal offense, the law ordinarily requires separation of the family.”).

¹⁶ Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting*, NOVA (June 20, 2018), https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/?linkId=53285430&utm_medium=social&utm_source=TWITTER [perma.cc/4R9D-ZSCR]. Before the “Zero Tolerance Policy,” migrant children and their parents were detained together in family detention centers to await processing and possible detention. Dara Lind, *What Obama Did with Migrant Families vs. What Trump Is Doing*, VOX (June 21, 2018), <https://www.vox.com/2018/6/21/17488458/obama-immigration-policy-family-separation-border> [perma.cc/E9PA-4CBV]. As the government is not allowed to hold children in detention centers for more than twenty days due to the 1997 Flores Settlement, the federal government had made a practice of releasing the children as well as the parents (even though parents are legally allowed to be held in detention for longer than twenty days) before the twenty-day time limit. *Id.* The “Zero Tolerance Policy” changed this practice by separately detaining children and parents through criminal prosecution. *Id.* Children are still largely released before the twenty-day time limits. *Id.* Their parents, however, are not. *Id.*

Resettlement (ORR).¹⁷ The ORR is part of the Department of Health and Human Services (HHS) and handles children who enter the U.S. unaccompanied by adults.¹⁸ HHS usually seeks foster care placements for these children and is unaccustomed to communicating with DHS.¹⁹ Ultimately, due to the new policy—and the quickness with which it was implemented since DHS officials did not know about the policy until the day they had to implement it—DHS and HHS were unequipped to handle tracking multiple family members through their different bureaucratic processes, and parents were separated from their children without knowing where their children were.²⁰ In over four hundred of these instances in which children were separated from their parents, the parent was deported back to their country of origin while their child remained in the United States.²¹ Many of these families were asylum-seekers, which is a crucial fact to the argument made in this Comment.²²

Traditionally, the ICC would not be a viable legal response to the Zero Tolerance Policy or other U.S. government migrants' rights abuses. The ICC has many jurisdictional limitations. The first is the Court only prosecutes

¹⁷ *Id.*

¹⁸ Ron Nixon, 'Zero Tolerance' Immigration Policy Surprised Agencies, Report Finds, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/us/politics/immigration-family-separation-zero-tolerance.html> [perma.cc/SJ97-7D2E].

¹⁹ Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and 'Zero Tolerance' at the Border*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> [perma.cc/3M56-6LDS]. HHS usually works with unaccompanied children—that is, children who crossed the border without an adult. See Tim Dickinson, *A Former ICE Director Explains How Separated Children Can Easily Become Orphans*, ROLLING STONE (June 22, 2018), <https://www.rollingstone.com/politics/politics-news/a-former-ice-director-explains-how-separated-children-can-easily-become-orphans-666059/> [perma.cc/2NKB-RGXY]. For these children, HHS either finds extended family already present in the U.S. who can provide for them, or puts them in the foster care system in states all over the country. *Id.* Even though the children separated from their families in the summer of 2018 were not unaccompanied, HHS largely treated them as such once they were separated from their parents. *Id.*

²⁰ Dickinson, *supra* note 19; Nixon, *supra* note 18.

²¹ Tom Hals & Reade Levinson, *U.S. Says 463 Migrant Parents May Have Been Deported Without Kids*, REUTERS (July 23, 2018), <https://www.reuters.com/article/us-usa-immigration/u-s-says-463-migrant-parents-may-have-been-deported-without-kids-idUSKBN1KE029> [perma.cc/6452-XHC4]. Another factor behind these separations was that unaccompanied migrant children are low-priority for deportation, while adults are high-priority. Dickinson, *supra* note 19. Adults can take days or weeks to work their way through the immigration system, while children often take years. *Id.*

²² Dara Lind, *Beyond Family Separation: Trump's Ongoing War on Asylum, Explained*, VOX (Aug. 6, 2018), <https://www.vox.com/explainers/2018/8/6/17501404/trump-asylum-separate-legal-definition> [perma.cc/CWV2-WVDW].

individuals.²³ The second is subject matter. The ICC only has the jurisdiction to prosecute four crimes: genocide, crimes against humanity,²⁴ war crimes, and crimes of aggression.²⁵ Deportation can qualify as a crime against humanity, but many acts of deportation do not fit under the ICC's definition.²⁶ The third limitation is that the ICC has jurisdiction only in cases when "the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court."²⁷ In the case of family separation, the alleged crimes were committed by U.S. citizens; the U.S. is not a State Party to the Rome Statute, the treaty that governs the ICC.²⁸ Thus, the ICC historically would have lacked jurisdiction to bring a case. Recently, however, an ICC decision concerning whether the Court could exercise jurisdiction over the alleged deportation of the Rohingya people changed global outlook on the ICC's jurisdiction.²⁹

On September 6, 2018, the ICC released its "Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute.'"³⁰ In short, the ICC's prosecutor sought a ruling regarding whether the Court could exercise jurisdiction of the alleged deportation of the

²³ INT'L CRIM. CT., *supra* note 11. In this case, the court would also have to consider whether the U.S. officials who implemented the "Zero Tolerance Policy" would have diplomatic immunity since they were acting in their official capacities as Head of State and Attorney General when the alleged crimes occurred. *See* Prosecutor v. Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09, Situation in Darfur, Sudan (July 6, 2017).

²⁴ A crime against humanity is a certain act (acts, including deportation, listed in article 7.1 of the Rome Statute) "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack[.]" Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9 (entered into force on July 1, 2002). The crime of aggression—only prosecutable as recently as July 17, 2018—is "planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." *Id.*

²⁵ INT'L CRIM. CT., *supra* note 11.

²⁶ Vincent Chetail, *Is There Any Blood on My Hands: Deportation as a Crime of International Law*, 29 LEIDEN J. INT'L L. 917, 923 (2016).

²⁷ INT'L CRIM. CT., *supra* note 11. The crime also has to be referred to the ICC Prosecutor and adhere to the rule of complementarity: the ICC "prosecutes cases only when States . . . are unwilling or unable to do so genuinely." *Id.*

²⁸ Rome Statute of the International Criminal Court, *supra* note 24.

²⁹ Toby Sterling, *International Criminal Court Says it has Jurisdiction over Alleged Crimes against Rohingya*, REUTERS (Sept. 6, 2018, 9:38 AM), <https://www.reuters.com/article/us-myanmar-rohingya-icc/international-criminal-court-says-it-has-jurisdiction-over-alleged-crimes-against-rohingya-idUSKCN1LM23H> [perma.cc/D6EX-F2QA].

³⁰ Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, P.T. Ch I, (Sept. 6, 2018), [https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46\(3\)-01/18-37](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-37) [perma.cc/C9QL-NYZZ].

Rohingya people from Myanmar to Bangladesh.³¹ The prosecutor was interested in starting a preliminary examination into government and military officials from Myanmar.³² Bangladesh is a State Party of the Rome Statute and is, therefore, under ICC jurisdiction; Myanmar is not.³³ This case was monumental in international law because it ruled that if the crime against humanity of deportation occurs in one country that *is not* a State Party to the Rome Statute, but the crime's effects are felt in a country that *is* member to the Rome Statute, the ICC has jurisdiction over the alleged perpetrators of the crime—even in a country that is not a State Party of the Rome Statute.³⁴ In other words, the ICC can exercise jurisdiction over individuals in non-member states in certain contexts.

The implications of this decision are broad. First and foremost, this is an important step in holding accountable those government and military authorities in Myanmar who have committed what the U.N. Independent International Fact-Finding Mission on Myanmar recognizes as atrocity crimes.³⁵ The more than 71,000 Rohingya Muslims forced out of Myanmar—and those who have lost their lives to ethnic cleansing—deserve justice.³⁶ Second, the Court's ruling implicates alleged international criminal perpetrators all over the world who have thus far avoided prosecution. For example, Bashar al-Assad, the Syrian president wanted for alleged war crimes and crimes against humanity committed during the ongoing conflict

³¹ *Id.*

³² “Preliminary examination” is a legal term of art for the ICC. Preliminary examinations determine whether a set of affairs are likely to meet the ICC's criteria in order to warrant a full investigation. INTERNATIONAL CRIMINAL COURT, PRELIMINARY EXAMINATIONS, <https://www.icc-cpi.int/pages/pe.aspx> [perma.cc/JJ36-BCWY]. “[I]n order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.” *Id.*

³³ INT'L CRIM. CT., THE STATES PARTIES TO THE ROME STATUTE, <https://asp.icc-cpi.int/en/menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> [perma.cc/7HE6-6ZXS].

³⁴ Decision on the Prosecution's Request, *supra* note 30.

³⁵ UNITED NATIONS HUM. RTS. COUNCIL, A/HRC/39/64, REPORT OF THE DETAILED FINDINGS OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON MYANMAR (September 2018), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E> [perma.cc/RV6Y-DYNU]. The Independent International Fact-Finding Mission on Myanmar was established in March 2017 by the United Nations Human Rights Council to determine “the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar.” *Id.*

³⁶ *Burma: Satellite Imagery Shows Mass Destruction*, HUM. RTS. WATCH (Sept. 19, 2017, 12:00 AM), <https://www.hrw.org/news/2017/09/19/burma-satellite-imagery-shows-mass-destruction> [perma.cc/99X3-VSCJ].

in Syria, could be affected, as well as other members of the Syrian government, even though Syria is not a signatory of the Rome Statute.³⁷

For the purposes of this Comment, the recent ICC decision means individuals within the United States government could be prosecuted under international criminal law for the Family Separation Policy and its ongoing effects.³⁸ This Comment does not intend to compare the Rohingya tragedy to that of Central American immigrants. Rather, it focuses on the ICC's jurisdictional claim pursuant to the Pre-Trial's recent decision on the crime of deportation. The United States is not a State Party of the Rome Statute.³⁹ Nevertheless, asylum-seekers who have been deported while separated from their children come from countries that are State Parties of the Rome Statute, including Mexico, Honduras, El Salvador, and Guatemala.⁴⁰ As the ICC found in its September 6th decision, deportation as a crime against humanity has a start point and an end point.⁴¹ If just one of these points is a State Party of the Rome Statute, then the ICC has jurisdiction over the crime.⁴² In this

³⁷ Michael Holden & Raissa Kasolowsky, *Lawyers Hope Refugees' Case Against Damascus will be Breakthrough*, REUTERS (Mar. 7, 2019, 6:30 AM), <https://www.reuters.com/article/us-mideast-crisis-refugees-icct/lawyers-hope-refugees-case-against-damascus-will-be-breakthrough-idUSKCN1QO1HD> [perma.cc/K9RW-RMSE]. Lawyers representing twenty-eight Syrian refugees in Jordanian refugee camps have asked the ICC to investigate Syria for crimes against humanity since Jordan is a signatory to the Rome Statute. *Id.* They argue that “the ICC’s decision last September that it had jurisdiction over the alleged deportation of Rohingya people from Myanmar to Bangladesh as a possible crime against humanity should act as a precedence for the Syrian refugees.” *Id.*; David Scheffer, *Working Paper Number 2018-03: Critical Rulings on International Criminal Justice*, THE CHICAGO COUNCIL ON GLOBAL AFFAIRS, 1 (2018).

³⁸ The legal reasoning behind the Rohingya decision has yet to be applied outside of that specific case. Its implications on the U.S., then, are theoretical.

³⁹ INT’L CRIM. CT., *supra* note 11.

⁴⁰ *Id.* Although not discussed in this Comment, some aspects of the analysis presented here could also apply in select instances to “migrant caravans” awaiting entry into the United States from Honduras, El Salvador, or Guatemala. Many immigrants in the caravan plan to seek asylum in the United States. A federal judge ruled in November 2018 that the administration has to accept asylum claims from any migrants who claim asylum, despite the Trump Administration’s attempt to refuse to accept asylum claims from immigrants who cross the southern border without inspection. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018). The case was largely argued under domestic law—the Immigration and Nationality Act—but the plaintiffs could have also supported their claim under the same international law discussed in this Comment. Miriam Jordan, *Federal Judge Blocks Trump’s Proclamation Targeting Some Asylum Seekers*, N. Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/judge-denies-trump-asylum-policy.html> [perma.cc/JH88-3 GRL]; Emily Sullivan, *Federal Court Blocks Trump Administration’s Asylum Ban*, NPR (Nov. 20, 2018), <https://www.npr.org/2018/11/20/669471110/federal-court-blocks-trump-administrations-asylum-ban> [perma.cc/NPD2-EYJF].

⁴¹ Decision on the Prosecution’s Request, *supra* note 30, at ¶ 59.

⁴² *Id.* at ¶ 64.

case, the starting point is the United States, and the end point is the Central American countries that are State Parties to the ICC. Because these Central American countries are members of the ICC, the crime against humanity of deportation invokes ICC jurisdiction over U.S. officials.

Since the U.S. is not a member of the ICC, there would be no obligation for the government to surrender any government official indicted by the Court.⁴³ Indeed, considering former National Security Adviser John Bolton's recent attack against the ICC, it is likely that the U.S. government would do everything possible to delegitimize or actively ignore any ICC decision concerning the U.S.⁴⁴ Nonetheless, State Parties to the Rome Statute are obligated to transfer any indicted individuals to the Court should the individual visit their country, so the official's travel would be limited.⁴⁵

In order to show that U.S. government officials could be prosecuted by the ICC for the crime against humanity of deportation, this Comment will be broken into three parts. The first level of analysis will explore the international definition of deportation and how it pertains to U.S.

⁴³ Scheffer, *supra* note 37, at 2.

⁴⁴ *Full Text of John Bolton's Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), <https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html> [perma.cc/S7A3-PT4L]. In September 2018, four days after the ICC issued its decision on the Prosecutor's Rohingya jurisdictional question, former U.S. National Security Adviser John Bolton, fiercely denounced the ICC. In a speech to the Federalist Society in Washington D.C., Bolton called the Court "ineffective, unaccountable, and indeed, outright dangerous." *Id.* He declared further, "the United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court." *Id.* It is likely that Bolton was responding to news of the Prosecutor's request to investigate alleged war crimes committed by U.S. service people during the war in Afghanistan. No State Party requested this investigation. *Id.* This Comment will address the possible ICC investigation into U.S. military officials in Part V.

⁴⁵ Scheffer, *supra* note 37, at 2. Most recently on November 17, the Central African Republic extradited MP and former militia leader, Alfred Yekatom, wanted by the ICC for "murder, torture, attacking civilians, and using child fighters." *Central African Republic Extradites Ex-Militia Leader 'Rambo'*, BBC NEWS (Nov. 18, 2018), <https://www.bbc.com/news/world-africa-46249316> [perma.cc/P62Z-SSCT]. Nonetheless, the process of transferring indicted officials to the Court is far from perfect. For example, the ICC has had an outstanding warrant for Sudanese President Omar al-Bashir for eight years. He has evaded arrest despite visiting several countries that are State Parties to the Rome Statute. Robbie Gramer, *South African Court Tells Government It Can't Withdraw from the ICC*, FOREIGN POLICY (Feb. 22, 2017), <https://foreignpolicy.com/2017/02/22/south-african-court-tells-government-it-cant-withdraw-from-the-icc/> [perma.cc/QX4S-ZRJV]. Nonetheless, a 2017 ICC decision makes clear, "a State Party cannot refuse to comply with a request by the Court for the arrest and surrender of the Head of State of another State Party as any possible immunity vis-à-vis the Court has been rendered inapplicable with the ratification of the Rome Statute." *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09, Situation in Darfur, Sudan, ¶ 80 (July 6, 2017).

immigration. The second level of analysis will then apply this definition to deportation as a crime against humanity under the Rome Statute. The third part of the analysis will briefly explore the ramifications of an ICC investigation into the U.S. government. The Comment will conclude with the finding that the ICC has jurisdiction to prosecute U.S. government officials for its family separation policy of asylum-seekers in summer 2018.

II. DEPORTATION—THE DEFINITION UNDER INTERNATIONAL LAW

According to Article 7(2)(d) of the Rome Statute, deportation as a crime for the purposes of the ICC is “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”⁴⁶ Consequently, this section will explore (i) the forcible character of the U.S. government’s displacement of family asylum-seekers; (ii) the lawful presence of the asylum-seekers in U.S. territory under international law; and (iii) the absence of permitted grounds to deport the Central American asylum-seekers under international law.

A. “FORCED DISPLACEMENT OF THE PERSONS CONCERNED BY EXPULSION OR OTHER COERCIVE ACTS”

The first condition of deportation is easy to demonstrate in the Family Separation context because forced displacement over an international border is inherent to deportation.⁴⁷ It is safe to say the asylum-seekers who crossed the U.S. border this summer made the perilous journey because they wanted to live in the United States—at least for a little while.⁴⁸ When they were returned to their countries of origin, this expulsion was forced, thus satisfying the first condition of deportation.

Voluntary departures do not satisfy this condition, so some may argue that asylum-seekers who accepted stipulated removal—those who agreed to be deported instead of staying in immigration detention to fight their case—

⁴⁶ Rome Statute of the International Criminal Court, *supra* note 24.

⁴⁷ See Chetail, *supra* note 26, at 924; Report of the Preparatory Commission for the ICC, Finalized Draft Text of the Elements of the Crimes, PCNICC/2000/INF/3/Add.2, 9 (2000); *see also* Prosecutor v. Stakić, Judgement, Case No. IT-97-24-A, A. Ch., ¶ 281 (Mar. 22 2006); Prosecutor v. Krnojelac, Judgement, Case No. IT-97-25-T, T.Ch. II, ¶ 475 (Mar. 15 2002); Prosecutor v. Krstić, Judgement, Case No. IT-98-33-T, ¶ 529 (Aug. 2, 2001).

⁴⁸ *See, e.g.*, Marisa Peñaloza & John Burnett, *A Guatemalan Village Tells the Story of Immigration to the U.S.*, NPR (Sept. 19, 2018), <https://www.npr.org/2018/09/19/649300559/a-guatemalan-village-tells-the-story-of-immigration-to-the-u-s> [perma.cc/5QDE-8AZW].

cannot bring a deportation claim.⁴⁹ Nonetheless, according to the ICC's Elements of Crimes, the character of displacement can be psychological, "caused by fear of violence, duress, detention, psychological oppression or abuse of power," not just physical.⁵⁰ Therefore, if asylum-seeking immigrants accepted stipulated removal on the basis of duress, psychological oppression, or abuse of power, they could still bring a deportation claim.

In the case of immigrant parents accepting stipulated removal, psychological displacement centers around due process issues.⁵¹ "The Constitution protects everyone within the territory of the United States, regardless of citizenship."⁵² Yet there are reports that the government officials who offer stipulated removal do not always communicate to the detainees in their native languages, causing serious doubts about comprehension.⁵³ Further, officials:

[O]ver-emphasized the length of time detainees would spend in detention if they chose to fight their cases and see a judge, yet failed to tell detainees that they could secure release from detention on bond while fighting their cases, or that some might win the right to remain legally in the country.⁵⁴

Finally, immigrants who accept stipulated removal give up their rights to a hearing entirely and never appear in front of an immigration judge.⁵⁵ These potential due process issues implicate psychological displacement. Asylum-seekers could have accepted stipulated removal this summer because they did not understand what it meant.⁵⁶ Or, they could have thought that accepting removal was the quickest way to reunite them with their children. Regardless, any decision made pertaining to stipulated removal

⁴⁹ JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS 1 (2011) <https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf> [perma.cc/V254-LW4R].

⁵⁰ Rep. of the Preparatory Commission for the ICC, Finalized Draft Text of the Elements of the Crimes, UN. Doc. PCNICC/2000/INF/3/Add.2, at 11 (2000).

⁵¹ See, e.g., *Ms. L. v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 1133, 1142 (S.D. Cal. 2018) (holding "the Government's practice of separating class members from their children, and failing to reunite those parents who have been separated, without a determination that the parent is unfit or presents a danger to the child violates the parents' substantive due process rights to family integrity under the Fifth Amendment to the United States Constitution").

⁵² *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886); *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1161 (S.D. Cal. 2018).

⁵³ KOH ET AL., *supra* note 49, at 7.

⁵⁴ *Id.* at iii.

⁵⁵ AM. IMMIGRATION COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 2 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [perma.cc/2HMN-ASU9].

⁵⁶ KOH ET AL., *supra* note 49, at 5.

was likely made under extreme duress since the parents were separated from their children—oftentimes without knowledge of where their children were or when they would see them again.⁵⁷ Any of these alternatives would likely constitute a deportation claim due to psychological displacement.

Further, the U.S. has also ratified the International Covenant on Civil and Political Rights (ICCPR), which protects immigrants' due process rights in the case of expulsion.⁵⁸ Article 13 of the ICCPR states that an immigrant may be expelled from a receiving nation

only in pursuance of a decision reached in accordance with law and shall . . . be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.⁵⁹

Although the lawfulness of immigration proceedings against asylum-seekers will be discussed in the following section, it is clear in the case of stipulated removal that even asylum-seekers are not being permitted to “submit their reasons” against deportation or to have their cases reviewed before forced displacement. To reiterate, these asylum-seekers never appear in front of a judge and sometimes do not understand the documents they are signing.⁶⁰ Domestic courts have even recognized the regulatory violations inherent in stipulated removal.⁶¹ Therefore, it is likely that the asylum-seekers who accepted stipulated removal over the summer could still bring a valid deportation claim based on forced removal, akin to those who did not accept stipulated removal.

⁵⁷ Kevin Sieff, *The Chaotic Effort to Reunite Immigrant Parents with their Separated Kids*, WASH. POST (June 21, 2018), https://www.washingtonpost.com/world/theamericas/the-chaotic-effort-to-reunite-immigrant-parents-with-their-separated-kids/2018/06/21/325cceb2-7563-11e8-bda1-18e53a448a14_story.html?utm_term=.2f41dd12ca68 [perma.cc/JP4S-X9TJ].

⁵⁸ UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMM’R, STATUS OF RATIFICATION INTERACTIVE DASHBOARD, <http://indicators.ohchr.org/> [perma.cc/Q6GX-78UV]. The ICCPR is a multilateral treaty adopted by the United Nations General Assembly that went into force in 1976. The treaty is a foundation of international human rights law. The U.S. did declare some reservations to its ratification of the ICCPR, but none of these reservations implicate Article 13. *Id.*

⁵⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171.

⁶⁰ AM. IMMIGRATION COUNCIL, *supra* note 55, at 2.

⁶¹ *United States v. Ramos*, 623 F.3d 672, 683 (9th Cir. 2010).

B. “LAWFUL PRESENCE”

Asylum-seekers who cross the U.S. border are protected under both international law and domestic law.⁶² An essential component of international law includes the principle of *non-refoulement*, or the notion that a state should not return a refugee to “the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁶³ This principle finds legal basis in a number of international instruments, including the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol, the United Nations Declaration on Territorial Asylum, and the American Convention on Human Rights, among others.⁶⁴ *Non-refoulement* “is precisely aimed at exempting asylum-seekers from the entry requirements generally imposed on immigrants. It accordingly presumes that asylum-seekers are lawfully present under international law.”⁶⁵ It is a staple of international law.

In terms of domestic law, “U.S. asylum law arises largely out of international agreements that have been incorporated into immigration law” in response to the millions displaced after WWII.⁶⁶ The U.S. is a State Party to the 1967 Protocol, which undertakes articles 2 to 34 of the Convention Relating to the Status of Refugees, including article 33(1), the principle of *non-refoulement*.⁶⁷ Indeed, *non-refoulement* is an obligation of the 1967

⁶² 8 U.S.C. § 1158 (2012); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

⁶³ High Comm’r for the UNHCR, *Note on Non-Refoulement*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Aug. 23, 1977), <http://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> [perma.cc/33TN-PT3T].

⁶⁴ *Id.* Other international instruments upholding the principle of *non-refoulement* include the Organization of African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, the Resolution on Asylum to Persons in Danger of Persecution, and the Principles Concerning the Treatment of Refugees, among national constitutions. *Id.*

⁶⁵ Chetail, *supra* note 26, at 926.

⁶⁶ *Ms. L. v. U.S. Immigration & Customs Enf’t*, 302 F. Supp. 3d 1149, 1164 (S.D. Cal. 2018) (quoting KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 353 (2d ed. 2015)).

⁶⁷ Convention Relating to the Status of Refugees, Apr. 22, 1954, S. TREATY DOC. No. 2545, 189 U.N.T.S. 137. This was recently confirmed in a federal judge’s decision blocking the Trump Administration from banning asylum-seekers who enter without inspection. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 857 (N.D. Cal. 2018). Judge Tigar wrote, “Congress enacted the Refugee Act of 1980, including 8 U.S.C. § 1158, ‘to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968.’ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987). ‘The Protocol incorporates the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (the Convention), July 5, 1951, 189 U.N.T.S. 150.’” *Id.*

Protocol under Article 1(1).⁶⁸ Further, in 1980, the U.S. government enacted the Refugee Act, which incorporated the Convention and the Protocol into U.S. law.⁶⁹ Accordingly, those Central American families who crossed the border this summer in search of asylum were lawfully present under both international law and domestic U.S. law.

Nonetheless, because asylum-seekers are not permitted these rights if they present a threat to national security, some argue that the separated families this summer were not protected under the 1967 protocol.⁷⁰ Article 33(2) of the Protocol states:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.⁷¹

Therefore, those asylum-seekers who presented a national security risk to the U.S. in 2018 are not afforded the same protections under international or domestic law. However, it is unlikely that the parents separated from their children constituted national security risks for two reasons.

First, nineteen ICE agents wrote an open letter in June 2018 to Homeland Security Secretary Kirstjen Nielsen calling for the disbandment of ICE in response to the Family Separation Policy because the policy “made it harder for them to conduct effective investigations into significant national security issues.”⁷² The letter explained that the “political nature” of the policy targeted “undocumented aliens, instead of the transnational criminal organizations that facilitate cross border crimes impacting our communities and national security.”⁷³ In other words, the policy distracted from national security issues instead of preventing them. Second, the standard for constituting a “danger to the security of the country” is high.⁷⁴ The grounds for regarding an asylum-seeker as a security threat must be “reasonable”

⁶⁸ High Comm’r for the UNHCR, *supra* note 63. The U.S. has some reservations to the 1967 protocol, but the reservations have to do with articles involving the right to tax refugees and social security, which have no bearing on *non-refoulement*.

⁶⁹ “We Can’t Help You Here:” *US Returns of Asylum Seekers to Mexico*, HUM. RTS. WATCH (July 2, 2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico> [perma.cc/5BJH-UJ93].

⁷⁰ Convention Relating to the Status of Refugees, *supra* note 67, at art. 33(2).

⁷¹ *Id.*

⁷² Oliver Laughland, *More than a Dozen ICE Agents Call for Agency to be Disbanded*, THE GUARDIAN (June 29, 2018), <https://www.theguardian.com/us-news/2018/jun/29/ice-abolish-letter-agents-trump-immigration-crackdown> [perma.cc/PG2Y-LGMV].

⁷³ *Id.*

⁷⁴ Chetail, *supra* note 26, at 927.

based on a criminal conviction of a “particularly serious crime.”⁷⁵ Therefore, not only does an asylum-seeker have to have committed a serious crime, but they must also be past the final stages of conviction to depart from the *non-refoulement* principle.⁷⁶ It is highly unlikely that any of the asylum-seekers who crossed the border with their children in the summer of 2018 and were subsequently deported would qualify under this standard.

Indeed, the U.S. government through federal Judge Dana Sabraw has identified a criminal standard to which officials are holding asylum-seekers, and it is far lower than that of Article 33(2) of the Protocol.⁷⁷ Of the parents who have stayed in the U.S. in order to be reunited with their children, sixty-four out of 914 are ineligible to be reunited with their children based on criminal history.⁷⁸ In the case of those sixty-four parents, activists are arguing that “the government is using an overly broad definition of ‘criminal record.’”⁷⁹ Some parents have been barred due to criminal charges, not convictions.⁸⁰ Others are barred from being reunited with their children because of driving while intoxicated.⁸¹ These are the offenses that the federal government has selectively shared with the public.⁸² The government has an incentive to share the worst offenses that these parents have committed in order to show U.S. citizens and the rest of the world that the government is not arbitrarily keeping children separate from their biological parents. Therefore, one can assume that these are among the most heinous crimes that asylum-seeking parents have committed. Clearly, then, these charges do not meet the high standard set forth in Article 33(2) of the Protocol in terms of a clear “conviction” and a “particularly serious crime.”⁸³ Therefore, domestic law does not match the standard put forth in international law, and asylum-seekers do not likely constitute a national threat under international law.

C. “WITHOUT GROUNDS PERMITTED UNDER INTERNATIONAL LAW”

Finally, U.S. government deportation of Central American asylum-seekers is unlawful because the result of removal infringes on the basic right

⁷⁵ Convention Relating to the Status of Refugees, *supra* note 67, at art. 33(2).

⁷⁶ Chetail, *supra* note 26, at 927.

⁷⁷ *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1153 (S.D. Cal. 2018).

⁷⁸ Blitzer, *supra* note 8.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Convention Relating to the Status of Refugees, *supra* note 67, art. 33(2), at 30.

to family unity. Numerous international instruments uphold the human right of family unity, including the 1990 Convention on the Rights of the Child.⁸⁴ Shockingly, the U.S. is the only country in the world besides Somalia and South Sudan that has not ratified the Convention.⁸⁵ Nonetheless, as aforementioned, the U.S. has ratified the ICCPR, which protects the right to family in multiple instances.⁸⁶ Article 23(1) confirms the role of the state in protecting the family unit and Article 24(1) outlines the right of the child to have the protection of a family.⁸⁷ Article 17(1) of the ICCPR states, “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.”⁸⁸ A balancing test is used to weigh the interference on the individual versus the public interest in regard to the arbitrary or unlawful nature of family separation.⁸⁹ The balance weighs heavily in favor of the individual with children except in some criminal cases.⁹⁰ Considering the criminal analysis above, it is likely that all of the asylum-seeking parents and children who were separated this summer are protected under the ICCPR.

Even if the parents and children are protected under international law, some may argue that the U.S. government’s parent deportations do not meet the ICC prosecutor’s gravity requirement. Article 53 of the Rome Statute imposes a gravity requirement on the ICC prosecutor in which he or she can only open investigations into the most serious abuses.⁹¹ Cases at the ICC can affect thousands of people.⁹² Considering the small number of asylum-

⁸⁴ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en [perma.cc/2ZBU-EUS2].

⁸⁵ *Id.*

⁸⁶ Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, S. TREATY DOC. NO. 8791, 606 U.N.T.S. 267, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en [perma.cc/7RFF-YRH5].

⁸⁷ International Covenant on Civil and Political Rights, *supra* note 59.

⁸⁸ *Id.*

⁸⁹ Chetail, *supra* note 26, at 928.

⁹⁰ Winata v. Australia, U.N. Human Rights Comm., No. 930/2000, ¶¶ 7.2–7.3, UN Doc. CCPR/C/72/D/930/2000 (July 26, 2001); Sen v. Netherlands, App. No. 31465/96, 36 E.H.R.R. 7, ¶¶ 33–41 (2001).

⁹¹ Rome Statute of the International Criminal Court, *supra* note 24, art. 53, at 24.

⁹² For example, the ICC is currently hearing a case in which over 2,000 victims are participating in the trial. Lino Owor Ogora, *Thousands of Victims in Uganda Express Willingness to Participate in the Ongwen Case*, INT’L JUST. MONITOR (Sept. 5, 2016), <https://www.ijmonitor.org/2016/09/thousands-of-victims-in-uganda-express-willingness-to-participate-in-the-ongwen-case/> [perma.cc/3PYG-9ME8].

seeking parents personally affected by family separation, this issue may not be a serious enough abuse.⁹³

This counterargument is likely to fall flat. The prosecutor considers four elements of the crime when measuring gravity: scale, the nature of the crime, the manner of commission, and the effect on the international community.⁹⁴ The first two elements alone would likely meet the gravity requirement. First, even if four hundred parents is not a large enough number, the scale of a crime involves more than those people directly affected.⁹⁵ The scale also relates to those indirectly affected, which includes the 2,500 children who were not deported alongside their parents.⁹⁶ Further, scale includes the bodily and psychological extent of the damage caused as well as the geographical spread. Parents and their children are separated from one another across Mexico, El Salvador, Guatemala, Honduras, and the U.S.—a geographical spread spanning a distance of over 1,400 miles.⁹⁷ For a child separated from their parents, the high stress that this separation can create may lead to “destructive complications like heart disease, diabetes, and even some forms of cancer.”⁹⁸ Additionally, “multiple[] instances of trauma early in life can lead to mental health problems like depression, anxiety, and post-traumatic stress disorder (PTSD).”⁹⁹ Therefore, not only does the geographical spread span several countries, but the extent of the damage caused is potentially life-altering and long-lasting. Second, “there is a strong presumption that investigations and prosecutions of crimes against or affecting children will be in the interests of justice.”¹⁰⁰ Thus, family separation is likely to meet the gravity requirement under the first two elements.

The third element considered when measuring gravity will be analyzed in parts 3(a) and (c) of this Comment, but both the manner of commission

⁹³ Just over 450 parents are said to have been separated from their children. Blitzer, *supra* note 8; Hals & Levison, *supra* note 21; Ted Hesson et al., *Most Deported Migrants Were Not Asked About Leaving Children Behind, Trump Official Says*, POLITICO (Jul. 25, 2018, 9:43 PM), <https://www.politico.com/story/2018/07/25/deported-migrants-leaving-children-behind-712088> [perma.cc/X8E2-DBA7].

⁹⁴ The Office of the Prosecutor, *DRAFT Policy on Children*, INT’L CRIM. CT. (June 2016), ¶ 49, https://www.icc-cpi.int/iccdocs/otp/22.06.2016-Draft-Policy-on-Children_ENG.pdf [perma.cc/T4LK-EWAG].

⁹⁵ Hals & Levison, *supra* note 21.

⁹⁶ *Id.*

⁹⁷ DISTANCEFROMTO, <https://www.distancefromto.net/> [perma.cc/T2DK-LUB4] (search “from” field as United States and destination field as “Honduras”).

⁹⁸ Eck, *supra* note 16.

⁹⁹ *Id.*

¹⁰⁰ The Office of the Prosecutor, *supra* note 94, at 2323 ¶ 49.

and the fourth element—effect on the international community—would also likely meet the gravity requirement. There is no clear definition for what constitutes an effect on the international community.¹⁰¹ Nevertheless, “[e]very crime embodied in the ICC Statute is a source of utmost concern for the international community and, thus, inherently of high gravity.”¹⁰² Therefore, if this Comment shows that deportations under the Zero Tolerance Policy constitute a crime against humanity, then it is likely the gravity threshold has been met. To avoid too tautological of an analysis, however, the Comment will also explore other elements of the effect on the international community considered by the ICC.

The Court has deliberated both quantitative and qualitative factors in determining the effect of a crime on the international community.¹⁰³ One such factor is the effect on forces in the area.¹⁰⁴ In April 2018 when the Zero Tolerance Policy was announced, President Trump declared that the National Guard would help support the new policy.¹⁰⁵ In June, eleven states refused to deploy the National Guard to the U.S.-Mexico border in protest of family separation.¹⁰⁶ That same month, hundreds of thousands of protestors took to the streets to call for an end to the policy.¹⁰⁷ The protests occurred in the U.S. and abroad, another factor considered when measuring international impact.¹⁰⁸ Finally, the crime occurred over multiple months, in several locations along the U.S. border, and constituted massive displacement.¹⁰⁹ Considering these factors, and that “[c]ases of war crimes, crimes against

¹⁰¹ Marco Longobardo, *Factors Relevant for the Assessment of Sufficient Gravity in the ICC. Proceedings and the Elements of International Crimes*, 1 QUESTIONS OF INT’L L.J. 21, 41 (2016).

¹⁰² *Id.* at 29.

¹⁰³ Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶¶ 28–34 (Feb. 8, 2010).

¹⁰⁴ *Id.* at ¶¶ 33–34.

¹⁰⁵ Sinéad Baker, *11 States Are Pulling National Guard Troops from the US-Mexico Border in a Growing Protest Over Trump’s Family-Separation Policy*, BUS. INSIDER (June 20, 2018, 6:06 AM), <https://www.businessinsider.com/ny-mass-colorado-pull-national-guard-troops-over-family-separation-2018-6> [perma.cc/KXL4-TPZD].

¹⁰⁶ *Id.*

¹⁰⁷ Andrea Castillo, et al., *From L.A. to N.Y., Hundreds of Thousands Join Nationwide Rallies to Protest Trump’s Immigration Policies*, L.A. TIMES (June 30, 2018, 9:07 AM), <http://www.latimes.com/local/lanow/la-me-rally-family-separation-20180629-story.html> [perma.cc/L5GV-RDKU].

¹⁰⁸ Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html> [perma.cc/RJB2-7MCG].

¹⁰⁹ Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 49 (Jan. 23, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF [perma.cc/VCN9-J6V5].

humanity, and genocide will almost always present some features of gravity,” it is likely that family separation will pass the gravity threshold regarding the fourth element—international community—as well.¹¹⁰ Therefore, the Zero Tolerance Policy that led to the separation of asylum-seeking parents from their children meets all of the standards to show deportation as a crime under Article 7(2)(d) of the Rome Statute.

III. DEPORTATION AS A CRIME AGAINST HUMANITY

Having demonstrated that forcing the removal of asylum-seeking Central American parents while their children remain in the U.S. fits within the definition of deportation under Article 7(2)(d) of the Rome Statute, the analysis will now move to whether said deportation is a crime against humanity. According to Article 7(1), deportation is a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack[.]”¹¹¹ Article 7(2)(a) elaborates further: an “[a]ttack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 [deportation] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack[.]” Accordingly, the second half of this Comment will explore (i) whether the deportation of asylum-seeking parents was committed as part of a widespread or systematic attack; (ii) directed against a civilian population; and (iii) in furtherance of a policy to commit the attack.

A. “PART OF A WIDESPREAD OR SYSTEMATIC ATTACK”

Three words need to be defined in order to understand this first contextual element of crimes against humanity: “widespread,” “systematic,” and “attack.” To start with the latter, deportation automatically qualifies as an attack. According to the ICC, “the commission of the acts referred to in Article 7(1) of the Statute constitutes the ‘attack’ itself and, besides the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven.”¹¹² Therefore, because deportation is one of the acts in Article 7(1), deportation of Central American asylum-seekers qualifies as an attack under the first element.

¹¹⁰ Margaret M. DeGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, 12 WASH. U. GLOBAL STUD. L. REV. 475, 484 (2013).

¹¹¹ *Id.*

¹¹² Prosecutor v. Bemba Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges ¶ 75 (June 15, 2009).

The second term, widespread, refers to “the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”¹¹³ According to international law scholar Vincent Chetail, “this requirement is confined to some exceptional circumstances when collective expulsions have been perpetrated against a high number of non-citizens.”¹¹⁴ Considering the relatively small number of victims impacted by the U.S. policy that separated deported, asylum-seeking parents from their children, the crime might not qualify under this quantitative element. Nonetheless, the ICC has determined that an attack—in this case, deportation—needs to be *either* widespread *or* systematic in order for it to qualify as a crime against humanity.¹¹⁵

The Zero Tolerance Policy clearly falls under the first definition of a systematic attack. A systematic attack is “either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts, or as patterns of crimes such that the crimes constitute a non-accidental repetition of similar criminal conduct on a regular basis.”¹¹⁶ The Trump Administration is not shy in publicly proclaiming its goal of limiting the number of immigrants who seek asylum in the U.S.¹¹⁷ To further its policy of deterring asylum-seekers from crossing the U.S. border, the administration created a plan, the Zero Tolerance Policy.¹¹⁸ This plan “followed a regular pattern” of separating adults from

¹¹³ *Id.* at ¶ 83; Prosecutor v. Katanga and Chui, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 395 (Sept. 30, 2008).

¹¹⁴ Chetail, *supra* note 26, at 931.

¹¹⁵ Situation en République de Kenya [Situation in the Republic of Kenya], Décision relative à la demande d’autorisation d’ouvrir une enquête dans le cadre de la situation en République du Kenya rendue en application de l’article 15 du Statut de Rome [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya], Case No. ICC-01/09-19-Corr, P.T.Ch. II, 31 March 2010, para. 94.

¹¹⁶ Katanga and Chui, *supra* note 114, ¶¶ 397–398; *see also* Situation in the Republic of Kenya, *supra* note 116, at ¶ 96; Situation in the Republic of Côte d’Ivoire, ICC-02/11-14-Corr, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, ¶ 54 (June 23, 2011); Prosecutor v. Gbagbo, ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, ¶ 223 (June 12, 2014).

¹¹⁷ Michael D. Shear, *Trump Claims New Power to Bar Asylum for Immigrants Who Arrive Illegally*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/trump-asylum-seekers-executive-order.html> [perma.cc/2E55-LWK9]; Veronica Stracqualursi, *Trump Says ‘Good Time’ for a Government Shutdown if No Money for Border Wall*, CNN (Nov. 17, 2018, 6:35 PM), <https://www.cnn.com/2018/11/17/politics/trump-southern-border-government-shutdown/index.html> [perma.cc/JVA6-89Z3].

¹¹⁸ Nixon, *supra* note 18 (“The ‘zero tolerance’ policy was supposed to serve as a deterrent to families traveling with children.”).

their children through criminal prosecutions of entry without inspection.¹¹⁹ From its swift implementation in April 2018 to its high-profile end in June, the policy separated nearly 3,000 children from their parents.¹²⁰ This pattern led to a “continuous commission” of deportations of parents whose children remained within the U.S. borders.¹²¹ According to one source, nearly 463 migrant parents were deported without their children.¹²² Therefore, the “Zero Tolerance Policy” satisfies each of the factual bases of a systematic attack and thus fulfills the first contextual element of deportation as a crime against humanity.

B. “DIRECTED AGAINST A CIVILIAN POPULATION”

The second contextual element of deportation as a crime against humanity requires the deportation to be directed against a civilian population. ICC case law clarifies this element to mean a civilian population—more than one victim—should be “the primary object of the attack.”¹²³ This population could be discernable “by nationality, ethnicity, or other distinguishing features.”¹²⁴ Clearly, the asylum-seekers from this summer qualify as a civilian population.

The asylum-seekers who were deported to their countries of origin while their children stayed in the U.S. can be distinguished by any number of discernable traits. First, the discernable population could be defined as asylum-seekers. Second, they could further be defined as members of a certain nationality—for example, Mexican, El Salvadorian, Guatemalan, or Honduran asylum-seekers.¹²⁵ Third, and most contentiously, they could simply be identified as non-citizens.¹²⁶ Therefore, regardless of how to define the group of parents deported in the summer of 2018, they certainly qualify as a civilian population, thus fulfilling the second element of deportation as a crime against humanity.

¹¹⁹ *Id.*; Hals & Levinson, *supra* note 21. See e.g., *L.*, 310 F. Supp. 3d at 1145 (acknowledging a “practice of family separation”).

¹²⁰ Nixon, *supra* note 18.

¹²¹ *Id.*

¹²² Hals & Levinson, *supra* note 21.

¹²³ Prosecutor v. Kunarac, Kovac, and Vukovic, Case No. IT-96-23-7 & IT-96-23/1-T, Judgment, ¶ (70 Int’l Crim Trib. for the Prosecutions of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Feb. 22, 2001).

¹²⁴ Prosecutor v. Ruto, Kosgey, and Sang, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 164 (Jan. 23, 2012).

¹²⁵ Chetail, *supra* note 26, at 932.

¹²⁶ *Id.*

C. “IN FURTHERANCE OF A POLICY TO COMMIT THE ATTACK”

The final element of deportation as a crime against humanity is a policy requirement. In order to fulfill this requirement according to the Elements of Crimes, “the State or organization [must] actively promote or encourage such an attack against a civilian population.”¹²⁷ The Trump Administration’s Zero Tolerance Policy satisfies this final element.

Further to the analysis of the first contextual element, the Trump Administration has blatantly expressed its goal of deterring immigrants from entering the U.S. since before President Trump took office.¹²⁸ A clear example of this deterrence includes its campaign promise to build a wall on the southern U.S. border.¹²⁹ The Administration has also openly explored the idea of using family separation to deter asylum-seekers. In March of 2017, former Secretary of Homeland Security John Kelly told CNN, “Yes[,] I’m considering [separating children from their parents] in order to deter more movement along this terribly dangerous network. I am considering exactly that. They will be well cared for as we deal with their parents.”¹³⁰ Therefore, when Sessions implemented the Zero Tolerance Policy in the summer of 2018, the effects of the policy—separating families—was widely known.¹³¹ Respected media outlets even noted, “[T]he ‘zero tolerance’ policy was supposed to serve as a deterrent to families traveling with children.”¹³² Indeed, a Homeland Security memorandum released to the public on April 26 explicitly stated, “DHS could also permissibly direct the separation of parents or legal guardians and minors held in immigration detention so that the parent or legal guardian can be prosecuted.”¹³³ The Trump

¹²⁷ Rep. of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of the Crimes, *supra* note 50.

¹²⁸ See, e.g., *Promises about Immigration on Trump-O-Meter*, POLITIFACT, <https://www.politifact.com/truth-o-meter/promises/trumpometer/subjects/immigration/> [perma.cc/HDX6-XN6M]; Daniella Diaz, *Kelly: DHS is Considering Separating Undocumented Children from their Parents at the Border*, CNN (Mar. 7, 2017), <https://edition.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/> [perma.cc/D3BC-ZGGC]. Domestic courts have also determined that the Trump Administration had a policy of family separation. See e.g., *L.*, 310 F. Supp. 3d at 1145 (acknowledging a “practice of family separation”).

¹²⁹ POLITIFACT, *supra* note 128.

¹³⁰ Diaz, *supra* note 128.

¹³¹ Nixon, *supra* note 18 (“The ‘zero tolerance’ policy was supposed to serve as a deterrent to families traveling with children.”).

¹³² *Id.*

¹³³ Memorandum from Kevin K. McAleen et. al., Commissioner for the U.S. Customs and Border Protection to Kirstjen Nielsen, Secretary of U.S. Department of Homeland Security (Apr. 23, 2018), <https://www.documentcloud.org/documents/4936568-FOIA-9-23-Family-Separation-Memo.html> [perma.cc/NT8K-X9V4]. The memo was followed by nineteen senior

Administration thus organized the Zero Tolerance Policy in furtherance of its goal to deter asylum-seekers by separating families, which resulted in the state actively encouraging the deportation of asylum-seeking parents to their countries of origin while their children remained in the U.S.

Even if one is to believe Secretary of Homeland Security Kirstjen Nielsen's claims that the Trump administration does not condone family separation, the final requirement of deportation as a crime against humanity ". . . would be met when deportations are carried out by the organs of a state following a regular pattern."¹³⁴ Since there was a regular pattern of separating children from their parents this summer, the Zero Tolerance Policy would meet the requirement regardless. Therefore, the final element of deportation as a crime against humanity is satisfied.

IV. CONSEQUENCES

This Comment demonstrates that the deportation of asylum-seeking parents while their children remained in the U.S. as part of the Zero Tolerance Policy constitutes a likely crime against humanity. The next logical question, then, is: what would it look like if the ICC actually pursued prosecution against top U.S. government officials? Luckily, the answer to that question is not entirely theoretical.

The current ICC prosecutor, Fatou Bensouda, recently asked for authorization to investigate alleged crimes committed by U.S. Armed Forces in Afghanistan since July 1, 2002.¹³⁵ Before asking for authorization to investigate an alleged crime, the Office of the Prosecutor conducts a preliminary examination of the Situation.¹³⁶ The Office of the Prosecutor has been looking into the Situation in Afghanistan since 2006.¹³⁷ The Situation primarily implicates the Taliban, but involves Afghan National Security Forces, the U.S. Armed Forces, and the U.S. Central Intelligence Agency as

ICE officials writing an open letter to Ms. Nielsen calling for the agency to be disbanded. Letter from Homeland Security Investigations, Special Agents in Charge, to Kirstjen Nielsen, Secretary of U.S. Department of Homeland Security (June 29, 2018); Laughland, *supra* note 72.

¹³⁴ Chetail, *supra* note 26, at 932.

¹³⁵ *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT'L CRIM. CT., <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh> [perma.cc/8529-VWF7].

¹³⁶ "Situation" is a term of art used by the ICC to indicate that the Office of the Prosecutor is conducting a formal investigation of a person's or multiple people's alleged crime(s). *Situations under Investigation*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/pages/situations.aspx> [perma.cc/5NX7-7YHL]. As such, it is capitalized here.

¹³⁷ *Id.*

well.¹³⁸ Since Fatou Bensouda asked for authorization to commence an investigation, it means that the Office of the Prosecutor has already determined that there is a reasonable basis to believe that atrocity crimes have been committed and that national proceedings have not sufficiently identified the alleged perpetrators.¹³⁹ However—shocking the international law community—the ICC recently decided not to authorize the Prosecutor to investigate the situation.¹⁴⁰ The Prosecutor’s office is currently appealing that decision.¹⁴¹

The Trump Administration is livid about the proposed investigation. As aforementioned, National Security Advisor John Bolton railed against the ICC in a speech in September 2018.¹⁴² Bolton threatened sanctions against the ICC as well as the following sweeping retaliatory steps:

We will negotiate even more binding, bilateral agreements to prohibit nations from surrendering US persons to the ICC. And we will ensure that those we have already entered are honored by our counterpart governments.

We will respond against the ICC and its personnel to the extent permitted by US law. We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans.

We will take note if any countries cooperate with ICC investigations of the United States and its allies, and we will remember that cooperation when setting US foreign assistance, military assistance, and intelligence sharing levels.

We will consider taking steps in the UN Security Council to constrain the court’s sweeping powers, including ensuring that the ICC does not exercise jurisdiction over Americans and the nationals of our allies that have not ratified the Rome Statute.¹⁴³

¹³⁸ Scheffer, *supra* note 37, at 1.

¹³⁹ INT’L CRIM. CT., *supra* note 135.

¹⁴⁰ Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-33, Pre-Trial Chamber II (12 April 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF [perma.cc/KD2F-Q97X].

¹⁴¹ Initially, international criminal law scholars expected the ICC to authorize the investigation. Scheffer, *supra* note 37, at 2; Laura Dickinson & Alex Whiting, *Expert Q&A: The International Criminal Court’s Probe and the US*, JUST SECURITY (Mar. 26, 2018), <https://www.justsecurity.org/54276/background-icc-afghanistan-probe-us-expert-qa/> [perma.cc/4VWX-FF7J]. Members of the human rights community were surprised and saddened to see the Court’s decision, as it effectively closes the door for families whose last recourse to justice was an ICC trial. Param-Preet Singh, *In Afghanistan, the ICC Abandons the Field*, HUM. RTS. WATCH (Apr. 23, 2019), <https://www.hrw.org/news/2019/04/23/afghanistan-icc-abandons-field> [perma.cc/S658-TGG8].

¹⁴² *Full Text of John Bolton’s Speech to the Federalist Society*, *supra* note 44.

¹⁴³ *Id.*

Whether the U.S. government follows through with these threats in the case of the Situation in Afghanistan will be a good indicator of its potential response to the proposed ICC investigation of the effects of the Zero Tolerance Policy.¹⁴⁴

As Bolton alluded, if the ICC moves forward with the Afghanistan investigation, the U.S. may use its status as a permanent member of the United Nations (UN) Security Council to defer the prosecutor's investigation.¹⁴⁵ The U.S. is one of five permanent members of the fifteen states that make up the UN Security Council.¹⁴⁶ Each member has one vote.¹⁴⁷ But, the five permanent members also have veto power to stop any resolution, as opposed to the remaining ten members that rotate every two years and do not have veto power.¹⁴⁸ Under Article 16 of the Rome Statute, the UN Security Council—mandated to hold primary responsibility for maintaining international peace and security—can vote to stop an investigation for up to twelve months, renewable at the end of each year.¹⁴⁹ If the U.S. were to use this tactic, they would have to convince the rest of the permanent members—China, France, Russia, and the United Kingdom—not to use their veto power to stop the resolution.¹⁵⁰ “Presumably, such a resolution would suspend the entire investigation, not just parts of it.”¹⁵¹ Thus, a permanent member may veto the resolution if they thought the Situation in Afghanistan was too important not to investigate, despite the U.S.'s involvement.¹⁵² Whether a state would risk its political and economic relationship with the U.S. for the sake of the ICC's investigation into Afghanistan is unlikely, however. Therefore, both the Situation in Afghanistan and the Zero Tolerance Policy would have to be prepared for a Security Council resolution that defers the investigation.

Another likely response to either possible ICC investigation into the U.S. is lack of cooperation with the Court. The U.S. is not a State Party

¹⁴⁴ The U.S. has already revoked the entry visa for the ICC's prosecutor, Fatou Bensouda. Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html> [perma.cc/H3V3-ANDV].

¹⁴⁵ *Id.*

¹⁴⁶ *Current Members*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/security-council/content/current-members> [perma.cc/4HR5-4T3B].

¹⁴⁷ U.N. Charter art. 27, ¶¶ 1–3, <http://www.un.org/en/sections/un-charter/chapter-v/index.html> [perma.cc/S6YP-WQLC].

¹⁴⁸ UNITED NATIONS SECURITY COUNCIL, *supra* note 146.

¹⁴⁹ Rome Statute of the International Criminal Court, *supra* note 24, art. 16.

¹⁵⁰ UNITED NATIONS SECURITY COUNCIL, *supra* note 146.

¹⁵¹ Dickinson & Whiting, *supra* note 141.

¹⁵² *Id.*

member to the Rome Statute, so it does not have to comply with the prosecutor's requests for information.¹⁵³ Likely, then, the U.S. would do everything in its power to hinder the ICC investigation by refusing to give information. In the Situation in Afghanistan on the other hand, Afghanistan is a State Party member to the ICC, so it would be legally obligated to provide information to the Court.¹⁵⁴ Nevertheless, Afghanistan could also refuse to give information—perhaps due to the sanctions the U.S. would likely impose if Afghanistan were forthcoming with information on the investigation. In that case, the Court would likely find a failure to comply and refer the matter to the Assembly of States Parties (ASP) of the ICC.¹⁵⁵ The ASP is composed of 123 representatives of states that have signed the Rome Statute and acts as the Court's legislative body.¹⁵⁶ Historically, the ASP has not been able to act collectively in order to enforce cooperation with the court.¹⁵⁷ Therefore, if Afghanistan refuses to cooperate—or other State Parties such as Mexico, Honduras, Guatemala, and El Salvador—the investigation may stall.

The U.S. could also stop any ICC investigation by exercising complementarity. The ICC will not investigate a situation that has already been addressed by national courts.¹⁵⁸ In the Situation in Afghanistan, all the U.S. has to do to stop the investigation is demonstrate that Washington is investigating the matter in good faith through its own judicial system.¹⁵⁹ The same principle applies to the potential investigation into the Zero Tolerance Policy. If the ICC determines all potential wrongdoers have been addressed, the Court will not investigate.

The U.S.'s probable alternatives to the Situation in Afghanistan show that the application of international criminal law is “contingent on geopolitics.”¹⁶⁰ The U.S. can halt or stall an ICC investigation by using its status as a world power to bully other states through threats of sanctions into refusing to cooperate with the ICC. This is a tactic the U.S. will likely use if the Zero Tolerance Policy makes it to the Court. Nonetheless, the U.S. always runs the risk that a state will refuse to cooperate. Former U.S.

¹⁵³ INT'L CRIM. CT., *supra* note 11.

¹⁵⁴ Rome Statute of the International Criminal Court, *supra* note 24, at art. 86.

¹⁵⁵ Dickinson, *supra* note 19.

¹⁵⁶ *Assembly of States Parties*, INT'L CRIM. CT., <https://www.icc-cpi.int/asp> [perma.cc/ER72-J8HZ].

¹⁵⁷ Dickinson, *supra* note 19.

¹⁵⁸ INT'L CRIM. CT., *supra* note 11 (“[The ICC] prosecutes cases only when States are unwilling or unable to do so genuinely.”).

¹⁵⁹ Scheffer, *supra* note 37, at 2.

¹⁶⁰ Ben Taub, *Does Anyone in Syria Fear International Law?*, NEW YORKER (Aug. 31, 2016), <https://www.newyorker.com/news/news-desk/does-anyone-in-syria-fear-international-law> [perma.cc/X4KU-PJSQ].

Ambassador for War Crimes David Scheffer wrote that it may be more politically savvy for the U.S. to provide “the greatest possible cooperation with the Prosecutor’s office immediately by relevant U.S. authorities” in order to show the ICC and the rest of the world that the U.S. has nothing to hide when it comes to atrocity crimes.¹⁶¹ Considering the attitude of the current Administration toward the ICC, however, cooperation is unlikely.

CONCLUSION

Despite the barriers to enforcement should the ICC prosecute top U.S. officials for the Zero Tolerance Policy, international criminal law still has a place in denouncing the family separation that occurred in 2018. The ICC’s drawn-out judicial process would make it unlikely that the world could forget the alleged crimes that occurred.¹⁶² This becomes increasingly important at a time when each news cycle seems to shed light on a new international scandal. Further, human rights allegations in the form of an ICC investigation puts international pressure on the U.S. government. Public shaming is a widely used tactic in international law. Despite the current administration’s apparent apathy toward its reputation, the U.S. is a world power; image matters. Image in the form of soft power leads to hard power summits and trade deals—or lack thereof.¹⁶³ Therefore, the international community’s perception of a country’s stance on human rights has wide-reaching impacts. Affirmed by the Situation in Afghanistan, the ICC has a role to play in denouncing top U.S. government officials.¹⁶⁴

This Comment demonstrates that the ICC can theoretically prosecute U.S. government officials for deportation as a crime against humanity. The deportation of asylum-seeking parents as a result of the U.S. government’s Zero Tolerance Policy was a criminal affront to human rights. It illegally caused the separation of asylum-seeking parents from their children across national borders. Due to the ICC’s recent decision that the Court has jurisdiction over officials in both the receiving and sending state in regard to

¹⁶¹ Scheffer, *supra* note 37, at 2.

¹⁶² Hans-Peter Kaul, *The ICC of the Future*, 45 *STUD. TRANSNAT’L LEGAL POL’Y* 99, 116 (2012).

¹⁶³ See Rosie Perper, *Individuals and Businesses are Distancing themselves from Saudi Arabia following the Disappearance of Journalist Jamal Khashoggi*, BUSINESS INSIDER (Oct. 18, 2018), <https://www.businessinsider.com/businesses-cutting-ties-with-saudi-arabia-over-jamal-khashoggi-disappearance-2018-10> [perma.cc/2FZM-WJX7]; see also Crane Stephen Landis, *Human Rights Violation in Japan: A Contemporary Survey*, 5 *J. INT’L L. & PRAC.* 53, 86 (1996).

¹⁶⁴ Scheffer, *supra* note 37, at 2.

the crime against humanity of deportation, the ICC can prosecute U.S. government officials.