



The University of Texas at Austin  
Immigration Clinic  
School of Law



WOMEN'S  
REFUGEE  
COMMISSION



TEXAS  
CIVIL RIGHTS  
PROJECT

Inter-American Commission on Human Rights (IACHR)  
Organization of American States  
1889 F Street N.W.  
Washington, D.C. 20006  
*Submitted online via the portal*

**Re: MC 505-18, Antonio Bol Paa and others (Zero-Tolerance Family Separation) (GRANTED)**  
**United States**  
**Observations on Feb. 7, 2023 U.S. Government Response**

May 3, 2023

Dear Members of the Inter-American Commission:

We (applicants) write to thank the Commission for its continued supervision of the precautionary measures issued in connection with the grave human rights violations caused by the separation of migrant families and to respond to the U.S. Government's response from February 7, 2023. We express ongoing concern regarding the State's unwillingness to provide information regarding separated families and note that the beneficiaries of the precautionary measures have not received full protection under the precautionary measures.

#### **Lack of State information on beneficiaries**

We were disappointed that the State once again cited the lack of a domestic administrative privacy waiver document as its reason to not provide specific information regarding the beneficiaries and what steps the State has taken to comply with the precautionary measures regarding the five beneficiary families. As authorized legal representatives of the beneficiaries in a proceeding before this honorable Commission, with jurisdiction over the State under the Charter of the Organization of American States, the State's insistence on the need for an executive branch agency administrative waiver is misplaced.<sup>1</sup> In litigation before a United States federal court, the State does not and cannot require regular authorization signed directly by the parties to the litigation as a condition for participation in the proceedings and for the provision of documents and information relevant to the case (*e.g.*, through discovery). Instead, counsel acts in representation of the parties before the tribunal. Yet, the United States refuses to provide information to the Commission or to the applicants' counsel in this matter without any citation to the rules of procedure of the Commission or any other source of law that would allow insistence on periodic signatures on privacy waivers by the applicants before participating fully in the proceedings before the

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<sup>1</sup> The Privacy Act, invoked by the State to require the administrative waivers, governs disclosure of government records relating to individuals. The Privacy Act of 1974, Pub. Law No. 93-579, 88 Stat. 1896 (Dec. 31, 1974), codified at 5 U.S.C. § 552(a) (2021). Unacknowledged by the State is the Privacy Act's explicit exclusion of nonresident noncitizens like the beneficiaries from its coverage. 5 U.S.C. § 552a(a)(2). By its explicit terms, the Privacy Act covers only U.S. citizens and Lawful Permanent Residents. By relying on nonbinding agency guidance encouraging the extension of Privacy Act protections to nonresident noncitizens to elide responsibility for the beneficiaries' status, the State violates the spirit of that agency guidance by using privacy protections to the detriment rather than in protection of the nonresident noncitizens.

Commission.<sup>2</sup> At the beginning of these proceedings, counsel received signed privacy waivers for all five proposed beneficiaries. Specifically, ICE Form 60-001 was used and submitted as an annex to our petition, and while those waivers technically expire, our representation has not.

Even were these domestic administrative waivers to be a reasonable condition for exchange of information regarding the State's compliance with the precautionary measure in ordinary circumstances, it would not be reasonable to insist on the waivers in this instance. The very nature of the grave human rights violations to which the beneficiaries have been subjected would make obtaining waivers for all five beneficiary families impossible. At the time that the applicants authorized counsel to act on their behalf, the State was in the process of separating parents and children and then deporting one or more family members or placing them in State custody in areas around the United States—a great distance from the border where we met with the applicants. For this very reason, counsel knew that it was critical to act very quickly in obtaining authorization and filing the precautionary measures and did so. It is not reasonable to require further periodic authorization. As documented by several State auditing bodies<sup>3</sup> and acknowledged by the State's Interagency Task Force on the Reunification of Families ("Task Force"),<sup>4</sup> a significant aspect of the severe harm of the Zero-Tolerance family separation policy derives from the near-total chaos of its implementation, characterized by endemically incomplete and inaccurate recordkeeping.<sup>5</sup> It has not been possible for counsel to maintain contact with all of the applicants in these circumstances. Counsel is currently in contact with only one applicant, Vilma Aracely Lopez Juc De Coc and her son, Sergio Vicente Coc Lopez. Counsel has made multiple efforts—across the years—to locate the other four applicants to no avail. We have called legal service providers in the cities where EOIR shows their immigration case pending, and we have searched Facebook and other social media. It is therefore incumbent on the State to provide what information it has available so that we can evaluate compliance with the precautionary measures and establish further contact with the beneficiaries as appropriate.

The refusal of the United States to provide information regarding the beneficiaries of the precautionary measures who suffered grave human rights violations at the hands of the State raises concerns about the possibility of an additional human rights violation relating to the right to truth. The Inter-American Commission and the Inter-American Court have recognized the right to truth as an essential right of the public and the family members of victims, particularly where the State has made it difficult or impossible to discover the truth of human rights violations that have taken place, as has occurred here.<sup>6</sup> The right to truth is implicated in this instance by the State's unwillingness to provide information exclusively in the State's possession regarding the consequences of its own human rights violations. Rather than ensuring

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<sup>2</sup> Counsel did receive signed privacy waivers from the applicants at the beginning of these proceedings, making clear that counsel was granted the authority to participate in these proceedings on the applicants' behalf. The United States may not insist that the authorization be continually renewed on a U.S. government form rather than recognizing the representation.

<sup>3</sup> See, e.g., U.S. Department of Justice Office of the Inspector General, [Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services](#), Jan. 2021; U.S. Department of Homeland Security (DHS) Office of the Inspector General (OIG), [DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families](#), Nov. 2019; DHS OIG, [CBP Separated More Asylum-Seeking Families at Ports of Entry Than Reported and For Reasons Other Than Those Outlined in Public Statements](#), May 2020.

<sup>4</sup> See, e.g., Interagency Task Force on the Reunification of Families, [Initial Progress Report](#), June 2, 2021.

<sup>5</sup> Indeed, additional harms of this chaotic and incomplete recordkeeping continue to come to light, most recently in the revelation that the Task Force is examining government records to identify as many as 1,000 additional children separated from their parents under Zero-Tolerance. Miriam Jordan, NY Times, [U.S.-Born Children, Too, Were Separated From Parents at the Border](#), Apr. 11, 2023.

<sup>6</sup> See, e.g., Inter-Amer. Comm., *The Right to Truth in the Americas*, 2014; Inter-Amer. Comm., Case 10.580, Report N° 10/95, Ecuador, Manuel Bolaños, September 12, 1995; Inter-Amer. Comm., Case 10.606, Report N° 11/98, Guatemala, Samuel de la Cruz Gómez, April 7, 1998; Inter-Amer. Court, *Bámaca Velásquez Case*, Judgment of November 25, 2000.

adequate implementation of the protections set out in the precautionary measures, the State is impeding an evaluation of compliance and also forgoing its duty to provide information that would reveal the truth regarding the violations suffered by the beneficiaries.

In light of these challenges, it is imperative that means be found for the State to provide assurances on the status of precautionary measure compliance with respect to each of the five beneficiary families without insisting on privacy waivers. This is critical to ensure the protection and remedies ordered by the precautionary measure, to ensure that ongoing harm is not visited on the beneficiary families, and to ensure that family separation does not occur in the future.

We respectfully request that the Commission clarify that the State may not insist on privacy waivers as a condition for full participation in the proceedings before this body. The Commission should seek the relevant information from the State pursuant to its authority under Title II, Chapter I, Art. 25(10) of the IACHR Rules of Procedure relating to precautionary measures, which mandates the Commission to “take appropriate follow-up measures, such as requesting relevant information from the interested parties.”

### **Gaps in beneficiaries’ access to services and potential future remedies**

In spite of the severe communication challenges resulting from State action described above, we have maintained contact with beneficiary Vilma Aracely Lopez Juc de Coc and her family. Per the State’s February 7, 2023 communication, families like Vilma’s who were separated under Zero-Tolerance, are in the U.S., and as such should be receiving the behavioral health services through the Family Reunification Task Force described in the United States’ February 7, 2023 communication. Such services would correspond to the psychological services contemplated by the present precautionary measure in paragraph 41(b). However, Vilma’s family has not received such services, and many others may be in this same position. Language access barriers also remain, specifically for indigenous language speakers.

As of April 13, 2023, neither Vilma nor her son has received any mental health services. Vilma and her son’s native language is Q’ueqchi’, but her family is unable to receive mental health services in this language. Since we last updated the U.S. and the Commission, accessing services has not improved—Vilma continues to have trouble navigating processes to access any sort of mental health services. To date, she has not received outreach regarding any sort of services.

We have also obtained limited information regarding another beneficiary, Dagoberto A. Molchor Santacruz, who was removed in 2019. He would not have been able to adequately defend his rights to redress for the harm caused by family separation. He would have needed specific assurances from the U.S. that he would be considered for parole and the behavioral health services benefits through the Family Reunification Task Force. Counsel cannot attest to whether Dagoberto ever received access to services or remedies.

As to all beneficiaries, we note that the State’s refusal to provide information about its past harms to the beneficiaries and its compliance, if any, with the precautionary measures, the State is also risking potential future violations of the beneficiaries’ rights. As provided by Executive Order 14011, the Task Force is not a permanent body.<sup>7</sup> While we applaud the Task Force’s efforts described by the State in its February 7, 2023, communication, general statements do not reveal whether the beneficiaries have been identified by the Task Force or able to avail themselves of its critical reunification and behavioral health services. This matters not only for purposes of precautionary measure compliance, but also for the safeguarding of

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<sup>7</sup> [Executive Order 14011 of February 2, 2021: Establishment of the Interagency Task Force on the Reunification of Families.](#)

beneficiaries' access to future redress and remedy. As acknowledged by both the Task Force<sup>8</sup> and the U.S. federal court in the *Ms. L* litigation,<sup>9</sup> the whereabouts of some separated families remain unknown. Should any of these family members come forward in the future, Commission jurisprudence requires the State to provide redress and remedy, regardless of time elapse or the expiration of the Task Force.<sup>10</sup> However, given the recordkeeping chaos that characterized Zero-Tolerance, and in the absence of any information on the beneficiaries from the State, we have no way to confirm the existence and availability of State records that would facilitate beneficiaries' access to any future redress and remedy, including through any potential settlement in the *Ms. L* litigation. This leaves beneficiaries at risk of a new iteration of harm by the State, compounding the original separations and violating the precautionary measures.

### **Recommendations for non-repetition measures for the State**

We are grateful for the promising dialogue that we previously held with the State on recommendations for non-repetition measures. We believe that this Commission is uniquely suited to encourage and guide the State in developing and implementing reparative justice measures in response to the systematic human rights violations implicated by family separation and to guarantee that these violations do not recur, for the individual beneficiaries as well as for other families. In the attached Appendix, we share again our recommendations for non-repetition measures and urge the Commission to consider avenues for providing input to the State on these and other guarantees.

We thank you in advance for your consideration of these requests. Please do not hesitate to let us know if any additional information would be helpful.

Respectfully,

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<sup>8</sup> See, e.g., Interagency Task Force on the Reunification of Families, [Interim Progress Report](#), March 31, 2023.

<sup>9</sup> See, e.g., [Status Report](#), March 1, 2023, *Ms. L v. U.S. Immigration and Customs Enforcement*, 3:18-cv-00428 (S.D. Cal. 2018).

<sup>10</sup> Inter-American Commission on Human Rights, Compendium of the Inter-American Commission on Human Rights on truth, memory, justice and reparation in transitional contexts, April 12, 2021, OEA/Ser.L/V/II. Doc.121/21, at ¶¶ 182-188. Despite its reference to transitional contexts, the IACHR makes clear that its guidance is meant to strengthen the "intrinsic relationship between democracy and human rights ... the IACHR hopes that ... the compendium will serve as a tool for the construction and consolidation of a culture of human rights based on the rule of law." *Id.* at ¶ 9.

## Appendix: Recommendations for Non-Repetition Measures

As recognized by the State's Executive Order 14011, the widespread separation of thousands of children from their parents under the Zero-Tolerance policy was a human tragedy. This human tragedy was the result of deliberate and systematic violations of core human rights recognized throughout the Inter American system and the globe, namely the prohibition on torture and the rights to personal integrity, family life, and identity.

The intentional and widespread violation of the fundamental rights of thousands of families has not only caused severe and irreparable harm to those children and parents, but also threatened the rule of law in the United States. For this reason, we applaud the State's report in its February 7, 2023 communication that "the Task Force has made recommendations<sup>11</sup> and continues to develop policies to help ensure that the Federal Government will not repeat the policies and practices that led to the separation of families at the border during the prior Administration." We renew here our recommendations for measures of non-repetition first presented at the October 20, 2021 Working Meeting on PM 505-18 and note that any non-repetition measures should center and protect family integrity, including where such integrity may be threatened as a collateral consequence of government policy and practice.

### Full, Comprehensive, and Public Investigation and Accounting of the Zero-Tolerance Policy

Full, complete, and public investigations and accounting of the Zero-Tolerance policy and its origins, designs, and implementation are indispensable to ensuring that these practices and policies are not repeated. While we welcome the work accomplished by various auditing bodies of the State documenting various deficiencies associated with the family separation policy,<sup>12</sup> these reports focus on operational failures and lack the comprehensive and contextual accounting necessary to lay durable groundwork for non-repetition.

The Inter-American Commission on Human Rights (Commission) identifies the contextual investigation of systematic and grave human rights violations as an essential component of the State's due diligence.<sup>13</sup> Contextual investigations of massive human rights violations establish the patterns and modus operandi involved<sup>14</sup> and identify institutional deficiencies and responsibilities.<sup>15</sup> Critically, their evaluation of the impact on the victims of systematic human rights violations enables the recognition of the victims as individuals and subjects of rights, a humanizing process that is fundamental to achieving non-repetition.<sup>16</sup> In investigating impact on the victims, the Commission emphasizes the importance of varied approaches that capture the differentiated impacts on distinct vulnerable populations.<sup>17</sup>

We recommend that the United States pursue full, comprehensive, and public investigations into both

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<sup>11</sup> In December 2021, DHS published a Request for Public Input on minimizing family separation: [Identifying Recommendations To Support the Work of the Interagency Task Force on the Reunification of Families](#). Women's Refugee Commission submitted comments in its [WRC Response to Request for Input on Family Separation](#), Jan. 25, 2022.

<sup>12</sup> *Supra* n. 3; see also Committee on Oversight and Reform, US House of Representatives, [Child Separations by the Trump Administration](#) (July 2019); U.S. Gov't Accountability Office, Report to Congressional Requester, [Southwest Border: Actions Needed to Improve DHS Processing of Families and Coordination Between DHS and HHS](#) (Feb. 19, 2020); U.S. Dep't of Health & Human Servs., Off. of Inspector General, [Communication and Management Challenges Impeded HHS's Response to the Zero-Tolerance Policy](#) (Mar. 5, 2020).

<sup>13</sup> *Supra* n. 10 at ¶ 71.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 129.

<sup>16</sup> *Id.* at ¶ 88.

<sup>17</sup> *Id.* at ¶ 121.

State responsibility and responsibility of specific State officials through the Federal Bureau of Investigation (FBI) and other relevant components of the Department of Justice, as well as other appropriate Executive Branch bodies. These investigations must be accompanied by robust and sustained encouragement of and support for relevant Congressional bodies to pursue such investigations and accounting. Special attention must be paid to the particular impact of family separation on indigenous peoples, people of African descent, children, people with disabilities, and women.

Full transparency on the part of the government will be key to not only the success of any investigations and accounting but also their ultimate goal of non-repetition. For this reason, we strongly recommend that the government withdraw its application of executive privilege to records relating to the Zero Tolerance policy.<sup>18</sup> This would bring the United States in line with international and customary law and practice, as well as the law and practice of other countries in the region that prohibit the application of State privilege to government records concerning human rights violations.<sup>19</sup> Moreover, withdrawing executive privilege protections for Zero-Tolerance-related records would ensure due recognition of this policy as a threat to the rule of law, as the Biden administration has declined to assert privilege over other government records concerning threats to the rule of law and democratic institutions.<sup>20</sup>

Since the October 20, 2021, Working Meeting on PM 505-18, the most significant investigations and accountings of the Zero-Tolerance Policy have come from nongovernmental sources, including investigative journalism by U.S. media outlets like The Atlantic<sup>21</sup> and the Washington Post,<sup>22</sup> lawyers and advocates.<sup>23</sup> These investigations have revealed that several key figures who planned and carried out Zero-Tolerance remain in State positions of power,<sup>24</sup> while other former government officials responsible for these gross violations of the human rights of thousands of families continue to justify their actions as acceptable exercises of State authority. Moreover, the State has adopted a similar litigation position in response to lawsuits from affected families seeking redress,<sup>25</sup> claiming the Zero-Tolerance Policy was within the State's discretionary authority. This lack of progress, even retrogression, on transparency and accountability threatens to undermine the laudable efforts of the current presidential administration and the Task Force to ensure that policies like Zero-Tolerance are never repeated.

Ultimately, non-repetition cannot be achieved, even with full, comprehensive, and transparent investigation, without accountability for the individual responsibility and meaningful reform of the institutional deficiencies that led to the widespread violations of the fundamental rights of thousands of children and their parents in the first place.<sup>26</sup>

### **Acknowledgement, Apology, and Memorialization**

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<sup>18</sup> Jacob Soboroff and Julia Ainsley, NBC NEWS, [Biden DOJ refuses to release key Trump admin documents about zero tolerance family separation policy](#), Apr. 12, 2021.

<sup>19</sup> See *supra* n. 10 at ¶¶ 125, 147.

<sup>20</sup> See, e.g., Evan Perez and Zachary Cohen, CNN, [Biden refuses to assert privilege over Trump documents sought by January 6 committee](#), Oct. 9, 2021; Aaron Parsley, PEOPLE, [Jen Psaki Says Biden Has 'No Intention to Lead an Insurrection' While Explaining Decision to Release Documents](#), Oct. 15, 2021.

<sup>21</sup> Caitlin Dickerson, The Atlantic, ["We Need to Take Away the Children": The Secret History of Family Separation](#), Aug. 7, 2022.

<sup>22</sup> Maria Sacchetti, The Washington Post, [Lawyers for migrants say U.S. officials slowed family reunifications](#), June 8, 2022.

<sup>23</sup> American Oversight, [A TIMELINE OF THE TRUMP ADMINISTRATION'S FAMILY SEPARATION POLICY](#).

<sup>24</sup> See, e.g., Jack Herrera, Texas Monthly, [Biden's New Border Patrol Leader in the RGV Promoted Trump's Family Separation Policy](#), Sept. 20, 2022.

<sup>25</sup> Camilo Montoya-Galvez, CBS News, [Migrant families separated under Trump face elusive quests for reparations under Biden](#), May 11, 2022.

<sup>26</sup> See, e.g., *supra* n. 10 at ¶¶ 71-74, 129, 168.

Although full and public investigations and public accounting of systematic human rights violations are indispensable to ensuring non-repetition of the violations, investigations and accounting alone are insufficient. Investigations and accounting must be accompanied by and inform public acknowledgement of responsibility by the State, official apologies to the victims, and memorialization of the violations through initiatives such as the creation of archives.

The United States government must publicly acknowledge its responsibility for the deliberate and systematic violation of the most fundamental rights of thousands of children and their parents, as well as publicly apologize to these families on whom the government inflicted such harm. These actions would not only powerfully represent but also promote the government's commitment to non-repetition of family separation.

Ensuring the non-recurrence of serious human rights violations is a long game that requires the construction and preservation of historical memory. The United States should draw on the many existing examples of historical memory initiatives remembering and consolidating records of massive human rights violations, including the construction of museums, archives, and monuments,<sup>27</sup> to design and promote initiatives to remember Zero-Tolerance and its victims. Moreover, the consideration, design, and implementation of any such initiatives must include meaningful participation from the victims and their families.

### **Integral Reparation of Separated Families**

In addition to public accounting and acknowledgement, non-repetition of grave human rights violations requires reparation for the victims. The Commission identifies non-repetition as one element of integral reparation, a concept pioneered and developed by the Inter-American system constituted by measures of restitution, compensation, rehabilitation, and satisfaction, in addition to non-repetition.<sup>28</sup> The United States must publicly commit to make the victims of family separation under Zero-Tolerance whole, a commitment that must necessarily go beyond the critical but limited services currently available to affected families through the Interagency Task Force on the Reunification of Families (Task Force). Instead, making these families whole will require a combination of shorter- and longer-term commitments to providing urgently needed services, appropriate restitution, and durable policies to prevent family separation.<sup>29</sup>

In cases like that of family separation where full restitution is not possible due to the nature of the violations and the damage caused to the victims, the Commission has identified an enhanced obligation for the State to provide structural or compensatory reparations.<sup>30</sup> Given the centrality of comprehensive medical, behavioral health, educational and other services to mitigating the harm inflicted on these families, combined with the high incidence of asylum seekers among the families, durable immigration relief is the minimum threshold necessary for the United States to deliver restitution, compensation, rehabilitation, and satisfaction<sup>31</sup> to the thousands of families it tore apart. We urge the government to not only take every available step to champion the passage of legislation providing durable immigration relief, but also pursue every available avenue for providing permanent immigration status through executive authority.

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<sup>27</sup> See *supra* n. 10 at ¶¶ 144, 154-156.

<sup>28</sup> See *supra* n. 10 at ¶ 166.

<sup>29</sup> See, e.g., Women's Refugee Commission, [Update on Families Forcibly Separated Under the Trump Administration: Urgent Service Needs, Appropriate Restitution, and Policies Needed to Prevent a Future Administration from Separating Families](#), Sept. 30, 2022.

<sup>30</sup> See *supra* n. 10 at ¶ 167.

<sup>31</sup> See *supra* n. 10 at ¶ 166.

## **Preventing and Minimizing Future Family Separations**

To guarantee the non-recurrence of systematic human rights violations, the State must implement forward-looking measures as well as engage in a comprehensive backward-looking examination of the past. The United States can and should develop and implement several measures right now to prevent and minimize family separations in the immigration context.

In light of the ongoing separations of migrant families by border authorities described by the Texas Civil Rights Project during the October 20, 2021 Working Meeting on PM 505-18, the government should, in consultation with state-licensed child welfare professionals, immigration law experts, and immigrant community service providers, establish an oversight structure to prevent or speedily resolve, as applicable, separation of children from their parents by border authorities in individual cases. The constitutional right to family integrity, reflected in international law as the right to family life or the protection of the family, must be adopted as a central guiding principle in immigration law and policy. Oversight is necessary to ensure that any decision by border authorities to separate a parent and child meets the same rigorous standards for such a momentous and consequential decision as those of the domestic child welfare system. Moreover, policies must be established to meaningfully ensure immediate support for location and tracking, regular and meaningful contact, including by video, and speedy reunification of separated family members in the rare instances where separation may occur. Policies and procedures must include access to administrative and judicial appeals processes, appointed counsel, and complete, accurate, and transparent tracking and recordkeeping.

Finally, the government should institute a review process for any existing or new immigration policy that will evaluate the possibility that the policy will result in family separation, including as a collateral consequence of the policy. Should a likelihood of family separations be identified, the policy must be revised or withdrawn. A review process that evaluates the possibility of family separation would facilitate adherence to the principle of family unity and the non-repetition of policies like Zero-Tolerance.

### **Conclusion: Task Force's Report on Non-Repetition Recommendations Is Only a First Step**

As detailed above, much remains to be addressed and accomplished to effectively guarantee that the United States government will never again design and implement a policy to deliberately and systematically tear children from their parents. For this reason, we make a final recommendation for the government as it "continues to develop policies to help ensure that the Federal Government will not repeat the policies and practices that led to the separation of families at the border during the prior Administration": to make a public commitment to finalizing and implementing these measures. Making such a commitment to enacting durable policy will help ensure that family separation, rather than the Task Force's recommendations on non-repetition measures, is consigned to the dustbin of history.