

Was Trump's family-separation policy torture?

Commentary

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Peter Costantini ~ Seattle

"A crime against humanity" and "a disgrace to our great country": that's how 99-year-old Benjamin Ferencz, the last surviving prosecutor of the Nazis at the Nuremberg war-crimes trials, characterized the Donald Trump administration's coercive separation of thousands of immigrant children from parents seeking asylum.¹

Former U.N. High Commissioner for Human Rights Zeid Ra'ad Al Hussein cited a statement by the American Association of Pediatrics that the family-separation policy was a form of "government-sanctioned child abuse" which could cause "irreparable harm" with "lifelong consequences". He added: "The thought that any State would seek to deter parents by inflicting such abuse on children is unconscionable."²

Now, a report from Physicians for Human Rights raises questions of criminal liability and accountability arising from the policy. And it points to potential avenues towards justice for both victims and perpetrators.

"'You Will Never See Your Child Again' - The Persistent Psychological Effects of Family Separation"³ makes the case that separation of immigrant children from their parents by U.S. immigration officials constitutes torture and enforced disappearance.

To investigate the families' experiences, PHR clinicians performed psychological evaluations of a sample of asylum seekers from Guatemala, Honduras and El Salvador who had suffered an average of over 60 days of forced separation at the hands of U.S. immigration authorities.

They found that before leaving Central America, all the families had already "been exposed to trauma" due to "targeted acts of violence", mostly due to gang activity. All parents feared for their children and believed that traveling to the U.S. would offer them protection.

When the families arrived in the U.S., however, treatment by the U.S. government compounded the pain. "Parents reported that immigration authorities forcibly removed children from their parents' arms, removed parents while their children slept, or simply 'disappeared' the children while their parents were in court rooms or receiving medical care." Nearly all parents said they were given no explanation of why their children were taken away, where they were being held, or if they would be reunited.

Mental-health diagnoses by medical experts found that nearly all the victims suffered from post-traumatic stress disorder, and many also met diagnostic criteria for major depressive disorder or generalized anxiety disorder.

Citing the United Nations Convention Against Torture,⁴ PHR asserted that “the U.S. government’s treatment of asylum seekers through its policy of family separation constitutes cruel, inhuman, and degrading treatment and, in all cases evaluated by PHR experts, rises to the level of torture.” It found that “the policy and practice of family separation also constitutes enforced disappearance, which occurs when state agents conceal the fate or whereabouts of a person who is deprived of liberty.”

The report concludes that the U.S. government is obligated by domestic and international standards to “provide redress to victims of torture and ill-treatment, including in the form of rehabilitative services; ensure the families of disappeared children know the truth of their family members’ whereabouts by dedicating adequate government resources to ensure timely reunification for all separated families, including deported parents; and prosecute U.S. officials who have broken the law.” The document ends with detailed recommendations to the Biden administration and Congress for policy changes to achieve these and further ends.

Physicians for Human Rights executive director Donna McKay said in a statement⁵ that families who suffered this treatment should be given “legal residency in the United States”, along with ongoing mental health care and “redress in monetary compensation” as recommended by the report. She urged the new Secretary of Homeland Security, Alejandro Mayorkas, to deliver on his pledge that the family-reunification task force proposed by President Joseph Biden would explore “lawful pathways” for citizenship for separated families. And she called for “accountability for the perpetrators of the family separation policy”. PHR is a New York-based non-governmental organization that shared in the 1997 Nobel Peace Prize.

From 2017 through 2019, the PHR report said, 5,512 children were coercively separated from their families by border officials. Of the 1,556 children separated between July 1, 2017 and June 26, 2018, according to the American Civil Liberties Union, 207 or 13.3 percent were younger than 5 years old.⁶

In 2018, the ACLU brought a successful lawsuit, *Ms. L v. ICE*, in which a federal court held the practice unconstitutional and required the government to reunite all separated families.⁷

Yet even now, the damage continues. As of January 2021, more than 611 of the forcibly separated children had still not been reunited with their parents, according to the ACLU. Lee Gelernt, Deputy Director of the ACLU Immigrants' Rights Project, said that even after the ruling in *Ms. L v. ICE*, Trump administration officials delayed furnishing or withheld critical data, and provided stale contact information. As a result, some children have remained separated from their parents for nearly two years.⁸

Gelernt told me in an e-mail that the organization currently has a civil class-action suit for damages pending in Arizona against individuals responsible for family separation.

Family values and razor wire

The full scope of family separation, though, is much broader than just those forcibly torn apart by Trump. It also encompasses the many immigrant children and parents already in the U.S. who have been separated by deportations, imprisonment, and other forms of persecution targeting immigration status during the three previous administrations. For example, many of the hundreds of thousands deported after raids by Immigration and Customs Enforcement were parents whose children were left behind, sometimes without a breadwinner.

From the beginning of the Trump administration, restrictionist policies also inflicted harm on thousands more children who sought asylum alone, or who remained with their families. Many who were already accepted into the asylum process were imprisoned for long periods in poor conditions. Tens of thousands of others were forced to wait for their court dates in dangerous camps in the Mexican borderlands.⁹ Thousands more were blocked from even asking for asylum by the “metering” of asylum claims, which made asylum seekers put their names on long, unofficial lists and wait in Mexico to even approach border officials. Many others were excluded by unofficial and later official shutdowns of border crossings.¹⁰

Much of this anti-immigrant blitzkrieg has been sharply criticized by international human rights officials. Michelle Bachelet Jeria, the current U.N. High Commissioner for Human Rights and former president of Chile, said she was “profoundly disturbed” by several Trump policies that she said had “drastically reduced protections for migrant families.” She singled out family separation, Migration Protection Protocols (Remain in Mexico), “the arbitrary privation of liberty”, and “the denial of access to humanitarian services and assistance”.¹¹

Erika Guevara-Rosas, Americas director at Amnesty International, asserted: “Trump's efforts to end asylum are an all-out assault on human rights. ... The obligation to protect the rights of people seeking safety is a bedrock principle of U.S. and international law – and the U.S. is failing miserably. The ‘crisis’ at our borders is not the result of people ‘flooding our border’ – it is a crisis of xenophobic policies that masquerade as security measures and serve only to exacerbate human suffering.”¹²

The abuse, torture, and disappearance of children and parents were not accidental or unintended. Trump, his then Attorney General Jeff Sessions, and his advisors Stephen L. Miller and Steve Bannon were ideologically fueled by what might be called white sado-nationalism.¹³

As Jen Kirby of *Vox* reported, Trump complained during a meeting discussing Haiti, El Salvador, and African countries: “Why do we want these people from all these shithole countries here? We should have more people from places like Norway.”¹⁴ Roughly four-fifths of all immigrants to the U.S. come from Latin America, Asia and Africa. So Trump’s operatives implemented an array of deliberately cruel practices aiming to deter any form of authorized or unauthorized immigration.

Some of the ideas they reportedly considered bordered on the psychotic. According to *N.Y. Times* reporters Michael D. Shear and Julie Hirschfeld Davis, “Privately, the president had often talked about fortifying a border wall with a water-filled trench, stocked with snakes or alligators, prompting aides to seek a cost estimate. He wanted the wall electrified, with spikes on top that could pierce human flesh.” He also reportedly suggested that soldiers shoot migrants if they threw rocks, but his staff told him that this would be illegal. Later he proposed shooting migrants in their legs to slow them down, but was again told that this was not allowed.¹⁵

Most of the hundreds of executive orders and bureaucratic snares Trump’s cadre did deploy may not be indictable. But they gratuitously inflicted harm on all kinds of immigrants, violated their human and civil rights, and attempted to demonize them. The multiple border “crises” Trump produced and directed were B-grade agitprop portraying a border overrun by “bad hombres”, and calculated to turbo-charge anti-immigrant hatred among his gullible base.

The Refugee Act of 1980 assures immigrants the right to ask for asylum, not just at ports of entry, but anywhere along the border.¹⁶

To enforce Sessions' "zero tolerance" policy, however, Customs and Border Protection constructed a Catch-22. They slow-walked reception of asylum seekers at official ports of entry with "metering".¹⁷ Then, when growing numbers forced to wait weeks or months in dangerous camps began to cross the border away from ports of entry to request asylum from the Border Patrol – which was their legal right – officials castigated them as a surge of "illegal aliens" and detained them. To further impede the asylum process, Trump implemented his Remain in Mexico policy (ironically entitled the Migrant Protection Protocols), which forced some 70 thousand who had been granted asylum hearings to await their court dates in Mexico.¹⁸ The administration also made agreements with Central American governments to send some migrants back to the very places they had escaped from in the first place.¹⁹ The cumulative damages inflicted by Trump policies effectively eliminated the right to asylum.²⁰

Many of the increased numbers of children and families now requesting asylum at the border are driven by the bottled-up desperation of those tens of thousands of migrant families stranded in limbo over the past two years.²¹ These backlogs have also been exacerbated by Trump's undermining of many programs that had previously accepted and integrated children and families, leaving staffing and infrastructure in smoking ruins.²²

Tragically, most of the crises and suffering could have been easily averted. All Trump had to do, rather than declaring "zero tolerance", was to treat asylum seekers lawfully and rationally. If, instead of doubling down on his "wall" scam, sending troops to the border, and filling private immigration prisons, he had moved decisively to get asylum seekers out of Mexico, brought in more asylum agents and case managers at the border, expanded immigration courts, worked with non-profits to receive asylees, and sent well-targeted resources to Central America and Mexico, there would have been little or no border drama, and much less waste of public resources.²³ But the manufacturing of threats and crises, the criminalization of immigrants and the militarization of the border were precisely the point.

Family separation and other forms of persecution of immigrants are not only wrong, cruel and often unlawful. They are also nonsensical. Asylum seekers, refugees and other immigrants – authorized and unauthorized – are not a threat to be repulsed. On the contrary, they are fellow humans who deserve encouragement and welcome, and fellow workers caught in the riptides of the same global economy. They are also a valuable resource for a stagnant, aging U.S.-born population: decades of evidence demonstrate that immigration's benefits to the people and the economy of this country far outweigh any costs.²⁴

Violating immigrants' rights also weakens U.S. national security. When other countries see the U.S. torturing children and parents while stonewalling asylum seekers and refugees, the credibility of U.S. criticism of other countries' human rights abuses is devalued.

Digging out of the rubble

On January 20, a bombed-out migration landscape greeted the incoming Biden administration. His first day in office, the new president sent draft legislation to Congress to provide a path to citizenship for most of the 10.5 to 11 million undocumented immigrants in the U.S. He also issued several executive orders to remedy injustices around immigration, including asylum and family separation. But the new

administration has not yet been able to ramp up capabilities fast enough to handle the backlog of long-suffering families and unaccompanied children at the border, or to rebuild or repair much of what Trump dismantled. And some of Biden's positive proposals seem to be stalling because of depleted reserves of political capital.

The new family-reunification task force mandated by Biden and chaired by DHS Secretary Mayorkas has gotten quickly to work. A court filing reported by Priscilla Alvarez of CNN showed that the number of children and parents still separated under "zero tolerance" had been reduced from 611 in January to 506 in late February.²⁵

Mayorkas told news media that efforts were ramping up to bring back into the U.S. in-process asylum seekers excluded under Trump's "Remain in Mexico", which has been cancelled by Biden. The secretary announced that admissions of those affected by the program have been expanded to three U.S. ports of entry. The administration hopes to give the separated families the choice of where to be united, he said, and if they choose to reunite in the U.S., "we will explore lawful pathways for them to remain in the United States and address the family needs."²⁶

These compensations should also be offered to all others who were unjustly prevented from applying for asylum or wrongly rejected.

The Biden administration should also ensure that no families are being separated by its current border policies. Currently, families with children and adult individuals seeking asylum are being summarily turned back at the border in most areas under Title 42, a controversial public-health provision promulgated by the Centers for Disease Control and Prevention under Trump.²⁷ Unaccompanied children, however, are being accepted into the asylum process at the border. Because of this discrepancy, turning back families may give them an incentive to help older children escape danger by sending them on alone. The sooner those families can be allowed to cross and request asylum together, the quicker one source of children crossing alone, and consequent family separation, will be reduced.

"Transforming border reception to a humanitarian model requires many, large federal agencies to implement a wholesale shift in short-, medium-, and long-term approaches," wrote Clara Long of Human Rights Watch. "While the administration has made important progress, kids are still stuck in border jails because the administration of former President Trump destroyed what system existed for keeping kids safe at the border. The current situation requires urgent, sustained action to address this failure. Safe, swift reunification procedures should continue to be refined, starting from the moment kids cross the border."²⁸

Beyond the work of the Family Reunification Task Force, the Biden administration must not let bygones be bygones. It should open investigations at multiple levels into abuses by the Trump administration of all kinds of immigrants.

The president should mandate internal investigations by inspectors general in Justice, Homeland Security and other relevant departments. Any remaining Trump political appointees should be vetted and, if appropriate, fired or moved to where they can do no further harm. Those found to have violated laws or regulations should be subject to legal or administrative action.

Congress should convene a select committee, along the lines of the 1975 Church Committee,²⁹ to investigate crimes and abuses by the Trump administration against immigrants and refugees, including

the Muslim and African travel bans. They should recommend far-reaching reforms and investigate responsible officials.

Finally, other governments and non-governmental organizations should pursue the possibility of bringing charges against those responsible for family separation before international human rights bodies such as the International Court of Justice³⁰ and the Inter-American Commission on Human Rights.³¹ Another avenue to explore might be actions in courts of other countries, invoking universal jurisdiction for grave international crimes. This is the legal doctrine used by Spanish magistrate Baltazar Garzón Real to bring human-rights charges against Chilean dictator General Augusto Pinochet.³²

Trump, Miller and their accomplices may not end up on trial in a glass booth in Tegucigalpa. But there is some cause for hope for asylum seekers and refugees. It will require sustained pressure from the movements for immigrant justice and human rights, and responsive action at all levels of government, to untangle the wrongdoing, make all the victims whole again, and punish the perpetrators - all in the face of the violent mobs of xenophobia and racism, spurred on by Republican demagogues. Ultimately, It will require reinventing immigration law, regulations and practice to ensure that the rights to asylum and refuge, along with all the other human rights of immigrants, are fully respected in the United States.

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