



March 5, 2019

Rep. Bennie G. Thompson
Chair
House Homeland Security Committee

Rep. Mike Rogers
Ranking Member
House Homeland Security Committee

RE: Amnesty International Statement for March 6 Hearing on “The Way Forward on Border Security”

Dear Chairman Thompson, Ranking Member Rogers, and Members of the Committee:

On behalf of Amnesty International¹ and our more than two million members and supporters in the United States, we hereby submit this statement for the record.

Amnesty International is an international human rights organization with national and regional offices in more than 70 countries, including in the U.S. and Mexico. One of Amnesty International’s top global priorities for the past several years has been protecting the human rights of refugees and asylum-seekers around the world, including those who arrive to the U.S. border in search of safety. Amnesty welcomes this oversight effort by the Committee on Homeland Security of the policies and practices of the Department of Homeland Security (DHS) related to the U.S. border.

Through extensive research and documentation, **Amnesty International has concluded that the Department of Homeland Security, under the leadership of Secretary Kirstjen Nielsen, has engaged in an all-out assault on the right to seek asylum at the U.S. border.** DHS has undermined the the right to asylum by: (1) turning back asylum-seekers who attempt to seek asylum at ports of entry (as they are authorized to do under domestic and international law); (2) separating parents and children to deter families who attempt to come to the U.S. in search of safety; and (3) detaining record numbers of asylum-seekers, including children, who face abuse and ill-treatment at the hands of DHS officials.

¹ Amnesty International was awarded the Nobel Peace Prize in 1977.

Who is Seeking Asylum at the U.S. Border?

Though members of the current administration, including Secretary Nielsen, have portrayed individuals seeking protection at the border in alienating terms, the vast majority of these individuals are fleeing record levels of insecurity, instability, and repression in their home countries. They are survivors of violence, not perpetrators of it.

Amnesty International has documented that this violence, which occurs against a backdrop of generalized impunity and lack of government protection, drives people to leave Honduras, Guatemala, and El Salvador – collectively, the most common countries of origin of asylum-seekers at the U.S. southern border.² In this environment of violence and insecurity, nationals of these countries face numerous particularized risks, including forced recruitment of children and adolescents, extortion, death threats, and even murder at the hands of the *maras*, or powerful criminal groups acting as quasi-state authorities, exercising territorial control in various parts of these countries.³ Sexual violence, especially against women and members of the LGBTI community, is endemic.⁴

Over the past five years, in response to these risks, the number of asylum claims from these three countries of origin around the world have increased. As Customs and Border Protection (CBP)’s own apprehension data shows, in January 2019 alone, over 60 percent of individuals apprehended at the border, and nearly half of all individuals seeking admission at ports of entry, were family units and unaccompanied children.⁵

² Amnesty International, “Americas: Stuck at the Door,” Nov. 2018, available at: <https://www.amnesty.org/download/Documents/AMRO194472018ENGLISH.PDF>, at 4.

³ *Id.*

⁴ Amnesty International, “No Safe Place: Salvadorans, Guatemalans, and Hondurans Seeking Asylum Based on their Sexual Orientation and Gender Identity,” Nov. 2017, available at: <https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf>; Kids in Need of Defense, Latin America Working Group, and the Women’s Refugee Commission, “Sexual and Gender Based Violence & Migration,” May 2018, <https://supportkind.org/wp-content/uploads/2018/05/SGBV-Fact-sheet.-April-2018.pdf>.

⁵ See Customs and Border Protection, “FY19 Southwest Border Statistics,” available at: <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

While Secretary Nielsen has dismissed the human right to seek asylum as an inconvenient “loophole,”⁶ it is in fact a bedrock principle of international and domestic law. Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (the latter of which the United States has signed and incorporated into domestic law through the 1980 Refugee Act),⁷ governments have the obligation not to forcibly return individuals to a place where they would fear harm – not just their countries of origin, but any other place where a person would have reason to fear for their lives.⁸ To ensure this obligation is met, Congress has codified the right to seek asylum both at and between ports of entry in domestic law,⁹ and it has specifically mandated that U.S. authorities refer individuals who express a fear of return at the border to a “credible fear” process to assess their asylum claims.¹⁰

Pushbacks, Metering, and “Remain in Mexico”: How DHS is Illegally Turning Back Asylum-Seekers at the U.S.-Mexico Border

Though the number of border crossers are at historic lows, DHS has institutionalized a practice of restricting access to territory for asylum-seekers, forcing them to wait in Mexico at grave personal risk, with the goal that they will be dissuaded from seeking protection. These measures range from the informal practice of artificially lowering, or “metering,” the number of asylum applicants allowed to access U.S. territory per day to the formally announced Migrant Protection Protocols, popularly known as the “Remain in Mexico” policy. They collectively reflect how DHS has illegally restricted the right to seek asylum at the U.S. border, circumventing congressional intent in the process.

⁶ “Transcript: Homeland Security Secretary Kirstjen Nielsen's Full Interview With NPR,” May 11, 2018, available at: <http://www.wlrn.org/post/transcript-homeland-security-secretary-kirstjen-nielsens-full-interview-npr>.

⁷ *Convention and Protocol Relating to the Status of Refugees*, available at: <https://www.unhcr.org/3b66c2aa10>.

⁸ Amnesty International, “You Don’t Have Any Rights Here: Illegal Pushbacks, Arbitrary Detention & III-Treatment of Asylum-Seekers in the United States,” Oct. 2018, available at: <https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF> [hereinafter “You Don’t Have Any Rights Here”].

⁹ 8 U.S.C. sec. 1158(a).

¹⁰ 8 U.S.C. sec. 1225(b).

In May 2018, Secretary Nielsen confirmed that DHS was “metering,” or limiting, the number of asylum-seekers allowed to enter U.S. territory,¹¹ stationing CBP officials at bridges leading to ports of entry to turn back asylum-seekers.¹² Before 2017, when the practice intensified, asylum-seekers who approached U.S. officials at ports of entry to express a fear of return and need for protection could typically access U.S. territory and an asylum procedure, as Congress has required. Now, CBP officials are instead pushing them back to Mexico, where their names are placed on a series of ad hoc waiting lists at ports of entry managed variously by Mexican authorities, NGO groups, and even fellow asylum-seekers; at some ports of entry, there are two, competing lists, creating an environment ripe for abuse.¹³ Depending on the number of people on the list, asylum-seekers are forced to wait for weeks to months in this state of limbo.¹⁴ While no official statistics on the number of people CBP officials have illegally pushed back in this manner are available, Amnesty International has documented that this practice has affected thousands of asylum-seekers, including families with children.¹⁵

In December 2018, DHS announced that it would be implementing a policy popularly known as “Remain in Mexico,” which it has misleadingly labeled as the “Migrant Protection Protocols.”¹⁶ Under the program, certain individuals seeking asylum at the border are forced to stay in Mexico at great risk to their personal safety for the duration of their proceedings, which can take months or even years. In the early days of its implementation in January and February 2019, the “Remain in Mexico” policy has already implicated vulnerable individuals in its sweep, including families with children

¹¹ Id. at 11 (quoting DHS Secretary interview on Fox News, 15 May 2018).

¹² DHS Office of the Inspector General, “Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy,” Sept. 27, 2018, available at:

<https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>, at 5-7.

¹³ Strauss Center, “Asylum Processing and Waitlists at the U.S. -Mexico Border,”

https://www.strausscenter.org/images/MSI/AsylumReport_MSI.pdf, at 5.

¹⁴ Id. at 6.

¹⁵ “You Don’t Have Any Rights Here,” at 17.

¹⁶ “Migrant Protection Protocols,” Jan. 24, 2019, available at:

<https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

and LGBTI-identifying individuals,¹⁷ and DHS has announced plans to expand the program, including to individuals who are apprehended between ports of entry.¹⁸

The practice of pushing back asylum-seekers through metering or the “Remain in Mexico” policy, either to await their ability to articulate a fear of return in a credible or reasonable fear interview or the outcome of their asylum case, violates international and domestic law, is practically unjustified, and comes at significant human cost.

As explained above, the U.S. government – in this case, DHS – has a statutory obligation to receive asylum-seekers’ claims, thereby ensuring the U.S. government does not run afoul of its obligation to refrain from forcibly returning individuals to harm.¹⁹ Even the statutory provision supposedly authorizing the “Remain in Mexico” initiative explicitly excepts individuals in expedited removal proceedings, a category which covers most individuals who apply for asylum at the border.²⁰ Even at the outermost perimeter of the border, the turning away of asylum-seekers clearly violates the government’s obligations under international law.²¹

Secretary Nielsen’s attempts to justify these practices by citing “capacity constraints” are belied by reality. Border crossings are at all-time historic lows,²² while the number

¹⁷ See Human Rights First, “A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum-Seekers to Mexico,” 13 Feb. 2019, <https://www.humanrightsfirst.org/resource/sordid-scheme-trump-administration-s-illegal-return-asylum-seekers-mexico>.

¹⁸ Dara Lind, “Remain in Mexico”: Trump’s quietly expanding crackdown on asylum seekers, explained,” Vox, March 5, 2019, <https://www.vox.com/2019/3/5/18244995/migrant-protection-protocols-border-asylum-trump-mexico>.

¹⁹ See 8 U.S.C. sec. 1158(a); 8 U.S.C. sec. 1225(b).

²⁰ See Hillel R. Smith, “Expedited Removal of Aliens: Legal Framemwork,” CONGRESSIONAL RESEARCH SERVICE, Sept. 19, 2018, <https://fas.org/sgp/crs/homesecc/R45314.pdf>.

²¹ See “You Don’t Have Any Rights Here,” at 17.

²² Linda Qiu, “Border Crossings Have Been Declining for Years, Despite Claims of a ‘Crisis of Illegal Immigration,’” N.Y. TIMES, June 20, 2018, <https://www.nytimes.com/2018/06/20/us/politics/fact-check-trump-border-crossings-declining-.html>.

of CBP officials is now at a historic high of nearly 60,000 agents,²³ with funding for an additional 600 CBP officials appropriated just last month.²⁴ This represents more than double the CBP personnel since DHS’s creation in 2003, when border crossings were three times as high as they are now.²⁵

Furthermore, though ports of entry along the border have vastly differing capacities to detain and process individuals, metering and pushbacks have been universally implemented at all of them. Senior CBP and ICE officials at the San Ysidro port of entry, which is the busiest land border in the western hemisphere, informed Amnesty International in 2018 that CBP has only reached its detention capacity a couple of times per year.²⁶ Yet in 2017 and 2018, CBP personnel frequently turned away even small numbers of asylum-seekers at San Ysidro and other ports of entry, without explaining why.²⁷

Finally, and most importantly, though terms like “metering” place a clinical, anodyne gloss on the practice, make no mistake: this is a dangerous policy that places asylum-seekers directly in harm’s way. In April and May 2018, Amnesty International documented firsthand the negative consequences of CBP’s refusal to receive asylum-seekers’ requests for protection after interviewing asylum-seekers who had been pushed back. In one shelter in Tijuana, a transgender Guatemalan woman named Maritza recounted being turned away from San Ysidro when attempting to seek asylum; upon return to Tijuana, she was detained and beaten by local police.²⁸ Shortly afterward, a group of six armed men attacked a Tijuana shelter where eleven LGBTI asylum-seekers had been staying, yelling homophobic slurs and threatening to kill them if they did not leave the neighborhood. Though the group approached CBP officials to request asylum and convey the threats they’d suffered, the officials maintained that they still had no

²³ See “CBP Snapshot: A Summary of Facts and Figures,” March 2018, <https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/cbp-snapshot-20180320.pdf>.

²⁴ See Dept. of Homeland Security Appropriations Act 2019, Title II, available at: <https://www.congress.gov/bill/116th-congress/house-joint-resolution/31/text>.

²⁵ See supra note 16.

²⁶ See “You Don’t Have Any Rights Here,” at 17.

²⁷ Id.

²⁸ “You Don’t Have Any Rights Here,” at 23.

“capacity” to process the asylum-seekers.²⁹ In February 2019, two Honduran teenagers – both still children – were killed near the youth migrant shelter where they were staying while they waited to apply for asylum.³⁰

Amnesty International has previously documented the many risks asylum-seekers face in Mexico: following a comprehensive survey, we concluded that nearly 40 percent of individuals surveyed who were detained by Mexican immigration authorities had been unlawfully returned to harm’s way, and 75 percent of those surveyed were never even informed of their right to seek asylum in Mexico.³¹ One individual who Amnesty had spoken with after he was wrongfully deported from Mexico was killed by the very individuals he feared just days later.³²

Family Separations: How DHS Weaponized an Illegal Practice to Deter and Punish Asylum-Seekers

In April 2018, DHS implemented a campaign of forcible separation of thousands of asylum-seeking families under a so-called “zero tolerance” policy, by which it criminally prosecuted adults crossing between ports of entry (the same adults who, had they tried to approach at ports of entry, would likely have been pushed back thanks to the “metering” policy in place at those ports). Though the administration was ordered to cease separating children from their families in June 2018, months later, DHS continues to regularly separate children from their parents, as well as from other relatives and caretakers.³³ The full scope and scale of family separation is still unknown.

²⁹ Id.

³⁰ Julia Gavarrette & Heather Gies, “Honduran Teen Fled Gangs Only to be Murdered While at U.S.-Mexico Border,” THE INTERCEPT, Feb. 23, 2019, <https://theintercept.com/2019/02/23/unaccompanied-minor-migrants-us-border-policy/>.

³¹ Amnesty International, “Overlooked and Under-protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum,” Jan. 2018, <https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf>, at 5.

³² Id. at 9.

³³ Dara Lind, “Hundreds of Families Are Still Being Separated at the Border,” Vox, Feb. 21, 2019, <https://www.vox.com/2019/2/21/18234767/parents-separated-children-families-border-trump-jails>.

Based on public statements and internal memoranda by U.S. government officials, there is overwhelming evidence that family separations were intended to deter asylum-seekers from requesting protection in the United States as well as to punish and compel those who did seek protection to give up their asylum claims. Numerous media reports document the leveraging of family separations to coerce asylum-seekers to give up their claims in exchange for reunification;³⁴ on one occasion, Amnesty International witnessed firsthand an immigration judge tell a Brazilian grandmother who had been separated from her developmentally disabled grandchild that she could give up her asylum claim and be reunited with him or be deported without him, presumably after the denial of her claim.³⁵

An internal DHS memo dating from December 2017, which was made available in January 2019, revealed that the agency conceived of the family separations policy as a means of deterring children and their families from coming to the United States.³⁶ Contrary to U.S. and international legal obligations, DHS never considered the children’s best interests in its cruel and unlawful family separation policy.

Furthermore, there still has not been a full reckoning of the scale of family separations. Amnesty International’s October 2018 report was the first to document how the number of family separations was far greater than DHS initially disclosed, and could be as high as 8,000 family units, if not more.³⁷ In January 2019, a report by the Office of the

³⁴ “You Don’t Have Any Rights Here,” at 30 & note 102-103.

³⁵ “You Don’t Have Any Rights Here,” at 31.

³⁶ The memo is available here: <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

³⁷ “You Don’t Have Any Rights Here,” at 42; Amnesty International, “USA: Facts and figures on illegal pushbacks, arbitrary detention and ill treatment of asylum-seekers in the United States,” 22 Oct. 2019, <https://www.amnesty.org/en/latest/news/2018/10/usa-facts-and-figures-of-illegal-pushbacks-arbitrary-detention-and-ill-treatment/>. Part of the ambiguity stems from the fact that the various agencies “count” family units differently – while DHS and the Dep’t of Health and Human Services appear to count a family as a single “family unit,” CBP’s Southwest Border Migration Statistics appear to count “family units” as the total number of individuals in the unit. *Compare* “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children” (7 Sept. 2018), available at: <https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf> (defining “family units” as a group of

Inspector General of the Department of Health and Human Services revealed that the total number of separated families and children is “unknown.”³⁸ Though family separations are the subject of an ongoing class action lawsuit, many of the affected families do not fall within the definition of the class, and thus DHS has not publicly counted the families not falling within class definition towards the total, though it has suggested that thousands more have been separated than it previously revealed.³⁹

Based on its research in 2018, Amnesty International found that the administration’s deliberate and punitive practice of forced family separations in some cases constituted torture under both U.S. and international law. To meet the definition of torture, an act must be: (1) intentional; (2) carried out or condoned by a government official; (3) inflicting severe pain or suffering, whether physical or mental; and (4) carried out for a specific purpose such as punishment, coercion, intimidation, or for a discriminatory reason.⁴⁰ The Trump administration’s deliberate policy and practice of forcible family separations satisfies all of these criteria.

In 2018, Amnesty International interviewed fifteen adults whom DHS agencies separated from their children both before and after the introduction of the so-called zero-tolerance policy.⁴¹ The separations happened in all four U.S. states along the U.S.-Mexico border (California, Arizona, New Mexico, and Texas), at the hands of both CBP and Immigration and Customs Enforcement (ICE) personnel. In all of those cases, prior to being separated, the families had requested asylum and expressed their fear of return to their countries of origin. According to the adults, in none of these cases did

two or more aliens consisting of a minor or minors accompanied by his/her/their adult parent(s) or legal guardian(s)”) with “Southwest Border Migration FY2019,” available at:

<https://www.cbp.gov/newsroom/stats/sw-border-migration> (defining “family units” as the total number of individuals in the units).

³⁸ Dep’t of Health & Human Services Office of the Inspector General, “Separated Children Placed in Office of Refugee Resettlement Care,” Jan. 2019, available at: <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

³⁹ Id.

⁴⁰ U.N. Convention Against Torture and Other Cruel, Degrading, or Inhuman Treatment or Punishment, art. 1, available at: <https://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>.

⁴¹ “You Don’t Have Any Rights Here,” at 36.

DHS personnel explain to the families the reasons for the separations at the time that they happened or allow them to defend their custodial right to family unity. DHS personnel simply separated the families – in some cases through the use or threat of physical force.

Amnesty International interviewed a Brazilian mother, Valquiria, who was separated from her eight-year-old son, Abel, with no explanation given, after the two approached CBP officials at a port of entry to seek asylum. Nearly a year later, Valquiria remains in detention at the El Paso Processing Center; on March 17, it will be one year since Valquiria was separated from her son. Abel has stared blankly for months at the door in the house where he lives, waiting for his mother to return.

“They told me, ‘You don’t have any rights here, and you don’t have any rights to stay with your son,’ Valquiria recalled. “For me, I died at that moment. They ripped my heart out of me. It would have been better if I had dropped dead. For me, the world ended at that point. How can a mother not have the right to be with her son?”

Detention and Ill-treatment in Custody as Punitive Measures for Seeking Asylum

Even for those asylum-seekers who manage to access U.S. asylum proceedings, in recent years, an increasing number of them have been relegated to mandatory and indefinite detention as they fight for the right to be protected. As of January 2019, ICE was detaining close to 50,000 people per day.⁴² Many of those detained are asylum-seekers.

In January 2017, the administration adopted a policy requiring all asylum-seekers to remain in detention for the duration of their proceedings, without parole, effectively punishing them for exercising the right to seek asylum. Although a court in June 2018

⁴² Heidi Altman & Mary Small, "Immigration Detention and the DHS Negotiations: An Explainer," National Immigrant Justice Center, Feb. 11, 2019, <https://immigrantjustice.org/staff/blog/immigration-detention-and-dhs-spending-negotiations-explainer>; Detention Watch Network, "ICE's Fiscal Mismanagement: Fraud, Deceit, and Abuse," available at: <https://www.detentionwatchnetwork.org/sites/default/files/ICE%E2%80%99s%20Fiscal%20Mismanagement-%20Deceit%20and%20Abuse.pdf>.

declared that individuals who had been found to have a “credible fear” of return to their home countries – and were thus authorized to proceed with their asylum claims – had to receive individualized determinations for parole from detention, the ruling applies only in certain jurisdictions, and a significant number of asylum-seekers continue to languish in detention for the duration of their proceedings.⁴³

Amnesty International has documented how particularly vulnerable individuals, including transgender asylum-seekers, remain in detention for months at a time, where they are unable to access adequate health care and are vulnerable to abuse and ill-treatment while in custody, often after having suffered death threats, exploitation, and sexual violence in their home countries.⁴⁴ For example, since May 2018, Amnesty has advocated for the release of Alejandra, a trans woman and transgender rights activist from El Salvador who has been detained since December 2017 in the Cibola County Correctional Center in Milan, New Mexico, where she has been denied parole on three separate occasions despite her rapidly deteriorating health.⁴⁵ In each of the three denials she has received, no reason is given for Alejandra’s continued detention other than a checked box stating that Alejandra – who fled to the United States in 2017 after facing death threats and sexual assaults at the hands of both the Salvadoran military and the *maras* – is a “flight risk.”

Furthermore, detention creates an environment that is ripe for abuse and ill-treatment: recent reports reveal troubling allegations of abuse at the hands of ICE officials responsible for the care of asylum-seekers in their custody. A 2018 study of sexual abuse allegations made by individuals in ICE custody found that nearly 60 percent of the complaints reviewed involved perpetrators who were ICE officials.⁴⁶ In CBP custody, meanwhile, two children died over the course of a single month in December 2018, and

⁴³ “You Don’t Have Any Rights Here,” at 53.

⁴⁴ *Id.* at 54-55.

⁴⁵ *Id.*

⁴⁶ Alice Speri, “Detained, then Violated,” THE INTERCEPT, APR. 11, 2018, <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/>.

reports document the verbal, physical, and sexual abuse children have faced at the hands of CBP agents over the past several years.⁴⁷

Amnesty International’s Recommendations

On illegal pushbacks of asylum-seekers:

- Exercise greater oversight of DHS to halt the illegal pushback of asylum-seekers and to understand the extent of the practice.
- Request regular information about the processing capacities and numbers of individuals turned back at all ports of entry.
- Implement measures clarifying that the purported justification for the “Remain in Mexico” program, Section 235(b)(2)(C) of the Immigration and Nationality Act, is not meant to apply to asylum-seekers.
- Demand all information from the government regarding cross-border negotiations undertaken in conjunction with metering and pushbacks, both practices which appear to require cooperation of Mexican government officials.
- Participate in delegations to ports of entry at the southwest border, including to migrant shelters adjacent to the ports of entry, to understand firsthand the impact of metering, pushbacks, and “Remain in Mexico.”
- Decline to continue funding CBP operations absent rigorous external oversight of CBP field operations and U.S. Border Patrol and increase funding specifically for the processing of asylum claims at the southern border.

On family separation:

- Pass legislation outlawing the separation of children and families unless clear and specific evidence exists that family unity is not in the child’s best interests.
- Continue to exercise oversight of DHS’s role in the family separation policy to understand the scope and extent of the policy.

⁴⁷ Ashley Hackett, “Thousands of Children Have Suffered Abuse at the Hands of U.S. Border Protection Agents,” PACIFIC STANDARD, 25 May 2018, <https://psmag.com/social-justice/thousands-of-children-have-suffered-abuse-at-the-hands-of-us-border-protection-agents>.

On indefinite detention of asylum-seekers:

- Pass legislation to provide for a presumption against detention of asylum-seekers and to ensure the right to judicial review and due process in cases of detention.
- Support and fund community-based alternatives to detention, such as the former Family Case Management Program.

For more information, please contact Charanya Krishnaswami at (202) 675-8766 or ckrishna@aiusa.org.

Sincerely,



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