

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**D.J.C.V., minor child and G.C.,
his father,**

Plaintiffs,

v.

United States of America,

Defendant.

Case No. 1:20-cv-5747

**BRIEF OF INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND
INTERNATIONAL LAW SCHOLARS
AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS**

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INTRODUCTION

The formulation and implementation of the United States (U.S.) Government's policy under the Trump Administration to separate by force asylum-seeking parents from their children as a means of deterring future migration to the U.S. shocked the conscience of the international community.¹ This policy (hereinafter "Family Separation Policy") constituted an affront to the international system of human rights protections and commitments based on the moral assumption, enshrined in law, that "all human beings are born free and equal in dignity and rights."²

Plaintiffs have alleged that their forced separation as part of this systemic and discriminatory governmental policy, which has which has caused immense trauma and suffering to thousands of children, their parents and families, amounts to a crime against humanity. This *amicus curiae* brief supports Plaintiffs' position and establishes the legal basis for concluding that the violations of international law and inhumane acts that they endured amounted to the crimes against humanity of persecution and other inhumane acts.

Crimes against humanity, "do not affect the interests of one State alone but shock the conscience of mankind."³ This category of universally condemned conduct consists of prohibited acts committed as part of a widespread or systematic attack against a civilian population.

¹ For international reactions, see e.g., Fionnuala Ní Aoláin, *Global Responses to President Trump's Family Separation via "Zero-Tolerance" Detention Policy*, JUST SECURITY (June 30, 2018), <https://www.justsecurity.org/58783/global-responses-president-trumps-family-separation-zero-tolerance-detention-policy/>; U.N. High Comm'r Hum. Rts., *Press Briefing Note on Egypt, United States, and Ethiopia*, U.N. Press Release (June 5, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174>; U.N. High Comm'r Hum. Rts., *UN Experts to US: "Release Migrant Children from Detention and Stop Using Them to Deter Irregular Migration,"* (June 22, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E>.

² Article 1, Universal Declaration of Human Rights, G.A. Res 217(A)(III), (Dec. 10, 1948).

³ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 57 (Oct. 2, 1995), ("*Tadić* Decision on Jurisdiction").

The crime against humanity of persecution is designed to protect members of targeted groups from the deliberate denial of their fundamental rights on a discriminatory basis. Persecution, as an extreme form of discrimination, has been labelled “one of the most vicious of all crimes against humanity” because “it nourishes its roots in the negation of the principle of the equality of human beings.”⁴ The Family Separation Policy discriminated against non-white migrants from Central America, specifically Guatemala, El Salvador and Honduras, severely deprived those migrants of internationally recognized rights and permitted the commission of persecutory acts on a widespread and systematic scale.

Like persecution, the prohibition on “other inhumane acts” is derived from the post-Second World War proceedings before the International Military Tribunal (“IMT”) at Nuremberg. It is deliberately a non-exhaustive category in order not to “create opportunities for evasion of the letter of the prohibition.”⁵ Inhumane acts incorporate serious violations of basic human rights, committed in circumstances that raise the violations to the level of a crime against humanity.⁶

International law demands scrutiny of grave violations of human rights that shock the collective conscience under well-established prohibitions, including persecution and other inhumane acts as crimes against humanity. It is through this lens that the forcible separation of children and their parents under the Family Separation Policy is identified as being among the most serious offences that “assault humanness as such”⁷ and demand accountability and redress.

⁴ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, ¶ 751 (Jan. 14, 2000), (“*Kupreškić* Trial Judgment”).

⁵ *Kupreškić* Trial Judgment, ¶ 563.

⁶ *Kupreškić* Trial Judgment, ¶ 566.

⁷ David Luban, *A Theory of Crimes Against Humanity*, 29 *Yale J. Int’l L.* 116, 116-117 (2004).

INTEREST OF THE *AMICI CURIAE*

Amici curiae are international human rights organizations – Center for Justice and International Law (CEJIL); International Association of Democratic Lawyers (IADL); International Federation for Human Rights (FIDH); MADRE; Acción Ecológica (Ecuador); Asociación Pro Derechos Humanos (APRODEH) (Peru); Centro de Investigación y Promoción de Derechos Humanos (CIPRODEH)/ Center for Research and Promotion of Human Rights (Honduras); Centro de Políticas Públicas y Derechos Humanos (Equidad)/ Center for Public Policies and Human Rights (Peru); Colectivo de Abogados “José Alvear Restrepo” (CAJAR) (Colombia); Comisión de Derechos Humanos de El Salvador/Human Rights Commission of El Salvador (CDHES) (El Salvador); Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (CMDPDH)/ Mexican Commission for the Defense and Promotion of Human Rights (Mexico); Comisión Nacional de los Derechos Humanos de la República Dominicana/ National Human Rights Commission of the Dominican Republic (Dominican Republic); Comité De Accion Juridica/ Legal Action Committee (CAJ) (Argentina); Comité de Familiares de Detenidos Desaparecidos en Honduras (COFADHEH)/ Committee of the Families of the Detained and Disappeared in Honduras (Honduras); Instituto Latinoamericano para una Sociedad y un Derecho Alternativos (ILSA)/ Latin American Institute for an Alternative Society and Law (Colombia); Justiça Global (Brazil); Liga Mexicana por la Defensa de los Derechos Humanos (Limeddh)/ Mexican League for the Defense of Human Rights (Mexico); Movimento Nacional de Direitos Humanos/National Movement of Human Rights (Brazil); Observatorio Ciudadano (Chile); El Programa Venezolano de Educacion-Accion en Derechos humanos (PROVEA)/ Venezuelan Program of Education-Action in Human Rights (Venezuela) – and international law scholars – Oxford University’s *Border Criminologies*; Surabhi Chopra; Richard Goldstone; Kelley Loper;

Claudia Martin; Geoffrey Robertson QC; Leila Sadat; and Wolfgang Schomburg – specializing in the law on crimes against humanity and refugee protection, committed to promoting respect for the human rights of all, and who recognize the foundational principles of equality and non-discrimination as being central to the international rule of law.⁸ *Amici* also recognize that migrants may be vulnerable to discriminatory immigration policies that prioritize political interests over respect for human rights and that such conduct constitutes a clear violation of customary international law. *Amici* consider that the violation of fundamental human rights on a discriminatory basis can constitute persecution and other inhumane acts; internationally recognized types of crime against humanity. As Plaintiffs assert a claim of persecution and other inhumane acts as crimes against humanity, *Amici* believe this brief, which explains the import of these norms of international law and elucidates their definition, will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

Crimes against humanity are universally condemned and have been prohibited under customary international law since the process of accountability that followed the events of the Second World War. Both States and individuals can be held liable for their commission. Persecution and inhumane acts have been recognized as forms of crimes against humanity since the earliest stages of development of the definition of such crimes. The prohibition on crimes against humanity is a peremptory norm of international law (*jus cogens*).

The essence of persecution is extreme discrimination on prohibited grounds which by its nature impacts both on the targeted group and the individuals who identify with that group. The prohibited conduct consists of violations of fundamental human rights. These serious human rights

⁸ See Appendix A, for the full list of *amici curiae*.

violations also form the basis for the category of inhumane acts. When the violations are grave and are committed as part of a widespread or systematic attack against civilians, the conduct constitutes a crime against humanity.

The Family Separation Policy and the means and methods of its implementation violated the fundamental human rights of migrants from Central America on a discriminatory basis. The conduct was carried out in a widespread and systematic manner, being orchestrated by the State on a massive scale and designed to put pressure on migrant families to return to potentially unsafe countries of origin. It constituted an attack on family integrity involving severe mistreatment. These acts meet the definition of persecution and other inhumane acts as crimes against humanity under international law.

ARGUMENT

I. CRIMES AGAINST HUMANITY ARE PROHIBITED UNDER CUSTOMARY INTERNATIONAL LAW AND ARE CHARACTERIZED AS *JUS COGENS*.

References to “crimes against humanity” pre-date the Second World War,⁹ but it was in response to the horrors of that global conflict that the international community, with the U.S. playing a leading role, embarked on a new era of international justice that placed the interests of humanity at its center and ensured that those who engaged in conscience-shocking behavior would be held to account.

Crimes against humanity came of age in Article 6(c) of the Nuremberg Charter, which listed as one of the categories of crimes within the jurisdiction of the Tribunal for which there would be individual responsibility: “Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population,

⁹ For an overview, see KAING Guek Eav alias ‘DUCH’, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶ 102 (Feb. 3, 2012) (“DUCH Appeal Judgment”).

before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”¹⁰ This provision marked a firm departure from the position that international law was not concerned with the way in which a State treated its citizens.¹¹

Crimes against humanity is a well-established category under customary international law.¹² This is evidenced by its inclusion in all statutes and other instruments of international criminal law and the extensive application of the law on crimes against humanity before international, internationalized and domestic courts.¹³ Crimes against humanity are “specific, universal and obligatory” and satisfy the standard for claims brought under the Alien Tort Statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25, 732 (2004).

The definition of crimes against humanity has evolved since Nuremberg and the key elements of the offence have been developed and refined in the jurisprudence.¹⁴ A crime against

¹⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280.

¹¹ CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 52 (2019).

¹² *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 623 (May 7, 1997) (“Tadić Trial Judgment”); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352-53 (N.D. Ga. 2002): “Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg trials and therefore are actionable under the ATCA.”

¹³ *See e.g.* Statute of the International Criminal Tribunal for the former Yugoslavia, Article 5, S.C. Res. 827, U.N. Doc. S/RES/827, (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, Article 3, S.C. Res. 955, U.N. Doc S/RES/955 (Nov. 8, 1994); Statute of the Special Court for Sierra Leone, Article 2, (Jan. 16, 2002) 2178 U.N.T.S. 137; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, Article 5, (as amended Oct. 27, 2004), NS/RKM/1004/006; Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (Special Panels of the Dili District Court in East Timor), Section 5, UNTAET/REG 2000/15 (Jun.6, 2000).

¹⁴ For an overview of these developments, *see* Leila Sadat, *Crimes against Humanity in the Modern Age*, 107 Am. J. Int’l L. 334 (2013); Beth Van Schaack, *The Definition of Crimes against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnat’l L. 787 (1999).

humanity is any of a list of prohibited acts, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.¹⁵ These are the essential, contextual elements that distinguish crimes against humanity from domestic crimes. Crimes against humanity can be committed in times of war and in times of peace.¹⁶ The term “civilian population” is central to the concept of crimes against humanity according to which the nationality or affiliation of the victim is irrelevant. The word “civilian” is to be interpreted broadly to cover at least non-combatants,¹⁷ while the word “population” indicates that the conduct affects a group of victims collectively, without requiring that the entire population be targeted.¹⁸

It is well-established that “the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*).”¹⁹ This conclusion is supported by a wide range of

¹⁵ Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3 (“ICC Statute”). The definition in the ICC Statute was adopted following multilateral negotiations involving 160 states, the Statute has been ratified by 123 States and is now the basis for the adoption of national laws by State Parties. See Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 Am. J. Int’l L. 43, note 4 (1999). The definition in the ICC Statute has been adopted almost verbatim in the Draft Articles on Crimes Against Humanity prepared by the International Law Commission, pointing towards its crystallization as the customary law definition. See Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, 2019, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, Part Two (2019) (“Draft Articles on Crimes Against Humanity”).

¹⁶ Although the Nuremberg Charter required a link between crimes against humanity and an armed conflict, the ICTY, whose Statute also required such a link, has confirmed that “customary international law no longer requires any nexus between crimes against humanity and armed conflict.” *Tadić* Decision on Jurisdiction, ¶78, 140-141. See also *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352-53 (N.D. Ga. 2002). United Nations commissions of inquiry have found reasonable grounds to believe that crimes against humanity, including persecution, have been committed in countries at peace at the time of the allegations. See e.g., U.N. General Assembly, Human Rights Council, *Report of the commission of inquiry on human rights in Eritrea*, A/HRC/32/47, (May 9, 2016); Human Rights Council, *Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea*, A/HRC/25/63, (Feb 7, 2014).

¹⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 582 (Sep. 2, 1998).

¹⁸ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T&IT-96-23/1-T, Judgment, ¶ 425 (Feb. 22, 2001).

¹⁹ Preamble to the Draft Articles on Crimes against Humanity. According to Article 53 of the Vienna Convention on the Law of Treaties, (May 23, 1969), 1155 U.N.T.S. 33, “a peremptory norm of general international law is a norm accepted and recognized by the international

decisions from regional human rights courts, international criminal courts and tribunals and domestic courts.²⁰ The characterisation as *jus cogens* is reserved for “some principles that transcend national borders and achieve universal binding force.”²¹

II. PERSECUTION IS UNIVERSALLY RECOGNIZED AS A PROHIBITED ACT UNDER THE CATEGORY OF CRIMES AGAINST HUMANITY.

Persecution has been included in the list of prohibited acts underlying crimes against humanity in all relevant international law instruments commencing with the Nuremberg Charter and is part of customary international law.²² The distinguishing feature of persecution is that the prohibited conduct is carried out on discriminatory grounds. Indeed, “discrimination is the essence of the crime of persecution.”²³

As developed in the jurisprudence of the international tribunals, persecution is: “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as [other crimes against humanity].”²⁴ In terms of its composite elements, persecution has been defined as “an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the

community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

²⁰ Draft Articles on Crimes against Humanity, Commentary to the Preamble, ¶ 5 (pp. 24-25), notes 24-26. The International Law Commission has previously affirmed that: “Those peremptory norms that are clearly accepted and recognized include [...] crimes against humanity and torture.” Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, Part Two, as corrected (2001), Commentary to Article 26, ¶ 5.

²¹ LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT 24 (2004).

²² DUCH Appeal Judgment, ¶ 225.

²³ Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 Am. J. Int’l L. at 46.

²⁴ *Kupreškić* Trial Judgment, ¶ 621.

intention to discriminate on one of the listed grounds [...] (the *mens rea*).”²⁵ The acts of the perpetrator must have been “aimed at singling out and attacking certain individuals on discriminatory grounds, by depriving them of the political, social, or economic rights enjoyed by members of the wider society.”²⁶

Article 7(2)(g) of the ICC Statute defines the crime against humanity of persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”²⁷ The ICC Statute contains an open-ended list of prohibited grounds, including “political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law.”²⁸ The offence “includes targeting individuals because of their membership in the group or collectivity, as well as targeting the group or collectivity as a whole.”²⁹

While persecution can take different forms, its central characteristic is the deprivation of fundamental rights that every individual is entitled to without distinction.³⁰ The definition of persecution does not enumerate the precise forms of deprivation of fundamental rights and types of harm covered by the concept. This is deliberately so, recognising that not all types of inhumane

²⁵ *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, ¶ 113, (Feb. 25, 2004) (“*Vasiljević* Appeal Judgment”). See also *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 185 (Sep. 17, 2003).

²⁶ *Kupreškić* Trial Judgment, para. 634.

²⁷ This definition is repeated in the Draft Articles on Crimes Against Humanity, Article 2(2)(g).

²⁸ ICC Statute, Article 7(1)(h); Draft Articles on Crimes Against Humanity, Article 2(1)(h).

²⁹ Special Rapporteur on Crimes Against Humanity, First rep. on crimes against humanity, Int’l Law Comm’n, U.N. Doc. A/CN.4/680 (Feb. 17, 2015) (by Sean D. Murphy), ¶ 168 (p. 81/88), referring to International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), p. 10.

³⁰ First rep. on crimes against humanity (supra), ¶ 168 (p. 81/88), noting that: “The importance of this notion can be seen in Article 1(3) of the Charter of the United Nations, which provides for “respect for human rights and for fundamental freedoms of all without distinction as to race, sex, language, or religion”, as well as article 2 of the International Covenant on Civil and Political Rights.”

acts forming the basis of crimes against humanity have yet been imagined. The types of harm envisaged may be divided into two main categories. First, it is recognized that the prohibited acts underlying crimes against humanity, such as torture, deportation, imprisonment and other inhumane acts, can constitute persecution when carried out with a discriminatory animus. Second, human rights violations of sufficient gravity that are carried out on discriminatory grounds may also be characterized as persecution.

Persecutory acts may be legal under national laws but illegal according to international legal standards.³¹ They include the passing of discriminatory laws and the exclusion of members of a targeted group from aspects of social, political, and economic life.³² The “use of a legal system to implement a discriminatory policy” can also constitute persecution.³³ Thus, discriminatory acts targeting the victims’ “general political, social and economic rights” as well as attacks on their person have been found to constitute persecution.³⁴

There is no exhaustive list of the rights that constitute fundamental rights for the purposes of persecution.³⁵ It is clear that: “infringements of the elementary and inalienable rights of man, which are ‘the right to life, liberty and the security of person’, the right not to be ‘held in slavery or servitude’, the right not to be ‘subjected to torture or to cruel, inhuman or degrading treatment or punishment’ and the right not to be ‘subjected to arbitrary arrest, detention or exile’ as affirmed in Articles 3, 4, 5 and 9 of the Universal Declaration of Human Rights, by their very essence may

³¹ *Kupreškić* Trial Judgment, ¶ 558.

³² *Kupreškić* Trial Judgment, ¶ 610.

³³ *Kupreškić* Trial Judgment, ¶ 612, referring to *U.S. v. Josef Altstoetter, et al.* (Justice case), Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 – April 1949, Vol. III, (Washington, 1951).

³⁴ *Kupreškić* Trial Judgment, ¶ 597.

³⁵ *Kupreškić* Trial Judgment, ¶ 623, warning that “the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights.”

constitute persecution when committed on discriminatory grounds.”³⁶ Other recognized types of harm that may constitute persecution include: “harassment, humiliation and psychological abuse.”³⁷

In an assessment of gravity, the cumulative effect of the acts should normally be evaluated.³⁸ However, a single act may constitute persecution if there is clear evidence of the discriminatory intent.³⁹

III. THE FAMILY SEPARATION POLICY AND THE CONDUCT UNDERLYING ITS IMPLEMENTATION AMOUNT TO THE CRIME AGAINST HUMANITY OF PERSECUTION.

The conduct at issue in this case falls within both categories of harm underpinning the definition of persecution in international law. The acts and circumstances of forcibly separating parents and children under the Family Separation Policy may be found to constitute torture,⁴⁰ imprisonment,⁴¹ deportation and transfer of populations,⁴² and other inhumane acts.⁴³

³⁶ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 220 (Mar. 3, 2000) (“*Blaškić* Trial Judgment”).

³⁷ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgment, ¶ 325 (Feb. 28, 2005).

³⁸ *Kupreškić* Trial Judgment, ¶ 622; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgment, ¶ 102 (Dec. 17, 2004) (“*Kordić and Čerkez* Appeal Judgment”).

³⁹ *Vasiljević* Appeal Judgment, ¶ 113.

⁴⁰ See e.g. ICC Statute, Article 7(1)(f).

⁴¹ *Kordić and Čerkez* Appeal Judgment, ¶ 116 (holding that imprisonment as a crime against humanity involves “arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law”).

⁴² See e.g. ICC Statute, Article 7(1)(d). See also Reilly Frye, *Family Separation Under the Trump Administration: Applying an International Criminal Law Framework*, 110 J. Crim. L. & Criminology, 349, 376 (2020) (arguing the “deportation of asylum-seeking parents as a result of the U.S. government’s Zero Tolerance Policy was a criminal affront to human rights”).

⁴³ ICC Statute, Article 7(1)(k): “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” See also *Kupreškić* Trial Judgment, ¶ 566 (finding “parameters for the interpretation of ‘other inhumane acts’ can [...] be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966”).

Additionally, the conduct severely deprived, contrary to international law, asylum seekers such as the Plaintiffs of their fundamental rights to liberty and security of person, and family integrity.

The conduct was a grave violation of the rights of the child. The Convention on the Rights of the Child (“CRC”)⁴⁴ incorporates core and foundational international principles of non-discrimination and fulfilment of rights and obligations in the best interests of the child.⁴⁵ Striking at the heart of the illegal conduct in this case, Article 9 of the CRC provides that “a child shall not be separated from his or her parents against their will” except in limited circumstances to do with the child’s welfare.

The Inter-American Commission on Human Rights concluded in 2018 that the rights to family life and personal integrity, as well as the right to identity, in respect of migrant children affected by the “Zero Tolerance” policy were in principle at risk.⁴⁶ The Family Separation Policy sacrificed the best interests of the child to deter immigration from selected countries on a discriminatory basis. In the process of being separated from one another and in the aftermath of the separation, the Plaintiffs and thousands of other victims suffered harassment, humiliation and psychological abuse which are recognized forms of persecution under international law.

⁴⁴ U.N. General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3. The Convention has achieved nearly universal ratification with 196 State Parties. While the U.S. has not ratified the Convention, it is bound by the core protections that form part of customary international law.

⁴⁵ Convention on the Rights of the Child, Articles 2 and 3. *See also Wayne Smith, Hugo Armendariz, et al. v. United States*, Report N. 81/10 - Case 12.562, Inter-American Commission on Human Rights, ¶ 56-57 (Jul. 12, 2010), (finding that the right of children to special protection under Article VII of the American Declaration requires that removal proceedings consider the best interests of the child, and that “removal proceedings for non-citizens must take due consideration of the best interest of the non-citizens’ children and a deportee’s rights to family, in accordance with international law”).

⁴⁶ Inter-Am. Comm’n Hum. Rts., Resolution 64/2018, Precautionary Measure No. 731-18: Migrant Children Affected by the “Zero Tolerance” Policy Regarding the United States of America (Aug. 16, 2018).

The violations of fundamental rights were directed against immigrant communities from Central America and Mexico and specifically in this case against Plaintiffs from Honduras. The acts discriminated in fact against the victims, both individually and collectively, selecting parents and children for separation on the basis of their Latin American origin. The formulation of the policies underlying these acts, together with their application and implementation demonstrate an intention to discriminate on various grounds, including on national, ethnic or racial grounds.

The fact that the discriminatory policies were formulated at the highest level of government and implemented through the legal system does not render them legal under international law; to the contrary, policies and legislation deemed to be discriminatory constitute a violation of international law and may amount to persecution. Each of the violations described above could independently constitute persecution. When taken cumulatively, they clearly meet the gravity threshold for persecution as a crime against humanity.

For purposes of establishing the commission of a crime against humanity, the “attack” against a civilian population need not involve the use of armed force or be violent, and may include “exerting pressure on the population to act in a particular manner [...] if orchestrated on a massive scale or in a systematic manner.”⁴⁷ An attack can include “any form of mistreatment, including denunciation or discriminatory practices.”⁴⁸ It is the context of a widespread or systematic attack against a civilian population that raises the persecutory conduct to the level of a crime against humanity. In most circumstances, as in the current case, “the existence of a widespread or systematic attack would be notorious and knowledge could not credibly be denied.”⁴⁹

⁴⁷ *Akayesu* Trial Judgment, ¶ 581.

⁴⁸ Stahn, *supra* n. 11, p. 57.

⁴⁹ ROBERT CRYER, DARRYL ROBINSON AND SERGEY VASILIEV, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 242 (2019).

The “attack” must be widespread *or* systematic, i.e. these two words should be read disjunctively as each one is sufficient on its own to exclude isolated or random acts.⁵⁰ In other words, the conditions of scale and system need not be fulfilled simultaneously although there will often be a partial overlap. The term “widespread” refers to the magnitude of the acts and the number of victims, “for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”⁵¹

The term “systematic” refers to “the organized nature of the acts of violence and the improbability of their random occurrence.”⁵² Factors that point towards the systematic nature of the attack include the existence of a political objective or plan targeting a particular community, the establishment of special institutions and the use of considerable financial, military or other resources to implement the objective or plan, the involvement of high level actors, such as political authorities, in the definition and establishment of the objective or plan, and a pattern of violence against the targeted community.⁵³

The Plaintiffs are civilians who belonged to the targeted civilian population of asylum-seekers from Central America, specifically Honduras, Guatemala and El Salvador. This civilian population was subjected to a notorious attack on a widespread and systematic scale. Intense and traumatic pressure was exerted on the population on a discriminatory basis, through the forced separation of parents and children, to return to countries where individual members of the population risked persecution. Even if arguably non-violent in its design, this attack involved violence in its implementation. The attack was widespread in terms of the number of victims and

⁵⁰ *Tadić* Trial Judgment, ¶ 646.

⁵¹ *Tadić* Trial Judgment, ¶ 648.

⁵² *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment, ¶ 477 (Mar. 24, 2016).

⁵³ *Blaškić* Trial Judgment, ¶ 203.

systematic in terms of being planned, well-organized, backed by political and financial resources and involving officials such as the immigration authorities in its implementation. While evidence of a State policy as such may not be required under customary international law,⁵⁴ the fact that the Family Separation Policy was approved at the highest level of government further demonstrates the systematic nature of the conduct and constitutes an aggravating factor.

IV. BOTH STATES AND INDIVIDUALS MAY BE HELD ACCOUNTABLE FOR CRIMES AGAINST HUMANITY.

The International Court of Justice has recognized the duality of State responsibility and individual criminal responsibility.⁵⁵ While the emphasis since the Nuremberg trials has been on individual criminal responsibility for crimes against humanity, this does not permit the State to hide itself behind the individual perpetrators of *jus cogens* violations, especially when such violations are carried out systematically as part of a State policy.⁵⁶ The acts of those individual perpetrators may be attributable to the State according to the rules on the responsibility of States for internationally wrongful acts.⁵⁷

This position is supported by the Draft Articles on Crimes Against Humanity which establish in Article 3(1) that: “Each State has the obligation not to engage in acts that constitute

⁵⁴ Article 7(2)(a) of the ICC Statute stipulates that the “attack” must be “pursuant to or in furtherance of a State or organizational policy.” But see *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&IT-96-23/1-A, Judgment, ¶ 98 (Jun. 12, 2002), stating that a plan or policy is not required under customary international law. The ICC’s definition of an “attack” emphasizes the understanding that crimes against humanity “cannot be the work of isolated individuals alone.” See *Blaškić Trial Judgment*, ¶ 204-205.

⁵⁵ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ¶173 (2007) ICJ Reports 43.

⁵⁶ See NINA H.B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES*, 187-207 (2000), suggesting that punitive damages may be an appropriate response to State crimes.

⁵⁷ Draft Articles on Crimes Against Humanity, Commentary to Article 3, ¶ 2 (p. 48).

crimes against humanity.” A State may never invoke “internal political instability or other public emergency” to justify crimes against humanity.⁵⁸

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court deny the U.S. government’s motion to dismiss and allow this case to proceed.

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Respectfully submitted,

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⁵⁸ Draft Articles on Crimes Against Humanity, Article 3(3).

APPENDIX A:

LIST OF AMICI CURIAE

International Human Rights Organizations

[Center for Justice and International Law](#) (CEJIL)

[International Association of Democratic Lawyers](#) (IADL)

[International Federation for Human Rights](#) (FIDH) (Secretariat in France, comprised of 192 human rights organizations from 117 countries, representing all regions of the world)

MADRE

[Acción Ecológica](#) (Ecuador)

[Asociación Pro Derechos Humanos](#) (APRODEH) (Peru)

[Centro de Investigación y Promoción de Derechos Humanos](#) (CIPRODEH)/ Center for Research and Promotion of Human Rights (Honduras)

[Centro de Políticas Públicas y Derechos Humanos](#) (Equidad)/ Center for Public Policies and Human Rights (Peru)

[Colectivo de Abogados "José Alvear Restrepo"](#) (CAJAR) (Colombia)

[Comisión de Derechos Humanos de El Salvador](#)/ Human Rights Commission of El Salvador (CDHES) (El Salvador)

[Comisión Mexicana de Defensa y Promoción de los Derechos Humanos](#) (CMDPDH)/ Mexican Commission for the Defense and Promotion of Human Rights (Mexico)

[Comisión Nacional de los Derechos Humanos de la República Dominicana](#)/ National Human Rights Commission of the Dominican Republic (Dominican Republic)

[Comite De Accion Juridica](#)/Legal Action Committee (CAJ) (Argentina)

[Comité de Familiares de Detenidos Desaparecidos en Honduras](#) (COFADHEH)/ Committee of the Families of the Detained and Disappeared in Honduras (Honduras)

[Instituto Latinoamericano para una Sociedad y un Derecho Alternativos \(ILSA\)](#)/ Latin American Institute for an Alternative Society and Law (Colombia)

[Justiça Global](#) (Brazil)

[Liga Mexicana por la Defensa de los Derechos Humanos \(Limeddh\)](#) / Mexican League for the Defense of Human Rights (Mexico)

[Movimento Nacional de Direitos Humanos](#)/ National Movement of Human Rights (Brazil)

[Observatorio Ciudadano](#) (Chile)

[El Programa Venezolano de Educacion-Accion en Derechos humanos \(PROVEA\)](#)/ Venezuelan Program of Education-Action in Human Rights (Venezuela)

International Law Experts

Border Criminologies, University of Oxford, Centre for Criminology, Faculty of Law. (*Border Criminologies* is an international network of researchers, practitioners, and those who have experienced border control (<https://bordercriminologies.law.ox.ac.uk>)).

Surabhi Chopra, Associate Professor, Faculty of Law, Chinese University of Hong Kong, Principal Investigator, *Immigration Detention and Vulnerable Migrants in Hong Kong* (Hong Kong Research Grants Council).

Richard J. Goldstone, retired Justice of the Constitutional Court of South Africa, former Chief Prosecutor of the United Nations International Tribunals for the former Yugoslavia and for Rwanda, and member of the Steering Committee of the Washington University in St. Louis Project on a Crimes Against Humanity Convention.

Kelley Loper, Associate Professor, Co-Director, LLM in Human Rights Programme, Faculty of Law, the University of Hong Kong.

Claudia Martin, Professorial Lecturer in Residence, Co-Director, Academy on Human Rights & Humanitarian Law, American University, Washington College of Law.

Geoffrey Robertson QC, Author, *Crimes Against Humanity*.

Leila Sadat, James Carr Professor of International Criminal Law, Washington University in St. Louis, School of Law; Director of the Whitney R. Harris World Law Institute; Special Adviser on Crimes Against Humanity to the ICC Prosecutor.

Wolfgang Schomburg, retired Judge at the United Nations International Tribunals for the former Yugoslavia and for Rwanda, and Federal High Court, Germany, retired Professor, Doctor of Civil law h.c. (Durham University, UK).