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# IMMIGRATION

## **Forced Family Separation: U.S. crimes against Indigenous Peoples**

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**Abstract:** Forced family separation under the U.S. Zero Tolerance policy is not only a crime against humanity, but also a crime against Indigenous Peoples, which includes the Maya. Rooted in white supremacist ideologies and settler colonialism, contemporary forced family separation continues historical violence inflicted upon Maya Peoples by the U.S. government. Submitted to the International Criminal Court, this amicus brief contends that the Court should investigate and hold the U.S. accountable for crimes against Indigenous Peoples under the U.S. Zero Tolerance policy. The amicus brief begins with an overview of Maya Peoples in present-day Guatemala and the meanings and practices of indigeneity. We then trace key historical periods that evidence the United States' willful and systemic violence inflicted on Indigenous children and families over time. Periods include, among others, 1) removal of Indigenous children and placement in boarding schools; 2) U.S. support of military dictatorships during the 36-year armed conflict and genocide of Maya Peoples in Guatemala; 3) the intercountry adoption of children from Guatemala predominantly to U.S. families; and 4) ongoing punitive immigration policies that harm and in some instances kill Maya children. Perpetuating the U.S.'s long history of disappearing Indigenous people and culture, the Zero Tolerance policy specifically and U.S. immigration policy more generally is a patterned product of genocidal logics and state-inflicted harms by the United States designed to criminalize and terrorize families as a tool of deterrence.

**Key Words:** Zero tolerance policy, Crimes against humanity, immigration enforcement, child-taking

## Introduction

Forced family separation under the U.S. Zero Tolerance policy is not only a crime against humanity, but also a crime against Indigenous children, families, and communities. Piloted in 2017 in Yuma, Arizona and El Paso, Texas and enacted nationally in 2018, the Zero Tolerance policy has forcibly separated approximately 5,569 children from their parents and legal guardians.<sup>1</sup> Of impacted families, 55.8 percent are Guatemalan nationals, the vast majority of whom are Maya. In fact, U.S. and Guatemala authorities variously estimate that 75 to 90 percent of those migrating irregularly from Guatemala are Indigenous.<sup>2</sup> Rooted in white supremacist ideologies and settler colonialism, contemporary forced family separation under both the Zero Tolerance policy specifically and U.S. immigration policy generally continue historical violence inflicted upon Maya Peoples by the U.S. government.

Submitted to the International Criminal Court (ICC), this *amicus curiae* brief details how the Trump administration's U.S. Zero Tolerance policy is a crime against Indigenous Peoples. An *amicus curiae* (friend of the court) brief typically is written by individuals who are not directly involved in a legal case but who offer insight or expertise to the court. An *amicus* brief attends to how the court's decision will affect groups beyond the specific litigants in the case and/or society at large, and is increasingly enlisted by the ICC to inform its deliberations.<sup>3</sup> In what follows, we share our brief submitted to the ICC as part of a larger case requesting investigation and charges be brought against the United States government for crimes against humanity under the Zero Tolerance Policy. This *amicus* brief contends that these charges also should include charges for crimes against Indigenous Peoples.

The brief begins with an overview of Maya Peoples in present-day Guatemala and the meanings and practices of indigeneity. We trace key historical periods that evidence the United States' willful and systemic violence inflicted on Indigenous children and families over time. Periods include, among others, 1) removal of Indigenous (U.S. Native American) children and placement into "U.S. Federal Indian" boarding schools; 2) U.S.-support of military dictatorships during the 36-year armed conflict and genocide of Maya Peoples in Guatemala; 3) the intercountry adoption of children from Guatemala predominantly to U.S. families; and 4) ongoing punitive immigration policies that harm and in some instances kill Maya children. Perpetuating the U.S.'s long history of disappearing Indigenous people and culture, the Zero Tolerance policy was a patterned product of genocidal logics and state-inflicted harms by the United States designed to terrorize families as a tool of deterrence. Throughout, we identify how the Zero Tolerance policy under the Trump administration was not an anomaly, but a continuation of colonial genocidal logics that continue under the Biden administration.

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<sup>1</sup> Dickerson, C. 2022. The Secret History of Family Separation. *The Atlantic*. Located at: <https://www.aclu.org/podcast/why-is-america-so-keen-on-separating-families>

<sup>2</sup> See Heidbrink, L. 2020. *Migranhood: Youth in a new Era of deportation*. Palo Alto, CA: Stanford University Press.

<sup>3</sup> Williams, S., & Woolaver, H. (2006). The role of the Amicus curiae before International Criminal Tribunals. *Int'l Crim. L. Rev.*, 6, 151-189. Farber, S. (2019). The Amicus Curiae Phenomenon-Theory, Causes and Meanings. *Transnat'l L. & Contemp. Probs.*, 29, 1-61.

We then detail the specific rights violated by the Zero Tolerance policy, including the rights to a dignified existence, identity, language, family, health, education, transborder rights, and access to justice and the enduring impact of these violations on Maya children, families and communities. We draw from the robust scholarship on the intergenerational harms of forced family separation on Indigenous Peoples across the Americas and the emerging research on the direct impact on Maya youth, now four years since the end of Zero Tolerance. This brief concludes with a proposal for holding U.S. authorities accountable, for repairing the harm inflicted by the U.S. on Maya Peoples, and a call for the U.S. government to adhere to the Indian Child Welfare Act (ICWA) for all Indigenous children, including Indigenous migrant children.

We write as three scholars deeply engaged in the support of Maya Peoples and communities. Dr. Chón (Maya-Poqomam) is an education scholar whose research focuses on Maya youths' racialized and linguistic experiences in Guatemala and the U.S. Dr. Batz (Maya K'iche') is an anthropologist who has worked for thirteen years in the Maya Ixil region of present-day Guatemala on issues of extractivist industries, migration and forced displacement, and Indigenous social movements and resistance. Dr. Heidbrink is an anthropologist whose community-based research focuses on the migration, detention, and deportation of Maya children and youth from Guatemala. Together, we draw from our decades of collaborative research, academic publications, and engagement with Maya communities across North and Central America, including interviews with those who were victimized by the Zero Tolerance policy and its aftermath.<sup>4</sup> In spite of generations of forced displacement, violence and genocide, Maya Peoples, culture, and history continue to flourish.

## Maya Peoples in present-day Guatemala

In Guatemala, there are twenty-four Indigenous groups: twenty-two Maya groups<sup>5</sup>, the Xinca, and Garifuna. Each community has their own respective histories, languages, cultures, and customs. Non-Indigenous Peoples are commonly known as *ladinos* and remain an ambiguous identity since there is no clear definition or characteristic surrounding this ethnic group beyond being recognized as non-Indigenous. According to the most recent national census, approximately 44 percent of the population is Indigenous; however, according to the Council of Maya People, 75 to 80 percent of the population is Indigenous.<sup>6</sup> The discrepancy in the approximate figures and claims of undercounting of Indigenous Peoples has been attributed to a variety of reasons that are related to discrimination, racism and structural inequalities. The undercounting of Maya Peoples in

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<sup>4</sup> We write with deep gratitude to Maya ancestral authorities, knowledge-holders, and spiritual guides who accompany and guide communities and researchers such as us. We write with humility about the devastating impacts of forced separation on Maya families, community members, organizations, and attorneys with whom we spoke. Through this brief, we hope to center the ongoing pursuit of accountability, justice and reparations for Maya children, families and communities.

<sup>5</sup> The Maya include the Achi', Akateco, Awakateco, Chalchiteco, Ch'orti', Chuj, Itza', Ixil, Jacalteco, Kaqchikel, K'iche', Mam, Mopan, Poqomam, Poqomchi', Q'anjob'al, Q'eqchi', Sakapulteco, Sipakapense, Tektiteko, Tz'utujil and Uspanteko. For detailed information on the demographics of each Maya community, see [https://www.censopoblacion.gt/archivos/resultados\\_censo2018.pdf](https://www.censopoblacion.gt/archivos/resultados_censo2018.pdf).

<sup>6</sup> n.a. 2019, September 24. Tres argumentos del Consejo del Pueblo Maya para rechazar los resultados del Censo. *Prensa Libre*. Located at: <https://www.prensalibre.com/ciudades/quetzaltenango/tres-argumentos-del-consejo-del-pueblo-maya-para-rechazar-los-resultados-del-censo/>.

Guatemala can be considered a form of statistical genocide (the elimination of oppressed and minority groups from official state data).

In Guatemala and Latin America, Indigenous Peoples have historically been associated with backwardness, inferiority, and a roadblock to progress and civilization; this has been referred to as the “Indian Problem.”<sup>7</sup> As a result, nation-building projects in Guatemala and elsewhere have adopted racial whitening and *ladinization* policies that have sought to “solve” this problem, which has included forced assimilation. For example, throughout the late-19th and 20th century—and akin to U.S. and Canadian boarding schools—the Guatemalan State adopted forced schooling that obligated Indigenous students to discard their traditional Maya dress nor speak their language. It is common to hear Maya elders within Indigenous communities of Guatemala tell stories of how their parents would hide them in the *temazcal* (sweat lodge) and other locations to avoid being taken by ladino truant officers (created in 1929) who compelled children to attend schools that were discriminatory and violent toward Maya children.<sup>8</sup>

Today, Maya Peoples experience individualized and structural forms of racism and greater inequality than their non-Indigenous counterparts. Indigenous children are acutely impacted by systemic discrimination; this is borne out in statistics on educational outcomes, health disparities, and violence, among other national indicators.<sup>9</sup> In addition, Maya Peoples in Guatemala experience everyday racism and discrimination, including derogatory and racial terms such as ‘*indio*’ (Indian), ‘backwards,’ ‘savages,’ and ‘witches.’ These epithets and corresponding disparaging treatment occur daily within Guatemalan society, including in state institutions, courtrooms, hospitals and clinics, police precincts, and espoused in public speeches by government officials.<sup>10</sup> It is noteworthy that U.S. Customs and Border Protection officers enlisted some of these specific epithets as they forcibly separated Maya children and their parents, explicitly linking anti-Indigenous beliefs to U.S. Customs and Border Protection (CBP) practices under Zero Tolerance.

## **Ongoing atrocities inflicted by the U.S. on Indigenous children**

Child-taking from the *Mayab'* (a Maya concept that refers to the area where the Maya Peoples live) has a long and violent history. The above-mentioned genocidal logic of forced family separation of Indigenous families was a prevalent characteristic of Spanish colonialism (1524-1821). Rooted in colonial ideologies that inflicted violence and coerced conversion of children to Christianity, present-day U.S. settler colonialism has enlisted its law, institutions and system of governance to harm Maya Peoples. Maya children are not alone; child-taking, violent socialization, and coercive

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<sup>7</sup> Oppressed and marginalized peoples elsewhere in the world are often viewed as a “problem” to dominant groups. For example, in Europe, Jewish peoples have been historically marginalized and persecuted. During World War II, the Nazi’s justified the Holocaust by labeling it as “the Final Solution to the Jewish Question”  
<https://encyclopedia.ushmm.org/content/en/article/final-solution-overview>

<sup>8</sup> Carey, D. 2006. *Engendering Mayan History: Kaqchikel Women as Agents and Conduits of the Past, 1875-1970*. New York: Routledge. Pgs. 182-3, 190.

<sup>9</sup> Heidbrink, L., Chuc Norato, S. & García Maldonado, M. 2022. *Conditions of Children and Youth in Guatemala*. New York City: Center for Mexico and Central America of Columbia University. Located at:  
<https://ilas.columbia.edu/content/regional-expert-paper-series>.

<sup>10</sup> Heidbrink, L. 2020. *Migranthood: Youth in a new Era of deportation*. Palo Alto, CA: Stanford University Press.

or clandestine adoptions have impacted Indigenous children across the Americas.<sup>11</sup> In what follows, we trace how Maya children and their families have been simultaneously politicized, criminalized and infantilized through several periods of U.S. intervention in Guatemala, including the 36-year armed conflict (1960-1996), intercountry adoption schemes (1996-2007), punitive immigration policies (1980s to the present), and the Zero Tolerance policy (2017-2019).

### ***Family disruptions during the Colonial era***

With Spanish colonialism, Indigenous kinship structures were violently altered. European invaders and the Catholic Church imposed a nuclear patriarchal family model that privileged heteronormative male dominant households. In this way, women, elders and children were placed in vulnerable positions. According to historians of Mesoamerica, “Colonial authorities believed that [Indigenous Peoples] would be easier to supervise and control if divided into small nuclear households. The authority of the elders would be reduced if their adult children were separated from their influence.”<sup>12</sup> Moreover, priests would force young people to get married in their mid-teens or younger, particularly girls.<sup>13</sup> Thus, colonialism disrupted Indigenous forms of kinship that saw colonial officials intervene by dividing family cohesion as a means of control and surveillance. These historical disruptions laid the groundwork for subsequent disruptions and separations during the ongoing settler-colonial occupation of Maya territories in the present-day.

### ***U.S. Federal Indian Boarding Schools for Indigenous Children***

The Zero Tolerance policy and the violence and trauma it causes on Indigenous families migrating from Guatemala is reminiscent of U.S. and Canadian educational and child welfare policies targeting American Indian, Alaska Native, and First Nations families. The U.S. Federal Indian boarding school system (1819-1969) and the Canadian Residential school system (1876-1996) were created to fix what these governments perceived as the unsuitability endemic to the Native family to properly raise children. Guided by the forced assimilationist philosophy of “Kill the Indian, and save the man,”<sup>14</sup> Native children were separated from their families and sent to boarding or residential schools to “civilize” them and assimilate them into the nation.<sup>15</sup> Many Native children died in these schools due to a lack of medical care and pervasive abuse.<sup>16</sup> In the 1950s and 1960s, child welfare systems emerged as an alternative to boarding and residential schools.<sup>17</sup> The U.S.’s Indian Adoption Project (1958-1967) and Canada’s Sixties Scoop targeting Native children resulted in Indigenous children disparately placed in federal, state, or provincial

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<sup>11</sup> González, O. E., & Premo, B. (Eds.). (2007). *Raising an Empire: Children in early modern Iberia and colonial Latin America*. UNM Press. Hecht, T. (Ed.). (2002). *Minor omissions: Children in Latin American history and society*. Univ of Wisconsin Press.

<sup>12</sup> Carmack, Robert M., Janine L. Gasco and Gary H. Gossen, 2007. *The Legacy of Mesoamerica: History and Culture of a Native American Civilization*. New Jersey: Pearson. Pg. 207.

<sup>13</sup> Ibid

<sup>14</sup> This phrase was taken from an 1892 speech made by Captain Richard H. Pratt, a U.S. Army soldier.

<sup>15</sup> Milloy, J. S. 2017. *A National Crime: The Canadian Government and the Residential School System 1879 to 1986*. Winnipeg: University of Manitoba Press. See also, Newland, B. 2022, May. *Federal Indian boarding school initiative investigative report*. Bureau of Indian Affairs, U.S. Department of the Interior.

<sup>16</sup> Milloy 2017, supra note 15.

<sup>17</sup> George, L. 1997. Why the Need for the Indian Child Welfare Act? *Journal of Multicultural Social Work*, 5(3-4), 165–175. [https://doi.org/10.1300/J285v05n03\\_04](https://doi.org/10.1300/J285v05n03_04). See also, McKenzie, H. A., Varcoe, C., Browne, A. J., & Day, L. (2016). Disrupting the Continuities Among Residential Schools, the Sixties Scoop, and Child Welfare: An Analysis of Colonial and Neocolonial Discourses. *International Indigenous Policy Journal*, 7(2). <https://doi.org/10.18584/iipj.2016.7.2.4>.

care when compared to white children.<sup>18</sup> These trends continue to contemporary U.S. domestic child welfare systems.

### ***Family separation during the 36-year armed conflict in Guatemala***

The 1954 U.S.-backed coup that overthrew the democratically-elected government of Jacobo Arbenz, ushered in a military dictatorship. During the Guatemalan civil armed conflict, the U.S. provided military and technical assistance to Guatemala's army, police and government. In 1999, President Bill Clinton would apologize for the role that the U.S. had in the violence against the Guatemalan people. The United Nations sponsored Guatemalan Commission for Historical Clarification (CEH) reported 669 massacres during Guatemala's 36-year armed conflict, which left 200,000 people dead. Eighty-three percent of these victims were Indigenous, and 1.5 million people displaced.<sup>19</sup> The same report found that the military was responsible for ninety-three percent of these deaths. During the dictatorships of General Fernando Romeo Lucas García (1980-1982) and General José Efraín Ríos Montt (1982-1983), the Guatemalan State carried out a "scorched-earth" counter-insurgency campaign meant to displace, massacre and eliminate Maya communities that the military viewed as a safe-haven for the guerrilla.

There is ample evidence to demonstrate that the military targeted Maya Peoples during the conflict due to their Indigenous identity. The CEH's report states that the Guatemalan State developed the idea of the "internal enemy," which led the military and paramilitary forces to commit massacres, disappearances and other forms of violence. The CEH reports that "between 1981 and 1983 the Army identified groups of the Maya population as the internal enemy, considering them to be an actual or potential support base for the guerrillas, with respect to material sustenance, a source of recruits and a place to hide their members. In this way, the army, inspired by the National Security Doctrine, defined a concept of internal enemy that went beyond guerrilla sympathizers, combatants or militants to include civilians from specific ethnic groups."<sup>20</sup>

The military also viewed Indigenous youth and children as enemies.<sup>21</sup> The CEH noted with "particular concern that a large number of children were also among the direct victims of arbitrary execution, forced disappearance, torture, rape and other violations of their fundamental rights" and that the conflict "left a large number of children orphaned and abandoned, especially among the Maya population, who saw their families destroyed and the possibility of living a normal childhood within the norms of their culture, lost."<sup>22</sup> In Guatemalan military's counterinsurgency strategies detailed in Operation Sophia, children were referred to as "chocolates," demonstrating the dehumanized way that the armed forces viewed children.<sup>23</sup> There are a significant number of cases and testimonies throughout Guatemala that during the war, children were executed during

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<sup>18</sup> McKenzie, H. A., Dell, C. A., & Fornssler, B. 2016. Understanding addictions among Indigenous people through social determinants of health frameworks and strength-based approaches: a review of the research literature from 2013 to 2016. *Current Addiction Reports*, 3, 378-386.

<sup>19</sup> *Guatemala Memory of Silence: Report of the Commission for Historical Clarification, Conclusions and Recommendations*. 1999. Commission for Historical Clarification. Located at: <https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf>.

<sup>20</sup> *Ibid*, 39

<sup>21</sup> *Ibid*, 20

<sup>22</sup> *Ibid*, 23

<sup>23</sup> Ejército de Guatemala. 1982. *Operación Sofía*. Guatemala. Located at: [https://nsarchive2.gwu.edu/NSAEBB/NSAEBB297/Operation\\_Sofia\\_lo.pdf](https://nsarchive2.gwu.edu/NSAEBB/NSAEBB297/Operation_Sofia_lo.pdf).

massacres, tortured, sexually assaulted, disappeared, and separated from their families. In some instances, children who survived the war were adopted by military officials and soldiers.<sup>24</sup> Children and youth were forced to flee Guatemala, many who migrated to the United States seeking refuge. In spite of this history—and U.S. involvement in the conflict—Guatemalan youth often are criminalized as a threat given the prevalence of street gangs in Central America.

### ***Intercountry Adoption***

Family separation of Maya families—with U.S. complicity—was institutionalized via intercountry adoption of predominantly Maya children from Guatemala. The conditions that created missing or disappeared children during the war continued in post-conflict Guatemala via intercountry adoption. Guatemala is the origin of the largest number of intercountry adoptions in Latin America. Between 1996 and 2007, over 50,000 Guatemalan children were adopted internationally; 22,242 children were adopted by U.S. citizens.<sup>25</sup> Researchers have documented that many of these adoptions were coercive or involved child trafficking of Indigenous children.<sup>26</sup> The majority of international adoptions from Guatemala were completed via extra-judicial processes via notary or attorney without the oversight of a judge or state welfare agency.<sup>27</sup> Eager to make sizable profits, medical professionals, midwives, and baby brokers (*buscadoras* or *jaladoras*) cajoled, intimidated, and paid birth mothers to relinquish their parental rights and expedite foreign adoption.<sup>28</sup> They preyed upon income-poor families and single mothers in rural, predominantly Indigenous areas of the country or among women who had migrated from rural areas to work in Guatemala City. Given the history of child taking in Guatemala during colonialism and the armed-conflict, adoption in Indigenous communities is often met with anxiety, uncertainty, and concern for a loss of culture and language. Disappearances of children for illicit organ harvesting and trafficking—occurring during the influx of intercountry adoptions—continue as a concern for many communities.<sup>29</sup>

Investigative journalists and researchers have since documented how the Guatemalan government profited by kidnapping and selling children internationally under the guise of

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<sup>24</sup> For example, Oscar Alfredo Ramírez Castañeda was a survivor of the 1982 Dos Erres Massacre, who was kidnapped and adopted by a military official when he was three years old. His story is the basis for the documentary *Finding Oscar* that discusses his story in depth. For more information, see:

<https://www.propublica.org/article/finding-oscar-massacre-memory-and-justice-in-guatemala>.

<sup>25</sup> Selman, P. 2009. The Rise and Fall of Inter-Country Adoption in the 21st Century. *International Social Work*, 52(5): 575–594.

<sup>26</sup> Rotabi, K. S., Morris, A. W., & Weil, M. O. 2008. International child adoption in a post-conflict society: A multi-systemic assessment of Guatemala. *Journal of Intergroup Relations*, 34(2), 9-41. McIntyre, E. S. 2018. Saviors, scandal, and representation: Dominant media narratives around human trafficking in international adoption. *Journal of Human Trafficking*, 4(1), 92-95.

<sup>27</sup> Briggs, L. 2012. *Somebody's Children: The Politics of Transracial and Transnational Adoption*. Durham, NC: Duke University Press. See also, Gresham, K., Nackerud, L., & Risler, E. 2004. Intercountry adoption from Guatemala and the United States: A comparative policy analysis. *Journal of Immigrant & Refugee Services*, 1(3-4), 1-20.

<sup>28</sup> Lacey, M. 2006. Guatemala system is scrutinized as Americans rush in to adopt. *New York Times*, 5. Located at: <https://www.nytimes.com/2006/11/05/world/americas/05guatemala.html>.

<sup>29</sup> Adams, A. 1997. Los cosechadores de órganos y Harbury: relatos transnacionales de impunidad y responsabilidad en Guatemala después de la Guerra. *Mesoamérica* 34(12), 595—632. See also, Posocco, S. 2011. Expedientes: Fissured legality and affective states in the transnational adoption archives in Guatemala. *Law, Culture and the Humanities*, 7(3), 434-456.



adoption, often with the implicit and explicit knowledge of the U.S. Embassy.<sup>30</sup> As early as 1999 and 2000, reports emerged of widespread corruption in the adoption industry in Guatemala, including “baby theft,” “baby snatching,” and “baby farms.”<sup>31</sup> Several countries, including Canada, ceased adoptions from Guatemala, yet the U.S. continued as the primary receiving country of adoptees. Laundered identities and false documents of children were presented to U.S. embassy officials in order to issue the requisite immigration travel documents for children. Now released government papers indicate that adoption paperwork passed through the hands of multiple U.S. bureaucrats and several levels of approval with limited scrutiny.<sup>32</sup> Legal scholars point to the political pressure from prospective families for the U.S. to continue facilitating intercountry adoptions from Guatemala in spite of these well-known concerns.<sup>33</sup> The International Commission Against Impunity in Guatemala (CICIG, Comisión Internacional Contra la Impunidad en Guatemala) has since documented over 3,000 cases of irregular adoptions before the Guatemalan government closed CICIG’s offices and expelled its staff from the country.<sup>34</sup>

In 2007, the Guatemalan legislature passed the Law of Adoptions (*Ley de Adopciones*) in response to high levels of corruption and abuse within the international adoption sector, terminated international adoptions of Guatemalan children to non-nationals, and attempted to curb informal domestic adoption.<sup>35</sup> In the same year, Guatemala became a party to the Hague Intercountry Adoption Convention and became a U.S. Treaty Partner. While inadequate oversight and enforcement of the Law of Adoptions remains a concern, intercountry adoption from Guatemala effectively has ended.<sup>36</sup>

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<sup>30</sup> Telemundo News. 2019, May. Robados, arrebatados de hospitales y vendidos: los niños perdidos de Guatemala buscan a sus padres y a sus raptos. *Telemundo*. Located at: <https://www.telemundo.com/noticias/2019/11/13/robados-arrebatados-de-hospitales-y-vendidos-los-ninos-perdidos-de-guatemala-buscan-sus-tmna3581733>. See also, Siegal, E. 2012. *Finding Fernanda: Two mothers, one child, and a cross-border search for truth*. Boston, MA: Beacon Press.

<sup>31</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, Ofelia Calcetas-Santos, 27 January 2000, E/CN.4/2000/73/Add.2, available at: <https://www.refworld.org/docid/3ae6b0fe0.html>. See also, McGirk, J. 2000, April 5. Guatemala starts crackdown on illegal baby trade” *The Independent*. Located at: <https://www.independent.co.uk/news/world/americas/guatemala-starts-crackdown-on-illegal-baby-trade-279553.html>. Rotabi, K. S., & Gibbons, J. L. 2016. Fraud in intercountry adoption: Child sales and abduction in Vietnam, Cambodia, and Guatemala. In *Intercountry Adoption* (pp. 93-102). Milton Park, UK: Routledge.

<sup>32</sup> Siegal, E. 2011. *The U.S. Embassy Cables: Adoption Fraud in Guatemala, 1987-2010*. Cathexis Press, LLC.

<sup>33</sup> Smolin, D. M. 2006. Child laundering: How the intercountry adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping, and stealing children. *Wayne Law Review*, 52 (113), 113-200. See also, Yemm, L. M. 2010. International adoption and the “best interests” of the child: Reality and reactionism in Romania and Guatemala. *Washington University Global Studies Law Review*, 9, 555-574.

<sup>34</sup> Comisión Internacional Contra la Impunidad en Guatemala. 2010. Report on players involved in the illegal adoption process in Guatemala since the entry into force of the adoption law (Decree 77-2007). Located at: [http://www.cicig.org/uploads/documents/informes/INFOR-TEMA\\_DOC05\\_20101201\\_EN.pdf](http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_EN.pdf).

<sup>35</sup> Ley de Adopciones. Decree No. 77-2007. See also, Comisión Internacional contra la Impunidad en Guatemala. 2010. Informe sobre actores involucrados en el proceso de adopciones irregulares en Guatemala a partir de la entrada en vigor de la Ley de Adopciones. Located at: [https://www.cicig.org/uploads/documents/informes/INFOR-TEMA\\_DOC05\\_20101201\\_ES.pdf](https://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_ES.pdf).

<sup>36</sup> Cultural Survival. 2018. *Convention on the Rights of the Child Alternative Report Submission: Indigenous Children’s Rights Violations in Guatemala*. Located at: <https://www.culturalsurvival.org/sites/default/files/CRC%20Report%20Guatemala%202017.pdf>.

### ***Punitive child welfare policies disproportionately impacting Indigenous families***

Family separation of Indigenous children is also institutionalized in punitive domestic child welfare policies. In the United States, pervasive racial disparities exist in the child welfare involvement of families of color. Nationwide, Black and Indigenous families are more likely to be reported and investigated for abuse, abandonment and neglect than their white counterparts.<sup>37</sup> Researchers point to institutionalized racism and racial bias as the primary causes of these disparities.<sup>38</sup> In spite of specialized protections for Indigenous children under the Indian Child Welfare Act (ICWA), Maya families and children in the United States do not benefit from these critical protections. In fact, Maya children and families who are undocumented in the U.S. face compounded discrimination owing to Indigenous identity and undocumented status, which shape their outcomes in child welfare interventions and family courts. The following are a few examples that illustrate how Maya migrant children and families become ensnared in punitive child welfare policies in the United States.

- Mercedes Santiago-Felipe (Maya), an asylum seeker in the U.S. since 1992, was arrested in 2001 for hitting her U.S.-born son for “being rough with her sister.”<sup>39</sup> Her children were placed into protective custody. She was not provided legal interpretation in her Mayan language and was deported to Guatemala without her children. The state of Nebraska filed a motion to terminate her parental rights after 15 months following her deportation because her “children had been in out-of-home placement for 15 or more months.”<sup>40</sup>
- María Luis (Maya-K’iche’) was arrested for obstructing a government operation due to a doctor’s notification to Nebraska’s child welfare agency that she missed her child’s medical appointment. Her children were placed in protective custody and later in foster care. Maria was not provided legal interpretation in K’iche’ when she agreed to a voluntary departure to Guatemala nor was she informed that her children would remain in the U.S. Within the year, the state of Nebraska filed a motion in 2006 to terminate her parental rights.<sup>41</sup>
- Immigration authorities apprehended Encarnación Bail Romero (Maya) in a workplace raid in 2007 and accused her of using false identity documents. She was charged with aggravated identity theft and separated from her young son Carlos, whom she initially entrusted to the care of her relatives and later to other caretakers. During her two years of incarceration, Bail was not permitted visitations with her son. At age two, Carlos came into the care of a white couple Melinda and Seth Moser. Although Bail did not grant consent

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<sup>37</sup> Cross, T. L. 2021. Racial disproportionality and disparities among American Indian and Alaska Native populations. *Racial disproportionality and disparities in the child welfare system*, 99-124. See also, Dettlaff, A. J., & Boyd, R. 2020. Racial disproportionality and disparities in the child welfare system: Why do they exist, and what can be done to address them? *The Annals of the American Academy of Political and Social Science*, 692(1), 253-274.

<sup>38</sup> Crofoot, T. L., & Harris, M. S. 2012. An Indian child welfare perspective on disproportionality in child welfare. *Children and Youth Services Review*, 34(9), 1667-1674.

<sup>39</sup> Teague, C. R. 2020. ASFA: How Policy and Prejudice Undermine Immigrants' Rights. *Texas Law Review*, 99, 1041. <https://texaslawreview.org/asfa-how-policy-and-prejudice-undermine-immigrants-rights/>.

<sup>40</sup> Ibid

<sup>41</sup> Nelsen, A. 2011, December 20. Torn apart: How the government separates parents and children. *In These Times*. Located at: <https://inthesetimes.com/article/torn-apart-how-the-federal-government-separates-parents-and-children>.

for the Mosers to adopt him, a family court ruled that Bail had abandoned her child and permitted the Mosers to proceed with adoption. On appeal, the Missouri Supreme Court reversed the decision to terminate Bail's parental rights and remanded the case to the lower courts, calling the decision a "travesty." On retrial, in July 2012, the lower courts ruled that it was in the best interests of Carlos to have Bail's parental rights terminated and to be adopted by the Mosers. In 2009, *Flores-Figueroa v. United States* struck down the criminalization of aggravated identity theft because the U.S. Supreme Court ruled there must be intent. In effect, Bail was separated from and lost custody of her son for committing a crime that is no longer punishable by two years of incarceration.<sup>42</sup>

As frequent expert witnesses on behalf of Maya migrants in U.S. immigration and family courts, our research documents that these are not isolated cases, rather they represent the dual discrimination that Maya Peoples confront as undocumented immigrants and asylum seekers in the United States. Taken together, these examples illustrate the ways state child welfare authorities work in tandem with federal immigration authorities to separate Maya children from their families. They are not afforded specialized protection due to their Indigenous identity via ICWA and, as legal scholars have documented, their undocumented legal status is instrumentalized<sup>43</sup> to separate Maya migrants from their children.

### ***Punitive immigration policies on Indigenous children and youth***

The United States has enacted legislation that harms Indigenous Peoples who migrate across imposed international borders. Over the past two decades, there has been record levels of U.S. government funding of immigration enforcement (U.S.\$24 billion in 2023); the militarization and technologization of the U.S.-Mexico border; the fluid collaboration between local law enforcement and federal immigration authorities; and an infusion of U.S. funding, technology, and training to Mexican and increasingly Guatemalan authorities to thwart migration through Mexico and Central America, respectively. There likewise has been a proliferation of detention facilities in the U.S. for adults, families and unaccompanied minors which are particularly violent and deadly for Maya Peoples.

The following are recent accounts of deaths of Indigenous children and youth in U.S. immigration custody during the Trump administration. Their avoidable deaths exemplify U.S. immigration enforcement's violent and deliberate neglect of Indigenous children who migrate.

- December 2018: Jakelin Caal Maquín (Maya Q'eqchi', seven years old) died of streptococcal sepsis while in CBP custody. CBP denied her and her father access to water while they waited eight hours to be transferred to a CBP station. Jakelin's chances of surviving would have been improved with earlier medical intervention. Instead of accepting responsibility for medical neglect, U.S. Department of Homeland Security Secretary

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<sup>42</sup> Heidbrink, L. 2014. *Migrant youth, transnational families, and the state: Care and contested interests*. Philadelphia, PA: University of Pennsylvania Press, p.177.

<sup>43</sup> Rogerson, S. 2012. Unintended and unavoidable: The failure to protect rule and its consequences for undocumented parents and their children. *Family Court Review*, 50(4), 580-593. See also, Thronson, D. B., & Sullivan, J. F. P. 2012. Family courts and immigration status. *Juvenile and Family Court Journal*, 63(1), 1-18.

Kirstien Nielsen stated that Caal's death was “a very sad example of the dangers of this journey”, and that “this family chose to cross illegally.”<sup>44</sup>

- December 2018: Felipe Gómez Alonzo (Maya Chuj, eight years old) was taken to the hospital by CBP and was told he had a common cold and a fever but was not tested for influenza. He died in CBP custody.
- May 2018, Claudia Patricia Gomez Gonzalez (Maya Mam, 20 years old) was shot and killed by a U.S. Customs and Border Protection agent in Texas after crossing the border. Initially, CBP claims Ms. Gómez Gonzalez was an assailant who resisted arrest, yet a video of the murder surfaced disproving CBP's account.<sup>45</sup>
- May 2019, Juan Leon Gutierrez, (Maya Ch'orti', 16 years old) died from a brain infection likely caused by an untreated sinus infection while in Immigration and Customs Enforcement (ICE) custody. His father, Tanerjo de León mourned, “He went seeking life, but found death.”<sup>46</sup>
- June 2019: Wilmer Josue Ramirez, (Maya Ch'orti', two years old) died from respiratory distress and parasites, treatable conditions when diagnosed and treated quickly, while in ICE custody. Lawyers for Wilmer's family said he and his mother were “subjected to inhumane conditions” during their three days in CBP custody, “including exposure to extreme temperatures, being forced to sleep outside on the ground, and other terrible conditions of confinement.”<sup>47</sup> At the conclusion of a year-long investigation, the Office of the Inspector General found “deeply troubling failures” by CBP.
- September 2019: Carlos Gregorio Hernández Vasquez (Maya Achi, 16 years old), died in CBP custody due to lack of medical treatment for the flu.<sup>48</sup> By its own admission, CBP failed to conduct “regular and frequent” welfare checks.<sup>49</sup>

Taken together, these devastating yet avoidable losses illustrate how the United States immigration enforcement continues to dehumanize migrants like Jakelin, Felipe, Claudia, Wilmer, Juan and Carlos. Notably, these policies are not passive state actions, rather they are deliberate and strategic approaches to deter the increasing number of people on the move worldwide. Policymakers continue to engage in *necropolitics*, or the social and political power to dictate how some people live and how some die.<sup>50</sup> Whether by compelling migrants through the desert or establishing

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<sup>44</sup> n.a. 2018, December 18. 7-Year-Old Guatemalan Girl Dies In Border Patrol Custody. *CNN*. Located at: <http://www.cnn.com/TRANSCRIPTS/1812/15/ndaysat.03.html>.

<sup>45</sup> Lakhani, Nina 2019, May 22. ‘I want justice’: a year on, family of Guatemalan woman shot dead in Texas wait for answers". *the Guardian*. Located at: <https://www.theguardian.com/us-news/2019/may/22/guatemala-woman-claudia-gomez-texas-border-agents>

<sup>46</sup> Brigada, A.C. 2019, May 13. ‘He Went Seeking Life But Found Death.’ How a Guatemalan Teen Fleeing Climate Change Ended Up Dying in a U.S. Detention Center. *Time*. Located at: <https://time.com/5587817/juan-de-leon-gutierrez-guatemala-migrant>.

<sup>47</sup> Moore, R. & M. Sacchetti. 2019, July 2. Toddler who died after being taken into custody at the Mexican border suffered multiple diseases. *Washington Post*. Located at: [https://www.washingtonpost.com/immigration/toddler-who-died-after-being-taken-into-custody-at-the-mexican-border-suffered-multiple-diseases/2019/07/02/5fda6674-9d03-11e9-9ed4-c9089972ad5a\\_story.html](https://www.washingtonpost.com/immigration/toddler-who-died-after-being-taken-into-custody-at-the-mexican-border-suffered-multiple-diseases/2019/07/02/5fda6674-9d03-11e9-9ed4-c9089972ad5a_story.html).

<sup>48</sup> Ibid

<sup>49</sup> Montoya-Galvez. C. 2021, September 17. Border Patrol failed to conduct welfare checks on migrant boy who died in 2019, probe finds. *CBS News*. Located at: <https://www.cbsnews.com/news/border-patrol-failed-to-conduct-welfare-checks-on-migrant-boy-who-died-in-2019-probe-finds>.

<sup>50</sup> Mbembé, J. A., & Meintjes, L. 2003. Necropolitics. *Public Culture*, 15(1), 11-40.

inhumane detention centers, by taking their children the United States uses immigration enforcement as an instrument of violence and death.<sup>51</sup>

## **The U.S. Zero Tolerance Policy**

Despite the Biden administration claims that the Zero Tolerance policy was an “unfortunate” immigration policy under the Donald Trump administration, the policy strategically and forcibly separated Indigenous children from their parents and custodial care providers. In what follows, we detail examples of the specific violations of Indigenous Peoples rights and its enduring impacts on children, families, and communities. Further, we identify how practices enacted under the Zero Tolerance policy continue under the Biden administration’s immigration and custodial policies and practices. Perpetuating the U.S.’s long history of disappearing Indigenous people and culture, these policies and practices are designed to terrorize families as a tool of deterrence.

### ***Intentional targeting of Indigenous children and families***

This anti-immigrant, anti-Indigenous culture cannot be dismissed as a few bad apples or rogue CBP/ICE agents. First, Zero Tolerance was a formal state policy that builds on and extends the longstanding continuity of U.S.-inflicted harms against Maya youth and families as discussed above. Second, the anti-immigrant and anti-Indigenous messages within the Zero Tolerance policy originated from the highest levels of state power in the United States. President Trump himself disparaged Central American migration as an infestation<sup>52</sup> of “animals.”<sup>53</sup> White House Chief of Staff John Kelly described migrants as “rural people with limited education who don’t have the skills nor integrate well.”<sup>54</sup> Third, like the historic educational and child welfare policies in the U.S. and Canada targeting Indigenous families, the Zero Tolerance policy also arises out of a colonial system that pathologizes Indigenous families as unfit to raise children. Legal scholar Stephen Lee notes that historically, the U.S. immigration system has been “pervasively organized around principles of family separation.”<sup>55</sup> The Zero Tolerance policy functioned as designed because it is situated within this history of forcible separation of Indigenous peoples. Fourth, there is a well-documented “persistent culture of racism” and anti-Indigenous sentiments in the U.S. Customs and Border Protection across U.S. administrations.<sup>56</sup> Agents and officials have engaged in racist behaviors and treatment against migrants generally and Indigenous peoples specifically who are dehumanized with racial and derogatory slurs such as “filthy Indian,” “guats,” “wetback,” “beaners,” “savages,” “subhuman shit.”<sup>57</sup> It is noteworthy that many of these derogatory and

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<sup>51</sup> De León, J. 2015. *The Land of Open Graves: Living and dying on the migrant trail*. Berkeley, CA: University of California Press.

<sup>52</sup> Simon, A. 2018, June 19. People Are Angry President Trump Used This Word to Describe Undocumented Immigrants. *Time*. Located at: <https://time.com/5316087/donald-trump-immigration-infest/>

<sup>53</sup> Hirschfeld Davis, J. 2018, May 16. Trump Calls Some Unauthorized Immigrants “Animals” in Rant. *The New York Times*. Located at: <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>.

<sup>54</sup> *Transcript: White House Chief of Staff John Kelly’s Interview with NPR*, NPR (May 11, 2018). Located at: <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>.

<sup>55</sup> Lee, S. 2019. Family separation as slow death. *Columbia Law Review*, 119(8), 2319-2384. p. 2322.

<sup>56</sup> Murdza, K. & W. Ewing. 2021. *The Legacy of Racism within the U.S. Border Patrol*. American Immigration Council, 12. Located at: [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_legacy\\_of\\_racism\\_within\\_the\\_u.s.\\_border\\_patrol.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_legacy_of_racism_within_the_u.s._border_patrol.pdf).

<sup>57</sup> Ibid

specifically anti-Indigenous slurs were used by CBP agents as they separated Maya children from their parents.<sup>58</sup>

### ***Grave harm that violates rights of Indigenous children, families, and communities***

Should the International Criminal Court investigate the grievous harms inflicted upon Maya children, it is important to investigate not only the consequences on singular children and their parents, but also on their extended families and communities across national borders. In Maya cosmology, an action—whether negative or positive—is consequential beyond the individual; the action impacts fellow community members, nature, and the balance of positive and negative in the universe. Under the Zero Tolerance policy, the United States inflicted grievous harms on children, yet those harms are rippling and enduring. Based upon our respective research with Maya Peoples in Guatemala, Mexico and the United States as well as interviews with impacted families, community members, and organizations, here, we discuss the immediate and enduring harms inflicted by the Zero Tolerance policy on Maya children, families, *and* communities.

Further, should the ICC investigate crimes inflicted against Indigenous peoples under Zero Tolerance, it is likewise important to understand that in Maya worldviews, children and youth are recognized as interdependent members of families and communities who have complex, multidimensional identities. An Indigenous person’s identity consists of multiple, intersecting factors such as sacredness of Two-Spirit people,<sup>59</sup> generation,<sup>60</sup> (dis)ability, among others.<sup>61</sup> As Patricia Monture-Angus (Mohawk) states, “[T]o artificially separate my gender (or any other part of my being) from my race and culture forces me to deny the way I experience the world.”<sup>62</sup> Thus, to only consider the unique harms inflicted on Maya children and their families on account of their Indigenous identity in isolation not only is discordant with Indigenous worldviews and lived experiences of Indigenous peoples but likewise erroneously reifies indigeneity as a racio-ethnic identity rather than a question of sovereignty/nationhood.<sup>63</sup>

### ***Right to a dignified existence***

Article 15 of UNDRIP states, “Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.”<sup>64</sup> The Zero Tolerance policy deliberately and explicitly prevented Indigenous parents and children the right to development in accordance with

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<sup>58</sup> Diaz, S. & J. Lee. 2022, December. *Zero Tolerance: Atrocity crimes against migrant children and families in the united states: An accountability framework for family separation*. New York: Center for Mexico and Central America, Columbia University.

<sup>59</sup> Driskill, Qwo-Li. 2010. “Doubleweaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies.” *GLQ: A Journal of Lesbian and Gay Studies* 16, no.1–2: 69–92.

<sup>60</sup> Winnemucca, Sarah. [1883] 1969. *Life Among the Piutes: Their Wrongs and Claims*. Bishop, CA: Sierra Media Inc.

<sup>61</sup> Red intersectionality “does not center the colonizer, nor replicate the erasure of Two-Spirit and trans peoples in our communities, but instead... attends to the many intersecting factors including gender, sexuality, and a commitment to activism and Indigenous sovereignty.” Clark, N. 2016. Red intersectionality and violence-informed witnessing praxis with Indigenous girls. *Girlhood Studies*, 9(2), 46-64.

<sup>62</sup> Monture-Angus, P. 1995. *Thunder in my Soul: A Mohawk Woman Speaks*. Halifax, NS: Fernwood Publishing.

<sup>63</sup> Clark 2016, *supra* note 61.

<sup>64</sup> United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People. Located at: [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

their own needs and interests through inhumane treatment, manipulation, and abuse while in Customs and Border Protection (CBP) custody. CBP held children (including infants) and adults in cells known as *hieleras* (Spanish for ice boxes) due to their extremely low temperatures; the freezing temperatures are especially inhumane for those exiting the extreme temperatures of the desert. *Hieleras* are holding cells without beds, are frequently overcrowded, and routinely lack adequate food, water, and medical care.<sup>65</sup> Families separated under the Zero Tolerance policy reported CBP deprived them of food and water for days and subjected them to verbal and physical abuse. Parents and children alike report that CBP officers yelled at and berated them, particularly parents who could not console their crying infants and toddlers who were hungry, freezing and traumatized. In addition, CBP told parents that only if they signed immigration documents CBP would return their children to them. In effect, CBP held children as pawns in an effort to terrorize family members into relinquishing their right to seek asylum. Maya families with whom we spoke understood threats to take and never return their children as real and imminent precisely because of the U.S.'s long and repeated history of taking Maya children. Even while the Zero Tolerance policy has officially ended, anti-Indigenous attitudes, failure to provide interpreters, withholding of food, and use of *hieleras* persist under the Biden administration.

In June of 2018, reporters secured audio recordings from inside of one CBP facility of children (roughly between the ages of four and ten) crying uncontrollably, unable to breathe through their sobbing, and screaming repeatedly “Mami” and “Papá.” In the recording, CBP agents are overheard joking, “Well, we have an orchestra here. What’s missing is a conductor.”<sup>66</sup> Despite public outcry at the cruelty of the policy and the inhumane treatment of children and families, the Trump Administration stood by the policy. In fact, Attorney General Jeff Sessions cited passages from the Bible in an attempt to establish religious justification<sup>67</sup>—analogous to religious justifications enlisted historically to separate Indigenous children from their families during colonialism and via settler-colonial boarding schools.

### ***Right to identity***

The Zero Tolerance policy weaponized Indigenous identity against Maya migrants, violating their rights under Article 8 of UNDRIP “not to be subjected to forced assimilation or destruction of their culture.” Article 8 also provides mechanisms for prevention of and redress for any form of forced population transfer or forced assimilation or integration.<sup>68</sup> Indeed, forced assimilation is an integral step toward ethnocide—or the intentional destruction of culture while keeping the people.<sup>69</sup> Subjected to anti-Indigenous slurs and abuse, families have shared with us the deep and

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<sup>65</sup> Cantor, G. 2015. *Hieleras* (iceboxes) in the Rio Grande Valley sector. *American Immigration Council*, 17.

Located at:

[https://inclusion.americanimmigrationcouncil.org/sites/default/files/research/hieleras\\_iceboxes\\_in\\_the\\_rio\\_grande\\_valley\\_sector.pdf](https://inclusion.americanimmigrationcouncil.org/sites/default/files/research/hieleras_iceboxes_in_the_rio_grande_valley_sector.pdf).

<sup>66</sup> For audio of children separated by the Zero Tolerance policy who are pleading for their parents, listen at:

<https://www.youtube.com/watch?v=PoncXfYBAVI>. For further explanation, see Thompson, G. 2018, June 18.

Listen to Children Who’ve Just Been Separated From Their Parents at the Border. *ProPublica*. Located at:

<https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy>.

<sup>67</sup> Jacobs, J. 2018, June 15. Sessions’s Use of Bible Passage to Defend Immigration Policy Draws Fire. *The New York Times*. Located at: <https://www.nytimes.com/2018/06/15/us/sessions-bible-verse-romans.html#:~:text=and%20foster%20homes.-,Mr.,processes%20are%20good%20in%20themselves>.

<sup>68</sup> United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People.

<sup>69</sup> Pruum, S. 2014. Ethnocide and indigenous peoples: Article 8 of the declaration on the rights of indigenous peoples. *Adel. L. Rev.*, 35, 269.

enduring effects of CBP’s inhumane treatment. Maya parents who were temporarily separated from their children, reunified after several months and even years, report that their children have lost capacity to speak their native language and have been taught to devalue cultural practices, dress, and ways of living while in U.S. government custody and long term federal foster care. One parent (Maya-K’iche’) shared with us that her daughter—now a year since reunifying with her family in Guatemala—is ashamed of her Indigenous identity, saying she blames being Maya for the reasons she and her family suffered. On account of this targeting, her daughter has developed strategies to hide or obscure her Indigenous identity, including no longer wearing *traje* (traditional dress), using whitening creams, and refusing to speak K’iche’. We heard a similar account from a mother (Maya-Mam) who was separated from her daughter for six months and from community organizations who assisted in locating and supporting separated families. Still another parent (Maya-Mam) who was deported to Guatemala and whose young son remained in federal foster care for nearly one year shared that her son had difficulty communicating with their family over the phone and no longer speaks Mam fluently. Whether short or prolonged separation, the harm inflicted by Zero Tolerance endures for Indigenous children, families and communities.

### ***Right to language***

Article 13 of UNDRIP establishes that “States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.”<sup>70</sup> When apprehended by CBP, Indigenous families were not offered interpretation despite not speaking Spanish or English. Instead, CBP consistently and repeatedly threatened, intimidated, and coerced them to relinquish their rights to seek asylum and opt for deportation. CBP did not explain the consequences of signing the documents, nor enlist an interpreter to assist in explaining rights and consequences. Some parents reported that CBP threatened to take or indeed took their children when they refused to sign the immigration documents accepting deportation. Other parents reported that CBP took their children, only to briefly return them if parents agreed to sign; for those that continued to hesitate, CBP cruelly *re*-separated parents from their sometimes very young children. Intentionally and deliberately failing to provide interpretation for Indigenous language speakers—as legally required under U.S. law<sup>71</sup>—resulted in their inability to participate not only in the legal process but also in making decisions about the care and custody of their children in accordance with their values and beliefs.

Article 13 further establishes that “Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.”<sup>72</sup> Indigenous languages are more than words spoken, but are key to understanding how Indigenous Peoples conceive of, understand, and move through the world.<sup>73</sup> Absent measures to protect them, Indigenous languages are in danger of extinction. Experts concur that languages die because of legacies of colonization, ongoing settler-colonialism, demographic

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<sup>70</sup> United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People.

<sup>71</sup> Order, E. 13166. August 11, 2000. Improving access to services for persons with limited English proficiency. *Code of Federal Regulations*, 289-291.

<sup>72</sup> United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People.

<sup>73</sup> n.d., Indigenous languages hold the key to understanding who we really are. Cultural Survival. Located at: <https://www.survivalinternational.org/articles/3567-indigenuslanguages>.



change, social pressures, and violence, including forced family separations.<sup>74</sup> Passing language and corresponding meanings for Maya linguistic communities is critical for the survival of language and of Maya culture itself; forced family separation is a direct affront to the meaning and practice of Maya languages.

Forcibly separating children from their family members, deporting their parents, and placing children in federal custody is an egregious violation of Maya children’s right to listen, learn, and practice their languages. Following time held in CBP custody, children rendered unaccompanied when their parents or guardians were deported, were placed in the detention facilities for unaccompanied children under the custody of the Office of Refugee Resettlement (ORR). Research shows that access to interpreters—particularly for Indigenous language speakers—in ORR continues to be sidestepped across U.S. presidential administrations.<sup>75</sup> When asked why language lines are not used, facility staff described the inconvenience of scheduling telephonic interpreters when they can “get by” in Spanish, that interpretation prolongs meetings with children amid high caseloads, and a lack of awareness of children’s language rights due to high staff turnover within facilities. Staff of ORR facilities detaining unaccompanied children report that children are dissuaded from using their native language with other children and are even separated to different pods or during activities to ensure that staff can understand the conversations.<sup>76</sup> The deliberate separation of children from the same linguistic communities is a form of linguistic racism.<sup>77</sup> Meanwhile, then Secretary of State John Kelly financially profited from the detention of unaccompanied children as a board member of Caliburn, an international private company operating the largest detention facility (and three other facilities) for unaccompanied children.<sup>78</sup>

Those children placed in federal foster care did not fare better. There is a chronic dearth of bi-cultural and bi-lingual foster families that both pre-dates the Trump administration and continues under the Biden administration; to our knowledge, there are currently no Maya language speaking foster families in the U.S. federal foster care system despite Guatemalan children consistently being the largest population of unaccompanied children in its custody over the last decade. Some Maya children with whom author Heidbrink works have reported that their names were changed by foster families and foster care staff who had difficulty pronouncing their names, a deliberate and egregious violation of children's right to retain their own names. For children, the use of their own language relieves stress, provides cultural familiarity, and enhances communication. The longer that children were held in federal detention or in federal foster care—deliberately separated from their linguistic communities—the deeper the loss of connection to their language and families.

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<sup>74</sup> Toth, K. 2022. The Death and Revival of Indigenous Languages. *Harvard International Review*. Located at: <https://hir.harvard.edu/the-death-and-revival-of-indigenous-languages>.

<sup>75</sup> Heidbrink, L. Forthcoming. *From Congregate to community-based Care: Strengthening Reunification and Support of Unaccompanied Children*. Washington, DC: Women’s Refugee Commission.

<sup>76</sup> Heidbrink, L. 2023. *Decreasing ORR’s Dependence on Congregate Care: Four Recommendations for Progress*. Washington, DC: Women’s Refugee Commission. Located at: <https://www.womensrefugeecommission.org/wp-content/uploads/2023/08/Decreasing-ORR-Dependence-on-Congregate-Care.pdf>.

<sup>77</sup> Dovchin, S. 2020. Introduction to special issue: Linguistic racism. *International Journal of Bilingual Education and Bilingualism*, 23(7), 773-777.

<sup>78</sup> Kates, G. 2019, May 3. John Kelly joins board of company operating largest shelter for unaccompanied migrant children. *CBS News*. Located at: <https://www.cbsnews.com/news/john-kelly-joins-board-of-caliburn-international-company-operating-largest-unaccompanied-migrant-children-shelter/#:~:text=It%20wasn't%20clear%20why,unaccompanied%20migrant%20children%20in%20Texas>.

### ***Right to family***

Article 7 of UNDRIP states “Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”<sup>79</sup> The Zero Tolerance policy of the Trump Administration—from the highest levels of the administration to the individual immigration officers who implemented the policy—inflicted acts of genocide and violence when they targeted Indigenous families and forcibly removed children from their parents and customary care providers. The U.S. government kept no tracking system of children—even of infants—and their parents as there was never an intention to reunify families. In many instances, CBP officers placed Maya parents on planes and deported them while authorities placed children in ORR custody. In other instances, CBP officers told Maya parents that they would bring their children to the flights but failed to do so.

“I can’t put it into words; it was devastating,” described one mother (Maya-Mam) who was deported without her daughter, only to be reunified several months later with the assistance of a local organization. In another instance, one four-year-old was deported on a plane without notifying their parents. In fact, the U.S. government did not know where parents were—either in their home country, immigration detention, or eventually released into the United States. Family relocation only started when non-profit organizations in the U.S. and in Central America raised money and attempted to track down families on their own. Four years later, some families separated under the Yuma pilot remained separated and, in many cases, deported and unable to be found.<sup>80</sup> The U.S. Office of Civil Rights and Civil Liberties characterized the multiple separations as well as permanent separation of families created “a new population of U.S. orphans.”<sup>81</sup> Given the history of coercive intercountry adoptions of primarily Maya children from Guatemala by the U.S. parents, this is a cyclical form of structural violence and abuse.

Organizations working in Guatemala shared with us the challenges of locating parents who were returned on deportation flights to the military based in Guatemala City and compelled to make their own way back to their home communities without their children. The challenges included having no centralized list of names of impacted families; limited information on which children remained in the U.S. and where they were being held; parents living in distant and hard-to-access communities in the western highlands of the country (e.g. non-passable public roads, no cellular phone connection, etc.); and limited organizational capacity to community in the diversity languages (and corresponding dialects) spoken by impacted families. Further, Maya parents and families were highly traumatized, at times stigmatized for “leaving” their children in the U.S. and were very distrustful of individuals or authorities inquiring about their children.

Maya parents with whom we spoke as recently as 2023 shared feelings of continued grief, despair, and guilt for their inability to protect their children from the pain and suffering inflicted

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<sup>79</sup> United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People.

<sup>80</sup> Sieff, K. 2021, July 9. The Trump administration used an early, unreported program to separate migrant families along a remote stretch of the border. *The Washington Post*. Located at: <https://www.washingtonpost.com/world/2021/07/09/trump-separated-families-yuma-2017>.

<sup>81</sup> Kopan, T. 2018, June 29. Government never had specific plan to reunify families, court testimony shows. *CNN*. Located at: <https://www.cnn.com/2018/06/29/politics/family-separations-reunification-never-plan-court/index.html>.

by the U.S. government. In the absence of information provided to children, young people we interviewed shared feelings of anger, confusion, and abandonment by their families. “These feelings do not disappear overnight; they persist for generations,” described a (Maya-Tz’utujil) social worker working with separated families.

### ***Right to health***

Mayan traditional healing holistically brings together the mind, body, custom, ritual and science in the treatment of and preservation of health. Culturally-informed health care includes regular access to herbal medicines, healing practices, ceremony, and consultation with practitioners such as *curanderos* (healers), herbalists, *guías espirituales* (spiritual guides), *comadronas* (midwives), or *hueseros* (bonesetters). Given the geographic distance, financial hardship, and often discriminatory treatment Indigenous peoples encounter in accessing the public health system in Guatemala, many Indigenous communities exclusively rely on traditional healers for well-established remedies that are effective and affordable.<sup>82</sup> Many of the most prevalent medicinal plants are easily grown in home gardens, thus enhancing accessibility of remedies for low-risk illnesses such as headaches, colds, fevers, and childhood illnesses.<sup>83</sup> Traditional healers provide essential, culturally-informed, and linguistically-appropriate care.

Article 24 of UNDRIP states “Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals...Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.”<sup>84</sup> Yet, CBP denied Maya migrants access to their right to health while simultaneously subjecting them to inhumane and degrading treatment, including physical, verbal and psychological abuse. For Maya children that CBP rendered unaccompanied and placed in Office of Refugee Resettlement facilities, they continue to not have access to traditional medicines and health practices.<sup>85</sup>

The prolonged, and in some instances ongoing, separation of Maya children from their communities and their cultures causes severe harm to children’s physical, mental and spiritual health and well-being. This separation can also shift values and practices irrevocably. Take for example, a person prescribed insulin to treat diabetes rather than using naturally grown herbs with antidiabetic effects that are customarily used in Maya communities. Upon return to Guatemala, access to these pharmacological medications are both costly and inaccessible. So too, there are physiological consequences to suddenly stopping use of insulin. Or, for example, the use of psychotropic medication to treat depression and anxiety in young people following forced separation from family members. It is important to note that federal authorities routinely prescribe medications without parental consent and following release, ORR only provides children with a 30-day supply of medication with instructions given to minors to self-taper. While this is ethically

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<sup>82</sup> Stollak, I., Valdez, M., Rivas, K., & Perry, H. 2016. Casas Maternas in the rural highlands of Guatemala: a mixed-methods case study of the introduction and utilization of birthing facilities by an indigenous population. *Global Health: Science and Practice* 4(1): 114-131.

<sup>83</sup> Hawkins, J. P. 2007. *Health care in Maya Guatemala: Confronting medical pluralism in a developing country*. Norman, OK: University of Oklahoma Press.

<sup>84</sup> United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People.

<sup>85</sup> Statz, M., & Heidbrink, L. 2021. Unintended trauma: The role of public health policy in the detention of migrant children. *The Lancet Regional Health–Americas*, 2, <https://doi.org/10.1016/j.lana.2021.100012>.

and morally troubling for all children—especially given that abruptly stopping some medications can cause withdrawal symptoms and even suicidality<sup>86</sup>—these practices additionally are concerning for Indigenous children as it can erode their connection to and use of traditional healing practices. To illustrate, a fourteen year old (Maya-Mam) was prescribed psychotropic medication while in federal custody; upon her return to Guatemala, her mother shared that her daughter grew frustrated and angry because she could not access or pay for the medication. She blamed her mother and even her indigeneity as “backward” because there was “not a pill to cure her sadness,” her mother recently shared with us.

Further, Article 22 of UNDRIP recognizes specialized protections for Indigenous persons with disabilities. “States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”<sup>87</sup> Indigenous children with disabilities were separated from their parents without proper care being in place to take care of them. One parent (Maya Mam) of a child with disabilities with whom we spoke shared that she was separated from her daughter under Zero Tolerance; her child was placed in ORR custody despite her limited ability to communicate verbally and was never consulted on the care or treatment of her daughter while they remained separated for over six months. Now reunified in Guatemala, her daughter continues to wake with nightmares, cold sweats and continues to experience intrusive thoughts that lead to fits of inconsolable crying. The harm inflicted by CBP upon her child intensified given her cognitive delays and the failure of to access culturally-informed healing practices that include herbal medicines, *temazcal* (sweat lodge), medicinal baths and cleansings, guidance, ceremony, and ceremonial sites, critical to healing body, mind and spirit.

### ***Right to education***

Article 14 of UNDRIP establishes that “Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.”<sup>88</sup> Article 14 is clear that education for Indigenous Peoples is a right. This right, however, is denied to Maya Peoples in Guatemala and throughout their stages of migration. For instance, Guatemala’s institutionalized neglect and impoverishment of Maya Peoples through the systemic underfunding and under-resourcing of formal education in largely Indigenous rural regions is a primary reason why Maya families make the perilous journey to the U.S. As a result of being in transit, Maya youth’s schooling is interrupted and, in many cases, ended. If apprehended at the border, CBP does not provide for Maya youth education. If transferred to Office of Refugee Resettlement facilities for unaccompanied children, they receive basic English as a Second language instruction, that repeats every 30 days. There is no standardized curriculum nor learning opportunities corresponding to grade level, age, or literacy levels.<sup>89</sup>

Research on educational experiences of Maya youth in the U.S. is scant. However, educational scholars and scholars in Latinx studies have noted the unique schooling experiences

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<sup>86</sup> Howland, R. H. (Ed.). 2010. Potential adverse effects of discontinuing psychotropic drugs: part 2: antidepressant drugs. *Journal of Psychosocial Nursing and Mental Health Services*, 48(7), 9-12.

<sup>87</sup> United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People.

<sup>88</sup> Ibid

<sup>89</sup> Heidbrink, 2014, *supra* note 42.

pertaining to their Indigenous identities of Maya and other Indigenous youth from Latin America. These scholars trace how Indigenous youth navigate school environments that are often hostile, among other reasons, because of their Indigenous identities expressed through language, dress, and appearance.<sup>90</sup> In other words, the Zero Tolerance policy is one of many ongoing educational harms inflicted upon Maya Peoples in the U.S. both within and beyond the space of immigration detention.

### ***Transborder rights***

For Maya families victimized by the Zero Tolerance policy, the coerced and sustained separation between children, families, and communities across the United States and Guatemala prevented their ability to maintain and develop contacts, relationships, and connection across borders. This is a direct violation of Article 36 of UNDRIP which states “Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”<sup>91</sup> When the U.S. government violated the rights of Maya parents to seek asylum in the U.S. and summarily deported Maya parents to Guatemala, the government effectively rendered Maya children and youth unaccompanied. When the U.S. government failed to establish a system to track information and identities critical to eventually reunifying parents with their children, the U.S. government violated the transborder rights of Maya children to maintain relationships with their families and communities and to participate in the spiritual, cultural, political, economic and social lives of Maya Peoples. Given that hundreds of Maya children remain separated from their parents—who in some instances have yet to be identified and located—the violation of their transborder rights continues today.

### ***Access to justice***

Article 40 of UNDRIP states “Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”<sup>92</sup> In Maya jurisprudence, the aggrieved have the right to pursue justice in the territory and before the authority of their choosing. For example, when the U.S. government forcibly separated a Maya-K’iche’ child from his mother, the mother and child are empowered under Maya jurisprudence to identify where they seek justice and accountability. They can request that the U.S. government avail itself to Maya systems of justice in K’iche’ territory before ancestral authorities—or in whatever jurisdiction they choose—to hear testimony, review evidence, adjudicate findings, and administer justice. That Maya children and families have not been afforded the opportunity to advance a legal case against their aggressors nor the power to determine the authority under which they pursue justice is a violation of their right to access justice. So too, it is an ongoing undermining of Indigenous jurisprudence in preference of Western legal systems.

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<sup>90</sup> Barillas Chón, David W., Pablo D. Montes, and Judith Landeros. 2021. “Presencing While Absent: Indigenous Latinxs and Education.” In *Handbook of Latinos and Education: Theory, Research, and Practice* (2nd ed), edited by Enrique G. Murillo et al., 135-145. New York: Taylor & Francis Group.

<sup>91</sup> United Nations (General Assembly). 2007. Declaration on the Rights of Indigenous People.

<sup>92</sup> Ibid

## Enduring Traumas inflicted on Indigenous Children, Families and Communities

The harm on children forcibly taken from their parents has been widely denounced. The American Academy of Pediatrics described the practice as “state-sanctioned child abuse” and other medical professionals described it as a “form of torture.”<sup>93</sup> The research on the harm of family separation on Latinx immigrant families provides some insight into the harm that Maya migrant children and families experienced and continue to experience due to the Zero Tolerance policy. Health and policy scholars have studied the harm and trauma that family separation policies have on Latinx immigrant children and families.<sup>94</sup> From this research we have learned that this harm includes disrupted education and academic achievement,<sup>95</sup> poor health outcomes<sup>96</sup> and negative mental health and trauma.<sup>97</sup> Indeed, Indigenous children and their families suffered many of the same psychological harms as their non-Indigenous counterparts.

Given the recency of the Zero Tolerance policy, the full scope of *enduring* and *unique* impacts of separation on Indigenous families is unknown. However, Indigenous scholars have produced substantial research and evidence on how the U.S. government and its policies have traumatized Native peoples and the ensuing transmission of trauma across generations.<sup>98</sup> This literature provides insight into likely outcomes for Maya children, families and communities in the absence of reparations. Indigenous scholars variously refer to the multigenerational transmission

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<sup>93</sup> Diaz & Lee, *supra* note 58.

<sup>94</sup> Gil-García, Bové, F., Velazquez, L., Vener, S., & Miranda, A. 2021. “It felt like my son had died”: Zero tolerance and the trauma of family separation. *Latino Studies*, 19(2), 260–268. See also, Habbach, H., Hampton, K., & Mishori, R. 2020, February 25. “You will never see your child again”: *The persistent psychological effects of family separation*. Physicians for Human Rights. Located at: <https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation>.

<sup>95</sup> González, J. J., Kula, S. M., González, V. V., & Paik, S. J. 2017. Context of Latino students’ family separation during and after immigration: Perspectives, challenges, and opportunities for collaborative efforts. *School Community Journal*, 27(2), 211–228.

<sup>96</sup> Ayón, C. 2015. *Economic, social, and health effects of discrimination on Latino immigrant families*. Washington, DC: Migration Policy Institute. See also, Androff, D. K., Ayón, C., Becerra, D., Gurrola, M., Salas, L. 2011. U.S. immigration policy and immigrant children’s well-being: The impact of policy shift. *The Journal of Sociology & Social Welfare* 38(1), 77-98.

<sup>97</sup> Cardoso, J. B. 2018. Running to stand still: Trauma symptoms, coping strategies, and substance use behaviors in unaccompanied migrant youth. *Children and Youth Services Review*, 92, 143–152. See also, Perreira, K. M., & Ornelas, I. 2013. Painful passages: Traumatic experiences and post-traumatic stress among immigrant Latino adolescents and their primary caregivers. *The International Migration Review*, 47(4), 976–1005.

<sup>98</sup> Gone, J. P. 2021. The (post) colonial predicament in community mental health services for American Indians: Explorations in alter-Native psy-ence. *American Psychologist*, 76(9), 1514. See also, Brave Heart, M.Y. 2003. The historical trauma response among natives and its relationship to substance abuse: A Lakota illustration. *Journal of Psychoactive Drugs* 35(1). See also Brave Heart, M., Chase, J., Elkins, J., & Altschul, D.B. 2011. Historical trauma among Indigenous peoples of the Americas: Concepts, research, and clinical considerations. *Journal of Psychoactive Drugs*, 43, 282-290.

of distress due to trauma as historical trauma<sup>99</sup>, intergenerational trauma<sup>100</sup>, and colonial trauma.<sup>101</sup> Scholar Brave Heart (Lakota) describes historical trauma as a “cumulative emotional and psychological wounding, over the lifespan and across generations emanating from massive group trauma experiences.”<sup>102</sup> Social work scholar Evans-Campbell (Snohomish Nation) notes that this wounding is *intergenerational* in that the traumatic events “occurring at different time periods (often across generations) come to be seen as part of a single traumatic trajectory.”<sup>103</sup>

It is important to note that traumatic events are not only in the past but also *ongoing* as Indigenous Peoples continue to experience the force of colonialism in their everyday lives.<sup>104</sup> Utilizing a colonial trauma framework allows us to contextualize the unique psychological trauma in the form of fear, instability, uncertainty, and family dissolution that Maya youth and families experienced under Zero Tolerance as a continuation of the same traumas inflicted by the Guatemalan government and other colonial and settler colonial agencies, including the U.S. government, since the invasion of the Mayab’.

### **ICWA is the gold standard for child welfare and should be followed for all Indigenous children.**

The purpose of the U.S. Indian Child Welfare Act (ICWA) is “to protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families.”<sup>105</sup> ICWA establishes minimum federal standards for the removal of an Indian child and their placement in homes that reflect “the unique values of Indian culture.” Prior to the U.S. Congress passing ICWA in 1978, state child welfare authorities and private adoption agencies were separating roughly 35% of Native children from their families and intentionally placing nearly 85% of these children in non-Indian foster and adoptive homes.<sup>106</sup> Congress attributed these alarming numbers to anti-Indigenous discrimination institutionalized in programs like the Indian Adoption Project (1958-1967) which promoted the adoption of Native children by white adoptive families. Following considerable pressure from Tribes, Congress eventually recognized that it is in the best interest of the child to maintain Tribal connections and that children are vital to Tribes’ continued existence.<sup>107</sup> ICWA reflects a customary Tribal approach to childcare in which the community

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<sup>99</sup> Brave Heart, M.Y.H. 1999. Oyate Ptayela: Rebuilding the Lakota nation through addressing historical trauma among Lakota parents. *Journal of Human Behavior in the Social Environment*, 2, 109-126.

<sup>100</sup> Brave Heart, M.Y.H., & DeBruyn, L. M. 1998. The American Indian holocaust: Healing historical unresolved grief. *American Indian and Alaska Native Mental Health Research*, 8, 60-82. Evans-Campbell, T. 2008. Historical trauma in American Indian/Native Alaska communities: A multilevel framework for exploring impacts on individuals, families, and communities. *Journal of Interpersonal Violence*, 23, 316-338.

<sup>101</sup> Evans-Campbell, T., and Walters, K. 2006. Catching our breath: A decolonization framework for healing indigenous families. In Rowena Fong, Ruth McRoy, & Carmen Ortiz Hendricks (Eds.) *Intersecting Child Welfare, Substance Abuse, and Family Violence: Culturally Competent Approaches*. Alexandria, VA, CSWE Publications. (pp. 266-292).

<sup>102</sup> Brave Heart 2003, supra note 97.

<sup>103</sup> Evans Campbell 2008, 320-321, supra note 99.

<sup>104</sup> Evans-Campbell & Walters 2006, supra note 100.

<sup>105</sup> 25 U.S.C. 1902

<sup>106</sup> Hernandez, R. 2023, June 16. U.S. Supreme Court upholds Indian Child Welfare Act. *Oregon Public Broadcasting*. Located at: <https://www.opb.org/article/2023/06/16/supreme-court-indian-child-welfare-act-discussion/#:~:text=In%20a%207%2D2%20decision,adopted%20outside%20of%20their%20tribes>.

<sup>107</sup> Bureau of Indian Affairs. Frequently Asked Questions: *Final Rule: Indian Child Welfare Act (ICWA) Proceeding*. Located at: <https://www.bia.gov/sites/default/files/dup/assets/bia/ois/raca/pdf/idc1-034295.pdf>.

together is responsible for the care, education, learning, and health of an Indigenous children, critical to protecting and promoting a child's identity, sense of belonging, self-worth, and community resilience.<sup>108</sup>

In 2022, the U.S. Supreme court heard *Haaland v. Brackeen*, to consider if ICWA discriminates on the basis of race and thus violates the Equal Protection Clause; whether it violates the non-delegation doctrine (whereby Congress cannot delegate its legislative powers or law-making ability to other entities, such as Tribes); and whether ICWA's regulations violate the anti-commandeering doctrine (whereby federal government cannot require states or state officials to adopt or enforce federal law). In June of 2023, the U.S. Supreme Court affirmed the constitutionality of the ICWA, leaving the entirety of ICWA intact.

Under the national system of law in the United States, separating Indigenous children from their Tribe is a crime, and as such, ICWA is both a binding and generalizable principle. Further, there continues to be a robust body of scholarship that evidences how Indigenous children placed in non-indigenous environments are more likely to struggle with self-harm, suicide ideation, and mental illness<sup>109</sup> than similarly-situated Indigenous youth when placed in environments that followed their traditions, culture, and spoke their native language.<sup>110</sup> States across the political spectrum have taken considerable steps to implement ICWA including: appointment of ICWA case workers, inclusion of ICWA and tribal information in court case managements systems, judges treating tribal representatives like legal counsel, timely provision of court documents to tribal authorities, funding for qualified expert witnesses, physical re-organization of courtrooms to remove the dais and ensure horizontal deliberations, and co-location family court judges on tribal lands to remove barriers to full participation. These initiatives to adopt ICWA evidence the seriousness and significance accorded to ICWA across diverse constituents.

Yet, in contexts of migration, the U.S. government ignores obligations set forth and reaffirmed under ICWA for Indigenous children because they do not originate from federally recognized tribes. That is, U.S. immigration law and federal custodial determinations privilege nationality over Indigenous identity. This contrasts legal obligations under ICWA, child welfare practices for Indian children, and the ways Maya families self-identify as Maya primarily and Guatemalan nationals secondarily.

## **Recommendations**

The United States inflicted and continues to inflict violence on Indigenous Peoples via its foreign policies, immigration and border externalization apparatus, and state and federal child welfare

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<sup>108</sup> Londschouw, C. 2023. A Victory for Native Children and Their Families: U.S. Supreme Court Preserves ICWA. *Cultural Survival*. Located at: <https://www.culturalsurvival.org/news/victory-native-children-and-their-families-us-supreme-court-preserves-icwa>.

<sup>109</sup> McQuaid, R.J.; Schwartz, F.D.; Blackstock, C.; Matheson, K.; Anisman, H.; & Bombay, A. 2022. Parent-Child Separations and Mental Health among First Nations and Métis Peoples in Canada: Links to Intergenerational Residential School Attendance. *Int. J. Environ. Res. Public Health*, at 4.

<sup>110</sup> Pearce, M.E.; Jongbloed, K.A.; Richardson, C.G.; Henderson, E.W.; Pooyak, S.D.; Oviedo-Joekes, E.; Christian, W.M.; Schechter, M.T.; & Spittal, P.M.; For the Cedar Project Partnership. The Cedar Project: Resilience in the face of HIV vulnerability within a cohort study involving young Indigenous people who use drugs in three Canadian cities. *BMC Public Health* 2015, 15, 1095.



practices. These oppressive policies that separate and attempt to destroy families across the Americas must be ended.

In February 2021, President Biden created the Interagency Family Reunification Task Force in order to reunify families who remained separated. While concerted efforts have been made by the Biden Administration and community organization to locate and reunify families, an estimated 500 to 1000 families remain separated. In October 2023, a settlement agreement was reached in response to a class action lawsuit brought by some separated families.<sup>111</sup> Yet, this settlement agreement is limited and alarming. The agreement is *limited* in that impacted families will not receive any financial reparations, no permanent legal status in the U.S., nor services unless they undergo a psychological assessment to document the harm inflicted by Zero Tolerance. Notably, this assessment is not in accordance with Indigenous understandings of mental health and well-being. The settlement agreement is *alarming* because the U.S. government 1) does not claim any responsibility for harms committed in separating families as a means of deterrence, for violation the right to seek asylum under international humanitarian law, or for violating the rights of Indigenous Peoples under UNDRIP; and 2) codifies family separation in the future.

The settlement agreement remains insufficient in acknowledging, repairing harms nor in putting measures in place to prevent the repetition of these harms in the future. In response, we recommend:

- The Office of the Prosecutor of the International Criminal Court should conduct an investigation into crimes against humanity and crimes against Indigenous Peoples.
- The Biden Administration should declassify all documents related to the Zero Tolerance policy.
- The Interagency Family Reunification Task Force must immediately reunify all families that remain separated.
- The Biden Administration must provide *individual reparations* to impacted families. Reparations should include immediate issuance of work authorization, travel visas, a grant of permanent protection for families, and individual remediation and civil damages.
- Transborder harms necessitate transborder repair. Accordingly, the Biden Administration must provide *collective reparations* to impacted Indigenous communities across borders. The Biden Administration must end its harmful foreign policies, including deterrence policies at the U.S.-Mexico border and military aid and training to the Guatemalan government, which is consistently used to repress Indigenous communities. In Guatemala, collective reparations to Indigenous communities include working with Maya governing bodies such as ancestral authorities to re-establish stewardship of ancestral territories, language revitalization programs, and elimination of educational and employment inequalities. In the U.S., collective reparations include investment in community centers and programs that bring Maya peoples together and to revitalize and preserve Indigenous languages of Maya communities in the U.S. Collective reparations must also address anti-Indigenous bias institutionalized in law enforcement practices and courts of law and include the provision of Indigenous language interpretation to those in federal custody and to asylum seekers.

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<sup>111</sup> Ms. L v. ICE, 18-cv-00428-DMS-AHG (S.D. Cal).

- The U.S. Congress must pass the Crimes Against Humanity Act to ensure that forced family separation never happens again.
- The U.S. government must ensure that the Indian Child Welfare Act governs all federal, state, and local decisions regarding the care and custody of Indigenous children regardless of (settler-colonial imposed) citizenship status.

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