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Back to Basics:

How Trump's Zero Tolerance Policy evidenced the Inefficiency of the Human Rights Framework, and the Urgency to re-center Human Dignity

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Summary

In 2018, images of migrant children held in cages and sleeping on concrete floors while being held in immigration detention in the United States shocked the world. Within the framework of the zero tolerance policy on immigration mandated by President Trump, thousands of families have been separated at the border. The trauma borne out of these separations was purposefully capitalized upon to serve as a deterrent for future migration into the United States. As a consequence of this practice, migrants suffered a range of human rights violations. Pressure exerted from the international community to halt the practice was in vain. The implementation of this policy proved once again that the international human rights framework is in practice inefficient at halting states from infringing upon human rights within their jurisdictions. Therefore, the zero tolerance policy and its inhumane implementation are used as lens through which to analyze the shortcomings of the international human rights framework. What followed is a realization that through various processes, such as the proliferation, fragmentation and inflation of the human rights language, its formalism and its politicization, the rights framework has been siphoned off from what is at its core: the respect for human dignity. Thus,re-focusing attention on human dignity and respect for humanity as grounding values of the human rights framework is proposed to mitigate some of the encountered obstacles. Human dignity as principle is already enshrined in all major international human rights conventions' preambles, yet as such it has no direct operability. It is theorized, that giving the principle of human dignity meaning by operationalizing it as soft legal mechanism in order to mainstream a human dignity approach at all institutional levels could add a protective layer for the individual. Mainstreaming a human dignity approach would as such entail considering if any given law if enacted would respect the fundamental value of respect for human dignity. In applying this to the zero tolerance policy under review, it becomes evident, that its enactment would not have passed a review based on compliance with most basic notions of humanity. Placing the human being at the center of the legal system more sharply uncovers how state-enacted laws often contravene minimum respect for human dignity. More than that, by introducing a human dignity approach at the very least a reflection on dignitarian implications of governmental actions would be mainstreamed, turning into a "lingua franca" guiding behavior in a variety of fields. The added value of a human dignity approach as complement to the international human rights framework thus comes to light.

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Abbreviations

ACLU	American Civil Liberties Union
APA	Administrative Procedure Act
CBP	U.S. Customs and Border Protection
CRC	Convention on the Rights of the Child
DHS	Department of Homeland and Security
DOJ	Department of Justice
FSA	Flores Settlement Agreement
HHS	Department of Health and Human Services
ICCPR	International Covenant on Civil and Political Rights
ICE	U.S. Immigration and Customs Enforcement
ICESCR	International Covenant on Economic, Social and Cultural Rights
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
INA	Immigration and Nationality Act
OIG	Office of Inspector General
ORR	Office for Refugee Resettlement
TVPRA	Trafficking Victims Protection Reauthorization Act
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	United Nations Convention Against Torture
US	United States
USCIS	United States Citizenship and Immigration Services

1. Introduction

1.1. Problem Identification

5,349. This is the known number of migrant children that have officially been forcibly separated from their parents under Trump's zero tolerance policy.[1] Yet, as high as this number is, it does not reflect reality, as many more children have been separated without records accounting for them. The actual number of children that have been separated from their parents and detained is unknown and may be much higher.

The institution of the zero tolerance policy for immigration enforcement mandated by Trump, which consisted in prosecuting migrants for illegal entry, forcibly separating parents entering with children, and the consequent detention of these children that through this process became unaccompanied[2], proves once again one particular point: Ultimately, the existing international human rights law framework is practically insufficient to prevent states' human rights abuses within their jurisdictions. The policy contravenes a number of international human rights conventions which the United States (hereinafter 'US') has ratified.[3] Further, the US is not a dictatorship, with an illegitimate government, that enacts draconian laws. It is a state that formally abides by the rule of law, that disposes of a checks and balances system, that has an elected government and that, at least officially, recognizes the authority of organizations stipulating international conventions such as the United Nations ('UN'). Yet, although the UN for instance proliferates with hard law conventions, that states indeed do ratify, in practice, this is still what happens: a rule of law state, that in many instances has castigated others for their feeble human rights records[4], routinely violates human rights, as mandated by its own law. This condition is particularly evidenced in a field like migration, where there are two fundamental competing interests: on one side, a state's prerogative to protect its own borders and state security, and on the other, its obligation to protect the human rights of all people within its

[1] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 20 <https://fas.org/sgp/crs/homesec/R45266.pdf>
[2] Ibid. 1-2
[3] For example, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)
Practices constituted inhumane and degrading treatment, as also stated in Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 499; as well as against mandated domestic minimum standards of treatments for immigrant children in detention as stated in Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544 (RJK) (C.D. Cal. Jan. 17, 1997)
[4] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 500-501

jurisdiction. There is an abundance of international legal rules governing this field, yet particular paradoxes to curtail states' obligation to respect migrants' fundamental rights have been created. [5] What further emerges, is that not only the migrants' situation, but also the national security concerns have been framed in human rights language, which in the past has been shown to be manipulated into a language of power.[6] The fragmentation and proliferation of human rights, the use of human rights language as a language of domination and power and the fact that human rights are mostly envisioned within a violations framework have resulted in a general disconnect from what is at the core of the human rights project: the notion of respect for human dignity and humanity. Thus a series of questions surface: What does the enactment of the zero tolerance policy tell us about the human rights framework's ability to realistically protect individuals in state parties' jurisdictions? Which shortcomings within the human rights framework does the implementation of the zero tolerance policy uncover? Could the principle of human dignity, as a complement to the human rights framework, mitigate these shortcomings if operationalized?

The US zero tolerance policy offers a chance to take these questions under detailed review. By analyzing the family separation practice, its human rights implications, what the other state organs and other states could or could not do to halt it, the limits of the human rights framework will come to light.

1.2. Purpose and Research Question

By looking at the inefficiency of the international human rights framework in practically curtailing the US' ability to mandate the zero tolerance policy, which resulted in mass scale human rights violations, this thesis aims at looking at the broader limits of the human rights framework as it works today. The purpose of this thesis is to analyze the obstacles within the human rights framework and its contemporary workings, and how these result in states having the ability to in practice deny

[5] This is true not only for the US, but also for many other countries that are prominent immigration destinations. Prime in its example are European states. The EU and the Council of Europe have legislated a plethora of common minimum standards and human rights norms, implemented in all European states, to ensure protection. However, for many ways these are hypocritical. For instance, one of these paradoxes is that there is a right to asylum for asylum seekers, yet this right is enforceable only once European territory has been reached. At the same time, there is no legal way for migrants to reach Europe. A recent case exemplifying this issue in a particularly harsh manner, concerns two child asylum seekers who allegedly have been removed from a Greek refugee camp by Greek authorities, placed back into boats and left adrift in the sea. These types of push-backs have the aim of sending a message to future would-be asylum seekers to not even try to reach territory in which they could exercise their rights. States and their sophisticated machineries are aware of the legal fiction this framework creates. See also Vincent Wood, 'Greek 'pushbacks' brought to European court after child refugees 'towed out to sea and abandoned in raft' *The Independent* (4 March 2021)

[6] Mustiga K, 'Do Undocumented Immigrants Pose a Threat to Our Safety?' (*Global Americans*, 13 April 2017) <https://theglobalamericans.org/2017/04/undocumented-immigrants-pose-threat-safety/>

individuals their internationally protected human rights, which happens particularly in the field of migration. The US example of its enactment of the zero tolerance policy will be used to exemplify how the issues within this framework make it possible for states to distance themselves from their human rights obligations.

If everything rests on political will, then the international project is null. This thesis, however, suggests that there are certain norms that can be brought to the table, albeit perhaps in a revised form. Despite recognizing that this is an idealistic proposition, the thesis seeks, additionally, to explore what a shift in perspective including placing the concept of human dignity at the center of the human rights framework would entail. It is in fact maintained that the principle for the respect for human dignity indeed is already enshrined within all major international human rights conventions. The hypothesis would be that returning to the notion of human dignity and turning it into an operative legal mechanism may overcome some of the different issues within the human rights language as it is envisioned and functions today. In particular, mainstreaming a human dignity culture at all levels of public authority[10], could help avoid the enactment of laws such as the zero tolerance policy. Especially in the moment in which a law is considered, and in the moment in which there is a conflict between rights e.g. the tension between the right to control one's borders for citizens' security and the right to life of migrants, applying such mechanism would discard *a priori* any law that fundamentally contravenes the notion of human dignity.

This thesis intends to suggest that the way in which the human rights framework is structured as of now suffers from particular limitations, even though its core idea is the correct one. Thus the thesis invites an alternative reading of human rights. What would happen if a legal mechanism based on the principle of respect for human dignity was to be mainstreamed? The notion of human dignity is at the basis of all human rights conventions since it is at the core of the philosophical foundation of human rights more generally. By looking at how human dignity has been defined, philosophically (particularly by Kant) and legally (by various legal instruments) this thesis explores the possibility of envisioning a legal mechanism predicated on the notion of human dignity. The potential of such a shift in perspective as well as related concerns will be addressed.

The aim of this thesis is thus twofold: on one hand it discusses the challenges within the human rights framework as it is envisioned and functions today, which will be evidenced through the case study of the US zero tolerance policy, on the other it explores reviving the notion of human dignity as operable legal mechanism as a viable complement to the human rights framework.

[10] Koskenniemi M, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 47, 51

The Research Question is thus framed as follows:
What are the limitations of the human rights framework as evidenced by Trump's zero tolerance policy and how can a shift in perspective centering the principle of human dignity offer a way of overcoming the rights framework's inefficiency?

This thesis will thus seek to answer the following sub-research questions:

- *To what extent was the zero tolerance policy in line with the US' obligations to respect individuals' rights under domestic and international law?*
- *What obstacles can be found within the international human rights law framework which contribute to its inefficiency and states' non-observance?*
- *Could the principle of respect for human dignity be institutionally mainstreamed as to challenge the zero tolerance policy and, in a broader sense, some of the obstacles within the human rights framework?*

1.3. Delimitations

Within the framework of this thesis, the main focus is limited to what the existence of a policy such as the zero tolerance executive order reveals about the inefficiency of the international human rights framework as a whole and how human dignity as an existing principle may be operationalized to mitigate some of its obstacles. Being thus a critical study within which the human rights frameworks' fallacies are analyzed through the lens of the family separation practice in the US, this thesis does not contain a comprehensive human rights analysis specifying all the various human rights violations the US perpetrated through the enactment of this policy. Equally, this thesis is not concerned with the potential (international) criminal liability of the particular officers or US agencies implementing the order. In reviewing the obstacles within the international human rights framework and how these contribute to states' infringement of rights in their jurisdictions, this thesis does not contain a comprehensive outline of the human rights framework's shortcomings, but rather focuses on the framework's fallacies which the implementation of the zero tolerance policy highlights. In considering human dignity as an existing norm within the framework as a mechanism that could be revived to shift the framework's focus to a human-centric approach, this thesis will not be concerned with how human dignity has been particularly defined in various jurisdictions. The attention is rather on human dignity as a grounding norm within the international human rights framework. Again, the intention is not to map comprehensively what added value human dignity as behavior-guiding

mechanism could have, but rather which shortcomings of the human rights framework as evidenced by the zero tolerance policy such human dignity approach could mitigate.

1.4. Method and Materials

The above research question has been answered through a variety of methodological approaches.

Firstly, the legal dogmatic method has been applied in order to analyze and interpret what the executive order, the zero tolerance policy, mandates for.[11] Thus the first sub-research question has been answered through a *de lege lata* approach, therefore by looking at what the executive order mandated and how it was in compliance or conflicted with domestic US law and international human rights law, which thus have also been reviewed through the legal dogmatic method. Consequently, a desk-based review of the legal framework surrounding the executive order has been conducted, including US constitutional and statutory law, US case law, as well as international human rights law such as international conventions and customary international law.

In order to answer the subsequent sub-question, a critical legal theoretical approach was applied as lens through which to analyze the zero tolerance policy. This was done by taking stock of the criticisms raised by leading international scholars against the human rights framework and using it as perspective through which the zero tolerance policy was scrutinized. This goes both ways: the zero tolerance policy in this sense also exemplified in practice some of the most prominent criticisms raised against the human rights framework. The materials used were primarily academic articles and books criticizing the human rights framework.

The final sub-question then addresses how human dignity could potentially be explored as a viable tool to be mainstreamed in order to challenge some of the obstacles of the human rights framework as evidenced by the case study of the zero tolerance policy. This question was thus approached with a *de lege ferenda* and legal-philosophical method. Indeed, within this subchapter the existing principle of human dignity, as enshrined in the major human rights conventions' preambles, was proposed to be operationalized in order to mainstream it procedurally as an approach at all institutional levels. It is proposed that this could contrast some of the human rights frameworks' shortcomings as exemplified. Human dignity as a philosophical notion was thus explored, examining its operability on the basis of the Kantian perspective of human dignity. A review of how human

[11] Smits JM, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' [2015] Maastricht University Maastricht European Private Law Institute 1, 5

dignity has been enshrined in a number of international human rights instruments has also been conducted. Within this chapter, the materials used include mostly international conventions, books andacademic articles on human dignity and its philosophical underpinnings.

1.5. Outline

Chapter 2 sketches the main features of the executive order which is the focus of this thesis, the zero tolerance policy, and how its enactment by the Trump administration has led to forcible family separation and consequent child detention. This chapter will focus first on a chronological account of the implementation of the policy, then will move on to the legal framework, domestic as well as international, within which the enactment of this policy stands. It will conclude by detailing domestic as well as international unsuccessful attempts to halt the practice.

Chapter 3 seeks to apply the major criticisms purported against the international human rights framework by leading critical legal scholars to the zero tolerance policy. The enactment of the zero tolerance policy in the US therefore serves as case study through which to analyze the shortcomings of the human rights framework. Within this chapter, the proliferation and inflation of the human rights language, its formalism and its politicization are identified as major traits contributing to its inefficiency particularly in relation to the US case study.

Chapter 4 explores human dignity as a normative value to be re-discovered and mainstreamed throughout legal systems to mitigate some of the human rights framework's shortcomings as evidenced in the chapter before through the zero tolerance policy. Thus, human dignity is recognized as backbone of the international human rights framework, with special regard to the Kantian philosophical interpretation of human dignity forming its basis. Further, human dignity as already existing principle within major human rights conventions' preambles is identified as being an employable norm to achieve a shift in perspective which re-centers the respect for humanity within the human rights project. A reliance on procedure as mode of application of human dignity as soft law mechanism details its operability. Finally, potential added values as well as limitations to a human dignity approach are explored.

The thesis concludes with a chapter detailing its main findings and incorporating the author's concluding remarks.

2. Chapter 2: The Zero Tolerance Policy

2.1. Background

A surge in immigration along the Southwestern US-Mexico border in recent years saw an increase of central American families attempting to cross into US territory, many of them with the intent to seek asylum.[12] When Trump was campaigning for the presidential election in 2016, he addressed this phenomenon by promising to keep out foreigners, which further became his signature campaign issue.[13] He particularly promised to stop the, as he derogatively called it, "catch and release" practice of migrants who crossed the Mexico border. [14] The practice allows immigrants detained by the Immigration Customs and Enforcement (ICE) agency to be released while going through immigration court proceedings.[15] The executive order mandating the zero tolerance policy, which calls for "100% prosecution" of all illegal entry cases and all attempted illegal entry cases, is an outgrowth of these vows made during the presidential campaign, and can thus not be perceived as an aberration but rather as a culmination.[16] While this policy is a definite departure from previous Department of Justice (DOJ) practice, it is to be noted that the administrations of the past 30 years have nurtured fertile ground for the creation of the zero tolerance policy.

The tension of being a fairly open country for immigration has gradually tilted in its opposite direction, with administrations beginning to place a harsh focus on border and immigration control. The US has a long history of periodically welcoming migrant laborers and periodically deporting them, as well as periodically enforcing measures to limit legal and illegal immigration.[17] Particularly, since the Clinton Administration, immigrants have started to be associated with the criminal sphere

[12] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 1 <https://fas.org/sgp/crs/homesec/R45266.pdf>
[13] Dwyer M, 'Factbox: How Trump Followed through on His Immigration Campaign Promises' *Reuters* (14 August 2020) <https://www.reuters.com/article/us-usa-immigration-election-factbox-idUSKCN25A18U>
[14] For the purposes of this thesis, the term "migrant" refers to individuals who cross the United States international border. This umbrella term also refers to potential asylum seekers, who have a right to additional protection under both U.S. law and international law. It is noteworthy that it is not possible to ascertain whether a migrant is entitled to the asylum-seeker status without an individualized assessment, or whether indeed he is an asylum-seeker without such an individualized assessment. The term "migrant" and "immigrant" used throughout this thesis thus refer to both individuals who have been recognized to be asylum seekers, individuals for whom this individualized assessment has not been carried out and thus their status is unknown (who constitute a majority), and to individuals who do not have the right to asylum.
[15] Dwyer M, 'Factbox: How Trump Followed through on His Immigration Campaign Promises' *Reuters* (14 August 2020) <https://www.reuters.com/article/us-usa-immigration-election-factbox-idUSKCN25A18U>
[16] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 437
[17] Ibid. 443

due to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[18] of 1996, which furthermore introduced the present immigration enforcement system.[19] Amongst other things, this reform brought about the criminalization of deported persons re-entering the US and expanded government incarceration of undocumented persons.[20] This, on the other hand, opened the gateway to the equation of immigrant with criminal, the result of which over time unlocked a nationalistic justification for the need for stricter immigration control at the national discourse level, culminating with President Trump's zero tolerance policy for immigration. Further, after 9/11, President Bush enacted the Homeland Security Act of 2002, which combined 22 federal agencies into one.[21] The government transferred all customs and immigration law enforcement responsibilities to its newly instituted Immigration Customs and Enforcement (ICE) agency in 2003, which at present is one of the governmental bodies which enforces the various immigration legislation and executive orders.[22] The agency's initial focus was the prevention of terrorism by targeting people supporting terrorist groups and criminal activities, yet this focus quite swiftly shifted to targeting undocumented immigrants.[23] President Obama then changed priorities back to concentrate immigration enforcement efforts on people posing threats to national security and border safety. Nonetheless, his administration introduced the method of deterrence against illegal immigration via the tool of detention. In relation to illegal entry, the government routinely sought to deter families to seek asylum in the US by detaining them together and deporting them as fast as possible.[24]

It is on these premises that the Trump Administration found fertile ground to create the executive order mandating the zero tolerance policy on immigration. However, it is to be once again emphasized, that the zero tolerance policy is a departure from the longstanding DOJ's practice of focusing prosecutorial resources on individuals illegally present on US territory and convicted of serious crimes or posing a real security threat to the nation.[25]

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[18] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546

[19] Raffington T, 'Ice Ice Baby: The De Facto Termination of Parental Rights by an Enforcement Agency' (2020) 58 Family Court Review 243, 246

[20] Ibid.

[21] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[22] Raffington T, 'Ice Ice Baby: The De Facto Termination of Parental Rights by an Enforcement Agency' (2020) 58 Family Court Review 243, 246

[23] Ibid.

[24] Lind D and Scott D, 'Flores Agreement: Trump's Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling' (*Vox*, 21 June 2018) <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration>

[25] Noting a 38% increase in illegal entry prosecutions in 2018, see U.S. Department of Justice Press Release, 'Justice Department Smashes Records for Violent Crime, Gun Crime, Illegal Immigration Prosecutions, Increases Drug and White Collar Prosecutions' (17 October 2018) https://www.justice.gov/opa/pr/justice-department-smashes- records-violent-crime-gun-crime-illegal-immigration-prosecutions

2.2. Main Features of the Zero Tolerance Policy

As soon as Trump took office, he took executive action to curtail immigration and deliver on his election promises.[26] On 25 January 2017 he signed Executive Order 13767, which amongst other things mandated the construction of a wall at the southern border, expedited immigration processing and, took further actions to increase border and immigration enforcement.[27] On 6 April 2018, Trump ordered an end to the "catch and release" practice.[28] The same day Attorney General Jeff Sessions announced the "zero tolerance policy", also referred to as a policy of "100% prosecution", meaning that any illegal entry or attempted illegal entry cases on US territory would be prosecuted by the DOJ.[29] Once adults were referred by the Department of Homeland and Security (DHS) to the DOJ for prosecution, they could no longer be detained with their accompanying children since they were to be detained in adult facilities, thus resulting in family separation.[30] Three different agencies were involved in implementing the zero tolerance policy and its consequent family separation: the DOJ, the DHS, and the Department of Health and Human Services (HHS).[31] The Department of Justice was involved since the family separations took place in the framework of the implementation of the zero tolerance policy, which directs to prosecute any illegal entry or attempted illegal entry cases, mandated by the Attorney General, head of the DOJ. U.S. Attorneys in each respective federal district had thus to implement these prosecutorial guidelines. The DHS was involved in as much as it is the governmental body housing the agencies which in practice implemented the policy: the Customs and Border Protection (CBP) agency apprehends migrants, and the ICE agency detains migrants and

[26] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 439

[27] Exec. Order No. 13767, 82 Fed. Reg. 8,793 (25 January 2017)

[28] White House, '*Presidential Memorandum for the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services and the Attorney General on ending "Catch and Release" at the Border'* (6 April 2018), https://www.whitehouse.gov/presidential-actions/presidential- memorandum-secretary-state-secretary-defense-attorney-general-secretary- health-human-services-secretary-homeland-security/

[29] U.S. Department of Justice ' *Memorandum for Federal Prosecutors Along the Southwest Border'*, (6 April 2018) https://www.justice.gov/opa/press- release/file/1049751/download [https://perma.cc/4BDZ-LXM2]; U.S. Department of Justice Press Release, 'Attorney General Announces Zero Tolerance Policy for Criminal Illegal Entry' (6 April 2018), https://www.justice.gov/opa/pr/attorney-general- announces-zero-tolerance-policy-criminal-illegal-entry

[30] 'Family Separation and Detention' (*American Bar Association*) <https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/immigration/familyseparation/> ("Since children cannot be held in criminal detention, the children are designated as 'unaccompanied alien children' and placed in the custody of the Department of Health and Human Services' Office of Refugee Resettlement (ORR). ORR places the children in shelters until they are released."); 'Why Are Families Being Separated at the Border? An Explainer' (*Bipartisan Policy Center*, 13 June 2018) <https://bipartisanpolicy.org/blog/why-are-families-being-separated-at-the-border-an-explainer/> ("When adults are detained and prosecuted in the criminal justice system for immigration offenses, their children cannot, by law, be housed with them in criminal jails, so the family unit is separated.")

[31] Cordero CF, 'Legal Considerations for Separating Families at the Border' (*Lawfare*, 19 June 2018) <https://www.lawfareblog.com/legal-considerations-separating-families-border>

adjudicates immigration status.[32] Once the children had been separated from their parents, they were transferred to HHS, which manages temporary shelter and foster care.[33]

In order to carry out the policy, the Secretary for Homeland Security sent an implementation memorandum to the senior DHS, including the acting general counsel and the acting officials in charge of U.S. CBP, U.S. ICE and U.S. Citizenship and Immigration Services (USCIS). Amongst other things, the memo stated that "the Department would no longer exempt classes or categories of removable aliens from potential enforcement".[34]

After the zero tolerance policy had been announced, the course of action involved the following. The Attorney General ordered all U.S. attorneys operating in the border region to employ the 100% prosecution guideline, meaning that all individuals who illegally crossed or attempted to illegally cross the border were to be transferred by the DHS to DOJ for prosecution.[35] As stated, the policy made no exceptions for asylum seekers or family units.[36] Thus, if a family unit was apprehended because it was attempting to illegally cross or was illegally crossing, the CBP, as agency acting under the DHS, would refer the adults for prosecution to the DOJ. However, since children cannot be placed in adult detention facilities, the children accompanying the adults would be separated, therefore becoming unaccompanied under the Trafficking Victims Protection Reauthorization Act (TVPRA)[37], and placed in the care of Office for Refugee Resettlement (ORR), operating under the HHS.[38] In this way, the zero tolerance policy resulted in family separation, as a consequence of the policy itself. The policy in itself does not mandate specifically for family separation.[39] The DHS publicly stated, in fact, that "DHS does not have a blanket policy of separating families at the border."[40] It is however questionable whether this distinction of overtly mandating for family separation within the policy, or it just being a logical consequence of the policy is of any value in this instance, since in practice, the very enactment of the policy always resulted in family separation

[32] Ibid.
[33] Ibid.
[34] '*Memorandum from Secretary John Kelly to Senior Department of Homeland Security (DHS) Officials'* (20 February 2017), https://www.dhs.gov/sites/ default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to- Serve-the-National-Interest.pdf
[35] U.S. Department of Justice Press Release, 'Attorney General Announces Zero Tolerance Policy for Criminal Illegal Entry' (6 April 2018), https://www.justice.gov/opa/pr/attorney-general- announces-zero-tolerance-policy-criminal-illegal-entry
[36] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 8 <https://fas.org/sgp/crs/homesec/R45266.pdf>
[37] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008)
[38] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 8-9 <https://fas.org/sgp/crs/homesec/R45266.pdf>
[39] Ibid. 2
[40] U.S. Depart of Homeland Security, 'Myth vs. Fact: DHS Zero Tolerance Policy' (18 June 2018), https://www.dhs.gov/news/2018/06/18/ myth-vs-fact-dhs-zero-tolerance-policy

and child detention for migrating family units. The correlation between this policy and its outright consequence can be noted also in the media's and lawyers' synonymous use of the term "family separation policy" to intend the "zero tolerance policy". The DHS's full awareness of this consequence is further evidenced by a DHS Office of Inspector General (OIG) report, in which it was stated that DHS expected to separate at least 26,000 children from the time the policy began.[41] In fact, public statements from various senior officials involved in the implementation of the policy indicate, that the deterrence factor borne out of the family separations, resulting from the 100% prosecution of the zero tolerance policy, was indeed at the core of the rationale for the creation of the policy.[42]

Furthermore, the policy creates a bureaucratic fiction since the children arriving into US territory and who have been separated were consequently classified as "unaccompanied minors", when they in fact entered the US with their adult caretakers.[43]

After massive public outcry over the family separations,[44] Trump issued Executive Order 13841[45], which directed to end the "family separation policy", the same policy DHS leadership two days prior denied existed.[46] It ordered the Secretary of the DHS to "maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings".[47] In order to detain families together, the next day the U.S. AG Sessions requested the US District Court for the Central District of California, which oversees the Flores Settlement Agreement, to modify the agreement in

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[41] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 8 <https://fas.org/sgp/crs/homesec/R45266.pdf>

[42] 'The Situation Room (@CNNSitRoom)' (*Twitter*, 6 March 2017) <https://twitter.com/CNNSitRoom/status/838877868453064704> Wolf Blitzer asked, "Are you considering a new initiative that would separate children from their parents if they try to enter the United States illegally?" Kelly answered, "I would do almost anything to deter the people from Central America [from] getting on this very, very dangerous network [that facilitates movement through Mexico to the United States]..... *Yes, I am considering in order to deter..... exactly that, they will be well cared for as we deal with their parents.*" (Italics added). *See, also:* Shepardson D, 'Trump Says Family Separations Deter Illegal Immigration' *Reuters* (14 October 2018) <https://www.reuters.com/article/us-%20usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-%20idUSKCN1MO00C>

Bump P, 'Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent' *Washington Post* (19 June 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/>

(It is herein noted that numerous officials, including former Attorney General Jeff Sessions and Steven Wagner, Acting Assistant Secretary for Children and Families, Department of Health and Human Services, said that the policy was to act as a deterrent);

[43] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 441

[44] Edelman A, 'Trump Signs Order Stopping His Policy of Separating Families at Border' *NBC News* (20 June 2018) <https://www.nbcnews.com/politics/immigration/trump-says-he-ll-sign-order-stopping-separation-families-border-n885061>

[45] Exec. Order No. 13841, 83 Fed. Reg. 29435 (20 June 2018)

[46] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 441

[47] Exec. Order No. 13841, 83 Fed. Reg. 29435 (20 June 2018)

order to detain families together.[48] In brief, the Flores Agreement sets out minimum standards for the detention of children and more specifically prohibits indefinite child detention by limiting child detention to a maximum of 20 days.[49] This request was thus targeted at extending that 20-day child detention limit.[50] Federal courts have since then halted DHS and HHS finalized regulations that would have allowed for longer than 20-day detention of migrant children as inconsistent with the Flores Settlement Agreement, thereby upholding the Agreement's validity.[51]

The American Civil Liberties Union (ACLU) subsequently sued the government in the Southern District of California to halt the practice of family separation. On 26 June 2018 federal district Judge Dana Sabraw ordered the reunification of previously separated families. In the preliminary injunction, Sabraw stated:

> "Measures were not in place to provide for communication between governmental agencies responsible for detaining parents and those responsible for housing children, or to provide for ready communication between separated parents and children. There was no reunification plan in place and families have been separated for months."[52]

Ongoing litigation evidenced that the practice actually continued and migrant children remained detained, further disclosing a lack of processes to reunite families.[53] Notwithstanding the Executive Order officially halting the practice and the preliminary injunction ordering family reunification within certain deadlines, reports proved that family separation was still ongoing and reunification efforts were not in line with court mandated deadlines.[54] On 7 February 2019, a representative of HHS's OIG also testified before Congress that, although on a lower scale than during the period of the zero tolerance policy in May-June 2018, DHS was continuing to separate children from their parents.[55] On 14 February 2019 the Texas Civil Rights Project issued a report containing interviews with 272 adults who had experienced family separation after the enactment of the

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[48] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 11 <https://fas.org/sgp/crs/homesec/R45266.pdf>

[49] Flores v. Sessions, 862 F.3d 863 (9th Cir. 2017).

[50] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 6 <https://fas.org/sgp/crs/homesec/R45266.pdf>

[51] Ibid. 17

[52] *See* Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (order granting plaintiffs' motion for classwide preliminary injunction) at 1136-1137

[53] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 442

[54] 'CNN Newsroom (@CNNNewsroom)' (*Twitter*, 22 August 2019) <https://twitter.com/CNNnewsroom/status/1164563704781967360>
("Family separations are 'still going on,' said Lee Gelernt, ACLU lawyer, adding that he is going back to the San Diego court on September 13, hoping that the judge 'will put a halt to it.'").

[55] U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Testimony of Ann Maxwell, Office of Inspector General, HHS Office of Refugee Resettlement, 'Examining the Failures of the Trump Administration's Inhumane Family Separation' (116th Congress, 1st Session, 7 February 2019)

Executive Order formally halting it in June 2018.[56] In July 2019, the ACLU issued a memorandum to the court stating that migrant families continued to be separated at the border even after the preliminary injunction issued by Judge Sabraw, which prohibited the practice.[57] It requested Judge Sabraw take action to prevent family separation on the grounds that parents were charged with minor violations (such as traffic citations) and enforce a preliminary injunction restricting separations to cases where there was a real risk that the parents abused or neglected the child.[58]

By summer 2019, the public's attention shifted to the appalling conditions under which migrant children were being held in detention facilities.[59] Findings showed children detained without adequate access to food, blankets, toothbrushes and sleeping on concrete floors.[60] This on the other hand resulted in renewed attention from members of Congress, press reports, and congressional hearings.[61] Further, children were not only held in appalling conditions, they were also being mistreated by the staff. Most examples of alleged mistreatment involve DHS, including ICE and CBP officers, or HHS staff in their interaction with the detained migrant children.[62] The stories include harrowing accounts of a mother being separated from her child while breastfeeding, reports of children left alone in a federal housing facility, as well as a major increase in child sexual harassment complaints during the enactment of the policy.[63]

In November 2019, the DHS office of the Inspector General disclosed a major issue with CBP's information technology, referring to the agency's inability to track separated migrant families

[56] Peña L and Olivares EC, 'The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border' (Texas Civil Rights Project 2019) <https://texascivilrightsproject.org/wp-content/uploads/2019/02/FamilySeparations-Report-Final.pdf>

[57] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 17 <https://fas.org/sgp/crs/homesec/R45266.pdf>; Sacchetti M, 'ACLU: U.S. Has Taken Nearly 1,000 Child Migrants from Their Parents since Judge Ordered Stop to Border Separations' *Washington Post* (30 July 2019) <https://www.washingtonpost.com/immigration/aclu-us-has-taken-nearly-1000-child-migrants-from-their-parents-since-judge-ordered-stop-to-border-separations/2019/07/30/bde452d8-b2d5-11e9-8949-5f36ff92706e_story.html>; See also, Memorandum in Support of Motion to Enforce Preliminary Injunction, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 439-1 (S.D. Cal. July 30, 2019)

[58] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 17 <https://fas.org/sgp/crs/homesec/R45266.pdf>

[59] Dickerson C, '"There Is a Stench": Soiled Clothes and No Baths for Migrant Children at a Texas Center' *New York Times* (21 June 2019) <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>

[60] Ibid.; Ainsley J and Soboroff J, 'Migrant Children Stuck at Border Stations, Sleeping on Concrete, Because of HHS Overcrowding' *NBC News* (4 June 2019) <https://www.nbcnews.com/politics/immigration/migrant-children-stuck-border-stations-sleeping-concrete-because-hhs-overcrowding-n1013341>

[61] Dickerson C, '"There Is a Stench": Soiled Clothes and No Baths for Migrant Children at a Texas Center' *New York Times* (21 June 2019) <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>

[62] Cordero CF, 'Legal Considerations for Separating Families at the Border' (*Lawfare*, 19 June 2018) <https://www.lawfareblog.com/legal-considerations-separating-families-border>

[63] Ibid.; '"Thousands of US Child Migrants Sexually Abused"' *BBC* (26 February 2019) <https://www.bbc.com/news/world-us-canada-47377889>; Haag M, 'Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says' *New York Times* (27 February 2019) <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>

during the enactment of the zero tolerance policy.[64] It was further disclosed that they had been aware of this defect since November 2017, when a pilot program imitated the zero tolerance policy in El Paso, Texas.[65] CBP's and ICE's IT malfunction to this day results in the agency's inability to match children with their, sometimes already deported, parents. A Steering Committee (comprised of ACLU attorneys, members of various immigrant advocacy groups and private practice lawyers) that was engaging efforts in locating parents has as of December 2020 not been able to locate the parents of 628 children.[66] Further, on-ground searches in countries of origin for parents have been hampered by the Covid-19 pandemic.[67]

To reckon the total number of migrant children that have been separated as a result of Trump's zero tolerance policy and its pilot entails counting the children that have been separated over three periods of time: 1) during the 2017 pilot program, 2) during the enactment of the policy over two months in 2018, and 3) during the period after the policy had been officially halted in June 2018.[68] Data shows that within these three periods up until 30 November 2020, 5,349 children have been separated.[69]

Newly elected President Biden signed a number of executive orders aimed at undoing Trump's immigration policies.[70] One of these establishes a taskforce to reunite families separated under the zero tolerance policy.[71]

2.3. Domestic and International Legal Framework

In order to grasp how the zero tolerance policy could have been made law, an analysis of the legal framework within which it was enacted is due. To start, the executive's authority to design and implement immigration and border security measures is explored. This authority is curtailed by the federal government's obligations to respect the constitutional rights of individuals on U.S. soil when

[64] U.S. Department of Homeland Security, Office of the Inspector General, 'DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families', OIG-20-06 (25 November 2019)
[65] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 17 <https://fas.org/sgp/crs/homesec/R45266.pdf>
[66] Alvarez P, 'Parents of 628 Migrant Children Separated at Border Still Have Not Been Found, Court Filing Says' *CNN* (3 December 2020) <https://edition.cnn.com/2020/12/02/politics/family-separation-us-border-children/index.html>; See also, Joint Status Report, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 560 (S.D. Cal. December 2, 2020).
[67] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 19 <https://fas.org/sgp/crs/homesec/R45266.pdf>
[68] Ibid.
[69] Ibid. 20
[70] Exec. Order No. 14010, 86 Fed. Reg. 8,267 (2 February 2021); Exec. Order No. 14011, 86 Fed. Reg. 8,273 (2 February 2021) Exec. Order No. 14012, 86 Fed. Reg. 8,277 (2 February 2021)
[71] Exec. Order No. 14011, 86 Fed. Reg. 8,273 (2 February 2021)

enforcing immigration policies. Implementing policies which are not in line with the rights set forth in the Constitution renders them unconstitutional and thus illegal under US law. It is then up to the other branches of government, legislative and judicial, to step in in order to halt unlawful policies. To the extent that the separation of powers works and is efficient, Congress and federal courts are in theory able to discontinue laws and policies that are unconstitutional. At the same time, the U.S. is also bound by international law and international human rights law. When domestic efforts to halt certain laws that contravene fundamental rights fail at the domestic level, the enforcement and enforceability of international law may be an alternative avenue to halt laws contravening human rights.

2.3.1. Domestic Legal Framework

2.3.1.1. Constitutional Mandate

All sovereign states have a legitimate interest in governing their borders and regulating entry into their territories. Particularly, there is a legitimate interest of states to deter illegal entry of aliens into their territories to protect the nation's and citizens' public safety.[72]

The federal government's authority to regulate immigration and implement border security is established in the Constitution.[73] Congress has the authority to legislate on immigration laws under Article I, Section 8 of the Constitution, the Executive then enforces immigration law under Article II and maintains national security as Commander in Chief.[74] When the Immigration and Nationality Act (INA), the comprehensive federal law administering immigration authorities, agencies and procedures, was enacted in 2018, it accorded the executive specific authority to regulate immigration and border security.[75] Federal agents enforcing immigration laws may stop, interrogate, arrest and pursue proceedings against immigrants who are known or suspected to be illegally present on US territory.[76] Aliens who have entered the US unlawfully may be removed if appropriate proceedings

[72] For instance Art. 33 (2) of the 1951 Refugee Convention states that the non-refoulement obligation of states towards refugees can be limited by considerations of national security, see Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Art. 33(2)
[73] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 444
[74] U.S. Const. art. I, §8; U.S. Const. art. II
[75] Immigration and Nationality Act, 8 U.S.C. §§ 1101–1107 (2018).
[76] 8 U.S.C. § 1357 (2018) (powers of immigration officers and staff), 8 C.F.R. § 287 (2002) (exercise of power by immigration officers).

are followed, save certain exceptions.[77] Since 2003, the DHS has split into the CBP, USCIS and ICE, which is responsible for immigration and border enforcement.[78]

Executives' justification for enacting harsher immigration measures usually rests on national security concerns. This type of justification is rooted in the executive's mandate of having the constitutional responsibility to protect the state's national security, which is also reflected in certain specific powers it holds to implement national security measures.[79] This is why, to some extent, the executive is relatively free from federal courts' scrutiny when exercising this responsibility through the enactment of laws and policies.[80] When it becomes evident that the executive is abusing that justification, courts may start looking into whether there are reasonable security concerns mandating the enactment of measures based on those grounds.[81] On the other hand, such scrutiny could have consequences on the executives' ability to enact measures in the case of a real national security emergency in the future.[82] To further clarify, neither the 2018 nor the 2019 Worldwide Threat Briefing presented by the Director of National Intelligence to Congress classified migration from Central America as one of the state's most pressing national security threats.[83]

The Supreme Court has expressed that competing societal interests and the individual rights of the subjects affected by the enforcement of border security measures must be taken into account when implementing immigration laws.[84] Despite the wide discretion the federal government has in enforcing border security, as evidenced for instance by the current Fourth Amendment doctrine which allows for warrantless searches in the context of border protection, there are indeed constitutional

[77] 8 U.S.C. § 1227 (2018) (deportable aliens).
[78] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 445
[79] Ibid. 448
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Office of the Director of National Intelligence, Statement of Daniel R. Coats 'Worldwide Threat Assessment of the U.S. Intelligence Community' (13 February 2018), https://www.dni.gov/index.php/newsroom/congressional-testimonies/item/1845-statement-for-the-record-worldwide-threat-assessment-of-the-us-intelligence-community (identifying Central American migration as a trend but not considering it a pressing national security threat to the U.S.); Office of the Director of National Intelligence, Statement of Daniel R. Coats 'Worldwide Threat Assessment of the U.S. Intelligence Community' (29 January 2019) https://www.odni.gov/index.php/newsroom/congressional-testimonies/item/1947-statement-for-the-record-worldwide-threat-assessment-of-the-us-intelligence-community
(identifying Central American migration as a continued trend affecting the U.S., but not identifying it a national security threat to the U.S.)
[84]United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (for instance it is stated herein that there are "limits on search and seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.").

limits to what the government can do in the name of national security and border protection.[85] At this stage, a discussion on how domestic and, in particular, how constitutional law curtails the U.S.' authority to enforce immigration laws infringing upon individuals' rights, specifically migrant children's rights, is due.

2.3.1.2. Domestic Framework for the Protection of Rights and Welfare of Migrant Children

The domestic framework for the protection of rights of migrant children affected by immigration enforcement is constituted mainly by the Flores Settlement Agreement (FSA), the Trafficking Victims Protection Reauthorization Act (TVPRA) and the US Constitution.[86]

As previously stated, the FSA sets out guidelines for the detention, treatment and release of alien children, both accompanied and unaccompanied.[87] It has been judicially reinterpreted in 2015, which resulted in the adoption of a 20-day immigration detention limit for migrant children.[88]

The TVPRA mandates that all unaccompanied children be screened for trafficking.[89] It further prescribes that all unaccompanied minors, except those coming from Mexico and Canada[90], be transferred to the custody of the ORR and then be "promptly placed in the least restrictive setting that is in the best interest of the child".

At this point, it is widely known that children have been separated from their parents, and consequently have been misleadingly registered as unaccompanied, and held in detention for periods exceeding the 20-day limit. Newly obtained data substantiates that almost 1000 migrant children have been detained for more than a year since 2014.[91] It has also been asserted by child welfare experts and pediatricians, that immigration detention and the stress of family separation has long-lasting negative effects on the children's health, to the point of resulting in hinderances of a child's normal developmental process.[92] There is thus a credible assumption that the federal government's treatment

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[85] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 446
[86] Ibid. 476
[87] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 5 <https://fas.org/sgp/crs/homesec/R45266.pdf>
[88] Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544 (RJK) (C.D. Cal. Jan. 17, 1997)
[89] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) §235
[90] For Unaccompanied Alien Children from Mexico or Canada, see 'Unaccompanied Alien Children: An Overview' (Congressional Research Service 2019) <https://fas.org/sgp/crs/homesec/R43599.pdf>
[91] Bogado A and Lewis M, 'US Detained Migrant Children for Far Longer than Previously Known' (*Reveal*, 29 October 2020) <https://revealnews.org/article/thousands-migrant-children-languished-in-us-detention/>
[92] Wood LCN, 'Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children' [2018] BMJ Paediatrics Open 3 <https://pubmed.ncbi.nlm.nih.gov/30306145/>; American Academy of Pediatrics, 'Statement of the American

of migrant children was on no account in the child's best interest. This assumption is bolstered by the fact that family separation as a punitive method was at the heart of the zero tolerance policy, since its goal was to utilize the resulting trauma as a deterrent for other migrants planning on entering the US unlawfully.[93]

Further, the Constitution protects all individuals present on US territory, which includes non-citizens.[94] In the case of the protection of the rights of aliens at and near the border, a wide range of rights under the Constitution apply, such as the First, Fourth, Fifth, Sixth and Eighteenth Amendment.[95] Yet in the case of family separations taking place under the zero tolerance policy, the Fifth Amendment's right to family integrity as part of the guarantee of liberty within the Due Process Clause is of particular importance.[96] This was also the right on which Judge Sabraw, preliminarily enjoining the family separation policy, focused on mostly.[97] While parents do not have an absolute right to their children not being taken away from them, the state nevertheless needs to meet a high standard, like evidence of abuse, to terminate parental rights and intervene as *parens patriae*.[98] Particularly, former Secretary of Homeland Security Nielsen has equated the situation of family separation for the purposes of immigration enforcement to what happens when children are separated from parents because of arrest, conviction and detention in the framework of the criminal justice system.[99] Yet the substantial difference is that these parents would be provided due process, such as by way of a judge's issuance of probable cause that warrants the arrest, or following a judgement by a judge or jury, which is not the case of family separation in the framework of immigration enforcement.[100]

Academy of Pediatrics to U.S. Secretary of Homeland Security Kirstjen M. Nielsen' (1 March 2018) <https://downloads.aap.org/DOFA/AAP%20Letter%20to%20DHS%20Secretary%2003-01-18.pdf>

[93] ABA Commission on Immigration, 'Background on Separation of Families and Prosecution of Migrants at the Southwest Border' (*American Bar Association*, 31 July 2018) <https://www.americanbar.org/groups/public_interest/immigration/resources/memo-on-family-separation/>

[94] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 456

[95] Ibid. 457

[96] Ibid.

[97] Ms. L. v. U.S. Immigration & Customs Enf't, 302 F. Supp. 3d 1149, 1162 (S.D. Cal. 2018) (citing the "liberty interest" of parents' rights to "care, custody and control" of their children);

[98] Santosky, 455 U.S. at 748 (1982) (the state has to prove "clear and convincing evidence" before it can sever parental rights). Also, the state does have limits to its power to step in and take decisions instead of the parent, see In re Gault, 387 U.S. 1, 44 (1967)

[99] White House Daily Press Briefing, Remarks of Kirstjen Nielsen (18 June 2018), https://www.c-span.org/video/?447252-1/homeland-security-secretary- nielsen-calls-congress-fix-immigration-policy ("If an American were to commit a crime anywhere in the United States, they would go to jail and they would be separated from their family. This is not a controversial idea.").

[100] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 453

Moreover, the practice also violates the migrant child's rights to liberty and to due process.[101] Before being separated, migrant children and families are entitled to due process of law. They cannot arbitrarily be deprived of liberty.[102]

More generally, in applying a children's rights framework to the family separation resulting out of the zero-tolerance policy, what becomes evident is that in no case shall any child be detained separated from their parent without an individualized assessment that this is in the child's best interest. No such individualized assessments have taken place in the case of the family separation resulting out of the policy.[103]

Further, the punitive nature of family separation may underscore its unconstitutionality.[104] In the case of *Wong Wing v. United States*, it was decided that the government may not inflict a harsh punishment on aliens in relation to their removal proceedings.[105] Separation of a child from her parent constitutes "irreparable harm"[106] and would fall under the punitive conduct proscribed by *Wong Wing*.[107]

2.3.2. International Legal Framework

Not only does the US have to comply with the domestic framework establishing standards for protection for migrant children, it also has to respect international law which it has ratified on this matter. The US thus has to follow applicable provisions stemming from international treaties it has ratified and customary international law. The enforceability of international law depends on a series of factors, such as the source of the obligation, the availability of binding dispute resolution mechanisms and the willingness of states to condemn and respond to violations of international law.[108] A certain schizophrenic tension can be detected in states' attitudes towards international law. Especially in the US there are constant debates on how much influence international law really has on state practice, but at the same time international law is often invoked by the US to justify its own behavior and to criticize – and try to mould – other states' conduct.[109] Also, Cordero, Feldman and

[101] In re Gault, 387 U.S. 1, 4 (1967) para 28
(reminding that juveniles have a right to due process)
[102] Dailey AC, 'Children's Constitutional Rights' (2011) 96 Minnesota Law Review 2099, 2101
[103] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 456
[104] The government may not detain aliens to be deported indefinitely, see Zadvydas, 533 U.S. para 692
[105] Wong Wing v. United States, 163 U.S. para 228,
[106] Leiva Perez v. Holder, 640 F.3d para 962, 969–70 (9th Cir. 2011); Washington v. Trump, 847 F.3d para 1151, 1169 (9th Cir. 2017).
[107] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 459
[108] Ibid. 477
[109] For instance: Hathaway O and Shapiro SJ, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 Yale Law Journal

Keitner argue that international law's "lower profile" in US policy and legal considerations could be due to a lack of familiarity with international law and issues relating to the direct enforceability of international law in US courts.[110]

Nevertheless, these debates are void in the face of the commitments the US has taken when signing and ratifying relevant international treaties: the US is legally bound to comply with these applicable provisions. These are binding notwithstanding their enforceability in US courts.[111]

Despite these positions, in the case of migrant children in the framework of the zero-tolerance policy, lawyers took to international law as an additional source of protection and government lawyers analyze compliance with international law when advising administrations on policies. This latter fact however raises the question whether the Trump Administration was indeed considering international law as a valid source of law given the policies' human rights implications. In fact, multiple international legal standards are engaged by the policy.[112] International human rights concerns stem from the forced separations, the lack of adequate records of parents and children parentage resulting in reducing the prospects for reunification, the conditions in which the separated children were held, the length of detention and the punitive nature of family separations.[113]

Since international human rights law governs how states treat individuals within their jurisdiction, which does not depend on citizenship, the migrants finding themselves on US territory are protected by US international human rights obligations.[114]

Consequently, an overview of the US international human rights obligations will be given. These obligations can be subdivided into two different categories:

1) Migrant children's rights and family unity
2) Immigration detention and the right to be free from cruel, inhumane and degrading treatment.

2.3.2.1. Migrant Children's Rights and the Protection of Family Unity

While the US is the only country in the world which failed to ratify the Convention on the Rights on the Child (CRC)[115], it is still bound by international standards regarding the special

[110] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 479
[111] Justice Gray stated "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900).
[112] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 480
[113] Ibid. 481
[114] Ibid. 484
[115] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

protection afforded to children stemming from customary international law, such as the prohibition on torture and the principle of the child's best interest.[116] Further, children are protected by international treaties to which the US is a party which are not child-specific. Under this category, children are protected for instance under the International Covenant on Civil and Political Rights (ICCPR).[117] The special protection afforded to children is reflected in Article 24 of the ICCPR, which states "each child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, the right to such measures of protection as are required by his status as a minor."[118] The normative standards of protection afforded to children do not alter if they acquire the status of migrant child.[119] The particular situation of the separated children within the framework of the implementation of the zero-tolerance policy moreover requires particular attention since the state, in intentionally separating children from their parents, thus rendering originally accompanied children unaccompanied, incurs further obligations for their protection and care.[120]

Family separation further infringes upon parents' and children's right to family life.[121] When senators opposed the ratification of the CRC, US Senators underlined that "the primary safeguard for the well-being of the child is the family".[122] This is ironic, since at the same time the US government through the family separation took that "primary safeguard" away from the migrant child, leaving it further without an international legal claim for its protection as a child under the internationally ratified CRC. On the other hand, the ICCPR does provide parents and children with an international legal hard law claim to the right to family life. Article 23 in fact states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State"[123], further providing that "no one shall be subjected to arbitrary or unlawful interference with his […] family".[124] As stated above, the government has justified the family separation policy also on the basis of an

[116] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 485
[117] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[118] Ibid. art 24
[119] U.N. High Commissioner for Human Rights, 'Study of the Office of the United Nations High Commissioner for Human Rights on Challenges and Best Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration' (5 July 2010) U.N. Doc. A/HRC/15/29 5
Wherein was stated by the U.N. High Commissioner for Human Rights:
"The principal normative standards of child protection are equally applicable to migrant children and children implicated in the process of migration. Accordingly, international law provides that all such children be seen and protected as children first and foremost, rather than letting their migratory or other status, or that of their parents, dictate their access to protection and assistance."
[120] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 487
[121] Ibid. 497
[122] S. Res. 99, 112th Cong. (2012).
[123] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 23
[124] Ibid. art 17(1)

existing practice of separating children from parents who end up in detention due to a law enforcement action. Again, this argument is rebuttable on the basis of the lack of an individualized assessment which leads to said detention, thus violating the parents' right to due process. The procedural right to due process is further also protected under international law by the ICCPR.[125]

In sum, the decision to close borders, to prosecute all illegal entries, to detain and consequently separate children from parents on the basis of such prosecutions, without adequate track records and contact possibilities between the children and parents, and to deport parents without their children, displays a widespread disrespect for the international legal principle of the protection of families as such.[126]

2.3.2.2. Immigration Detention and the Right to be Free from Cruel, Inhuman and Degrading Treatment

The US is further party to the 1967 Protocol to the Refugee Convention.[127] Article 31 provides that no contracting state can institute penalties based on illegal entry or presence on refugees.[128] Further it states that the refugees' movements may not be restricted other than those which are necessary.[129] While states argue how immigration detention complies with this provision, it is evident how immigration detention instituted as a deterrent is *per se* of punitive nature and thus inconsistent with the prohibition to impose penalties on the grounds of illegal entry of refugees. Further, while it may be claimed that not all migrants are refugees, to whom this convention applies, it is also to be noted that immigration detention is used by the US *ex ante* determination of whether the migrants qualify as refugees, although this violates the migrants' constitutionally protected right to due process. Only in July 2019 did a federal judge rule the indefinite detention of asylum-seekers before their status determination hearing as unconstitutional.[130] As Guy Goodwin-Gill moreover stated, "to impose penalties without regard to the merits of an individual's claim to be a refugee will

[125] Starr S and Brilmayer L, 'Family Separation as a Violation of International Law' (2003) 21 Berkeley Journal of International Law 213, 223
[126] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 499
[127] Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267
[128] Ibid. art 31
[129] Ibid. art 31(2)
[130] Romo V, 'Federal Judge Blocks Trump Policy Ordering Indefinite Detention for Asylum-Seekers' *NPR* (3 July 2019) <https://www.npr.org/2019/07/03/738385096/federal-judge-blocks-trump-policy-ordering-indefinite-detention-for-asylum-seeke?t=1621947521483>

likely also violate the obligation of the state to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction."[131]

Further, the video and audio recordings, as well as first-hands accounts of how the separated children have been treated when detained by the federal government agencies, illustrate treatment which is cruel, inhumane, and degrading.[132] There are recorded instances detailing physical and sexual abuse, lack of medical care provided and instances of suicide at detention facilities.[133] The US government itself has stated that as of 2015 "certain DHS owned facilities and [Contract Detention facilities] are subjecting detained immigrants to torture-like conditions".[134] The detailed conditions are in contravention of the UN Convention Against Torture (UNCAT)[135] and the ICCPR, to both of which the US is a state party. The prohibition of torture is absolute and non-derogable and is further also a jus cogens norm.[136] Justifications based on scarce allocation of resources or unprofessional management thus are untenable.[137] What is further worrisome is that there are reasons to believe that children have been mistreated due to a deliberate indifference of the federal officials.[138] The ICCPR holds that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"[139] and that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment."[140] The UNCAT on the other hand provides that states must "prevent in any territory under its jurisdiction other acts of cruel inhuman or degrading treatment or punishment which do not amount to torture […] when such acts are committed by or at the instigation of or with the consent of a public official or other personal acting in an official capacity."[141] The images and first-hand accounts detailing detention conditions in the immigration detention facilities prove that the US government could not in any way assert to have complied with that provision.

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[131] Goodwin-Gill GS, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection' (Depatment of International Protection for the UNHCR Global Consultations 2001) 2 <https://www.unhcr.org/3bcfdf164.pdf>

[132] Lokka B, 'Trump's Torture Legacy: Isolating, Incarcerating, and Inflicting Harm upon Migrant Children' (2019) 35 American University International Law Review 169, 172

[133] Ibid. 183

[134] U.S. Commission on Civil Rights, 'With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities' (2015) <https://reliefweb.int/sites/reliefweb.int/files/resources/Statutory_Enforcement_Report2015.pdf>

[135] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)

[136] *Prosecutor v. Anto Furundžija* (Judgement) IT-95-17/1-T (1998)
Within this case it was established, that the violation of jus cogens norms, amongst which the prohibition against torture, has direct legal consequences for the character of all official domestic actions relating to the violations.

[137] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 499-500

[138] Ibid. 450

[139] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10(1)

[140] Ibid. art 7

[141] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 16(1);

2.4. Attempts at Halting the Policy Ex Post Enactment

2.4.1. Domestic Attempts at Halting the Family Separation Practice

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[142]

To the extent that separation of powers works Congress and judicial supervision would have been able to halt the family separation policy because of its unconstitutionality and consequent unlawfulness and its absence of a real legal rationale. Judicial injunctions[143] and congressional proposals[144] have been issued, yet in practice they have been unable to *de facto* stop the family separation policy which, as proven above, continued until at least summer 2019.

2.4.1.1. The Role of Congress

Trump's executive order officially halting the family separation order can to some degree be said to constitute an attempt by the administration to delegate responsibility and blame for the family separation practice on Congress.[145] The title and substantive text of the executive order seems to send the message that the zero-tolerance policy was a short-term solution envisioned by Trump, while he lays the responsibility on Congress to pass a long-term immigration bill that could address the issue.[146] In fact, through an executive order, the President is delegated some degree of discretionary power to pass legislation, also called "delegated legislation".[147] When executive orders are based on the authority of the President stemming from the Constitution[148], they have the force and effect of law.[149] In the past, congressional attempts to block such orders have been successful where the

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[142] Myers v. United States, 272 U.S. 52 (1925) Supreme Court Justice Brandeis herein cites *Democracy in America* (1865) by Alexis Tocqueville

[143] E.g. Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (order granting plaintiffs' motion for classwide preliminary injunctions)

[144] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 25 <https://fas.org/sgp/crs/homesec/R45266.pdf>

[145] Exec. Order No. 13841, 83 Fed. Reg. 29,435 (20 June 2018)

[146] Korte G, 'Anatomy of an Executive Order: What President Trump's Order on Family Separation Does' *USA Today* (21 June 2018) <https://eu.usatoday.com/story/news/politics/2018/06/21/trump-executive-order-family-separations-border-explained/721466002/>

[147] Contrubis J, 'Executive Orders and Proclamations' (Congressional Research Service Report for Congress 1999) 1-2 <https://fas.org/sgp/crs/misc/95-772.pdf>

[148] U.S. Const. art. II

[149] Staff of House Committee on Government Operations, 'Executive Orders and Proclamations: A Study of a Use of Presidential Powers' (85th Congress, 1st Session, 1957)

President exceeded his authority or the situation could have been handled through legislation.[150] Congress theoretically has the power to overturn an executive order by passing legislation that invalidates it. The President can then veto that decision, on the other hand Congress can override that veto by a two-third majority vote to end the executive order.[151] Yet in reality, it has been argued that achieving Congressional override of an executive order is a nearly impossible event because of the fact that a supermajority vote would be required and that it would leave lawmakers susceptible to political criticism in such an event.[152] Further, the ambiguity of executive orders is a cause of concern for Congress and the public. There is a risk that these instruments, if abused, can directly or indirectly hamper substantive rights, duties and obligations of individuals outside the government. Particularly, because executive orders are a sort of "executive legislation", they have fundamental constitutional implications, especially in respect to the separation of powers.[153]

Largely shocked by video and audio recordings detailing conditions of separated and detained migrant children, Congress agreed to the need to end the family separation practice. Members of Congress from all types of different factions have proposed various bills to halt the practice.[154] At the meeting of the 115th Congress, relevant legislation was introduced that would have strengthened immigration enforcement while preventing family separation.[155] Bills emphasizing immigration enforcement for instance included provisions that would have provided for statutory authority for Trump's executive orders under the Immigration and Naturalization Act. Other bills contained provisions that would have limited the separation of families seeking asylum by mandating that they be housed together.[156] Also legislation introduced at the meeting of the 116th Congress largely was aimed at preventing or limiting the practice, including provisions that mandated that families be kept together throughout the entire processing phase after apprehension at the US border.[157] However, of all the different proposed bills, few saw any legislative action and none were enacted.[158] Lastly, Congress failed to enact any viable legislation that effectively limits any administration's ability to enforce family separation policies. Cordero, Feldman and Keitner hold that both litigation and

[150] Wozencraft FM, 'OLC: The Unfamiliar Acronym' (1971) 57 American Bar Association Journal 33, 35

[152] Koh HH, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (1990) 118-119
[153] Contrubis J, 'Executive Orders and Proclamations' (Congressional Research Service Report for Congress 1999) 2 <https://fas.org/sgp/crs/misc/95-772.pdf>
[154] Rogin A, 'Congress Agrees on Need to End Family Separation Practice, but Still Divided on How' *ABC News* (19 June 2018) <https://abcnews.go.com/Politics/congress-agrees-end-family-separation-practice-divided/story?id=56001375>
[155] 'The Trump's Administration's "Zero Tolerance" Immigration Enforcement Policy' (Congressional Research Service 2021) 26 <https://fas.org/sgp/crs/homesec/R45266.pdf>
[156] Ibid.
[157] Ibid. 25
[158] Ibid.

congressional action are still needed to ensure that family separation at the border cannot be used again in the future.[159]

2.4.1.2. The Role of the Courts

In general, individuals whose rights have been violated in immigration-related settings have a number of options to recover damages for such actions from the government through litigation. The claims are usually brought against the officer/s or entity/entities that are responsible for the alleged wrongdoing.[160] Generally, most immigration-related actions in district courts are brought against the United States and/or against the officer/s or entities within the DHS or the DOJ.[161] Within the DHS, liable entities would thus be the USCIS, ICE and CBP. There are three main types of actions individuals can litigate in immigration-related settings. An individual can bring an action under the Federal Tort Claims Act.[162] This action allows for monetary recovery for damages, loss of property, personal injury or death which came about as a result of "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[163] Secondly, individuals may bring so-called *Bivens* actions, under which individuals may recover damages for Fourth Amendment violations by federal officers.[164] Thirdly, an individual may issue a writ for habeas corpus when he is challenging the length and/or conditions of detention.[165]

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[159] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 431

[160] Realmuto T and Winger E, 'Practice Advisory: Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation' (American Immigration Council 2020) <https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/whom_to_sue_and_whom_to_serve_in_immigration-related_district_court_litigation.pdf?_cf_chl_jschl_tk_=ad73f2dd6e2e95f3ca929e4789ff3e9e1f601e58-1621954195-0-ATDqW12mvnRdLvmHMcx_DMjbFYgPDu1j65NelUB3xfvJy1WXR1tT_G5veTMl2-hy3Z6ttllLBeVXR23iopxu62equktnJ-CpibbMca6JJCo00jsWyLPHbC9TIizYpMjpD_5vY_9JFzNyzlAO0CVN_wBO2Oe5xuTha7Nkd5cpMzptsGK6LMd-4KTQEm_FTCjnjq3FPQjZsaLPbynAQowiTW3JVJLYuK5gDTiRdnFVolb4NenehJu0J7WUrxWZ2NapNcTdccDsCDphbT-a-qtjvi9TupzAjZ1bFeXd04SgII0beOM-HG9zZxRM8betl-JA9uiMW_c1GQSkv8_C3jYE2ljUFMJPsPEFL1shf8Ng-f1WwhmDEwHAkIF_pNF7SK1cGcxo0vekqH39y9kr5Q9tQJQb0ko8fa2eJMLW9_wj4shmMGslMJXpxZ9OmAGgyE3ootbNl3lnK_fkZ4E0qyJ32MLqd9Dgf0l2dvKEgOXL4mEwJNQJFXkxXxjbOa0Y5CUiDYaS5hQQ-TVWcv3SdA9aIO-hWEIJfntXYBSdRoeXllqAVKXU0HOqnJjtfqnV2wswWkjQBfPUBezpb7Yi5IrelenVO0fJ-4s8ZIUMVHr3N-6G>

[161] Ibid.

[162] The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680

[163] 28 U.S.C. § 1326(b).

[164] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)

[165] 28 U.S.C. § 2241

As stated above, the ACLU, acting on behalf of Ms. L. and her daughter S.S. sued the government in the Southern District of California in order to secure their immediate release or at least reunite them in a family detention center.[166] They claimed, among other things, that their substantive due process right had been violated by the government's practice of family separation of families entering the US. The ACLU in this case issued a writ for habeas corpus.[167] On 6 June 2018 in Ms. L v. U.S. Immigrations and Customs Enforcement (ICE), Judge Dana Sabraw acknowledged the existence of a constitutional claim against the government filed by the ACLU on behalf of the separated parents.[168] A few weeks later, Judge Sabraw certified the claim to a class-wide action to determine whether the Trump administration had violated the class members' substantive due process right to family integrity.[169] The class was defined as:

> "[a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child."[170]

After the class action was certified to include other similarly situated parents, the plaintiffs requested a class-wide injunctive relief to prohibit separation of class members from their children in the future, unless there is the finding the parent might be unfit, as well as demanding reunification as soon as the parent is returned to immigration custody, unless there is a finding that he is unfit.[171]

What is interesting in this regard is that the Court focused mostly on the violation of the Constitution's due process clause, a procedural right, of which the plaintiffs were victims.[172] On 26 June 2018, the Judge ordered the reunification of the separated children in custody of the ORR with the parents within 30 days through a preliminary injunction. However, rather than litigate the case to conclusion, including the constitutionality question of the federal government's action, the government entered into a negotiated agreement with the court to reunite the families within the

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[166] Samuels J, 'A Mother and Child Fled the Congo, Only to Be Cruelly Separated by the US Government' (*ACLU*, 26 February 2018) <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/mother-and-child-fled-congo-only-be-cruelly>

[167] Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-0428, Document 71 (S.D. Cal. 6 June 2018) (order granting in part and denying in part plaintiffs' motion to dismiss)

[168] Ibid.

[169] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 439, 460

[170] Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (order granting plaintiffs' motion for classwide preliminary injunction).

[171] Ibid.

[172] Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-0428, Document 71 (S.D. Cal. 6 June 2018) (order granting in part and denying in part plaintiffs' motion to dismiss)

mentioned deadlines, thus implementing the relief ordered by the court.[173] The original requests also included a declaratory relief on the part of the government, acknowledging the illegality of the family separation practice and a guarantee of no further family separations, which the government granted. Yet other requests were not fulfilled in the court's current injunction, such as requests that the government either release the children and parents or detain them together, that the US stop deporting parents who are legally removable before reuniting them with their children (except if they knowingly accept to be deported without their children) and that the government refrain from removing parents until class members met with counsel and had a reasonable chance to issue an asylum claim.[174] In order to comply with the court order, the government had to make specific reunification efforts within certain deadlines, to which it had to comply under the Judge's supervision. However, reports show that family separation was still taking place until at least August 2019 and that the government had not been able to keep pace with the reunification commitments it had issued.[175] The court order that mandated the reunification efforts on the part of the government led to months-long efforts by workers of federal agencies, working day, night and weekends to track down the parents of the separated children.[176] The actual extent of how many children and parents were still separated and had to be reunited however became clear after the initiation of these efforts, when it crystallized that families were separated also before and after the official beginning and end of the zero-tolerance policy. To this day 506 children are still separated from their parents.[177] Many of the parents cannot be tracked down since they have been deported before having been reunited with the children.[178]

It is thus disputable to what extent the judicial branch, through this court order, has actually contributed to end the practice of family separation since children continued to be separated from their parents at the border until at least August 2019.[179] It also raises the question of to what extent

[173] Pending Agreement, Part 2, Ms. L. v. U.S. Immigration & Customs Enf't, No. 3:18-cv-00428 (S.D. Cal. 2018), https://www.aclu.org/legal-document/ms- l-v-ice-pending-agreement-part-2
[174] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 461
[175] 'CNN Newsroom (@CNNNewsroom)' (*Twitter*, 22 August 2019) <https://twitter.com/CNNnewsroom/status/1164563704781967360>
("Family separations are 'still going on,' said Lee Gelernt, ACLU lawyer, adding that he is going back to the San Diego court on September 13, hoping that the judge 'will put a halt to it.'").
[176] Dickerson C, 'Parents of 545 Children Separated at the Border Cannot Be Found' *New York Times* (15 March 2020) <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html>
[177] Alvarez P, 'Lawyers Make Progress in Locating Parents of Children Split from Families at the Border, Latest Court Filing Says' *CNN* (25 February 2021) <https://edition.cnn.com/2021/02/24/politics/children-border-reunification/index.html>
[178] Ibid.
[179] 'CNN Newsroom (@CNNNewsroom)' (*Twitter*, 22 August 2019) <https://twitter.com/CNNnewsroom/status/1164563704781967360>
("Family separations are 'still going on,' said Lee Gelernt, ACLU lawyer, adding that he is going back to the San Diego court on September 13, hoping that the judge 'will put a halt to it.'").

the government's judicial branch can then actually limit the executive's capacity to enact executive orders containing policies in contravention with individuals' constitutional rights.

2.4.2. International Attempts at Halting the Family Separation Practice

After pictures, video and audio recordings of children held "in cages"[180] started circulating, international shock ensued. Numerous organizations demanded an immediate response from the international community.[181] Renowned global leaders such as former British Prime Minister Theresa May, Canadian Prime Minister Justin Trudeaux and Pope Francis publicly condemned the practice.[182] International bodies such as the United Nations also denounced it. Former UN High Commissioner on Human Rights Zeid Ra'ad al-Hussein criticized the practice, expressing "The thought that any state would seek to deter parents by inflicting such abuse on children is unconscionable."[183] His office further released a press release stating that "the practice of separating families amount to an arbitrary and unlawful interference in family life."[184] A delegation of 11 UN Experts[185] released a public statement addressing the Executive Order formally halting the family separation practice, which recited:

> "This executive order does not address the situation of those children who have already been pulled away from their parents. We call on the Government of the US to release these children from immigration detention and to reunite them with their families based on the best interests of the child, and the rights of the child to liberty and family unity. Detention of children is punitive, severely hampers their development, and in some cases may amount to torture. Children are being used as a deterrent to irregular migration, which is unacceptable."[186]

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[180] 'Trump Migrant Separation Policy: Children "in Cages" in Texas' *BBC* (18 June 2018) <https://www.bbc.com/news/world-us-canada-44518942>; Long C, 'Written Testimony: "Kids In Cages: Inhumane Treatment at the Border" Testimony of Clara Long before the U.S. House Committee on Oersight and Reform, Subcommittee on Civil Rights and Civil Liberties' (*Human Rights Watch*, 11 July 2019) <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border>

[181] Karamouzian M, 'Trump's Zero-Tolerance Policy: Would a Political Response to a Humanitarian Crisis Work?' (2018) 7 International Journal of Health Policy and Management

[182] Fyre R, 'Family Separation Under the Trump Administration: Applying an International Criminal Law Framework' (2020) 110 Journal of Criminal Law and Criminology 349, 352

[183] Aolain FN, 'Global Responses to President Trump's Family Separation via "Zero-Tolerance" Detention Policy' (*Just Security*, 30 June 2018) <https://www.justsecurity.org/58783/global-responses-president-trumps-family-separation-zero-tolerance-detention-policy/>

[184] Spokesperson for the UN High Commissioner for Human Rights, 'Press Briefing Note on Egypt, United States and Ethiopia' (5 June 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174>

[185] UN Office of the High Commissioner for Human Rights, 'UN Experts to US: "Release Migrant Children from Detention and Stop Using Them to Deter Irregular Migration"' (22 June 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>

[186] Ibid.

Also, the Permanent Council of the Organization of American States, of which the US is a member, has issued a resolution jogging the US' memory of its international legal obligation to respect the human rights of migrants and particularly of migrant children.[187] In August 2018, the Inter-American Commission on Human Rights granted a request for precautionary measures received from six National Human Rights Institutions.[188] The Commission held that children that were separated under the family separation policy are at risk of "serious, urgent and irreparable harm" to the rights to a family life, personal integrity and identity as guaranteed by the American Declaration of the Rights and Duties of Man, which the US has adopted.[189] Further, in the UNHCHR's "global update" to the Human Rights Council in June 2019, it clarified that the US' government's treatment of migrant children is a matter of global concern.[190] More recently, in July 2019, it also held that children should never be held in immigration detention or separated from their families.[191] In July 2019, the European Parliament also voiced its dismay by adopting a resolution on the situation at the US-Mexico border.[192] It therein restated the US international human rights obligations and underlined that "depriving children of their liberty on the basis of their or their parents' migration status is never in the best interests of the child… and may constitute cruel, inhuman or degrading treatment of migrant children". It further reminded the US that "illegal family separations and the arbitrary and indefinite detention of asylum seekers without parole constitute cruel policies and flagrant violations of both US asylum law and international law."[193]

Statements by various states, international and regional organizations do account for a general global consensus that the family separation practice is not in line with US' domestic and, particularly, international legal obligations.[194] This may reflect the nature of a rule on prohibition of

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[187] Organization of American States, P.C. Res. 1106 (2168/18), 'Impact on the Human Rights of Migrants of the Policy of the Government of the United States of America of Separating Migrant Families' (29 June 2018)
[188] Inter-American Commission on Human Rights, Res. 64/2018 (16 August 2018), https://www.oas.org/en/iachr/decisions/pdf/2018/64-18MC731-18-US-en.pdf
[189] Ibid.
[190] UN Office of the High Commissioner for Human Rights, 'Opening Statement and Global Update of Human Rights Concerns by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein at 38th Session of the Human Rights Council' (18 June 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23206&LangID=E>; see also Spokesperson for the UN High Commissioner for Human Rights, 'Press Briefing Note on Egypt, United States and Ethiopia' (5 June 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174> (stating that "the practice of separating families amounts to arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child").
[191] UN Office of the High Commissioner for Human Rights, 'Bachelet Appalled by Conditions of Migrants and Refugees in Detention in the US' <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24800>
[192] European Parliament, 'Resolution on the Situation at the USA-Mexico', Res. 2019/2733 (18 July 2019) https://www.europarl.europa.eu/doceo/document/B-9-2019-0014_EN.html
[193] Ibid.
[194] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 483

such practices as customary international law. Throughout Trump's administration, states have however not gone further than engaging in the practice of "naming and shaming", trying to achieve moral leverage to end the practice. This might be due to the fact that this matter does not account for a primary foreign policy priority for other states to risk the consequences of such an action.[195] It is ironic then that on one side, the US has always been a fervent promoter of international human rights law and its values (particularly in its own foreign policy and interventions[196]), and on the other hand it does not ratify major treaties or does in fact enact policies which at its root have a rejection of its international legal obligations within its own jurisdiction. The US can however maintain such a dual position because it is a powerful player in the international community and is able to withstand a certain amount of pressure.[197] Material leverage (such as in the form of sanctions) to exert pressure on a state like the US would therefore most likely be unsuccessful.

It does not help then, that Trump himself has, as argued by Koh, made it his strategy to systematically disengage from globalism, undermine international institutions, adopt an isolationist "hard power" position if need be, and if questioned, invoke his legal right to act with extreme claims of presidential power.[198] Further, in particular, former Secretary of State Tillerson expressed his intention to defend American interests, but not American values.[199] Bluntly, he stated that an overreliance on values "creates obstacles to our national security interests and our economic interests".[200] In the past, the US bipartisan policy has shown at least to a reasonable extent that the conviction that advancing global human rights is in the American interest. These statements then confirm Trump's prioritization of national over universal rights.[201]

3. Conclusion

The just concluded chapter sought to sketch the main features of the executive order under review, the zero tolerance policy. Historically, the US has gradually shifted from being a relatively open country for immigration "[lifting its] lamp beside the golden door"[202] to increasingly equating migrants with criminals, finding its peak with the enactment of the zero tolerance policy on

[195] Ibid.
[196] Natarajan U, 'A Third World Approach to Debating the Legality of the Iraq War' (2007) 9 International Community Law Review 405, 411
[197] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 478
[198] Koh HH, *The Trump Administration and International Law* (Oxford University Press 2019) 6
[199] Ibid. 430
[200] Ibid.
[201] Ibid.
[202] Lazarus E, 'The New Colossus' enshrined on the Statue of Liberty, New York City (1883)

immigration. This executive order put in practice by the Trump administration in 2018 mandated for "100% prosecution" of all illegal entries and attempted illegal entries. As a consequence of this policy, migrant parents were separated from their children as adults and minors cannot be detained together. This thus resulted in child immigration detention. Findings point to the fact that this was the very intent of the policy enacted: the trauma solicited through the family separation was to act as deterrence against future migration.[203] This analysis detailed that the family separation practice mandated by the government violated a variety of constitutional, statutory and international human rights of the migrants subjected to it. After a domestic case brought by the ACLU on behalf of concerned victims mandated for discontinuance of the practice as well as international pressure to halt it, the policy was officially terminated by the administration. Notwithstanding this fact, evidence shows that the family separation practice continued throughout Trump's Presidency. The zero tolerance policy and its implementation uncovered a realization regarding the human rights framework's inefficiency in curtailing states' ability to violate human rights within its jurisdictions. The distinct shortcomings of the international human rights framework which the implementation of the zero tolerance policy exposed will be addressed in the subsequent chapter.

[203] 'The Situation Room (@CNNSitRoom)' (*Twitter*, 6 March 2017) <https://twitter.com/CNNSitRoom/status/838877868453064704> Wolf Blitzer asked, "Are you considering a new initiative that would separate children from their parents if they try to enter the United States illegally?" Kelly answered, "I would do almost anything to deter the people from Central America [from] getting on this very, very dangerous network [that facilitates movement through Mexico to the United States]..... *Yes, I am considering in order to deter..... exactly that, they will be well cared for as we deal with their parents.*" (Italics added). *See, also:* Shepardson D, 'Trump Says Family Separations Deter Illegal Immigration' *Reuters* (14 October 2018) <https://www.reuters.com/article/us-%20usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-%20idUSKCN1MO00C>
Bump P, 'Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent' *Washington Post* (19 June 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/>

3. Chapter 3: The Inefficiency of the Human Rights Framework in Curtailing States' Actions

The practice of family separation, emanating from the enactment of an executive order and resulting in the violation of various domestically and internationally protected rights of migrant children, evidences a telling story about the international human rights framework. Although the US has various constitutional, statutory and international human rights obligations towards migrant children in its jurisdiction, in practice mass-scale violations took place by reason of the implementation of the zero-tolerance policy. Although domestic and international public outcry over the practice caused President Trump to mandate another executive order halting the practice, it still continued. Notwithstanding congressional and judicial attempts to halt the practice, it still continued. Despite international condemnation, it still continued. What realistic and practical value does the human rights framework thus have? Is human rights law only "law" when political leaders actually have the political will to implement it, and otherwise, is it just one language of power as any other? This chapter explores various causes of the inefficiency of the human rights framework as it is envisioned and functions today. Through an analysis of some of the origins of the human rights frameworks' shortcomings this chapter aims at reflecting on how these causes result in states' ability to violate human rights or inability to halt human rights violations in their jurisdictions. In particular, in applying this analysis to the case study, this chapter will evidence how some of the reasons for the human rights' framework's inefficiency resulted in the US' ability to mandate a policy which resulted in the violation of human rights within its jurisdiction as well as in the inability of the other state's branches to halt the violations. Although the listed obstacles within the human rights framework are some of the most predominantly discussed aspects in the scholarship on this field, the below analysis does not in any way intend to portray an exhaustive panorama of the shortcomings of the human rights framework. The below discussed obstacles to the human rights framework have been picked as they are particularly well evidenced in the case study of the zero tolerance policy.

3.1. The 'Sacredness' of Human Rights

Human rights constitute a powerful language. They appear as pure facts, objective, true, unquestionable and self-sufficient.[204] It is arduous to defend human rights on the basis of their intrinsic value – they must be accepted outside of any rational convention, as part of our own self-definition and as part of our identity as part of a community.[205] In fact, they claim to exist beyond the political system, which at the same time constitutes their appeal.[206] Rather than being privileges endowed by legislation, they claim to curtail what can be legislated.[207] In fact, their place is claimed to be "outside politics, yet constraining politics".[208] It is true that in the ordinary course of administration, public officials may use discretion when they search for the most "equitable" or "cost-effective" solution, but still in doing that they are curtailed by rules codifying values most importantly held.[209] The strength of the human rights language derives thus also from its provision of seemingly apolitical principles which limit administrations without having to depend on anyone's political preferences.[210] Certain rights are so fundamental that they cannot be reduced to the technical legal considerations one would approach other laws with, or even, rights that lack that absolute status. Koskenniemi concedes that in practice some rights are downgraded from status of "trumps" to the level of soft policies, yet this does not concern so-called core rights.[211] In order to make that distinction, he holds, one has to fall back on "mythical" and "naturalistic" conceptions of basic rights that endow them with such holiness that does not permit for the type of legal technical arguments that allow to turn vulnerable ordinary rights to policies.[212] Take the distinction between for instance the right to property and the right to be free from torture. In this instance, there is a net difference between the absoluteness of these two rights. Gewirth defines an absolute right as a right that "cannot be overridden in any circumstance, so that it can never be justifiably infringed and it must be fulfilled without any exceptions".[213] He grounds this on a supreme principle of morality, which requires

[204] Koskenniemi M, 'Human Rights, Politics and Love', *The Politics of International Law* (Hart Publishing 2011) 156
[205] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 149
[206] Koskenniemi M, 'Human Rights, Politics and Love', *The Politics of International Law* (Hart Publishing 2011) 156
[207] Ibid.
[208] Cali B and Meckled-Garcia S, 'Human Rights Legalized', *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge 2006)
[209] Koskenniemi M, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 48
[210] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 135
[211] Ibid. 148
[212] Koskenniemi M, 'Human Rights, Politics and Love', *The Politics of International Law* (Hart Publishing 2011) 156
[213] Gewirth A, 'Are There Any Absolute Rights?' (1981) 31 The Philosophical Quarterly 1, 2

respect for the rights of all persons to the necessary conditions of human action and includes the notion of respect for the persons themselves as being able to reflect on their purposes and control their actions in light of such reflection.[214] He holds, for instance, that a mother's right not to be tortured to death by her own son is absolute and does not allow for exceptions.[215]

Further, the attempt to justify rights fails also because of this precise reason. Since the justifications with which one would defend a certain right lack that sacredness which however is intrinsic to the right, it becomes profane. Each justification contains a political theory and will consequently infect the right with the fragility which attaches to those theories, leading to them not being able to be used as "trumping" and "absolute" agents, since their point has been lost.[216] Ironically, rights are effective only if they are accepted on faith, the absence of which rooted the very reason of having the need to invoke them.[217]

3.2.1. Inflation Leads to Devaluation

On the other hand, precisely this absoluteness, unquestionability and power of the language of human rights led to its abuse. Every policy, social and political question became framed in rights language to trigger that peremptory nature and immunity from attack. This, however, started threatening the special dignity and power of the language of rights.[218]

Today, every interest and preference is framed in rights language, leading to the loss of the critical power of that language.[219] For instance, during President Bush's "war on terror" post-9/11 era, the expansion of the state's jurisdiction on security matters was opposed with the language of individual rights.[220] Nevertheless a shift in the language could be observed, as these security concerns were themselves increasingly framed in rights language, referring to the right to security of the prospective victims of the detained persons.[221] To some degree this can be observed in President Trump's immigration policy as well. The whole notion of "America first", one of the leading concepts in his campaign, is based on the prioritization of the rights of American citizens, which on the other hand was used as a justification for his harsh stance on immigration, culminating then with the zero-

[214] Ibid.
[215] Ibid. 7
[216] Koskenniemi M, 'Human Rights, Politics and Love', *The Politics of International Law* (Hart Publishing 2011) 161
[217] Ibid.
[218] Koskenniemi M, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 47, 48
[219] [219] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 142
[220] Ibid.
[221] Ibid.

tolerance policy. The rights language here is used by both proponents: on one side, the promoters of the rights of migrants and on the other the promoters of the rights to security of the American nationals. The tension within the migration discourse, to which balancing exercises are constantly applied, is between the protection of migrants' rights and the protection of national security. President Trump stated that it is the American citizens' right to choose who enters their state and referred to how Obama's and Clinton's inaction in that sphere has resulted in the surrender of the safety of the American people to open borders.[222] He thus put the right to public safety of American nationals v. the rights of migrants to seek asylum on a weighing scale. At the same time it is the juxtaposition of rights of Americans v. rights of migrants, the "us v. them" narrative and the creation of this polarization that at the national discourse level justified Trump's enactment of such type of policies vis-à-vis his voters. The "America first" strategy is predicated on this sentiment. In President Trump's words: "we need a system that serves our needs, not the needs of others".[223] Or rights?

However, because of the charge of the human rights language, putting everything in rights terms will sharpen the conflict between the two positions, polarizing the discussion. Further, because of the deadlock created by the equality of arms of the rights language, in which particularly in the migration discourse no position grounded on either right can successfully and definitely trump the other, a resolution must envision a place "beyond rights". This place is difficult to reach in the political playground, since such a place would require the limitation of the scope of the claimed rights because of their subordination to some idea of human character, some notion of human good.[224] Obviously this notion of human good is subjective. Nevertheless, this is also precisely why the rights language is resorted to so often in the political sphere. To make a political issue that has deep moral connotations a matter of basic rights means rendering it non-negotiable because of the unconditional nature of these entitlements, not receptive to moderation.[225] As Gray stated, rights do not allow issues to be resolved by legislative compromise exactly because of their peremptory nature. "They permit only unconditional victory or surrender".[226]

On the other hand the frequent resort of politicians and administrators to the rights language results in an open abuse of the language. As already alluded to above, because of the strength and absoluteness of the human rights vocabulary, it tends to get used as a language by political actors to

[222] 'Transcript of Donald Trump's Immigration Speech' *The New York Times* (1 September 2016) <https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html>
[223] Ibid.
[224] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 144-145
[225] Ibid. 149; Gray J, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (Routledge Classics 1995) 22
[226] Gray J, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (Routledge Classics 1995) 22

describe their interests thus making them seem non-negotiable.[227] Consequently, the human rights language has also been used to substantiate, justify and legitimize various repressive initiatives by both individuals and states.[228] In the past, in fact, it has also been used to legitimize the waging of wars, one may think of the term "humanitarian intervention" for that matter. It has been argued that the human rights movement has underestimated the abuse of its language and machinery by "people whose hearts are hard and political projects are repressive".[229] States like the US, the United Kingdom, Russia, but also Serbia and the Kosovar Albanians, have all taken military action and intervened politically defending their operations by reason of protecting human rights.[230] This is possible precisely because of the "porousness" of the human rights language, which lends itself to be distorted to frame almost any political preference or interest. Further, the "porousness" of this vocabulary has often resulted in actually tracking more political interest for these types of state action than its own emancipatory agenda.[231]

What can be also observed is that the moral grounding of rights that was crucial to Vitoria, Grotius or Locke, is not available anymore in our world, in which value systems are increasingly subjective and historically conditional, and have in our recent past even led to the reaching of liberalist or racist conclusions.[232] Yet exactly this easy manipulability of the language is why this language is readily abusable. The abuse of the language of human rights by political actors results in weakening its rhetoric. As stated, they promise value-neutrality, but they are in fact reduced to contested arguments about notions of the political good, the content of which of course is contestable depending on the side one is on. Further, what can be observed today particularly in Europe is that there is a banal administrative recourse to the rights language to substantiate one's political priorities.[233]

However, one of the negative consequences of the proliferation of rights emerging out of the process of terming most social issues in rights terms is that core human rights become policies like

[227] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 133
[228] Kennedy D, 'International Human Rights Movement: Part of the Problem?' (2002) 14 Harvard Human Rights Journal 101, 124
[229] Ibid. 119
[230] Ibid.
[231] Ibid.
[232] Koskenniemi M, 'Human Rights, Politics and Love', *The Politics of International Law* (Hart Publishing 2011) 156
[233] In Europe, this development has origins in the 60's and 70's. Under pressure from the Supreme Courts of Italy and Germany, the European Court of Justice started modifying its jurisprudence in order to defend its legitimacy vis-à-vis the two states' constitutions with developed systems of rights protection. The Court began characterizing aspects of market integration, and particularly the four freedoms, in terms of fundamental rights. The process of characterizing aspects of reality in terms of rights is also called 'field constitution'. See Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 133

any other because reversely many ordinary policies are framed as human rights issues. This inflation of terming every political preference into human rights language does in fact devalue its currency.[234] Cranston, criticizing the Universal Declaration of Human Rights, eloquently elaborated: "A human right is something of which no one may be deprived without a grave affront to justice… Thus the effect of a Universal Declaration which is overloaded with affirmations of so-called human rights which are not human rights at all is to push all talk of human rights out of the clear realm of the morally compelling into the twilight world of utopian aspirations."[235]

The problem now is that there is no litmus test to determine which are the genuine rights and which are the ones that simply represent the (egoistic) interests of the claimants.[236] There is no authoritative list of "pre-legislative rights", the ones that are so fundamental, "naturalistic" and "mythical", able to curtail what can be legislated.[237]

The abundance of different rights and right-thematic conventions, as well as treaty-monitoring bodies that have been created also as a consequence of this process led to an incremental distancing from those core rights that are regarded as grounding the entire human rights framework. These core rights as well as their philosophical underpinnings, such as the notion of the fundamental respect for human dignity, blur in the plethora of policies and political preferences turned new rights. Hersch Lauterpacht already described this phenomenon, criticizing international lawyers for never having truly taken seriously the literary tradition within which human rights originated but to "have fragmented it by appropriating parts of it while leaving behind crucial premises that gave these parts their underlying coherence."[238] This phenomenon is described as the "fragmentation" of human rights.

Arguably, this process can be observed in the creation of the zero-tolerance policy. Human rights considerations should have limited the President's ability to enact a policy which in its implementation resulted in human rights violations. Human rights considerations should have been paramount in mandating policies dealing with immigration matters. Yet, as stated, both migrants' protection and the protection of national and public security can be framed in human rights terms. Political preferences of the public officials enacting a certain law cannot be said to not have played a role here. More than that, even if public officials instituting a policy were to be neutral, since both sides' views can be dressed in human rights terms, no significant guidance on their hierarchy could be deducted from the rights themselves. What rights should they protect in writing that law? Then, it

[234] Wellman C, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Westview Press 1999) 3
[235] Ibid.
[236] Koskenniemi M, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 47, 48-49
[237] Ibid. 49
[238] Koskenniemi M, 'Human Rights, Politics and Love', *The Politics of International Law* (Hart Publishing 2011)

is arguable that working under a specific administration with specific stances on immigration, a preference on which rights to protect can be assumed. Human Rights Watch also described the zero-tolerance policy as explicitly targeting asylum seekers. It further transpired that the USCIS in issuing guidance to asylum officers directed them to consider illegal entry of asylum seekers as a factor to be used against them in reviewing their application for asylum.[239] Of course, in the end, by enacting such executive legislation President Trump was simply delivering on election promises: protecting American citizens' security through harsh immigration policy.[240] But in the tension between fulfilling American nationals' right to public security or respecting all of the different rights granted to migrants entering the US territory (and they are various and many), the latter considerations were neglected. It could be argued that this is borne out of the fact that in framing all of these issues in rights language – the national security and the migrant protection matters – no consideration could trump the other. At the same time, neither had a particular weight or sacredness to it, precisely because each individual right, dispersed in the "sea of rights", was just a policy consideration like any other. Finally, human rights considerations were not able to in practice limit the President's ability to enact a policy which violates human rights.

3.2.2. Human Rights Formalism

Another prominent issue of the human rights framework is its attachment to legal formalism. The human rights movement's reliance on the legal formalization of rights and the creation of a legal machinery for their implementation makes, as argued by Kennedy, the achievement of these very forms the goal of the movement itself.[241] There is further a certain degree of self-conviction and insistence amongst the elites of the political system which put in place the human rights machinery, that by setting up all these rules, treaties, bodies and institutions, they did in fact address the violations taking place through an elaborate and global "state of the arts" response.[242] This also represents another fallacy of the human rights framework: it treats the symptoms, yet does not cure the illness.[243] Human rights remedies within the rights/violation framework are a response to the harm suffered by the violation and are applied *ex post* violation through adjudication, mostly. Kennedy argues that

[239] 'AILA Policy Brief: USCIS Guidance on Matter of A-B. Blocks Protections for Bulnerable Asylum Seekers and Refugees' (American Immigration Lawyers Association (AILA) 2018)
[240] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 439
[241] Kennedy D, 'International Human Rights Movement: Part of the Problem?' (2002) 14 Harvard Human Rights Journal 101, 110
[242] Ibid.
[243] Ibid. 118

human rights remedies as such then allow "the illness not only to fester, but to seem like health itself."[244] He makes the example of anti-discrimination norms, that actually replace the endeavor to end discrimination.[245]

Also, with the institutionalization of rights and their ordinary use in the political and administrative culture came a moment in which the discourse of the transformational power of the rights language reached a saturation point: it became legal lingo like anything else.[246] Further, petrified in legal terms, many interests that could not be translated into rights terms became marginalized and consequently neglected.[247] Kennedy refers to these as the traditional problems of form: it can hinder peaceful adjustment and necessary change, and is simultaneously over- and under-inclusive.[248]

Moreover, laws that at face value seem respectful of human rights but in reality are background laws that in its implementation result in human rights violations ought to be scrutinized also. The human rights framework indeed leaves these background laws that do not explicitly condone violations but in reality affect their actual occurrence largely disregarded.[249] Such background laws might do more harm than an absence of rights or remedies for victims, further leaving these laws unscathed.[250]

The case study of the zero tolerance policy here serves as an example. The zero-tolerance policy, as has also been explained in Chapter 2, does not per se mandate for family separation nor does it specifically address the limitation of parental rights. The family separation occurs as a consequence of the policy which mandates for "100% persecution" of those migrants illegally entering or attempting to illegally enter US territory with minor dependents. As a consequence of this "background law", migrant children were detained under the conditions that resulted in the violations of their rights, were denied their right to due process, and suffered the rights violations by reason of being refugees. Thus, the zero tolerance policy does not specifically mandate for the separation of families which, perhaps if it had, and this is an assumption, would have elicited harsher and more immediate scrutiny because of its more readily evident potential human rights implications.

Another problematic consequence of the formalization of human rights is that it leads to alienation from both the general population and the public officials enacting the policies from the

[244] Ibid.
[245] Ibid.
[246] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 133
[247] Ibid.
[248] Kennedy D, 'International Human Rights Movement: Part of the Problem?' (2002) 14 Harvard Human Rights Journal 101, 110
[249] Ibid.
[250] Ibid.

cause human rights are actually serving.[251] As Kennedy stated: "Rather than enabling a discussion of what it means to be human, of who is human, of how humans might relate to one another, [the human rights movement's emancipatory vocabulary] crushe[s] this discussion under the weight of moral condemnation, legal adjudication, textual certainty and political power."[252] Formalization of the rights language creates an artificial distance, aided by legal and technical terminology, between the often brutal reality of the harm the right seeks to protect and the aseptic language which formally provides said protection. The alienation resulting out of this process means that the rights language is unable to convey neither the atrocity nor the banal in evil.[253] Harvard Law Professor Thomas Reid Powell also prominently described this phenomenon afflicting individuals in the legal profession: "If you can think about something that is related to something else without thinking about the thing to which it is related, then you have a legal mind."[254] Often, these lawyers are the ones creating the policies, laws and resolutions addressing human rights issues.

The case study of the zero tolerance policy proves that legal formalization allows a government to mandate a policy which by its language seems legitimate and, so long as detailed accounts of the consequent occurring rights violations by means of audio and video recordings do not emerge, to a large extent does not touch the general public's conscience. This is exemplified for instance by the fact that Congress started deliberating over possible legislation halting the practice only after widespread video and audio recordings of toddlers crying in detention centers started circulating and woke Congressmen up to the reality of the consequences of the zero tolerance policy.[255] Without success. After all, the reality of the enacted policy hid behind its technical and legally sound language until then.

Another instance that clearly evidences the contrast between a human right as formally enshrined in a human rights convention and the actual exercisability of such right in reality is the right to asylum. The practical inapplicability of the right to asylum also contributed to the numerous violations suffered by migrant children in the framework of the implementation of the zero tolerance policy. Within the migration discourse, a tension is detectable, namely the tension between on one side the state's sovereign right to guard its borders and control immigration, and on the other by competing humanitarian principles based in international law to which it is bound, which include the

[251] Ibid. 111
[252] Ibid.
[253] Ibid. 125
[254] Bader Ginsburg R, Hartnett M and Williams WW, *My Own Words* (Simon & Schuster 2016) 268
[255] Rogin A, 'Congress Agrees on Need to End Family Separation Practice, but Still Divided on How' *ABC News* (19 June 2018) <https://abcnews.go.com/Politics/congress-agrees-end-family-separation-practice-divided/story?id=56001375>

right to asylum.[256] The paradox now is that the right to asylum is the right to *seek* asylum. Some states have indeed argued that the liberty right to seek and enjoy asylum is null if it does not encompass a claim right to be granted asylum, which then would mean that the right to asylum would include a corresponding duty on the part of the state to grant asylum to any genuine refugee.[257] However the UN has starkly refused to include said duty within the right to asylum precisely because it would impend on the unquestioned right of every sovereign state to decide at its discretion whether to grant asylum or not.[258] In fact, international lawyers and political scientists routinely shed light on the ineffectiveness of the right to asylum, precisely because its actual protection is left at wide state discretion.[259] Since there is no human right to be granted asylum, the individual who seeks it is left without assurance of finding it and actually enjoying the object of the right itself: asylum.[260]

This dilemma is also reflected clearly in the US case study example. During Trump's administration, many policies were enacted steered at pushing back asylum seekers even before they could issue a legitimate asylum claim at a port of entry and thus exercise their right to seek asylum.[261] Thus the question arises, what worth and value does the right to asylum in practice actually have, when a state enacts policies, even in contravention of the Refugee Convention[262], aimed at making the exercise of that right, even in its diluted form (right to *seek* asylum rather than right to asylum) a legal fiction? There is no settled answer to this still highly debated issue, as states have an interest in maintaining this status quo.

However, since the rights language dominates the sphere of the protection of asylum seekers, that is the legal avenue through which a refugee can claim protection. It is however maintained here,

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[256] Goodwin-Gill GS and McAdam J, *The Refugee in International Law* (3rd Edition, Oxford University Press 2007) 1

[257] Wellman C, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Westview Press 1999) 18

[258] Ibid. 19

[259] Ibid.

[260] Ibid.

[261] Examples of this are the Asylum turn-backs via "Metering", taking place since at least 2016, which consists in turning back asylum seekers to Mexico, including dangerous regions of Mexico, and forcing them to wait to request US asylum protection, sometimes for months. Another example is the unsafe third country "Asylum Cooperative Agreements" made by Trump with Guatemala, El Salvador and Honduras, issuing an interim final rule to send back asylum seekers to those countries without providing them with the possibility to request asylum in the US. Another instance is constituted by the Presidential proclamation issued on 9 November 2018 together with a DHS and the US DOJ final interim rule effective the same day that barred asylum for individuals entering between US ports of entry, which openly violated the Refugee Convention's provision on penalizing refugees for improper entry. These are just a few instances, there are more policies that the US government has enacted to prevent asylum seekers to request asylum or actually pushes them back before being able to request it. For further information on what measures the US has instituted, particularly under Trump's administration, to avoid asylum seeker's ability to request asylum at a US ports of entry see 'Illegal Pushbacks by the United States of People Seeking Refugee Protection - Human Rights First's Submission to the Office of the High Commissioner for Human Rights (OHCHR) Special Rapporteur on the Human Rights of Migrants Pursuant to Human Rights Council Resolution 43/6' (Human Rights First 2021) <https://www.humanrightsfirst.org/sites/default/files/HRFSubmissionOHCHRAsylumPushbacks.pdf>

[262] ibid.

that the form within which this right is nested is not able to address the complex reality of migration and navigate the stated inherent tension between state sovereignty principles and refugee protection, precisely because a state, as evidenced by the US, lastly can make the principle of state sovereignty to guards its borders and restrict entry override its human rights obligations vis-à-vis refugees. This is what happens in practice: states implement strategies that keep migrants from even being able to reach their territory, in order to prevent them from making an asylum claim. The migrants' right to seek asylum in this type of scenario becomes functionally obsolete vis-à-vis the power of a state to make the exercise of its sovereignty prevail through the employment of such strategies. Thus, formally, everyone has a right to asylum, yet the exercise of the content of that right is reserved to very few.

Our case study again serves the purpose of exemplifying this dilemma in the case of the possibility for migrant children to claim the right to asylum. In the situation of migration to the US, in order to request asylum an individual would have to make a case for having credible reasons for seeking asylum in the US. However, due to the family separation practice, children as young as three were made to appear in court on their own for their deportation proceedings.[263] Usually, children are detained alongside parents who are able to narrate the tragic circumstances leading them to seek asylum in the US.[264] It is evident, that a child that age does not have the capacity to accurately describe the conditions that forced his family to take the decision to flee his home country and seek asylum in the US. Of course, children are still represented by counsel in court, yet the children's inability to state the circumstances that led the family to reach the US to seek asylum could not be laid out by them properly. Conversely, this inability to make a credible case for asylum would most likely result in a rejection of that asylum claim. Thus the question emerges: what worth does a right have when the conditions for its exercisability are stripped? What further crystallizes is that it is not only the vocabulary and form of the human rights framework which constitutes a problem in terms of usefulness but predominantly that the entire apparatus has structural flaws, particularly in regards to the refugee status determination process as exemplified.

Piercing the veil of formalism and looking at reality, the alienation borne out of the formalization process does elicit the question: what is at the core of any given law framing the protection of a human right? Does the language and way it is framed hamper or advance what it means to achieve? This will be the object of exploration in the following chapter.

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[263] Jewett C and Luthra S, 'Immigrant Toddlers Ordered to Appear in Court Alone' *The Texas Tribune* (27 June 2018) <https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/>
[264] Ibid.

3.2.3. The Fetishization of the Judge

Further, the human rights movement also promises that "law" can resolve the conflicts in society within its own materials, by relying on the machinery, the institutions, the profession et al.[265] It assures that this can be done by correctly interpreting these rights, a process that it sells as non-partisan and thus far from and more legitimate than politics.[266] But when relying heavily on the impartial interpretation of rights, this translates to relying heavily on the nonpartisanship of the persons that are indeed tasked with interpreting the law: the judges. The human rights movement "fetishizes" the judge as functioning as a tool of the law, and rejects the idea of the judge as a political actor.[267] Kennedy argues that this is not a realistic depiction of judicial behavior, particularly seen the porousness and indeterminacy of the rights language. It is not precise enough to allow for consistent application. Further, the situations to which it is applied are variegated, complex and not clear-cut. Which is also precisely the reason why a judge, a human person that is able to navigate the blurred lines of these types of situations and grasp the nuances resulting out of these circumstances must interpret the law. Thus, the interpretation of human rights laws by a human(e) judge is at the same time a *conditio sine qua non* for a nuanced and proportionate application of black letter law to often very complex and delicate circumstances of human life, while at the same time because of the fallibility of the judge as human being, it is also the gateway to biased and partial applications of the law, influenced by the judge's own views.

Further, judges always apply the law, and particularly human rights law, against the backdrop of very specific political contexts.[268] In human rights cases, international courts often defer to states in cases that are politically sensitive. States, through national judges, then do have a margin of appreciation, a certain level of discretion regarding the extent to which they intend to apply and protect human rights norms against the backdrop of the particular domestic circumstance. At the same time, that kind of discretion the state disposes of is precisely what the "rights as trumps" and absoluteness of the rights language intended to do away with.[269] When limiting human rights in adjudication, judges may apply the particular exceptions to the particular rights. In cases involving rights contained in the European Convention of Human Rights, one type of exception is that a right may be limited if it is "necessary in a democratic society". In the US, the first amendment right to

[265] Kennedy D, 'International Human Rights Movement: Part of the Problem?' (2002) 14 Harvard Human Rights Journal 101, 116
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Koskenniemi M, 'Human Rights, Politics and Love', *The Politics of International Law* (Hart Publishing 2011) 157

free speech is limited by the balancing test of the "clear-and-present-danger" standard contained in the amendment.[270] As Koskenniemi rightfully comments, it is difficult to imagine anything that is more politically charged than these two criterions.[271] Particularly in applying the porous human rights language, in adjudication, the technical language of rights combined with the balancing exercises that each human rights case demands generally mirror broad cultural and political preferences.[272] When faced with legislation that contravenes basic rights, the judge is called upon to make a moral choice.[273] A judge, and in the US in the case of the zero-tolerance policy a federal judge, has both the freedom to take such decisions and the scope to act upon them.[274] When asked to adjudicate upon such laws, and thus to make such choices, it is evident that there is no "neutral" legal stance.[275] Such a thing is virtually nonexistent in the field of human rights adjudication. Whether the judge sides with the legislator, and upholds the law or sides with the rule of law and established legal principles are both finally moral and political choices.[276] These choices are disguised as matters of pure legal reasoning, but are political and moral nonetheless.[277] Thus, to rephrase Kennedy, the judge often is a political actor who however utilizes the tool of the law through pure legal reasoning in its adjudications to disguise such activism. In cases that are particularly politically charged, (federal) judges tend to resolve that tension by basing their decisions not on contested "substantive" rights, the granting of which in a judicial system like the one of the US has long-lasting consequences due to the *stare decisis* model, but rather on the politically more neutral procedural rights. In this way, the disguise of pure legal reasoning is also more readily delivered, without the judge having to expose his political preferences ever so much, thus not angering or humiliating the politicians who may have in fact advanced the piece of legislation with human rights implications in question, or who have particular stances regarding the granting of one or the other right.

In the case study of the zero tolerance policy, the Ms. L. v. ICE case serves as an example of this development. Asylum seekers identified as Ms. L. and Ms. C. filed a class action lawsuit against the government, claiming, inter alia, that their rights to substantive due process had been violated by the government's practice of essentially separating them from their children when entering the US at the border, both when seeking admission at a US port of entry and when illegally entering US territory

[270] Ibid. 158
[271] Ibid.
[272] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 151
[273] Graver HP, *Judges Against Justice: On Judges When the Rule of Law Is under Attack* (Springer 2015) 292
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.

between ports of entry.[278] The plaintiffs claimed that the government had no legitimate justification for separating them from their children, and that the government thus violated their substantive due process rights to family integrity.[279] The plaintiffs further brought claims under the Administrative Procedure Act (APA) and the Asylum Act. The Court dismissed the latter claims.[280] It is irrelevant for the purpose of this thesis to look into the dismissal of the claim under the APA, however the dismissal of the claim under the Asylum Act does invite reflection on the tension between substantive v. procedural rights and their adjudication. The plaintiffs for instance claimed that family separation violated the Asylum Act "because it impede[d] their ability to pursue their asylum claims".[281] This is true, as clarified above. Minors, and particularly children rarely can successfully claim asylum. The Court however countered this claim by citing the same statute, which states: "Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the US or its agencies or officers or any other person."[282] What this evidences once again, is that the right to seek asylum is really limited to being the right to *seek* asylum, and that no type of guarantee to the right to asylum can be deducted from such a right. The Court moreover explicitly stated that "nothing in th[e] statute shall be construed to create any *substantive* […] right" (Italics added). The very valid claim that the family separation prevented the plaintiffs from even being able to exercise their right to *seek* asylum, which is differentiated from receiving asylum, was thus dismissed based on the fact that the plaintiffs could not rely on a statute which did not intend to create such a right as legally enforceable against the government.

Nevertheless, by also basing their claims on the infringement of their right to family integrity protected by the due process clause, the plaintiffs eventually got this claim granted and thus received an order for injunctive relief. Firstly, a brief introduction to the right to due process is required. The right to due process is a constitutional right enshrined in the 5th Amendment. The "touchstone of due process is protection of the individual against arbitrary action of government".[283] The substantive right to due process is concerned with the question whether the government's interference with a person's life, liberty or property is justified with a sufficient purpose.[284] The procedural right to due process on the other hand is based on an examination of whether the government has followed the

[278] Herman Peck S, 'Family Separation at the Border and the Ms. L. Litigation' (Congressional Research Service 2018) 3
[279] Ibid.
[280] Ibid.
[281] Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-0428, Document 71 (S.D. Cal. 6 June 2018) (order granting in part and denying in part plaintiffs' motion to dismiss) 24 para 25-26
[282] Ibid. 24 para 27-28 and 25 para 1
[283] Wolf v. McDonnell, 418 U.S. 539, 558 (1974)
[284] Chemerinsky E, 'Substantive Due Process' (1999) 15 Touro Law Review 1501

proper procedures when it has interfered with an individual's life, liberty or property.[285] The fundamental right of parents to the custody of their children has been interpreted by the Supreme Court to exist under the term "liberty".[286] Thus, under the procedural due process clause, the government would have to abide by specific procedures, such as give notice and a hearing, before terminating custody.[287] Under the substantive due process clause, the government must provide an adequate justification for terminating custody.[288] In the present case, the Court itself confirms that the liberty interest identified in the 5th amendment includes a right to family integrity.[289] It was found that the constitutional right to family integrity applies to the plaintiffs.[290] When a substantive due process issue arises, "the threshold question is whether the behaviour of the government is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience".[291] According to the Court, the facts detailing the family separation by the plaintiffs did, at a minimum, "shock the conscience" and thus violated their constitutional right to due process.[292] However, what needs to be realized at this point is that the right to due process as such is a procedural right, also in its "substantive version".[293] It still relates to government's correct behavior regarding the application of law. Adjudicating a case on the basis of a procedural right carries as such much less political weight than deciding a case on the basis of government's infringement of a substantive right, which is particularly true in the case of the right to asylum. The right to asylum has been instrumentalized and politicized widely in the last years. Particularly in the case of the Trump administration and its stance on immigration, deciding a case as Ms. L. v. ICE on the basis of the Asylum Act would have not only created a precedent which the state would have had to guarantee in the future – which in this case would have been the claim that separating families violated the statute "because it impedes [the asylum seekers'] ability to pursue their asylum claims" – but also would have been a reflection of a distinct choice taken by the judge. Thus adjudicating cases on the basis of procedural rights does

[285] Ibid.
[286] Santosky v Kramer 455 US para 745, 753 (1982)
[287] Id para 758-759
[288] Id. para 762
[289] Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-0428, Document 71 (S.D. Cal. 6 June 2018) (order granting in part and denying in part plaintiffs' motion to dismiss) 14 para 5-7
[290] Ibid. 14 para 14-15
[291] Ibid. 20 para 12-14
[292] Ibid. 23 para 7-9
[293] Many legal scholars argue that the words "due process" suggest a concern with procedure rather than substance, always. Justice Clarence Thomas, one of this theory's most well-noted supporters, argued this point when he wrote that "the Fourteenth Amendment's Due Process Clause is not a secret repository of substantive guarantees against unfairness" in the Supreme Court case Perry v New Hampshire.
Legal Information Institute, 'Substantive Due Process' (*Cornell Law School*) <https://www.law.cornell.edu/wex/substantive_due_process#:~:text=Many%20legal%20scholars%20argue%20that,with%20procedure%20rather%20than%20substance.&text=Substantive%20due%20process%20is%20still,as%20applied%20to%20contemporary%20issues>

constitute a backdoor allowing a judge to still uphold individuals' rights in highly politicized cases, without charging the cases with even greater political weight by deciding them on the basis of substantive rights.

After such a reflection however one fundamental question arises. What is the value of substantive human rights, such as the right to seek asylum, if they cannot be claimed (or successfully be claimed) in a court of law because they are too politically charged? Could a turn to procedure, be it also "substantive" procedure, perhaps offer insight into potential solutions and aid the judge in human rights adjudication? The author will seek to explore answers to these issues in the following chapter.

3.3. Conclusion

This chapter took stock of some of the criticisms raised by leading critical international scholars against the human rights framework and deployed it as a lens through which to analyze the zero tolerance policy. The case study exemplified how the shortcomings within the human rights framework contribute to its inability to prevent human rights abuses perpetrated by state agencies. Further, findings point to an inherent contradiction in how the human rights framework is perceived and functions within the political sphere. There is a tension between on one side the absoluteness and sacredness of human rights and their language and on the other its abuse, a profanation reached through its mainstream and exploitative use to frame basically every social conflict in its language. The political culture thus has a schizophrenic tension, simultaneously insisting that human rights are fundamental and inalienable, while persistently realizing they are not, which leads to a culture of bad faith.[294] In other words: God is dead. The profanation and abuse of the human rights language have brought to the dilution of the belief in its project, many devotees turned atheists. This also brought the population to distance itself from politics out of cynicism, with a sense that what the human rights project had so eloquently promised (to curtail legislation, to remedy violations, to hold states accountable) could not and would not be delivered. Events like the circumstances of the human rights abuses committed in the framework of the zero tolerance policy confirm that realization. The enactment and implementation of the policy further exemplify many of the criticisms forwarded against the human rights framework. What thus remains as a question, is whether there is the possibility to develop a system in which various conceptions of good can be debated and realized whilst at the same time rejecting the notion that these conceptions of good can only be taken seriously

[294] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 134

once they can rely on the "apolitical absoluteness" of rights as trumps.[295] Another major criticism of the human rights framework is that the proliferation of rights resulting out of this process led to the fragmentation of what is originally at the core and grounds the entire framework: the notion of a fundamental respect for human dignity. This basic concept gets lost and obfuscated by the plethora of different social policies turned rights, which by being framed in the same language, are perceived at the same level of some of the most fundamental rights which indeed are interconnected with the notion of dignity. When looking for the viability of different languages it could thus be of value to go "back to the basics", back to what political processes have distanced the original human rights project from, the concept which is at the basis of all human rights conventions and treaties: human dignity.

[295] Ibid. 152

4. Chapter 4: The Re-Discovery of Human Dignity as the Focus of the International Human Rights Framework

4.1. Introduction

The previously presented analysis shows that the human rights framework indeed has multiple shortcomings that in this specific case have allowed the state's adoption of the zero tolerance policy and the human rights violations resulting out of its implementation. The international human rights framework as has been described in the previous chapter is not able to curtail a state's ability to mandate laws that ultimately infringe upon a person's human dignity. Human rights have been highly politicized because of the absoluteness of their language. Most claims, framed in human rights terms, attain a perceived status of unquestionability. This leads to the language's manipulation by many political actors, who make that language instrumental in achieving their political aims. At the same time, this development led to a proliferation of rights, since more and more social issues came to be framed in human rights terms. This, on the other hand brought human rights to be considered as any other policy, diluting the strength of its language. Simultaneously, the proliferation led to a fragmentation from the core values which are at the basis of the human rights framework. The human rights project through the aforementioned processes has been siphoned off from what is at its core: the respect for human dignity. Consequently, that respect seems not to be a primary concern any longer.

This chapter proposes how a focus on the human dimension and on the basic principle of any human rights convention – the fundamental respect for human dignity – could be renewed. It is imagined as a procedural soft law mechanism based on the notion of human dignity to be mainstreamed and applied throughout a legal system. Its applicability is inspired by the Kantian idea of human dignity. This chapter explores the potential of such a mechanism to counter some of the presented obstacles recurrent in the modern human rights framework and to avoid situations such as family separation resulting out of the enactment of laws that at its foundation infringe upon human dignity.

4.1.2. Human Dignity as Basis of the Human Rights Framework

Human dignity is a central value in most legal systems. Whether civil or common law systems, in the West as well as in the East, in both international and regional legal frameworks, human dignity appears to be of fundamental importance.[296]

Most importantly human dignity is intimately interwoven with the backbone of the modern human rights machinery.[297] In fact, human dignity is the foundational concept which lays the groundwork of the Universal Declaration of Human Rights (UDHR), which for the first time set out human rights to be universally protected.[298] This document was borne out of a new conscience regarding the importance of the respect for humankind, elicited through the dramatic experience of the Second World War and particularly, the horrors and utter disregard for humanity manifested by the Nazi regime. Indeed, the Preamble of the Declaration opens with the assertion: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world […]".[299] Following, Article 1 states "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[300] In 1966, out of the non-legally binding Declaration, sprung two legally binding Conventions, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Since both documents reference human dignity in their preamble, supporting the "inherent dignity of all members of the human family", there are only two further references to the concept of human dignity in the Covenants, in Article 13 of the ICESCR and in Article 10 of the ICCPR.[301] The statements of respect for human rights and human dignity within the UDHR generally can be seen as a testament to the consolidation of the project initiated by the UN, and, perhaps more importantly, they confirm the values of human rights and human dignity as being universally supported as core for the conduct of public life.[302] Another way in which this milestone document can be seen, is as instituting a "non-negotiable marker against the denial of human

[296] Brownsword R, 'Human Dignity from a Legal Perspective' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 1
[297] Ibid.
[298] 'The Universal Declaration of Human Rights' (*UN Office of the High Commissioner on Human Rights*) <https://www.ohchr.org/en/udhr/pages/udhrindex.aspx>
[299] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Preamble
[300] Ibid. art 1
[301] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 13
[302] Brownsword R, 'Human Dignity from a Legal Perspective' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 2

dignity".[303] The provisions contained therein are deeply connected with the central syllogism that "every human being has inherent dignity, that it is this inherent dignity that grounds (or accounts for) the possession of human rights, that these are inalienable rights and that, because all humans have dignity, they hold these rights equally".[304] Thus, consequently, human dignity lays the foundation that is necessary for the construction of the human rights superstructure.[305] In attempting to sketch the relationship between human dignity and human rights, one could thus view human rights as giving practical sense and application to human dignity, a broad concept. It follows, that human rights constitute the primary practical and political discourse, while if anyone wanted to analyze the deeper rationale for those human rights, they would have to reexamine the notion of human dignity.[306]

Again proving the deductive nature of human rights as stemming from the core notion of human dignity is also the language in which human rights are introduced as normative concepts within not only the international legal sphere, but in a number of national legal arenas as well. The UN literally states "These [human] rights derive from the inherent dignity of the human person."[307] For instance, along similar lines, the German Constitution asserts "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority"[308], which is followed immediately by "The German People therefore acknowledges inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[309] Attention should in this instance be directed towards the choice of word "therefore", which signalizes the existence of a logical syllogism, deductive in nature, providing the argumentation that since human dignity is inviolable, and since it is the duty of the state to protect it, the people recognize human rights as the basis of every community.

Both these instances showcase that human dignity as a notion is primary, it is the first and foremost element which these legal documents intend to safeguard, operationalized then through human rights which have more practical application. However, human dignity is simultaneously not so much an *element* that calls for protection but rather an absolute composed by many elements, given voice to through rights, but which at the same time is an aspect so complete and intact that it can also

[303] Ibid. 3
[304] Ibid.
[305] Ibid.
[306] Ibid.
[307] As enshrined in the Preambles of, for instance, the ICCPR, the ICESCR and the UNCAT, see International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Preamble, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Preamble; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Preamble
[308] Art 1 I Grundgesetz für die Bundesrepublik in Deutschland;
[309] Ibid. Art 1 II

stand alone, independent, steadfast and paramount. This is precisely why it is mentioned first and separately in most human rights conventions' preambles.[310] But what then, is the content of human dignity?

The word dignity stems from the Latin word '*dignitas'*, which the Romans connected with the reverence and honor owed to a person because of his high-ranking position.[311] This idea of dignity reflected in the rank of a person is also confirmed by the French 1789 Declaration of the Rights of Man and of the Citizen which, in referring to the term 'dignity', mentions in Article 6 the opportunity for all citizens to be eligible for high offices.[312] In this sense, the rank marks a distinction: those who have rank are dignified while those who do not, are not.[313] Cicero, on the other hand, already in ancient times, associated dignity with an idea of universal nobility.[314] Since a person holds the status of human, rational being, the possession of such rational capacities alone was seen as reason to behave in conformity with that status.[315] Thus, according to him a person was under the duty to behave according to and in exercise of his rational capacities. However, in Cicero's view, human dignity is concerned with a duty to ourselves rather than a duty to respect the dignity of others.[316] At the same time, this view does not hold dignity to be inalienable as one can lose one's dignity in the moment in which one does not behave according to one's duties or in exercise of one's rational capacities.[317] Pico della Mirandola on the other hand viewed dignity as referring to the specificity of the human being. A human is not an animal as he is free, a human is not an angel as he is free and vulnerable, a human is not God as he is imperfect.[318] This interpretation tries to give a place to the

[310] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) Preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Preamble, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Preamble; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Preamble; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) Preamble; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006 A/RES/61/106, Annex I, entered into force 3 May 2008) (ICRD) Preamble

[311] Byk JC, 'Is Human Dignity a Useless Concept? Legal Perspectives' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 363

[312] *Déclaration des droits de l'homme et du citoyen* du 26 août 1789, article 6eme

[313] Düwell M, 'Human Dignity: Concepts, Discussions, Philosophical Perspectives' in Marcus Düwell, Roger Brownsword and Dietmas Mieth (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 25

[314] Ibid. 26

[315] Ibid

[316] Ibid

[317] Ibid.

[318] Ibid.

human being in the cosmological order, which has implications for his place in the political order.[319] This view also showcases a shift in focus from a state-centric to a human-centric approach.

Immanuel Kant made dignity the primary focus of his moral philosophy.[320] Indeed Kant is seen today as the "father of the modern concept of human dignity".[321] His interpretation is likely to be the most-cited, non-religious conception of human dignity.[322] His conception of human dignity is also seen as the one that grounds the modern human rights framework.[323] In fact Donnelly, discussing the genesis of human rights, stated: "In Immanuel Kant (1724-1804) we first find a fully-formed account of human dignity, very similar to that of the Universal Declaration, that is placed at the center of moral and political theory."[324] Predominantly, his view of human dignity is based on two central tenets: Firstly, it opposes the instrumentalization of human beings, recognizing the inherent worth of the human person which is the basis for the duty to treat humanity in each person never as means but always as ends in themselves.[325] Secondly his notion of dignity is intersected with autonomy, being that treating a person with dignity is to treat them as autonomous beings capable to choose their destiny.[326] According to Kant, the reason why the capacity to rational autonomy raises one to the status of dignity, is that the idea that we are bound by a moral law presupposes the existence of a categorically rational imperative. This imperative, on the other hand, demands from us that we behave only in accordance with maxims which are universalisable, maxims to which we could want to be bound by equally, that we treat each person as ends in themselves and to behave as if each person, because they have the same rational capacity as anyone else, is also a legislator of moral laws.[327] Thus, if we believe that each person is autonomous and rational, then it follows that we must believe in human dignity. [328]

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[319] Ibid 26-27
[320] Hill TEJ, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 215
[321] McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 The European Journal of International Law 655, 659
[322] Ibid.
[323] Bayefsky R, 'Dignity, Honour and Human Rights: Kant's Perspective' (2013) 41 Political Theory 809, 811
[324] Donnelly J, 'Swiss Initative to Commemorate the 60th Anniversary of the UDHR - Protecting Dignity: An Agenda for Human Rights - "Human Dignity and Human Rights"' (Geneva Academy of International Humanitarian Law and Human Rights 2009) 20 <https://www.legal-tools.org/doc/e80bda/pdf/>
[325] Hill TEJ, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 215
[326] Bayefsky R, 'Dignity, Honour and Human Rights: Kant's Perspective' (2013) 41 Political Theory 809, 811
[327] Hill TEJ, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 219
[328] Ibid.

This conception of human dignity is also interconnected with Kant's universal principle of justice, which posits that "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."[329] At the same time, this conception lays the foundation of an inherent right to equality and freedom held by everyone which functions as the rationale for the modern state as well as for the limits of the modern state.[330]

It is because of the centrality of Kant's conception of human dignity in human rights law that it is his interpretation of human dignity through the categorical imperative that will be tentatively applied as a hypothetical modality in which the notion of human dignity could be mainstreamed.

Having sketched the connection between human dignity as a foundational basis for the human rights frameworks' superstructure, attention will now be devolved to how this basic value could be given practical meaning.

4.2. The Operationalization of a Human Dignity Approach

4.2.1. An Existing Norm Lacking Effect

As stated, human dignity is already enshrined within virtually all major human rights conventions.[331] States have acceded to those conventions and thus made themselves bound by terms contained therein. It is therefore maintained herein that the institutional framework is already in place to achieve an operability of human dignity. Basically all international human rights conventions are grounded and legitimize their mandate on the fundamental respect for human dignity. Yet in practice, as extensively showcased in the chapter beforehand, the human rights framework has gradually distanced itself from what it was meant to protect to begin with. The ambition is to refocus attention on human dignity as a guiding principle to underlie all institutional decision-making and settings.

[329] Ibid. 220
[330] Ibid.
[331] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) Preamble; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Preamble, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) Preamble; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) Preamble; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) Preamble; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006 A/RES/61/106, Annex I, entered into force 3 May 2008) (ICRD) Preamble

This realization is borne out of the fact that there is a human rights framework, which contains a plethora of different rights, and there are states, as exemplified in this case by the US through the zero tolerance policy, who violate these rights on a routine basis. What thus emerges, is that if the ambition of the human rights project is truly to avoid these violations and infringements, then perhaps its attention and focus should shift from a state-centred to a human-centred approach. This view is supported by the fact that the human rights framework is already grounded in the core notion of the respect of human dignity, yet this notion has no operability in the human rights framework as such. Theoretically, thus, the structure for this reorientation is already present, it however lacks implementation in practice. At the moment, the preambular notion of human dignity is simply "pretty words" lacking real meaning.

What is proposed herein is thus a reflection on how devising an operability for human dignity could aid in the endeavor to achieve that the human rights framework is truthful to what it promised to begin with. This does not require the imposition of a new principle or mechanism. States which indeed have ratified human rights conventions also acceded to their preambles, which also make up the context for the purpose of the interpretation of the treaty as a whole.[332] It makes sense then, that in applying and interpreting the rights within the conventions in their jurisdictions, states should be guided by this underlying notion of respect for human dignity. Through human rights conventions states have pledged to not violate specific rights in their jurisdiction. Generally, human rights as hard law are implemented within states through incorporation into national law or through direct application of the various international conventions. The preamble, where most references to human dignity can be found, is as such non-binding for state parties.[333] However, it constitutes a statement of the purpose of the treaty as such.[334] It is thus widely accepted that preambles are of guiding importance for the interpretation of the entire treaty. Thus states, in applying human rights contained therein, should be guided by the notion of the respect for human dignity throughout. More generally, as a non-binding statement to which states subscribe, the respect for human dignity could be recognized as stand-alone soft law principle to which any given state acceding to such convention is committing itself. It is from this point of departure that the recognition of the respect for human dignity by any given state could be recognized not solely as guiding principle through which to interpret any given convention, but more broadly as "light" that could be mainstreamed within a state

[332] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(2)
[333] 'Preamble', *Max Planck Encyclopedia of Public International Law* (2003) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456>
[334] Ibid.

as general consideration to be had at all institutional levels. Such a principle could then potentially turn into an "ethical compass" and "lingua franca" to guide behavior in a variety of fields.[335]

In the following subchapter it will crystallize, also by means of applying such human dignity approach to the case study of the zero tolerance policy, what shifting the focus to human dignity could add as a protective mechanism within the existing international legal framework.

4.2.2. Re-Centering a Human Dignity Approach through Procedure

One manner in which a human dignity approach could be mainstreamed is through a reliance on procedure as modality of application. The author here proposes to envision this primarily as a soft law mechanism based on human dignity. Human rights function as hard law, and that makes sense: states should be bound by hard law in the case they commit violations. On the other hand, the guiding principle of human dignity, which is to be pictured as mainstreamed throughout a legal system and principally to be applied by procedure, could function as soft law. The principle could then be a soft law mechanism which is nested within the existing general hard law framework.[336] Often soft law mechanisms, particularly procedural soft law mechanisms are preferred to approach rights issues, as informal pledges also are less politically charged.[337]

One main feature of mainstreaming a human dignity approach could be the temporal aspect within this proposition: human dignity considerations would be applied *ex ante*, meaning prior, to the passing of legislation, executive orders and the like. In passing a law, one of the most fundamental requirements for it to be passed would be that it respects humanity and does not, in its application, result in the erosion of human dignity. The procedural element refers to the manner in which this principle would be applied, i.e. procedurally. In order to be passed, legislation needs to fulfil a number of procedural requirements, such as legal certainty, proportionality etc.[338] The introduction of a procedural check against laws of whether they infringe upon human dignity would constitute an *ex ante* mechanism to ensure that in application laws would not risk the erosion of human dignity. If

[335] Gilabert P, *Human Dignity and Human Rights* (Oxford University Press 2018) 134

[336] Düwell M, 'Human Dignity: Concepts, Discussions, Philosophical Perspectives' in Marcus Düwell, Roger Brownsword and Dietmas Mieth (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 19

[337] Koskenniemi M, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 47, 52

[338] 'Rule of Law: A Guide for Politicians' (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Hague Institute for the Internalisation of Law 2012) 23 <https://rwi.lu.se/app/uploads/2012/09/Rule-of-Law-a-guide-for-politicians.pdf>; 'The Rule of Law Checklist' (Venice Commission of the Council of Europe 2016) 17-33 <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf>

anything, such a mechanism would at the very least elicit a prior reflection and discussion by lawmakers and public officials on whether that given piece of legislation is indeed an affront to the human dignity of its subjects, which then would not only take place through human rights adjudication after such law has been passed and indeed the harm has been already done. The inclusion of such a mechanism would be procedural in nature although it would evoke a discussion regarding the substance of the law under review. This is the intent: at a minimum, by introducing such a principle a reflection on that aspect would be mainstreamed. And, at the very least, since human dignity always would constitute a pinnacle in the normative panorama,[339] in this scenario the burden of argument would be on the competing claims, which, owing to human dignity's heightened status, would be difficult to prove.[340]

This soft law mechanisms would then be the sort of, as Brownsword precisely phrased, "early stage governance that is relied on before a hard law intervention is viable."[341] Mainstreaming a human dignity approach towards the enactment of any law would constitute the type of prevention where the individuals affected by that law would then have to rely on hard law, the human rights framework, only if in the implementation of the law - enacted by giving thought to human dignity considerations - faults occurred, or in the case where certain implications could not have been foreseeable. In this way, the hard law framework and the soft law framework could be made complementary.

More generally, if such an approach could potentially be mainstreamed procedurally throughout the entire legal system, it could also be a working mechanism to complement *ex post* human rights adjudication.

An increasing reliance on procedure can be observed in current human rights adjudication. As has been addressed widely in the previous chapter, human rights are a politically loaded language. The judge, in balancing rights, is often called upon to make distinct choices, which may be covert by legalistic arguments, but nevertheless conceal preferences. As stated above, the human rights movement "fetishizes the judge" as functioning solely as a tool of the law, rejecting his role as a political actor. However, the indeterminacy of the rights language proves that this is an unrealistic depiction. Particularly in applying the porous human rights language, in adjudication, the technical language of rights combined with the balancing exercises that each human rights case calls for generally reflects ideological preferences.[342] This is why increasingly many judges are basing their

[339] Gilabert P, *Human Dignity and Human Rights* (Oxford University Press 2018) 125
[340] Ibid.
[341] Cali B and Meckled-Garcia S, 'Human Rights Legalized', *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge 2006) 19
[342] Koskenniemi M, 'The Effect of Rights on Political Culture', *The Politics of International Law* (Hart Publishing 2011) 151

decisions on procedural rights, which are less politically loaded. This has been evidenced for instance in the Ms. L. v. ICE case, within which the government's behavior vis-à-vis the migrants as a result of the zero tolerance policy's implementation was scrutinized. What has been observed in Ms. L. v. ICE, as has been analyzed above, is that the judge in that case decided to grant injunctive relief to the plaintiffs on the basis of their due process claim, thus basing his decision on a procedural right. He dismissed the plaintiffs' claims based on the invoked substantive rights within the Asylum Act. As already suggested, such a decision might indicate a reluctance to engage with substantive rights, such as the right to asylum, which are perceived to have stronger political connotations. In this case, it was beneficial that the plaintiffs had claimed injunctive relief also on the basis of the due process clause, which has a moral "neutral" stance.

This case just goes to show how procedural rights, and along those same lines, procedural mechanisms, might be useful for cases which are highly politically charged. In hypothesizing the existence of a procedural mechanism based on human dignity, it can thus be argued that such a tool would relieve the judge from such a dilemma *ab initio*, as the principle would have to be taken into account by procedure always. Particularly, in the Ms. L. v. ICE case, in reviewing the government's treatment of migrants as a result of the implementation of the zero tolerance policy, it might have perhaps even elicited broader reflections on the dignitarian implications of the governments' behavior.

This principle would be of value also in the case of reviews of laws *ex post facto* enactment, thus when in their application the harm has already occurred. Judges would be helped through the introduction of such a mechanism as their reflection on dignitarian implications could not be instrumentalized to be denotative of any political standpoint: in analyzing any given law's compliance with human dignity standards they would simply be following procedure. The primary consideration would then have to be the compliance with human dignity. Other rights claims would be addressed only thereafter. Mainstreaming such a principle as procedural would thus take away the political charge from analyzing how any given law would affect humanity.

The question arises spontaneously whether the zero tolerance policy would have been operationalized if such principle was mainstreamed throughout the US legal system. It is evident that an executive order, as already stated, does not go through a thorough review as regular legislation. However Congress and Federal Courts can strike down executive orders if the President lacked authority to issue them or if they are unconstitutional in substance.[343] It is highly questionable whether the executive order would have passed a procedural check against a human dignity standard if an

[343] 'Judicial Review of Executive Orders' (*Federal Judicial Center*) <https://www.fjc.gov/history/administration/judicial-review-executive-orders#:~:text=Since%20the%20early%20days%20of,actions%20of%20the%20executive%20branch.>

approach based on human dignity was streamlined across the legal system as envisioned. Some executive orders have in the past not been checked against statutory or constitutional grounds, but on the other hand have been subjected to a "reasonableness review".[344] It is unlikely that the zero tolerance policy would have passed such a review, which evermore increases the chances that it would not have passed a "human dignity review", highlighting the exigency of such a tool.

As stated, every perceived social issue could be framed into human rights language. Along those lines, President Trump in his campaign has framed the issue of immigration as a rights issue affecting the right to public security of American citizens. At the national discourse level he thus justified the chosen policy regarding migration with references to national security. However, as accurately stated by Cordero, Feldman and Keitner: "While the federal government unquestionably is authorized to regulate immigration and enforce border security, that enforcement must be exercised consistent with fundamental constitutional principles of due process and family integrity, as well as an overarching anti-dehumanization principle."[345] While they refer here to existing constitutional rights, with which the law enforcing national security measures would need to be in compliance with, they also mention that any such law should be in line with an anti-dehumanization principle. Precisely this is suggested by the author as well through the procedural mechanism based on human dignity: an additional protective mechanism, a tool which would prevent dehumanization by mainstreaming a human dignity approach at all institutional levels. It is herein thus also alluded to by Cordero, Feldman and Keitner that the executive order by Trump in this instance was going against such anti-dehumanization principle, reinforcing the notion that if the order was checked against a human dignity standard, it would have failed such review.

But what, then, would this procedural review based on human dignity look like? For instance, the application of such a mechanism could be modeled on the Kantian idea of human dignity. Collste tried to apply the Kantian model to duties owed to immigrants and refugees, which he maintains can be defended through the first and second version of the categorical imperative.[346] We, as citizens of affluent and relatively well-off countries, could one day be hit by armed conflict, and need to flee our home countries. Within this hypothetical situation, we would want to receive protection and asylum. It would thus as a consequence be illogical to will a law that does not grant protection to refugees.[347] It results that we have a duty to protect refugees.[348] Although an idealistic vision – states do have

[344]Ibid.

[345] Cordero CF, Feldman HL and Keitner CI, 'The Law Against Family Separation' (2020) 51 Columbia Human Rights Law Review 430, 437

[346] Collste G, 'Human Dignity, Immigration and Refugees' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 465

[347] Ibid.

[348] Ibid.

interests at stake, economically this would be unfeasible, there would be national security concerns etc. – in an idealistic world this is what it would look like to behave humanely. It is a very basic concept, also reflected in the Golden Rule standard ("do unto others as you would have them do unto you"), yet too idealistic for our modern society, which elicits the question, what society that may be. It further was precisely the Kantian idea of human dignity which inspired the modern human rights machinery. Was the project of complying with basic notions of humanity too ambitious?

The author recognizes that this conclusion – to grant all arriving refugees protection because of our duty towards them – is unfortunately unrealistic. However, by applying this type of model to any law, as stated earlier, at the very minimum public authorities and legislators would be reminded how a law in its operation is not compliant with basic notions of humanity. That, at the very least, is a tough realization to digest. Thus shifting the perspective on minimum requirements of humanity when reviewing laws could refocus attention on how the system in which we operate is faulty at its core, and redirect awareness to seeking to build the society we strive to be in.

Gilabert further explains the added value, particularly within an increasingly globalized world, of abstract humanist norms, as they "help us develop a truly universalistic attitude in our thought and practice".[349] Such principles could potentially turn into an "ethical compass" and "lingua franca" to guide behavior in a variety of fields, such as immigration, especially when dealing with individuals who are indeed different from us.[350]

The second categorical imperative could also be applied to these types of situations. As mentioned earlier, this imperative is enshrined in the notion of treating humanity never as means but always as ends in themselves. It thus opposes the instrumentalization of human beings. As stated, this imperative can be perfectly applied to the situation generated by the zero tolerance policy. The policy mandates for 100% prosecution for all types of illegal entries or attempted illegal entries into US territory. This results in the detention of migrants seeking to enter the US. As a consequence, adults and children are separated, resulting in practice in family separation. It has been alleged multiple times that the aim of the policy is precisely to create the emotional trauma provoked by family separation to act as a deterrent for future migration.[351] In this instance, the suffering of individuals is

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[349] Gilabert P, *Human Dignity and Human Rights* (Oxford University Press 2018) 134
[350] Ibid.
[351] 'The Situation Room (@CNNSitRoom)' (*Twitter*, 6 March 2017) <https://twitter.com/CNNSitRoom/status/838877868453064704> Wolf Blitzer asked, "Are you considering a new initiative that would separate children from their parents if they try to enter the United States illegally?" Kelly answered, "I would do almost anything to deter the people from Central America [from] getting on this very, very dangerous network [that facilitates movement through Mexico to the United States]..... *Yes, I am considering in order to deter..... exactly that, they will be well cared for as we deal with their parents.*" (Italics added). *See, also:* Shepardson D, 'Trump Says Family Separations Deter Illegal Immigration' *Reuters* (14 October 2018)

instrumentalized to reach a specific aim – the prevention of further migration, in order to deliver on election promises. In this instance, if a principle was mainstreamed and used as a procedural *ex ante* principle of human dignity in accordance with Kant's second categorical imperative, the executive order and consequent government action would have failed compliance with most basic notions of humanity. This adds to the point that dignity as a consideration should be mainstreamed before laws are enacted to ensure that grave violations could be prevented.

4.2.3. Potential Added Values and Limitations of a Human Dignity Approach

The above proposed mainstreaming of a human dignity approach is truly only possible if states were to recognize the implicit obligation on them through their membership to various human rights conventions to respect the fundamental notion of human dignity. As stated, the superstructure for the operability of human dignity is theoretically there: human dignity is indeed enshrined in virtually every major human rights convention's preamble. States would then finally render a principle which at present has no effect an implementable approach of ubiquitous application. As with the human rights framework, the implementation of a human dignity approach indeed only depends on nation-states' will to improve the position of the individual within the legal system. It is the same as the long-established issue of ensuring enforcement of human rights within the state sovereignty system: ultimately, the degree of respect for human rights depends on the sovereign will of the state.[352] Thus what would truly render human dignity as mainstreamed approach operational is predominantly just a question of political will. As such, prospects for its realistic implementation remain grim, especially within states such as the US, which majorly insist on their sovereignty and its "unfettered latitude [as] global superpower"[353] as also evidenced by its accession to as few international human rights treaties as possible.

On the other hand there is also evidence that points to an increasing willingness to mainstream commonly held values. One example is the project of human rights cities, where local

<https://www.reuters.com/article/us-%20usa-immigration-trump/trump-says-family-separations-deter-illegal-immigration-%20idUSKCN1MO00C>
Bump P, 'Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent' *Washington Post* (19 June 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/>

[352] Delbruck J, 'International Protection of Human Rights and State Sovereignty' (1982) 57 Indiana Law Journal 567
[353] Roth K, 'The Charade of US Ratification of International Human Rights Treaties' (2000) 1 Chicago Journal of International Law 347

government seeks to mainstream principles of the UDHR as guiding norms of governance.[354] Within a human rights city, the individual is placed at the center.[355] Cities that took steps in this direction are Barcelona, Spain, Eugene, United States and Lund, Sweden.[356] Bottom-up movements could gradually result in changes taken at the governmental level – there is thus a beacon of hope signaling that humanist norms may increasingly guide behavior at state-level in the future.

Mainstreaming human dignity then, as opposed to human rights, would potentially bring added advantages as well as a separate protective layer for the individual. For instance, the fragmentation process observed within the human rights framework could represent a challenge in trying to mainstream human rights. On the other hand, human dignity as a "universalist" approach unifies in one set the distinctive, and perhaps competing, claims people would have.[357] For example, it might be arduous, in reviewing legislation, to have an understanding of just how many distinct rights – many of which emerged through the process of right proliferation - any given law is potentially infringing upon, or not. It is no surprise then, that such thorough human rights assessment is rarely carried out as such, particularly for more immediate pieces of law that do not follow strict review processes, such as executive orders. Reference to human dignity and prioritizing the respect for human dignity then enables lawmakers and judges to capture whether any given law is indeed infringing upon one of the most foundational values of a legal system as a whole in one sitting.

Further, human rights are not always able to capture and address the entire dimension of the harm caused. As a language, the human rights framework is excessively constricted within the meanders of the rights-violation paradigm. The fragmentation of the rights does not necessarily aid that situation, but rather, distances the harm from the core aspects it indeed violated. Having both protection mechanisms, based on human dignity as well as human rights, would allow for the encompassment of the various dimensions of a violation occurring. The right not to be tortured exemplifies this position. One dimension of torture is the humiliation a person suffers through the loss of his personal dignity, which is rooted also in the loss of self-respect.[358] However, another fundamental aspect is that torture quite straightforwardly, hurts the victim, and causes horrible physical or mental pain.[359] The dignity dimension might be neglected in adjudicating torture instances, however the introduction of a soft law mechanism based on the respect of human dignity

[354] 'What Is a Human Rights City?' (*Raoul Wallenberg Institute*, 5 October 2020) <https://rwi.lu.se/blog/what-is-a-human-rights-city/>
[355] Ibid.
[356] Ibid.

[357] Gilabert P, *Human Dignity and Human Rights* (Oxford University Press 2018) 122
[358] Den Harthog G, 'Is Human Dignity the Ground of Human Rights?' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 206
[359] Ibid.

would bring the dignitarian dimension of torture to the forefront. Human dignity could then be envisioned not solely as an *ex ante* procedural mechanism, but as a streamlined approach implementable throughout the legal system, applicable also in adjudication. As such, it would add another distinct protective layer for the individual.

Finally, one major charge brought against human dignity is that it is inescapably vague. This distinct criticism can be countered by the realization that the more a human dignity approach was to be mainstreamed and applied in decision-making at state-level, the more it would indeed become defined, gradually building a "jurisprudence of human dignity" and a precedent at the national level, but basing itself on a principle enshrined at the international level.[360] At the same time this would counter a second criticism brought against the notion of human dignity: that it is Western and thus not universal. However, by mainstreaming a human dignity approach at governmental level each state would thereby be able to devise its own interpretation of human dignity[361], leading in the envisioned final totality to a universal application of human dignity throughout the international community.

4.3. Conclusion

It has crystallized how the politicization of the human rights language, its proliferation and consequent dilution have achieved a general disconnect from human rights' most core foundational value, the aspect the practical language of human rights has been created to protect in the first place: the respect for human dignity. This elicited the question, of whether attention can be restored towards it as a value capable of capturing the primacy of the human being, and indeed, whether the concept of human dignity could be operationalized into a functioning mechanism within the legal system aimed at protecting it. Findings point to the fact that human dignity as a fundamental value to be respected is already an existing principle within the international human rights framework to which states having ratified the major human rights conventions subscribed. It simply lacks application or effect stemming from this commitment. This Chapter therefore hypothesized how this principle could be made operational. A soft law mechanism based on the respect for human dignity to be mainstreamed and applied procedurally has thus been envisioned. It is pictured as an approach that is mainstreamed at the state level and straddles the entire legal system, but that predominantly is used as an *ex ante* mechanism to be applied at the review stage of legislation. However, it has also been theorized whether it could be applied in adjudication on the implementation of laws *ex post* enactment as well, to review whether in implementation human dignity has been infringed upon. It

[360] May JR and Daly E, *Human Dignity and Law* (Edward Elgar 2020) 37
[361] Ibid. 36

would be an approach that guides the “light” under which governmental actions are conducted and questioned. The analysis above further sought to prove, that if such an approach had been operationalized at the governmental level, the enactment of the zero tolerance policy would not have been in compliance with such a mechanism. Human dignity is always infringed upon when individuals are used as means to fulfill ends. The instance of the enactment of the zero tolerance policy as a way to curb immigration and thus deliver on the President’s election promises exemplifies this axiomatically. The introduction of a procedural mechanism based on human dignity would thus imbue any legal system with a perspective that concretely puts the person at the center of the legal system. At the very least, such a principle would entice continuous discussions regarding the human dimension and effect of any governmental action. Such considerations, achieved through the mainstreaming of human dignity, invite reflections on the limits of human power and what a humane society should and could look like.

5. Findings and Concluding Remarks

Trump's enactment of the zero tolerance policy was a reflection of his election promise to take a harsh stance on immigration.[362] The world watched as immigrants entering the US through the Southwestern border were separated from their children as a result of the implementation of the executive order. The executive order mandated for 100% prosecution of all immigrants illegally entering or attempting to illegally enter US territory, which resulted in the apprehension and detention of these immigrants. Since children and adults cannot be detained together, this automatically led to the separation of families. Evidence suggests, that the underlying intent of the Trump Administration's enactment of the policy was to deter future migration, capitalizing on the trauma caused by such separations.[363] As a consequence of these family separations, migrant children were detained in facilities which were ill-equipped to shelter children, resulting in the sub-standard detention of unaccompanied minors. Consequently, the enactment of this executive order had substantive human rights implications, as well as giving rise to constitutional and statutory concerns under US law. The ACLU thus decided to file a case on behalf of two affected migrants, subsequently turned into a class action, against the government agencies implementing the order claiming a number of rights violations. Further, extensive international criticism can also be said to have exerted a certain degree of pressure on the government to discontinue the order. The order was therefore officially halted two months after its enactment. Notwithstanding its official end, to a large extent the practice of separating families at the border still continued. The example of the zero tolerance policy and its consequent human rights violations exemplify how democratic and developed states today indeed still mandate for laws that at their core result in inhumane treatment of individuals. This is notwithstanding the existence of an elaborate international human rights framework and national checks and balances systems.

The example of the zero tolerance policy thus elicited the question which shortcomings the human rights framework as it operates today has, and how these potentially contribute to the states' incompliance with its impositions. In analyzing some of the obstacles of the human rights framework, a number of thought-provoking findings relating to the origins of its inefficiency have emerged. First and foremost, it has crystallized that the human rights language is, because of its powerfulness and

[362] Dwyer M, 'Factbox: How Trump Followed through on His Immigration Campaign Promises' *Reuters* (14 August 2020) <https://www.reuters.com/article/us-usa-immigration-election-factbox-idUSKCN25A18U>
[363] Van Schaack B, 'New Proof Surfaces That Family Separation Was About Deterrence and Punishment' (*Just Security*, 27 November 2018) <https://www.justsecurity.org/61621/proof-surfaces-family-separation-deterrence-punishment/>

the unquestionability which it surrounds, used and abused by virtually everyone who wishes to make an indisputable claim. Any claim can be framed in human rights terms and indeed, virtually any claim is framed in the rights language in order to attract attention. Politicians often use this strategy. President Trump has for instance justified his harsh stance on immigration by citing national security concerns and the right to security of American citizens. On the other hand, this process led to a proliferation of rights, and consequently, also of human rights instruments. Another development that has been observed is that the creation of evermore human rights instruments led to an increasing distancing from the core notion which all human rights instruments are supposed to protect in the first place: human dignity. One issue is that there is no real authoritative hierarchy of human rights, thus differing right-claims are constantly balanced against each other. Further, this puts the judges adjudicating on human rights cases in the difficult position of deciding cases on the basis of rights that are anything but politically neutral. As all human rights language has been politicized, deciding on one or the other right does have significant political connotations. Increasingly, judges thus select to abandon deciding cases on the basis of substantive rights and choose to opt for the more neutral procedural rights. This has also been evidenced by the Ms. L. v. ICE case within the framework of the US case study. Further, the exaggerated insistence on the human rights framework and its formalism obscures the possibility of resorting to other types of frameworks which might be able to better respond to intricate situations which the violations-framework might not be able to capture. When questioning which alternative approach could provide relief in these instances, what surfaced multiple times is the notion of respect for human dignity.

Human dignity is indeed the core foundation of the entire human rights framework, but as stated, the processes described above have gradually led to a dissociation from that notion. This thesis aimed at exploring whether that notion could be rediscovered as a functioning tool that might be able to complement the human rights framework and address some of its loopholes. As abstract as this endeavor may have been, as this thesis is not diving into any one particular legal system but questions the viability of human dignity as a functioning legal mechanism within the international human rights framework, the findings show what added value mainstreaming such value may have on systems that primarily rely on the human rights framework as mechanism to protect individuals.

Human dignity is the backbone notion grounding the entire human rights framework and is as such enshrined within virtually every major human rights conventions' preamble. It thus emerges, that states have indeed already committed to the respect for human dignity by acceding to these conventions. It is therefore maintained, that the superstructure for turning human dignity as a functioning mechanism to be mainstreamed is already in place. Although preambles are not legally binding, they reflect how conventions should be interpreted and applied. In fact, the principle for

respect for human dignity therein enshrined could be envisioned as soft law mechanism guiding state behavior at all institutional levels, as the preamble can be seen as a statement of intent to be bound to the respect for human dignity by each member state. It was discussed, that the philosophical perspective of human dignity that most correlates to the human rights frameworks' interpretation of it is the Kantian model of human dignity. This thesis not only envisions human dignity as a principle to be mainstreamed throughout a legal system, a "light" under which governmental actions should always be conducted, but also and principally, as a mechanism to be used at the *ex ante* review stage of legislation. It resulted, that as a pervasive and mainstreamed value, it could be very effective as it is able to capture dimensions that the human rights framework as such is not always able to. As a soft law mechanism based on human dignity, to be applied by procedure at the review stage of laws it would question whether in the application of the law, the dignity of the individuals affected by it would in any way be threatened. The fact that the US has not enshrined human dignity as a principle with direct effect in its legal system can be said to reflect the idea, that the respect for human dignity is not a primary concern nor a guiding principle for governmental decision- and law-making.[364] The enactment of the zero tolerance then confirms that finding. Mainstreaming human dignity as a procedural mechanism further would decrease the politicization of any given judicial decision. Certain substantive rights are charged with heavy political connotations, thus deciding on their basis can create political turmoil. Human dignity in that sense does not correlate to any particular faction. The envisioned principle would have to be applied procedurally in reviewing laws or the implementation of laws, thus in applying it judges would simply follow procedure. In hypothesizing how this principle could be applied in practice, the Kantian model of the categorical imperative has been explored as a viable mode of application. It emerged, that although idealistic and perhaps not always feasible in practice because too absolutist, the application of the categorical imperative to particular situations, such as states' duties owed towards migrants as evidenced by applying it to the US case study, does at the very least elicit reflections on the dignitarian implications of a law. Thus, even if not viable as a realistic model of application because indeed too "categorical" and unable to capture the nuances of states' competing interests, the fact that the sole consideration of these competing interests is not compatible with fulfilling duties of respect for the human dignity of individuals affected by the law at a minimum may evoke contemplation on systemic flaws within societal thinking and of what the limits of state and human power should be.

[364] Snead C, 'Human Dignity in US Law' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 393

On the whole, human dignity as an operative legal mechanism and pervasive approach seems to be a viable instrument to complement the international human rights framework. It was hypothesized, what a review based on an assessment of the zero tolerance policy's compliance with minimum standards for the respect for human dignity could have added to existing legal frameworks. The findings on the executive order's implementation point to the inefficiency of the human rights framework in realistically curtailing the state's ability to enact a family separation policy which contravenes basic principles of humanity. Finally thus a shift in perspective, centering the respect for human dignity has shown that the protective mechanisms for the individual at the state level could be enhanced through the additional mainstreaming of a principle based on human dignity.

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