



*Protecting Immigrant
Women and Girls
Fleeing Violence*

September 23, 2019

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Office of Policy
United States Department of Homeland Security

Submitted via:

<https://www.federalregister.gov/documents/2019/07/23/2019-15710/designating-aliens-for-expedited-removal>

Re: Comments in Response to DHS Notice: Designating Aliens for Expedited Removal: Docket Number DHS-2019-0036; 84 FR 35409

Dear Mr. Gunduz,

The Tahirih Justice Center (Tahirih) is pleased to submit the following comments in response to the Department of Homeland Security's (DHS) Notice: Designating Aliens for Expedited Removal.ⁱ The Notice, published in the Federal Register on July 23, 2019, advises that Immigration & Customs Enforcement (ICE) will now subject individuals found in any part of the country to swift, summary removal with no judicial review unless they 1) prove presence in the US continuously over the past two years or more; 2) indicate that they wish to seek asylum; or 3) are an unaccompanied minor.

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence throughout the past twenty-one years. Our clients endure unimaginable atrocities such as human trafficking, domestic violence, forced marriage, honor crimes, and sexual assault.

Tahirih is firmly opposed to DHS's arbitrary and capricious expansion of expedited removal. Expedited removal curtails critical due process protections that survivors fleeing violence at home and in the United States (US) desperately need in order to access safety and justice. Expanding expedited removal will drain government resources and further exacerbate the climate of fear pervading immigrant communities. When survivors – rightly or wrongly – avoid reporting crime for fear of swift deportation for doing so, dangerous criminals can more easily escape justice and put us all at risk. For these reasons, we urge DHS to rescind this Notice and implement policies and practices that promote meaningful access to justice for the benefit of all stakeholders.

I. DHS' Notice Expanding Expedited Removal is Both Unconstitutional and Arbitrary and Capricious

DHS' Notice is illegal for at least two reasons: 1) It unconstitutionally deprives immigrants of their due process rights under the Fifth Amendment; and 2) it violates the Administrative Procedure Act ("APA") because its rationales for drastically expanding expedited removal are arbitrary and capricious.

A. The Notice Violates Due Process

The Supreme Court made clear decades ago that immigrants "within the territory of the United States," including those who are "unlawfully present" as well as immigrants

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with status and asylum seekers, are protected by the Due Process Clause of the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 212 (1982). Because the Notice applies to people who have, by definition, been in the United States for months or years, it unquestionably implicates the due process rights of every person newly subject to expedited removal.

The Notice violates those due process rights. The “specific dictates of due process” derive from “three distinct factors”: (1) “the private interest that will be affected” by a government action; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value * * * of additional or substitute procedural safeguards”; and (3) “the Government’s interest.” *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Here, the private interest at stake is literally life or death; the Notice makes an already error-ridden procedure even more prone to deliberate and unknowing errors; and the government’s only legitimate interest runs contrary to the changes wrought by the Notice.

1. Erroneous removals frequently result in persecution, torture, or death

The private interest affected by the Notice is the weightiest interest conceivable. The Supreme Court has repeatedly recognized that removal “may result in poverty, persecution, and even death” (*Bridges v. Wixon*, 326 U.S. 135, 164 (1945)) and deprivation of “life” or “all that makes life worth living” (*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). This is unquestionably true of asylum seekers, who are, by definition, seeking protection from persecution. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). This is particularly true of survivors of gender-based violence, who form a vulnerable population not protected by the governments of many countries. In Guatemala, for instance, violence against women constitutes a “national scourge * * * motivated by a deep-seated sense of ownership over women and their place in relationships.”ⁱⁱ The same is true of Honduras and El Salvador.ⁱⁱⁱ Gender-based violence, including femicide, also remains widespread in Mexico.^{iv}

It is well-established that violence against women is not “personal” or accidental. Rather, such violence has deep cultural and social roots.^v Because the roots of gender-based violence run so deep, most countries where it is endemic either lack laws criminalizing such violence or fail to enforce those laws.^{vi} The result is that wrongfully removing a survivor to such a country will almost inevitably lead to persecution, torture, or death.

2. The Notice invites erroneous removals that are easily preventable

A process on which countless lives hinge must include appropriate safeguards against error. Even before the Notice, the expedited removal process has not. Although expedited removal previously applied only to those who had been in the United States for less than 14 days, long-time residents and citizens have been erroneously deported under the program. *E.g., ACLU, American Exile: Rapid Deportations That Bypass the Courtroom* (2014), <https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom> (“*American Exile*”).

DHS employees have also routinely violated the rights of asylum seekers who have undergone credible-fear interviews. Among other well-documented abuses, Border Patrol and ICE agents have routinely refused entry to asylum seekers approaching official ports of entry; pressured asylum seekers not to express fear of return to their home country; refused to transcribe such fears when they are expressed; and falsified the contents of interviews with asylum seekers.^{vii} All of these errors lead to the same result—the erroneous removal of asylum seekers to countries where persecution is a real threat.

These pervasive rights violations cannot be written off as the actions of a few bad apples. To the contrary, a court recently rejected the government’s motion to dismiss a claim premised on allegations of an

official *policy* “mandating that [Border Patrol] officers at [points of entry] drastically restrict the flow of asylum seekers * * * by turning them back to Mexico * * * based on * * * false claims of ‘capacity constraints.’” *Al Otro Lado*, 2019 U.S. Dist. LEXIS 129780, at *75; *see also id.* at *75-*95. Nothing in the Notice even begins to suggest otherwise. Every indication is therefore that, even before the Notice, the expedited-removal system has been implemented in ways that have systematically violated the rights of asylum seekers.

Furthermore, the Notice does nothing at all to lessen the shortcomings of the credible-fear process itself. It instead exacerbates those shortcomings by giving ICE agents in the interior of the country—many of whom will lack any prior experience with expedited removal—the sole discretion to determine whether an asylum seeker should be referred for a credible fear interview. This untutored, unchecked discretion will lead to even more erroneous removals. The lack of procedural safeguards in the Notice therefore suggests that its true goal is to remove as many asylum seekers and other immigrants as possible, without regard to the risk of error.

a. More survivors will be required to undergo credible fear screenings if they make it to the interview stage, causing re-traumatization and improper denial of access to the asylum process in practice

Pursuant to the Notice, countless more survivors nationwide, who successfully express a fear of persecution, will be required to pass an initial ‘credible fear’ interview in order to apply for asylum before the court. By contrast, regular removal proceedings do not include this duplicative and resource-intensive first step. Requiring survivors to endure an additional, preliminary screening is itself re-traumatizing and should be avoided to begin with. However, the credible fear interview process has become even more traumatizing for survivors in recent months because DHS is now having Border Patrol officials conduct interviews. In the past, highly specialized United States Citizenship and Immigration Services (USCIS) asylum officers with in-depth knowledge of nuanced humanitarian laws conducted the interviews. These officers were also skilled in trauma-informed, non-adversarial interviewing techniques to help mitigate re-traumatization particularly for survivors of sexual violence with Post-Traumatic Stress Disorder (PTSD) and gender-nonconforming individuals.

The use of Border Patrol agents to conduct credible fear interviews is already demonstrably limiting access to asylum for extremely vulnerable individuals.^{viii} Unlike USCIS asylum officers, Border Patrol agents’ primary experience and expertise is with law enforcement. They are specifically hired to perform adversarial functions. Disclosing highly sensitive, intimate information about torture and other violence to an adversarial foreign government official when the stakes are so high is inherently traumatic. This trauma is further compounded for those who were persecuted by government agents at home. Survivors of gender-based violence may also be apprehensive about recounting details of abuse to interviewers including naming the perpetrator, because of pervasive cultural stigmas or having to discuss family or sexual violence in front of young children.

b. More survivors who are unable to establish continuous presence in the US through no fault of their own will be improperly removed

The Notice effectively requires *all* immigrants lacking a formal status to carry with them (or otherwise have accessible) documents sufficient to show that they have not left the United States within the last two years. A U.S. citizen would find it difficult to conclusively make that showing. Most non-citizen immigrants will find it impossible. Most of the documents that ICE guidance suggests be used—“bankbooks, leases, deeds, licenses, bills, receipts, letters, birth records, church records, school records, employment records, [and] evidence of prior law enforcement encounters or tax payments” (Memorandum dated July 24, 2019,

from Matthew T. Albence, ICE Acting Director, at 2)—are not ones that most immigrants will possess. The Notice therefore creates a system in which large numbers of immigrants who are not subject to expedited removal will nevertheless be removed without any hearing in immigration court.

The requirement to prove continuous presence in the US is particularly harmful for survivors of domestic violence and human trafficking. Survivors are exceedingly unlikely to possess the very types of documents that the Notice requires immigrants to provide. As the government itself has long recognized, “self-petitioners are not likely to have access to” such documents, because most of them have either (i) “been forced to flee from their home,” (ii) file for relief “without their abusive spouse’s knowledge,” or (iii) have had documents destroyed by their abusers. Memorandum dated Oct. 16, 1998, from Paul W. Virtue, Office of General Counsel, INS. In fact, for these reasons, a bipartisan Congress mandated that abused spouses of U.S. citizens and lawful permanent residents be allowed to rely on “any credible evidence” to show eligibility for relief under the Violence Against Women Act (“VAWA”). 8 U.S.C. § 1154(a)(1)(J). This specifically includes the ability to prove residency through “any * * * type of relevant credible evidence.” 8 C.F.R. § 204.2(c)(2)(iii). The Notice, however, sets a higher bar that is inconsistent with VAWA. Thus, by both Congress’s and DHS’s own standards, the Notice will inevitably lead to the erroneous removal of survivors because of their inability to provide evidence controlled by their abusers.

c. DHS’s new policies permitting removal of survivors, coupled with the expansion of expedited removal, will harm both survivors of violence in the US and the public at large in direct contravention of Congressional intent

Longstanding forms of relief for survivors of gender-based violence in the US – namely VAWA and the Trafficking Victims Protection Act (TVPA), are meant to prevent abusers and traffickers from credibly threatening survivors with deportation for escaping or reporting abuse to the police. Survivors can ‘self-petition’ for status through VAWA and U and T visa petitions. To receive a U or T visa, survivors must cooperate with law enforcement in the investigation or prosecution of their abuser, which benefits the public at large. Historically, ICE and its predecessor agency properly recognized Congress’ desire to both protect survivors and assist law enforcement by enacting these provisions. As a matter of policy, ICE generally shielded survivors from deportation pending adjudication of their requests for relief.^{ix} DHS has since reversed its policy of exercising prosecutorial discretion favorably in survivors’ cases, however.^x A survivor with a pending U visa petition, or a survivor who is eligible for pursue a U visa but has not yet done so, will now be extremely vulnerable to fast-track removal to the detriment of herself, her children, and relevant law enforcement efforts.

Access to counsel and evidence is very limited during the expedited removal process, with little accountability when abuses of authority occur. A survivor with a legitimate claim for relief will likely be unaware of her rights during the process. And, as explained above, many will be deemed subject to the process incorrectly because abusers notoriously and intentionally withhold or confiscate victims’ immigration documents. Again, this is precisely why Congress sought to protect immigrant survivors from deportation through VAWA and the TVPA.

Subjecting survivors nationwide to summary removal 1) separates them from their US citizen children and support systems, potentially leaving children in the custody of abusers; 2) deters survivors from coming forward, putting themselves and possible future victims at risk; and 3) renders survivor-based protections less effective as tools to help law enforcement keep violent criminals off the streets. The broad implementation of expedited removal confirms that, contrary to the will of Congress, survivors should now in fact *believe* their abusers and traffickers when they say they can have them deported for reporting abuse.

By deepening and legitimizing the ‘chilling effect’ on survivors,^{xi} the expansion of expedited removal will have the perverse effect of emboldening and rewarding perpetrators who put us all in danger.

Some survivors^{xii} are permitted to pursue relief from outside the US if removed before having the opportunity to speak with counsel or file a petition. However, this is cold consolation given the nearly insurmountable obstacles they invariably face in doing so. Survivors have limited if any access to counsel, key evidence and witnesses, and auxiliary services once deported back to their home countries. Yet, mental health and other services are critical for helping survivors heal enough to initiate or even meaningfully participate in their cases.

3. The government’s only colorable interest is in preventing erroneous removals

The government’s interests do not plausibly outweigh the need for additional safeguards. As discussed below, the Notice identifies no colorable interest that it can possibly advance. The government’s true interest here is one the Notice ignores entirely: the strong interest in preventing wrongful removals, “particularly to countries where [individuals] are likely to face substantial harm.” *Nken v. Holder*, 556 U.S. 418, 436 (2009). There can thus be little question that *all* factors relevant to a due-process analysis weigh against the Notice. Its drastic, unsupported expansion of expedited removal is accordingly unconstitutional.

C. The Notice Is Arbitrary and Capricious

The Notice violates the APA because it contains no non-arbitrary justification for its sweeping changes. At the outset, the Notice asserts that it is aimed at the alleged “ongoing crisis at the southern border.” 84 Fed. Reg. at 35,411. But the Notice has nothing to do with the border. To the contrary, expedited removal *prior to* the Notice focused on the border. The Notice expressly removes that geographic focus. And it means that a smaller percentage of DHS’s “limited resources” (*id.*) will be dedicated to the border.

The Notice also complains of DHS’s “insufficient detention capacity.” 84 Fed. Reg. at 35,411. But the increases in detention numbers that cause any lack of capacity are partially caused by the increased use of expedited removal. The number of individuals detained by DHS has increased as the use of expedited removal has increased, even during periods when the total number of removals from the United States has remained flat.^{xiii} The available evidence therefore shows that the Notice will exacerbate, not relieve, any problem of insufficient detention capacity.

Moreover, detention capacity would not be “insufficient” if the government itself had not made unconstitutional policy choices about the use of detention. Foremost among those is the decision to detain every asylum seeker for the duration of proceedings in immigration court (*see Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019))—a decision that itself violates asylum seekers’ due process rights (*see Padilla v. ICE*, ___ F.3d ___, 2019 U.S. Dist. LEXIS 110755 (W.D. Wash. July 2, 2019)). The Notice’s invocation of detention capacity therefore attempts to support one unconstitutional policy by citing the fruits of another.

The “historic backlog of removal cases” cited in the Notice (84 Fed. Reg. at 35,411-12) has likewise been caused by illegal government actions. Immigrants seeking relief cannot be the cause of that backlog, because the number of immigration judges has increased more quickly than the number of new proceedings in immigration court. *See* TRAC, *Immigration Court Backlog Surpasses One Million Cases*, <https://trac.syr.edu/immigration/reports/536> (“Backlog”).

The backlog has instead been manufactured. The Attorney General added “330,211 previously completed cases” to “the ‘pending’ rolls” (TRAC, *Backlog*) with the stroke of a pen in *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). The Attorney General lacked the authority to do so: As the U.S. Court of

Appeals for the Fourth Circuit recently held, DOJ's own regulations expressly preclude his action. *See Zuniga Romero v. Barr*, 4th Cir. No. 18-1850, Dkt. 50 (Aug. 29, 2019).

The immigration courts' inability to deal expeditiously with the manufactured backlog, meanwhile, has largely been caused by the government's illegal Remain in Mexico program. That program serves to overwhelm immigration courts at the southern border, at least two of which have now been forced to suspend consideration of most other cases because of the Administration's "Migration Protection Protocols". *See* Hamed Aleaziz, <https://twitter.com/Haleaziz/status/1164609226942980096>; Aaron Reichlin-Melnick, <https://twitter.com/ReichlinMelnick/status/1164618910110560256>. The same program will soon consume the time of 100 additional immigration judges across the country. *See* Hamed Aleaziz, *A Surge of Immigration Judges Are Expected to Handle the Cases of Thousands Forced to Wait in Mexico*, Buzzfeed News (Aug. 27, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-court-judges-border-remain-in-mexico>. The Notice's decision to blame immigrants for the woes of the immigration courts is therefore not just arbitrary; it is nonsensical.

Although the Notice also asserts an expansion of expedited removal is necessary for "national security and public safety" purposes, it provides no evidence to support that rhetoric. 84 Fed. Reg. at 35,412. In particular, although the Notice cites two arrests of immigrants more than 100 miles from the border (*id.*), it fails to provide any plausible tie between those arrests and security or safety. Furthermore, given that the government encounters hundreds of thousands of immigrants each year, two arrests would hardly make a compelling national security case even if such a tie existed. The Notice accordingly provides no plausible rationale for changes that deprive many thousands of asylum seekers and others of their due process rights.

Finally, additional government resources will be required through the expansion of expedited removal, which will not be offset elsewhere. As explained above, detention costs will increase dramatically, as will those incurred from increased numbers of credible fear interviews. Resources allocated for the Asylum Program will be diverted for this purpose, which will only increase the asylum backlog in the affirmative asylum context.

II. Conclusion

This Notice amounts to a broad invitation to erroneously remove survivors of gender-based violence, including those fleeing horrific abuses in their home countries and in the US. For current or future U, T, and VAWA self-petitioners, such removals contravene statutory protections enacted by a bipartisan Congress. By deterring survivors from reporting crime, widespread summary removals compromise law enforcement efforts to keep survivors and all community members safe. And, contrary to sound public policy, fast-track removals of survivors rewards violent perpetrators in the process. Denying asylum-seekers a meaningful opportunity to pursue relief and returning them home to face life-threatening violence runs afoul of US international treaty obligations of *non-refoulement*.^{xiv} The US should instead seek to maximize due process and fully respect the rule of law.

Furthermore, simple, additional safeguards not contemplated by the Notice would do much to prevent erroneous removals. Shifting the burden of proof as to removability to the Government—which has much greater access to relevant evidence—would have substantial value in this regard. So, too, would requiring ICE agents to inform immigrants of their rights, including their right to express a credible fear and undergo screening with an asylum officer. There can be no question that an unambiguous regulatory right to counsel at no cost to the government would likewise reduce the risk of error throughout the entire process. And for survivors, use of the "any credible evidence" standard, coupled with training of ICE agents in that standard and/or an opportunity for administrative review by those conversant with the standard, is critical to preventing erroneous removal.

For the reasons outlined above, Tahirih urges DHS to promptly rescind this Notice to prevent the foreclosure of many survivors' only chance to seek safety and justice. We look forward to your detailed feedback on these comments, and please contact me at irenas@tahirih.org or 571-282-6180 for additional information.

Respectfully,



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ⁱ <https://www.federalregister.gov/documents/2019/07/23/2019-15710/designating-aliens-for-expedited-removal>

ⁱⁱ Azam Ahmed, *Women Are Fleeing Death at Home. The U.S. Wants to Keep Them Out.*, N.Y. Times Aug. 18, 2019, available at <https://www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.html>; see also, e.g., Comisión Internacional Contra la Impunidad en Guatemala, *Human Trafficking for Sexual Exploitation Purposes in Guatemala* 30 (2016), available at <https://www.refworld.org/docid/584aaec4.html>; U.S. Dep't of State, *Guatemala 2018 Human Rights Report* 16 (2018) ("Guatemala Report"), <https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf>.

ⁱⁱⁱ See, e.g., Ahmed, *supra*; U.S. Dep't of State, *El Salvador 2018 Human Rights Report* 16 (2018), <https://www.state.gov/wp-content/uploads/2019/03/EL-SALVADOR-2018.pdf>.

^{iv} See, e.g., Amnesty International, *Mexico 2017/2018*, <https://www.amnesty.org/en/countries/americas/mexico/report-mexico/>; NACLA, *Surviving One of Mexico's Most Dangerous Places for Women*, <https://nacla.org/news/2019/02/04/surviving-one-mexico%E2%80%99s-deadliest-places-women> (Apr. 2, 2019); World Health Organization, *Femicide* 3, https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf?sequence=1. And it is endemic in countries as diverse as Haiti, Saudi Arabia, and Kenya. See, e.g., U.S. Dep't of State, *Haiti 2018 Human Rights Report* 19-20 (2018), <https://www.state.gov/wp-content/uploads/2019/03/HAITI-2018.pdf>; U.S. Dep't of State, *Saudi Arabia 2018 Human Rights Report* 44 (2018) ("Saudi Arabia Report"), <https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf>; U.S. Dep't of State, *Kenya 2018 Human Rights Report* 23 (2018) ("Kenya Report"), <https://www.state.gov/wp-content/uploads/2019/03/KENYA-2018.pdf>.

^v See generally U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, U.N. Doc. A/61/122/Add. 1 (July 6, 2006), <https://www.refworld.org/docid/484e58702.html>; U.N. Secretariat Dept of Econ. & Social Affairs, *The World's Women 2010*, at 127, U.N. Doc. ST/ESA/STAT/SER.K/19 (2010), https://unstats.un.org/unsd/demographic/products/worldswomen/ww_full%20report_color.pdf; Nat'l Res. Council, *Understanding Violence Against Women* (1996); The Geneva Declaration, *Lethal Violence Against Women and Girls* (2015), http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf.

^{vi} See, e.g., *Saudi Arabia Report, supra*, at 43; *Kenya Report, supra*, at 34; *Guatemala Report, supra*, at 17.

^{vii} See, e.g., *Make the Road N.Y., Inc. v. McAleenan*, D.D.C. No. 1:19-cv-2369, Dkt. 13-1, at 7-12; *Al Otro Lado, Inc. v. McAleenan*, 2019 U.S. Dist. LEXIS 129780, at *15-*21 (S.D. Cal. Aug. 2, 2019); Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers*, <http://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf>; U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>; Human Rights Watch, *You Don't Have Rights Here* (2014), <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>; Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border* 12 (2017), <https://www.hopeborder.org/discretion-to-deny-1>. Innocent errors, including erroneous determinations concerning length of presence in the United States and serious problems in interpretation, have proven equally common. See, e.g., U.S. DHS Advisory Comm. on Family Residential Ctrs., *Report of the DHS Advisory Committee on Family Residential Centers* 96-100 (2016); *American Exile* 63.

viii <https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear>

ix <http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Memo-MortonVictimsWitness.pdf>

x <https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners>

xi <https://www.tahirih.org/news/survey-of-advocates-reveals-immigrant-survivors-fear-reporting-violence/>

xii Trafficking survivors, unlike U visa petitioners, must be physically present in the US to pursue relief.

xiii *See, e.g.,* American Immigration Council, *The Landscape of Immigration Detention in the United States*, <https://americanimmigrationcouncil.org/research/landscape-immigration-detention-united-states> Center for Migration Studies, *Immigration Detention: Behind the Numbers*, <https://cmsny.org/immigration-detention-behind-the-record-numbers/>.

xiv <https://www.unhcr.org/3b66c2aa10>