



Guidance on Corporate Human Rights Due Diligence Related to Immigration Detention and Family Separation

Introduction

The U.S. “zero tolerance” immigration policy, which includes the practice of family separation, has led to at least 2,300 children being separated from their parents, the indefinite detention of hundreds of families, and uncertainty about when and how those who have been separated will be reunited. According to the United Nation’s (UN) Office of the High Commissioner for Human Rights, the practice of separating children at the border constitutes “arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child,”¹ including those rights articulated in the UN Convention on the Rights of the Child,² and in other relevant instruments and standards.³

Companies with existing or potential contracts with the U.S. Federal Government associated with the enforcement of immigration policies are exposed to the risk of contributing to, or being directly linked to, violations of human rights, including children’s rights, due process, equal protection, freedom from persecution and torture, and the rights of asylum seekers. This exposes companies to significant legal and reputational risks, including brand risk and workplace unrest by employees who are strongly opposed to these practices.

This document, developed by the Investor Alliance for Human Rights, provides an overview of the human rights risks associated with family separation and indefinite immigration detention, and includes guidance to help companies identify, assess and address those risks, both in the U.S. and globally. The Investor Alliance is a platform for investors to engage companies, policy makers and standard-setting bodies to

¹ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E>

² The United States is not party to the Convention of the Rights of the Child (CRC), which exposes companies to particular risk with regards to respecting children’s rights. Relevant CRC articles include: the best interests of the child (article 3 CRC), the right to not be separated from their family (article 9 CRC), the right to family reunification (article 10 CRC), the right to family environment (article 20 CRC), the right to review of treatment in care (article 25 CRC), the right to an adequate standard of living (article 27 CRC), and the right to be free from detention and punishment (article 37 CRC).

³ Convention against Torture, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and guidelines developed on immigration detention by the UN Working Group on Arbitrary Detention and Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/28/68)

ensure corporate respect for human rights. The Alliance currently has 125 institutional investor members globally with over \$3 trillion in assets under management.⁴

Immigration Detention, Family Separation and the UN Guiding Principles for Business and Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs)—unanimously adopted by the UN Human Rights Council in 2011—clarify the roles and responsibilities of states and businesses with regard to human rights. While governments have a duty to protect human rights, companies have a responsibility to respect human rights by exercising human rights due diligence to identify, prevent, mitigate and account for how they address their adverse human rights impacts regardless of whether the state upholds its duty, and both must provide remedy to victims of corporate related abuses.

The U.S. government relies on products and services from various private enterprises to carry out different elements of its “zero tolerance” policy and therefore companies may contribute to or be directly linked to human rights abuses.⁵

Companies potentially at risk of impacting human rights in this context include:

- Technology companies with active contracts with federal immigration agencies to provide a range of hardware and other infrastructure, including cloud services, risk assessment tools, artificial intelligence, face scanning technology, network operations management, and military technology;
- For-profit private prisons engaged in the family and adult detention business, housing immigrant detainees across the country;
- Contractors involved in processing and transporting children to different parts of the United States or providing food, shelter, clothing, and other services related to managing Immigration and Customs Enforcement (ICE) and other relevant agency programs; and,
- Financial institutions which provide access to capital and financial support to the above industries.

It is imperative that companies with existing or potential contracts implement robust human rights due diligence processes to ensure that they do not contribute to human rights violations or become directly linked to violations through their business relationships with the U.S. government.

Recommendations for Companies and Financial Institutions on Human Rights Due Diligence Related to Immigration Detention and Family Detention

In line with the responsibilities outlined in the UN Guiding Principles on Business and Human Rights, the following guiding questions help:

⁴ For more information, contact Paloma Muñoz Quick, Program Director, pmunozquick@iccr.org

⁵ Whether a company contributes or is directly linked depends on the extent to which the company enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it. <https://www.business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf>

- Companies identify, assess and address real and potential human rights impacts they may be contributing to, or directly linked to, through government contracts and business relationships; and
- Investors engage their portfolio companies to address the human rights impacts associated with immigration and family detention.

UN Guiding Principle 16: As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy.

- Has the company or financial institution made explicit commitments to respect human rights, for example, through the development of a human rights policy commitment to respect internationally recognized human rights, including those found in the International Bill of Human Rights, the labor rights contained in the ILO's Declaration on Fundamental Principles and Rights at Work, and the rights outlined in the Convention on the Rights of the Child and the Convention on the Rights of Refugees?

UN Guiding Principle 18: In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.

- Does the company consider whether it can uphold its responsibility to respect human and children's rights when executing a federal contract that it is considering accepting or bidding for? Does the company fully understand the content of the product or service it will provide, receive transparent information about who will use its product or service, how it will be used and how it may affect immigrants and/or children?
- How does the company with a contract identify, prevent and eliminate the risk that their products and services could be used to abuse, exploit or otherwise harm children and their families in any way?⁶ Does the process include identifying and mitigating risks through stakeholder engagement, including with experts, for example on migration, and children's rights?⁷ Is there an assessment of how boys and girls, and children of different ages, may be affected differently?
- Financial institutions: How does the institution assess and identify actual or potential adverse impacts with which it may be involved as a result of its business relationships or investments?

UN Guiding Principle 19: In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

According to the commentary of Guiding Principle 19, companies that contribute to human rights abuses should take the necessary steps to cease or prevent its contribution and use their leverage to mitigate any remaining impact to the greatest extent possible, while companies that are directly linked to abuses should

⁶ Child rights due diligence tools available here: <https://www.unicef.org/csr/tools.html>

⁷ UNICEF, Engaging stakeholders on children's rights: A tool for companies: https://www.unicef.org/csr/css/Stakeholder_Engagement_on_Childrens_Rights_021014.pdf

exercise and maximize their leverage. Where companies lack the necessary leverage to prevent or mitigate human rights abuses in their business relationships, they should consider ending the relationship.⁸

- Where the company identifies that it has contributed to adverse impacts on human and children's rights linked to family separation and indefinite detention, has it taken steps to cease or prevent them? For example, has the company adopted relevant policies and procedures, and allocated adequate financial and human resources, including training of staff to respect human rights, including rights of the child, the right to family integrity and the rights of asylum seekers, when implementing the contract?
- How does the company use its leverage to mitigate the abuses?⁹ Has the company issued a statement condemning the immigration policy and associated human rights and children's rights violations, and has it advocated for just and equitable immigration policies to end abuses? In the case of financial institutions, does the company assess its financing portfolios to identify high-risk companies, and use its leverage with the companies that are knowingly contributing to human rights and children's rights abuses in order to encourage them to use their leverage to prevent or mitigate the abuse, and if necessary, cancel their federal contracts?
- Has the company considered whether continuing its business relationship with immigration agencies is inconsistent with its human rights responsibilities? If the use of the company's products or provision of its services cannot be carried out with respect for human rights despite efforts to prevent or mitigate the human rights abuses, has the company canceled its contracts with ICE or other government agencies and subcontractors¹⁰ after having assessed whether terminating such relationships would not lead to other adverse human rights consequences?¹¹ In the case of financial institutions, where portfolio companies that contribute to human rights abuses fail to take steps to respect human rights, what is the process for determining when it is appropriate to sever financial ties with these companies?
- For profit private prisons and detention centers: Has the company refrained from separating families when they are brought to their facilities? Unaccompanied children and families should not be permitted in company facilities; however, if this cannot be avoided, has the company taken measures to ensure the shortest time possible of detention, and that its facilities are not used to abuse, harm or exploit children, for example by providing adequate training of all staff engaging with children¹² (including security personnel),¹³ ensuring a child-friendly environment and

⁸ Commentary UNGP 19: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁹ For example, companies have used their leverage to pressure the government to change its policy. American Airlines called on the US federal government to "immediately refrain from using American Airlines for the purpose of transporting children who have been separated from their families due to the current immigration policy." Similar calls were made by Frontier, United and Southwest airlines. The Business Roundtable, chaired by J.P. Morgan CEO Jamie Dimon, went as far as to urge the Administration to immediately end the policy of separating accompanied minors from their parents. Microsoft said it was "dismayed by the forcible separation of children from their families at the border" after a blog post about its contract with ICE.

¹⁰ Commentary UNGP 19: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹¹ McKinsey & Company terminated its work with ICE <https://www.nytimes.com/2018/07/09/business/mckinsey-ends-ice-contract.html>

¹² Child Safeguarding Toolkit for business: https://www.unicef.org/csr/files/UNICEF_ChildSafeguardingToolkit_FINAL.PDF

¹³ Child Rights and Security Checklist https://www.unicef.org/csr/files/Child_rights_and_Security_Checklist_ENG.pdf

providing access to information in a child-friendly manner and in a language, they can understand? Are efforts made to create family-friendly facilities and spaces for immigrant families in open reception centers at the border in order to avoid the need for separation of children from their families?

- Transportation companies, including airlines and bus companies: Has the company publicly informed policy makers and federal agencies that using its services to transport children separated from their parents is not permitted? When federal agents with unaccompanied children seek to use their services to separate families, does the company refuse on the grounds that this would constitute a violation of the rights of the child?

UN Guiding Principle 20: In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their responses.

- Has the company or financial institution developed indicators to track and measure the effectiveness of its efforts to address its impacts in consultation with organizations with the relevant expertise, such as UNICEF?

UN Guiding Principle 21: In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally.

- How does the company or financial institution disclose its efforts to respect human rights, including children's rights?¹⁴ Where the company has identified that it has contributed to human rights violations of families and children associated with the immigration policy, does the company report on these impacts?

UN Guiding Principle 22: Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

- Where the company or financial institution identifies that it has contributed to human rights violations, has it provided for, or cooperated in, their remediation? Are remediation efforts developed in consultation with impacted stakeholders and/or their representatives? Remediation efforts may include, for example, efforts to support the reunification of families, the provision of legal services, and financially supporting organizations that are helping families and children at the border.¹⁵

Companies that follow these recommendations will be in a better position to address the human rights risks associated with existing or potential contracts with the U.S. Federal Government agencies responsible for the enforcement of immigration policies.

¹⁴ Companies should use the UN Guiding Principles Reporting Framework to report on efforts to respect human rights: <https://www.ungpreporting.org/>

¹⁵ For a list of organizations see: <https://slate.com/news-and-politics/2018/06/how-you-can-fight-family-separation-at-the-border.html>