



H U M A N
R I G H T S
W A T C H

Statement of Human Rights Watch
to
The United States Commission on Civil Rights
January 30, 2015 Briefing
on the
“State of Civil Rights at Immigration Detention Facilities”

March 2, 2015

Human Rights Watch submits the following statement in response to the Commission’s January 30, 2015 briefing on the “State of Civil Rights at Immigration Detention Facilities.” Human Rights Watch is an independent nongovernmental organization that promotes and protects human rights in more than 90 countries around the world.

Human Rights Watch has investigated the US immigration system for more than two decades and has frequently reported on how the United States has failed to uphold its international human rights obligations in its immigration enforcement and detention system. We have addressed the arbitrary detention of refugees and of lawful permanent residents, as well as the denial of bond to immigrants with nonviolent criminal convictions.¹ We have also reported on how women in immigrant detention have struggled to access health care and have been victims of sexual assault while in confinement.² And in partnership with the American Civil Liberties Union, we have documented the indefinite detention of immigrants with mental disabilities.³ Most recently, we have reported on the failure of US Customs and Border Protection to identify claims for international protection made by migrants fleeing violence from Central America.⁴

We appreciate the Commission drawing attention to concerns about the US immigration detention system in its broad-reaching, day-long hearing on January 30. In this statement, we will focus on three specific issues:

- Inadequate border screening by Customs and Border Protection;
- Harms caused by damaging and unnecessary transfers of immigration detainees between facilities; and
- Excessive and harmful use of family immigration detention.

¹ Human Rights Watch, *Jailing Refugees: Arbitrary Detention of Refugees in the US Who Fail to Adjust to Permanent Resident Status*, December 2009, <http://www.hrw.org/reports/2009/12/29/jailing-refugees-o>. Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, July 2007, <http://www.hrw.org/reports/2007/07/16/forced-apart-o>.

² Human Rights Watch, *Detained and Dismissed: Women’s Struggle to Obtain Health Care in United States Immigration Detention*, March 2009, <http://www.hrw.org/reports/2009/03/16/detained-and-dismissed>. Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, August 2010, <http://www.hrw.org/reports/2010/08/25/detained-and-risk-o>.

³ Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, July 2010, <http://www.hrw.org/reports/2010/07/26/deportation-default-o>.

⁴ Human Rights Watch, *“You Don’t Have Rights Here”: US Border Screening and Returns of Central Americans to Risk of Serious Harm*, October 2014, <http://www.hrw.org/reports/2014/10/16/you-don-t-have-rights-here-o>.

For each of these three issues, we offer a set of recommendations that we hope the Commission will put forward in its follow-up with representatives from the US Department of Homeland Security and the White House.

Inadequate border screening

Human Rights Watch's October 2014 report, *You Don't Have Rights Here*, details the current rapid-fire screening process at the US-Mexico border of migrants placed in accelerated deportation processes like "expedited removal" and "reinstatement of removal." The report shows that these screening processes have been inadequate in identifying potential claims of fear of return.⁵

During the Commission's January 30 hearing, US government officials defended the current practices of Customs and Border Protection (CBP). Department of Homeland Security (DHS) Officer for Civil Rights and Civil Liberties Megan Mack stated at the hearing: "We screen for fear and it's a simple questionnaire that we provide and go through. And so officers go through the questions. If someone expresses a fear, then under our law we're required to find a credible fear, and then they have more rights to not be returned."⁶ Franklin C. Jones, executive director for the Privacy and Diversity Office at CBP stated:

Officers go through the checklist and they give the individual their rights and the assessment is...the agent is not responsible for making or allowed to make an assessment. If the individual indicates that he or she meets the requirement then they have to be referred for additional screening. ... It's not a subjective belief of the agent that determines the outcome.⁷

Migrants who spoke to Human Rights Watch after being summarily deported to Honduras told a different story. They recounted that the CBP officers responsible for questioning them about their fear of returning to their country seemed singularly focused on removing them from the United States, which impeded their ability to make their fears known. One man who was deported in September 2014 told Human Rights Watch that when he informed a Border Patrol officer of the threats to his life in Honduras, "He told me there

⁵ Ibid.

⁶ United States Commission on Civil Rights, "Immigration Detention Briefing Morning Session," January 30, 2015, archived video livestream, YouTube, <https://www.youtube.com/watch?v=vQbrgWioXLc> (accessed February 23, 2015).

⁷ Ibid.

was nothing I could do and I didn't have a case so there was no reason to dispute the deportation.... I told him he was violating my right to life and he said, 'You don't have rights here.'"⁸

Migrants who were not referred for a credible fear interview also told Human Rights Watch that interviews by CBP were brief and focused on explaining the additional consequences of deportation, such as bars to return for set periods of time, rather than exploring their fear of return. "The officers don't pay attention to you. If you say you are afraid they say they 'can't do anything,'" said "Marlon J.," a migrant who said he feared being returned to Honduras. "All they said to me was that if I came back they would give me six months in prison."⁹

Some Border Patrol officers apparently tried to convince border crossers not to apply for asylum. "I asked for asylum," said "Jacobo E.," who fled after being shot and seeing his mother killed for her failure to pay fees to gang members to run her small clothing business. "The officer told me don't apply, 90 percent of the people who do don't get it."¹⁰

Deportation data obtained by Human Rights Watch via the Freedom of Information Act backs up these migrants' accounts. According to a Human Rights Watch analysis of deportation records from 2011 and 2012, CBP officers flagged a very small percentage of Mexican and Central American migrants for further screening about their potential asylum claims or claims under the Convention Against Torture, to which the US is party. The vast majority of Hondurans who arrived during that period, at least 80 percent, were placed in summary removal proceedings, and that only 2 percent were flagged as having expressed a fear of return by CBP. The percentages for people flagged for further screening based on their fear of return from Mexico, El Salvador, and Guatemala are similar, ranging from 0.1 to 5.5 percent.

The testimony by government officials on CBP officers not applying their "subjective belief" in identifying potential fear claims does not align with the accounts of migrants interviewed by Human Rights Watch.

⁸ Human Rights Watch, *You Don't Have Rights Here*, p. 9.

⁹ *Ibid.*, p. 27.

¹⁰ *Ibid.*

Recommendations

Human Rights Watch urges the Commission to recommend that:

- CBP take all reasonable steps to properly identify individuals who express fear of return so that they are afforded credible or reasonable fear assessments. This includes better training, oversight and accountability mechanisms.
- CBP, until it undertakes these reforms, should apply a presumption of fear of return for migrants from Honduras, El Salvador, Guatemala and other countries experiencing similar conditions.

Transfer of immigrant detainees

During the afternoon session of the Commission's hearing, Chairman Castro asked panelists a series of questions about the transfer of immigrant detainees from facility to facility and whether such transfers could impact the right of those individuals to counsel.¹¹ Human Rights Watch first reported on detainee transfers, and how such transfers could fail to protect the human rights of detainees, in 2009.¹² Immigration and Customs Enforcement (ICE) ultimately issued a directive limiting its use of transfers in 2012. While an improvement, the directive still leaves people in ICE custody vulnerable to transfers, which can severely curtail their ability to challenge their deportation.

In our 2011 follow-up report on transfers of immigrant detainees, Human Rights Watch analyzed 12 years of transfer data. We found that 46 percent of detainees were transferred more than once, on average 370 miles between facilities. One very common transfer was from a Pennsylvania detention facility to one in Texas, 1,642 miles away. We also found that the largest number of transfers between states involved detainees sent to Louisiana, Mississippi, and Texas—states within the jurisdiction of the US Court of Appeals for the Fifth Circuit. While some of these transfers may be operationally logical to ensure that detainees are closer to the region to which they will eventually be removed, they remain of particular concern both because the court has widely been known for decisions that are

¹¹ United States Commission on Civil Rights, "Immigration Detention Briefing Afternoon Session," January 30, 2015, archived video livestream, YouTube, <https://www.youtube.com/watch?v=oEnaVEl663c> (accessed February 23, 2015).

¹² Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, December 2009, <http://www.hrw.org/reports/2009/12/02/locked-far-away-o>.

hostile to immigrants and because the three states collectively have the lowest ratio of immigration attorneys to immigration detainees: 1 lawyer for every 510 detainees.

Transfers of detainees can separate detainees from the attorneys, witnesses, and evidence they need to defend against their deportation. They can also extend the time detainees must spend in detention. As an agency charged with enforcing the laws of the United States, ICE should not operate a system of detention that is dependent upon widespread, multiple, and long-distance transfers: in other words, it should not rely on a system of detention that violates detainees' rights.

ICE's 2012 transfer policy tries to limit the amount of unnecessary detainee transfers.¹³ It discourages transfers if the detainee has immediate family in the area, an attorney or pending court proceedings in the area, or if the detainee is awaiting a bond hearing. However, the transfer policy continues to have major gaps: transfers within ICE "areas of responsibility," or AOR (ICE regional divisions), do not trigger the policy and any transfer is still allowable to relieve overcrowding. Most troublingly, while the ICE transfer policy requires that reasons for a transfer be documented, we understand that such documentation is not taking place systematically.

Recommendations

Human Rights Watch urges the Commission to recommend that:

- ICE document all transfers that trigger the transfer policy, including the reason for the transfer as well as any factors arguing against transfer, and that data be aggregated and disseminated to the public on a yearly basis.
- ICE ensure that its field offices be adequately trained on the transfer policy and why transfers can violate the basic rights of detainees.
- ICE amend its transfer policy to include intra-AOR transfers in excess of 50 miles.

¹³ US Immigration and Customs Enforcement, Policy 11022.1: Detainee Transfers, <http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf> (accessed February 25, 2015).

Detention of families with children

Throughout the day, the Commission heard testimony regarding the Obama administration's expanded use of family immigration detention. In response to a surge of Central American asylum seekers crossing the US-Mexico border last summer, the administration opened a new 700-bed family detention center in Artesia, New Mexico, converted a 532-bed facility into family detention in Karnes, Texas, and announced plans for another 2,400-bed facility in Dilley, Texas. Prior to last summer, only 80 beds were being used for family detention nationwide.

Detention of children for immigration reasons, with or without their parents, is prohibited under international law. It can cause them severe harm—from anxiety and depression, to long-term cognitive damage. The United Nations Committee on the Rights of the Child stated in 2012 that children should never be detained for immigration reasons, and that immigration detention can never be considered in a child's "best interests."¹⁴ In its 2012 detention guidelines, the United Nations refugee agency called for "alternative care arrangements" for children accompanying their parents, "not least because of the well-documented deleterious effects of detention on children's well-being, including on their physical and mental development."¹⁵

The Obama administration has stated that one purpose for the increase in family detention beds is to deter migrants from entering the country to seek protection. DHS Secretary Jeh Johnson has referred to detention as part of an "aggressive deterrence strategy" in Senate testimony,¹⁶ and has told the media that he believed detention "would deter future illegal crossings."¹⁷ The Assistant Director of Investigative Programs for Homeland Security Investigations has stated that "[i]mplementing a 'no bond' or 'high

¹⁴ United Nations Committee on the Rights of the Child, "Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration," para. 78, <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> (accessed February 25, 2015).

¹⁵ UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, para. 53, <http://www.refworld.org/pdfid/503489533b8.pdf> (accessed February 25, 2015).

¹⁶ Department of Homeland Security, "Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations," July 10, 2014, <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations> (accessed February 25, 2015).

¹⁷ Mónica Ortiz Uribe, "New Detention Center to Begin Deporting Immigrant Families," *Fronteras*, July 11, 2014, <http://www.fronterasdesk.org/content/9708/new-detention-center-begin-deporting-immigrant-families> (accessed February 25, 2015).

bond’ policy would help alleviate these disruptions by deterring further mass migration.”¹⁸ The ICE press release announcing the Dilley facility stated that it would “help ensure more timely and effective removals that comply with our legal and international obligations, while deterring others from taking the dangerous journey and illegally crossing into the United States.”¹⁹

Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to international norms. According to the UN refugee agency, “detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain.”²⁰ Furthermore, detention of refugees and asylum seekers is not permitted as a punitive—for example, criminal—measure or a disciplinary sanction for irregular entry or presence in the country. This amounts to a prohibited penalty against refugees and asylum seekers under article 31 of the 1951 Refugee Convention.²¹

In February, a US federal court held that DHS's “no-bond” or “high-bond” policy promoting prolonged detention of families for the purposes of deterrence was “likely unlawful, and that the policy causes irreparable harm to mothers and children seeking asylum.”²² The court enjoined ICE from implementing its current bond policy for certain detained families while it decides on the policy’s lawfulness. The court is not expected to rule on the lawfulness of detaining children with families prior to their eligibility for a bond determination, likely allowing family detention to continue with some slight modifications.

¹⁸ César Cuauhtémoc García Hernández, “Is DHS Admitting Immigration Detention is Punishment?” post to “crlmigration: The Intersection of Criminal Law and Immigration Law” (blog), September 25, 2014, <http://crlmigration.com/2014/09/25/is-dhs-admitting-immigration-detention-is-punishment/> (accessed February 25, 2015).

¹⁹ US Immigration and Customs Enforcement, “ICE to open additional facility in South Texas to house adults with children,” September 22, 2014, <http://www.ice.gov/news/releases/ice-open-additional-facility-south-texas-house-adults-children>, (accessed February 25, 2014).

²⁰ UNHCR Detention Guidelines, para. 3.

²¹ *Ibid.*, para. 32. The 1951 Refugee Convention in article 31(1) [states](#): “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” The United States is a party to the 1967 Refugee Protocol, which incorporates this language from the Convention.

²² *RILR v. Johnson*, Memorandum Opinion, United States District Court for the District of Columbia, Civil Action No. 15-11 (JEB), February 20, 2015, <https://www.aclu.org/sites/default/files/assets/memorandum.pdf> (accessed February 25, 2015).

Recommendations

The Commission should urge:

- The Obama administration to not use the Dilley facility to house families, to end the detention of families at the Karnes County Residential Center, and to end the use of deterrence as a consideration for detention of families in any circumstance.
- Congress to exempt family units from mandatory immigration detention, and to adequately fund alternatives to detention for families with children.