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U.S. Detention of Families Seeking Asylum

A One-Year Update

June 2015



ON HUMAN RIGHTS, the United States must be a beacon. Activists fighting for freedom around the globe continue to look to us for inspiration and count on us for support. Upholding human rights is not only a moral obligation; it's a vital national interest. America is strongest when our policies and actions match our values.

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability, and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 30 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

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Executive Summary

On June 20, 2014—ironically, on World Refugee Day—the Obama administration announced its strategy for addressing the increase in families and children seeking protection at the U.S. southern border. Part of this plan: detain and quickly deport families from El Salvador, Honduras, and Guatemala in an attempt to deter more from coming. At the time, U.S. immigration authorities had fewer than 100 beds for detaining families with children, all in one facility in Pennsylvania. They quickly increased that number—first by using a makeshift facility in Artesia, New Mexico, then by converting a facility in Karnes County, Texas, and more recently, by opening a large facility in Dilley, Texas to hold up to 2,400 children and their mothers. All told, the administration’s plans would increase family detention by 3,800 percent to 3,700 detention beds for children and their parents.

One year later, as World Refugee Day 2015 approaches, the Obama Administration continues to send many mothers and children who fled persecution and violence in Central America into U.S. immigration detention. About five thousand children and mothers have been held in U.S. immigration detention since June 2014. Some have been held for nearly a year, and as of April 25, 2015, nearly one-third has spent more than two months in U.S. detention facilities. More than half of the children held in fiscal year 2014 were very young, from newborns to 6-year-olds.

The mothers and children held at these facilities face an array of obstacles, from a lack of access to counsel to the day-to-day trauma of detention. Medical and mental health experts report that detention damages the mental health of children, causing depression, posttraumatic stress disorder,

and suicidal behavior. Medical professionals who have interviewed these mothers confirm that detention is harming their mental health, and several have reportedly attempted suicide. Many of the women are survivors of violence who are already suffering from the effects of prior traumas. At the 2,400-bed Dilley facility, mothers have reported that their and their children’s sleep is disrupted each night as officers come into their rooms each hour, shining flashlights and pulling blankets off faces to “count” each person.

Beyond the human cost, immigration detention is extremely expensive. In addition to the over \$2 billion Congress spends each year on immigration detention (even mandating that the agency maintain 34,000 beds regardless of need), the administration requested, and in March Congress appropriated, an additional \$345.3 million to fund a sharp increase in the number of mothers and children held in detention. Family detention costs, on average, \$1,029 per day for a family of three. By contrast, community-based supervision or other alternatives to detention cost much less, from 17 cents to \$17 dollars a day in some cases.

U.S. detention policies and practices relating to asylum seekers violate the nation’s obligations under human rights and refugee protection conventions. While the administration has characterized these women and children as “illegal” border crossers, seeking asylum is not an “illegal” act. In fact, the United States has a legal obligation to protect those seeking asylum, one rooted in conventions the United States helped draft in the wake of World War II. Many of these mothers and children are indeed refugees entitled to protection under our laws and treaty commitments. Earlier this year, 87.9 percent

passed initial credible fear screening interviews, indicating that they have a significant possibility of establishing eligibility for asylum. When represented by quality pro bono counsel, many are able to prove their eligibility for asylum or other relief. For instance, about 77 percent of those represented by pro bono attorneys through the American Immigration Lawyers Association (AILA) have been determined by U.S. immigration judges to be “refugees” entitled to asylum or other protection.

Yet their path to asylum has been riddled with barriers: detention, lack of counsel, heightened screening procedures, and in some cases rushed asylum hearings. Only about 20 percent of immigrants held in detention are able to secure legal counsel, but the U.S. Department of Homeland Security (DHS) sent mothers and children to detention facilities located far from the major metropolitan areas where pro bono resources are more available. Without counsel, these mothers are 17 times less likely to succeed in their cases. In the weeks and months following the June 2014 announcement, many mothers were blocked from the chance even to apply for asylum by inadequate credible fear screening interviews, and the credible fear pass rate at Artesia was less than 40 percent in the initial weeks.

Those who passed credible fear screenings were blocked from release from detention by the refusal to set bonds or by absurdly high bonds—sometimes of \$15,000, \$20,000 or even \$30,000—an approach inspired by former Attorney General John Ashcroft and motivated by the administration’s desire to deter other asylum seekers and migrants from coming to the United States. One federal court has intervened to direct a halt to this practice of deterrence-motivated detention, and another issued a tentative ruling that, if finalized in the coming weeks, could conclude that the detention of children violates a

prior settlement order, which favors the release of children from immigration custody.

In May 2015, U.S. Immigration and Customs Enforcement (ICE) announced a “series of actions to enhance oversight and accountability, increase access and transparency, and ensure its family residential centers continue to serve as safe and humane facilities.” On June 8, 2015, DHS Secretary Jeh Johnson indicated that DHS has begun to “review” the cases of families detained beyond 90 days, and several families who had been detained for six to eleven months were released last week. These actions, though, do not address the fundamental problem: holding asylum-seeking mothers and children in detention facilities damages children, wastes government resources, and contravenes American ideals and human rights commitments.

Moreover, in the weeks since ICE’s announcement, mothers and children continue to be sent to these facilities, continue to face an egregious lack of counsel, and continue to have even their limited access to counsel hampered by detention facility staff. Many also continue to be blocked from release by the demand that they pay bond amounts too high for them to afford given their lack of financial resources. For instance, in none of the 26 bond cases assisted by Human Rights First legal staff during one week, a few weeks after the announced “actions” and months after the court ruling directing a halt to deterrence-based bond determinations, did ICE set a bond at a level that a mother could actually afford. Instead, bonds were typically set at \$8,000 or \$10,000 even for mothers who had family in the country and did not present security or flight risks. While these bonds were not as high as some of the bonds requested previously, they are still too high for indigent asylum seeker mothers to pay. In many cases, ICE’s setting of unduly high bond leads mothers and children to be detained for weeks or months longer, ultimately wasting

government resources by increasing the length of detention and requiring an immigration court bond hearing that would not have been necessary if ICE had instead set the initial bond at an appropriate level or released the family on parole.

The number of children and families apprehended at the southwest border has fallen steeply this year, in the wake of U.S. pressure on Mexico and Central American countries to prevent children and families from heading north to the U.S. border. As of April 30, 2015, the number of unaccompanied children apprehended had fallen by 48 percent to 18,919, and the number of children and parents apprehended (together as “family units”) had fallen by 35 percent to 16,997. The fact that the numbers have fallen so sharply for unaccompanied children as well makes clear that the use of detention—which was directed at families, not unaccompanied children—is not the reason for the decrease.

The Department of Homeland Security has taken some steps toward increasing its use of alternatives to detention. It has used these measures, however, to expand monitoring of asylum seekers and has not reduced excessive reliance on costly and damaging detention. It is also relying on intrusive and stigmatizing ankle monitors, putting these devices on many women automatically without first conducting a meaningful individualized assessment of the level of monitoring or appearance support necessary in each particular case.

Over the last year, Human Rights First staff have visited family detention facilities in Artesia, New Mexico, Karnes County, Texas, and Dilley, Texas, and have met with or interviewed scores of women detained at these facilities as well as pro bono attorneys struggling to provide at least some of these families with legal counsel and representation—in many cases flying across the country at their own expense. Human Rights First also provides pro bono representation, often in

partnership with volunteer lawyers and law firms, to asylum seekers, including mothers and children who have been released from immigration custody.

An array of voices have called for an end to the administration’s policy of detaining families seeking asylum: medical and mental health experts, prominent Catholic, Christian, Evangelical Lutheran, and Jewish leaders, leading women’s and children’s organizations, such as the National Organization for Women (NOW) and First Focus, the U.S. Conference of Catholic Bishops, the Leadership Conference on Civil Rights and Human Rights, The National Task Force to End Sexual and Domestic Violence, the National Council of La Raza the American Bar Association, and numerous legal and refugee assistance organizations. A recent poll, conducted by Public Opinion Strategies for Human Rights First, reveals that 62 percent of voters in key contested congressional districts, and statewide in New Hampshire and South Carolina, support the use of alternatives rather than holding asylum seekers in detention facilities.

In a May 27, 2015 letter, 136 House Democrats, including Democratic leader Nancy Pelosi (D-CA) and Democratic Whip Steny Hoyer (D-MD), urged DHS Secretary Johnson to end family detention, stressing their concerns that detention “is detrimental to mothers and children and is not reflective of our values as a Nation” and that the population in detention “is largely comprised of refugees fleeing violence and persecution in their home countries.” Earlier this month, 33 Senate Democrats, including Senate Minority Leader Harry Reid, sent a letter to Secretary Johnson stating, “we do not believe there is any system of mass family detention that will work or is consistent with our moral values and historic commitment to provide safe and humane refuge to those fleeing persecution.”

Recently, former Secretary of State Hillary Clinton called for reform of the U.S. immigration detention system, stating: “I don’t think we should put children and vulnerable people into big detention facilities because I think they’re at risk.” Former Maryland Governor Martin O’Malley also made remarks recently, criticizing the detention of families.

The Obama Administration should end the detention of families seeking asylum. In cases where additional measures are needed to assure an asylum seeker appears for removal proceedings, ICE should use case management and community based alternatives to detention. Congress should support this shift, as well as the reforms detailed below. This is a pivotal moment for the administration to seize the opportunity to end a practice that damages children, undermines U.S. global leadership on refugee protection, and will stain the administration’s legacy. Real leadership requires changing track and rejecting policies that are inconsistent with American ideals, due process, and U.S. human rights commitments.

Recommendations

In order to create a humane, safe, and cost effective system, the Obama Administration should implement—and Congress should support—the following reforms:

- **End the Detention of Families with Children.** Medical experts confirm that detention damages the mental health of asylum seekers and can be especially traumatizing to children and families. Detention also impedes access to counsel and due process. As many members of Congress have urged, the Obama Administration should end family detention. In cases where additional support is needed to assure appearance, individuals can be referred into case management or other

alternative programs, which are more humane and cost-effective. The government could save roughly \$400 million this year by not placing mothers and children in detention and using alternatives instead. These programs should be used for all asylum seekers and others held in immigration detention who do not need to be detained to assure their appearance. Rather than subjecting families to the “expedited removal,” “mandatory detention,” and “reinstatement of removal” systems, they should be referred directly into immigration court removal proceedings.

- **Abandon the Ashcroft deterrence-based detention approach.** Building on DHS and ICE’s recent statements that they have discontinued invoking general deterrence as a factor in “custody determinations” in cases involving families, the Obama Administration and immigration authorities at all levels should stop basing decisions to send or hold one person in immigration detention on the desire to deter other potential asylum seekers and migrants from coming to the United States. This approach, inspired by a 2003 ruling by former Attorney General John Ashcroft, seeks to justify the detention of one person, even if she satisfies release requirements, to attempt to send a message to other asylum seekers or migrants. The administration should stop pursuing this flawed argument in federal court by withdrawing its motion to reconsider in the *RILR v. Johnson* case pending before the federal district court in Washington, D.C. More broadly, immigration authorities should refrain from all deterrence motivated detention—including sending families to detention initially in an attempt to send a message and setting prohibitively high bonds. This approach violates due process and international human rights law.

- **End prolonged immigration detention and the use of prohibitively high bonds.** To the extent family detention continues, and with respect to all immigration detention, ICE should set bonds at levels that asylum seekers can actually afford. In the case of indigent asylum seekers, ICE and the immigration courts should release families without requiring bond payment. This approach would be in line with good practice models in the criminal justice system where money bails are not required for pretrial release in cases involving indigent persons. ICE detention reviews should not wait until 90 days have passed, but should be conducted immediately after an individual passes a credible fear or reasonable fear interview. The need for continued detention should then be regularly reviewed at least every 30 days thereafter. In most cases, continued detention is a waste of government resources, and appearance support can be addressed through case management and other alternatives to detention.
- **Use alternatives, rather than detention, in cases where additional support or supervision is needed to assure appearance.** Where additional supervision is needed, ICE can refer asylum seekers into case management or other alternative to detention programs, which are more humane and cost-effective. Lutheran Immigration and Refugee Service and the U.S. Conference of Catholic Bishops' Migration and Refugee Services have piloted and are operating community-based programs, which show high initial rates of compliance between 96 and 97 percent. The Government Accountability Office reported that a program operated by a private contractor funded by ICE, which relies on in-person contact and technology monitoring, has yielded an overall appearance rate of 99 percent at court hearings. Immigration authorities should refer asylum seekers to appearance support programs based on individualized assessments of appearance support needs, rather than automatically putting ankle bracelets on mothers. While DHS and ICE are increasing their use of alternatives, these measures should be used to facilitate release from, and reduce reliance on, unnecessary detention—not simply to expand migration monitoring capacity. Congress should support the transition of funds from detention to alternatives, significantly decrease the number of detention beds funded, and end the use of detention in cases where it would be impermissible under U.S. treaty commitments and human rights law.
- **Support staffing for the immigration courts and asylum office and counsel for asylum seekers and other immigration detainees.** The administration should request and Congress should support the resources necessary to adequately staff the immigration courts and asylum office so that hearings and interviews originating at the border, as well as all others, can occur in a timely manner. The Obama Administration should facilitate access to counsel by releasing asylum seekers from detention, including to alternative programs where needed, as those held in detention are unlikely to secure the legal counsel necessary to gather evidence and prove asylum eligibility. ICE should allow full access for the limited number of lawyers who are available to assist detained mothers and children, including by allowing pro bono attorneys to utilize the most recent technologies to maximize representation of indigent asylum seekers and immigration detainees. Congress should support funding for counsel and legal orientations for asylum seekers and others

held in immigration detention, as these measures promote efficiency, cost-savings, fairness, and justice.

- **Prevent improper denials of access to asylum.** The Obama Administration should create stronger oversight mechanisms to ensure the Department of Homeland Security and its component enforcement agencies, ICE and Customs and Border Protection (CBP), and the Department of Justice (DOJ) comply with U.S. commitments under refugee protection and human rights conventions and law. These mechanisms should include more active review of immigration enforcement policies by senior attorneys charged with ensuring compliance with U.S. human rights and refugee protection obligations and regular training on these obligations for senior officials and attorneys, as well as for front-line officers in these agencies. The administration should take steps to ensure asylum seekers are not

improperly denied access to asylum through the use of expedited removal or reinstatement of removal procedures. The administration, DHS, and the DOJ—with Congressional support—should implement measures to ensure that all potential asylum seekers, including women with children, are provided with Legal Orientation Presentations and meaningful access to counsel *prior to* undergoing credible fear screening and expedited removal, as well as reasonable fear interviews. USCIS should revise the 2014 Lesson Plan on Credible Fear to clarify that screenings are not full-blown adjudications, restore prior language on legislative history concerning the level of the screening standard, revise language that appears to attempt to further raise the “significant possibility” standard, and clarify that asylum seekers are not expected to produce documentary evidence at credible fear interviews.

One Year of Family Detention

Background

On June 20, 2014, World Refugee Day, the Obama Administration announced a series of steps to address the increase in children and families requesting protection at the southern border. The administration stated that it was “surging government enforcement resources to increase our capacity to detain individuals and adults who bring their children with them and to handle immigration court hearings—in cases where hearings are necessary—as quickly and efficiently as possible while also protecting those who are seeking asylum.” This announcement signaled that the administration had decided to increase its use of detention facilities to detain families with children seeking asylum, a practice it had nearly abandoned in 2009 when it closed the controversial T. Don Hutto Family Detention Center near Austin, Texas.

Since that time, the administration has launched efforts to expand its detention capacity to 3,700 beds, an increase of 3,800 percent from the 95 family detention beds that existed early last year. Last summer the U.S. Department of Homeland Security (DHS) quickly erected a 700-bed detention facility in Artesia, New Mexico, which was later closed. Its hyper-fast assembly resulted in significant gaps in services, telephones, education, mental health care, and legal meeting rooms.

DHS has been expanding the beds available at the pre-existing family detention facility in Berks County, Pennsylvania from 95 beds to 200 beds. The Department also repurposed and expanded a detention facility in Karnes County, Texas, which held up to about 500 individuals last year and is expanding to a capacity of 1,100. The newly-erected Dilley facility currently holds over 1,500

mothers and children and has the capacity to hold up to 2,400.

Over the last year, Human Rights First attorneys have visited family detention facilities in Artesia, New Mexico, Karnes County, Texas, and Dilley, Texas, meeting with scores of women detained at these facilities. Our staff has also interviewed many nonprofit and pro bono attorneys who provide legal counsel to families held at these facilities, as well as at the Berks facility in Pennsylvania. Additionally, we’ve met with government officials overseeing these facilities, both locally and nationally.

At each facility, Human Rights First staff encountered many mothers who did not have legal representation, were blocked from release by “no bond/high bond” policies, and did not have the financial resources to pay the bond amounts set by immigration authorities. The mothers were desperately concerned about the impact of detention on the physical and mental health of their children.

The escalation of family detention sparked litigation in the federal courts. In December 2014, mothers and children who received positive “credible fear” decisions filed a class action lawsuit alleging that the government’s “no-release policy” caused them irreparable harm by interfering with their ability to pursue asylum, in violation of U.S. immigration laws and their constitutional right to due process. The families were represented by the American Civil Liberties Union, the University of Texas School of Law Immigration Clinic, and Covington & Burling LLP. On February 20, 2015, the U.S. District Court for the District of Columbia ordered a preliminary injunction in the case, *RILR v. Johnson*, which enjoined the government from detaining mothers and children who were found to have credible fear

for the purpose of deterring future immigration to the United States and from considering deterrence as a factor in custody determinations.

Also in February 2015, lawyers for detained mothers and children filed a motion with the U.S. District Court for the Central District of California to enforce a settlement reached in 1997 in *Flores v. Johnson*. That settlement provides protections to immigrant children, including the right to be placed in the “least restrictive setting” pending their immigration proceedings and the right to be released to family in the United States who can care for them. The government has argued that the *Flores* settlement only applies to unaccompanied children, and not to children who are traveling with their adult parents. After hearing oral arguments on April 24, 2015, the court issued a tentative ruling, which signaled that the court would likely rule that *Flores* does in fact apply to children who are accompanied by their parents. The parties’ deadline to negotiate a settlement is set for mid-June, and the court could issue its ruling shortly thereafter.

Despite the many concerns about the detention of mothers and children, the administration has remained committed to locking up Central American families. In its Congressional Budget Justification for fiscal year 2016, DHS requested substantial additional funding to expand family detention. In April 2015, Secretary of Homeland Security Jeh Johnson continued to defend family detention, stating at a House Appropriations Committee hearing, “I believe that the expansion of the family unit space, frankly, is a good thing. Many people don’t agree with it, but I believe it was a good thing.” More recently, Secretary Johnson stated, “We understand the sensitive and unique nature of detaining families, and we are committed to continually evaluating it.” In June, he told the *New York Times* that “I am not prepared to abandon the policy and down the

facilities such that we have no capability to detain adults who bring their children.”

On May 13, 2015, U.S. Immigration and Customs Enforcement (ICE) announced “a series of actions” to its family detention system, which it said were intended to “enhance oversight and accountability, increase access and transparency, and ensure its family residential centers continue to serve as safe and humane facilities for families pending the outcome of their immigration proceedings.” These “actions” included creating an advisory committee, appointing a senior ICE official to coordinate and review family detention policies, a series of stakeholder engagements, adding some attorney meeting rooms, and a review process for families that have been detained for longer than 90 days.

Over the last few weeks, teams from Human Rights First visited Dilley, with one team spending a week there. From these on-the-ground legal experiences and additional research, Human Rights First has found that despite ICE’s “actions,” asylum seekers continue to be sent to immigration detention, continue to have their time in detention prolonged by unduly high bonds, continue to face an egregious lack of counsel, and continue to have even their limited access to counsel hampered by detention facility staff.

The bottom line is that ICE’s “actions” did not end the policy of sending families to immigration detention facilities. In fact, the announcement affirmed the decision to continue using these facilities to hold asylum-seeking mothers and children pending the outcome of their immigration proceedings.

Detention Leaves Mothers and Children Traumatized, Damages Families

Medical and mental health experts have documented that immigration detention is harmful to asylum seekers and in particular to children and families, even over relatively short periods of time. The bipartisan U.S. Commission on International Religious Freedom found in a 2005 report that asylum seekers, who have often suffered severe and very recent trauma and abusive treatment, are more likely to suffer long-term psychological consequences from detention.¹ Similarly, a study assessing the impact of detention on asylum seekers, conducted by the Bellevue New York University Program for Survivors of Torture and Physicians for Human Rights, concluded that detention inflicts further harm on an already vulnerable population and that conditions such as depression, anxiety, and posttraumatic stress disorder worsen the longer they are detained.²

Recent research conducted by Luis H. Zayas, the Dean of the School of Social Work and Robert Lee Sutherland Chair in Mental Health and Social Policy at the University of Texas at Austin, concluded that detention caused developmental regressions in children held in U.S. immigration detention as well as major psychiatric disorders, including suicidal ideation. The Royal College of Paediatrics and Child Health in the United Kingdom has concluded, “almost all detained children suffer injury to their mental and physical health as a result of their detention, sometimes seriously.” In Australia, the Royal Australasian College of Physicians concluded that immigration detention damages social and emotional wellbeing, growth, and development.³

Physical health problems include weight loss, sleep disturbance, and frequent infections, while mental health difficulties experienced by children range from emotional and psychological

regression, posttraumatic stress disorder, clinical depression, and suicidal behavior.⁴ Other studies have shown that adults held in immigration detention experience a threefold increase in psychiatric disorders and children experience a tenfold increase in psychiatric disorders subsequent to detention.⁵ Moreover, detention undermines the parenting process itself, leaving the parent impotent to comfort the child and address even basic needs.⁶

In a March 2015 report, Juan Mendez, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment summarized: “Even very short periods of detention can undermine a child’s psychological and physical well-being and compromise cognitive development. Children deprived of liberty are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with posttraumatic stress disorder. Reports on the effects of depriving children of liberty have found higher rates of suicide and self-harm, mental disorder and developmental problems.”

Mothers held in U.S. detention facilities with their children have described the negative impact of detention on their children in their own words. One mother who was detained for six months at the Karnes facility along with her nine year old son recounted: “[My son] would tell me, ‘I’m not a criminal that should be held in this place,’” and, “My son, crying, told me that if I didn’t get him out of there, he would throw himself from the roof.”⁷

Mothers held in Dilley, Texas recounted to Human Rights First the physical and mental health problems their children suffered in immigration detention. “They don’t want to eat, they just cry; they want to see their relatives,” said one mother, speaking of the children in general. Another woman lamented, “My daughter is seeing a psychologist for the trauma she suffers from the

death of her father. But what about the trauma she suffers from being detained?”

One woman recounted the story of her toddler, who had to be hospitalized when he fell unconscious after her pleas to the on-site medical staff that he needed their attention went unheeded. On June 3, a 19-year old mother, who had been detained for nearly eight months with her four-year old son after she sought protection from return to Honduras, attempted suicide at the Karnes facility, according to reports from her counsel and the media. The young mother left a note, seemingly addressed to immigration officials, stating she had been “treated worse than an animal.”⁸

Detention can be particularly traumatizing for women who are survivors of rape, domestic violence, and other gender-based violence. In a 2009 report titled “Precarious Protection,” the Tahirih Justice Center detailed the impact of detention on survivors of domestic and sexual violence, including that detention exacerbates symptoms of trauma and leaves survivors with limited access to desperately needed medical and mental health care.

Mothers and children at the Dilley facility were also distressed over being woken up by facility officers repeatedly throughout the night. The private contractor performs “counts” multiple times during the night, which involves a staff person entering the families’ sleeping quarters and turning on the lights or using flashlights to verify each individual’s presence. Some women noted that guards would even remove their blankets during the “count” procedure. These nightly intrusions disrupt sleep and generate fear in some of the children, who try to sleep in the same bed with their mothers for comfort.

Beyond the physical and mental health impacts, detention can leave mothers and children vulnerable to other harms. At the Berks County

Family Detention Center a guard was arrested and charged with seven counts of sexual assault in response to allegations he had sexually assaulted a 19-year old mother detained there. The mother had reportedly fled domestic violence and torture in Honduras. An eight-year old girl, who was also detained at the facility, told police she had walked in on the guard and the detainee in the bathroom stall. After that incident, the little girl was afraid to leave her mother’s side.⁹

After ICE “Actions” Families Still Detained, Many Blocked from Release

Over the last year, detained mothers and children have been denied bonds, or bonds were set too high for them to pay. Following the opening of the Artesia facility last year, the government adopted a policy of “no bond or high bond,” with some mothers told they would not be released unless they could pay as much as \$30,000.¹⁰ An excessively high bond is essentially no bond. Moreover, for a mother with children who has fled violence and persecution, even a few thousand dollars can be impossible to pay.

In May 2015, one mother held at a family detention facility explained to Human Rights First that she could not afford to pay a \$4,000 bond, and as a result she and her child could not get out of immigration detention. The woman had strong family ties in the United States, namely her mother who had been living here legally for over 20 years, which should have weighed in favor of her release.

The situation is so dire that ordinary Americans—often total strangers motivated by their religious beliefs or humanitarian concerns—have donated thousands and thousands of dollars to help pay for the release of some of these mothers and children.

This spring mothers at the detention facility in Karnes County, Texas launched a hunger strike during Holy Week to protest their continued detention and prohibitively high bonds. The mothers wrote: “We have come to this country, with our children, seeking refugee status,” but “have been locked in this place for as long as 10 months,” and “are still detained because we are not able to pay the elevated bond and in some cases we are not given the opportunity to pay the bond.” At least 80 women reportedly began the fast, but that number reportedly fell after three women were held in isolation with their children in the detention center’s clinic. Some mothers said they were threatened with separation from their children if they continued their protests.¹¹

ICE continues to set unduly high bond requirements, even after the federal district court’s ruling in the *RILR* case and after ICE and DHS’s confirmation that deterrence won’t be considered in bond determinations. These high bonds cause further distress to families while wasting government resources and volunteer attorneys’ time. For instance, in the 26 bond cases that Human Rights First legal staff assisted during one week at the end of May, ICE commonly offered bond at \$8,000 and \$10,000. The lowest bond set by ICE was \$6,000, and in three cases ICE set no bond, meaning that the families were given no option for release at that stage. The mothers, our legal team concluded, could not afford to pay these high bond amounts. These mothers overwhelmingly had strong family ties that weighed in favor of eligibility for release from detention, and did not present a security or flight risk.

Ultimately, given these factors, the immigration court reduced these bonds to amounts that were generally one fourth or one fifth of the level set by ICE. In one of the 26 cases, a mother who suffered from mental health problems was released on parole. In the remaining 25 cases, the

median bond amount set by the immigration court was \$2,000. Two weeks after the bond hearings, only about one half of these families have actually been released from detention. Even the lower bond amounts set by the immigration court can be too high for some asylum seekers to pay. The setting of bonds at levels that are too high for indigent asylum seekers to pay is essentially the same as setting no bond, and refusing to release the asylum seeker from detention.

In the criminal justice system, for decades bail reforms have tried to eliminate the pretrial jailing of indigent defendants deemed safe to return to the community by eliminating the use of bond payment for release. The Justice Policy Institute cites Washington, D.C. as a model, where financial bail bond is only used as a last resort and when defendants can actually afford it. This amounts to only 5 percent of cases. The vast majority—80 percent—of people charged with an offense are released on nonfinancial options.¹²

ICE’s setting of inordinately high initial bonds, at levels that mothers cannot afford and despite factors that weigh in favor of their release, actually leads to additional government costs, and additional time in detention for mothers and children. At \$1,029 per day for a family of three, the government incurs significant and unnecessary expenses in extra detention costs if the family remains detained after bond is set. There are further additional costs of bond redetermination hearings by the immigration court, which includes the time of judges, clerks, and ICE attorneys, not to mention the added strain on pro bono legal resources.

In some cases, mothers and children have spent a year in immigration detention. Pro bono lawyers report representing many mothers and children who have now been held in detention for nine or ten months, and in some cases longer. Some families at the Berks facility have reportedly been

held there for one year, and in at least one case for 14 months.

In its May 13 “series of actions,” ICE announced that it would “implement a review process for any families detained beyond 90 days, and every 60 days thereafter, to ensure detention or the designated bond amount continues to be appropriate while families await conclusion of their immigration proceedings before the Department of Justice’s Executive Office for Immigration Review.” In remarks made at Rice University on June 8, DHS Secretary Johnson stated, “as of last week, we began a review of the cases of any families detained beyond 90 days” and indicated that 30 percent of the women and children held in detention have been detained for two months or more. One month after ICE announced its series of “actions,” pro bono attorneys have reported that some families that have been held for many months are now being reconsidered for release on bond, and several families who have been detained for six to eleven months were released last week. Many more remain in detention. It is far from clear how effective this “review process” will be, particularly given the lack of effectiveness of similar review processes.¹³ The bottom line is that these reviews do not address the underlying problem of sending families with children to immigration detention in the first place.

Detention and Other Hurdles Imposed Impede Access to Asylum

The administration has consistently characterized women and children seeking protection at the border as illegal border crossers. However, many are in fact refugees, legally entitled to protection under our laws and treaty commitments. A 2014 study called “Children on the Run” conducted by the U.N. Refugee Agency (UNHCR) concluded that about 60 percent of children it interviewed in Office of Refugee Resettlement custody had

Survivor of Severe Domestic Violence and Her Child Held in U.S. Detention for Ten Months

A refugee woman who fled from Honduras was held in U.S. immigration detention for ten months along with her 8-year-old son. The mother and son were only released from detention by ICE after an immigration court ruled that she is a “refugee” who cannot be returned to persecution. The mother had been subjected to years of severe domestic violence and sexual abuse in Honduras. As U.S. government reports attest, the Honduran government has failed to pass and effectively implement laws adequate to curb the epidemic of domestic violence that rages in Honduras. Her case, like the cases of other mothers, was complicated by DHS’s use of “reinstatement of removal,” which has had the effect of barring refugees from asylum and prolonging their detention. ICE refused to set a bond or release her, despite requests from her pro bono attorneys at the law firm of Akin Gump Strauss Hauer & Feld LLP, and the immigration court did not intervene. Without the dedicated commitment of her pro bono lawyers, she and her son could have been returned to face severe persecution and violence.

potential claims to asylum or other international protection. There are extensive reports of high levels of gender-based violence and femicide in the Northern Triangle region of Central America.¹⁴ Asylum requests have increased over 700 percent in other Central America countries and Mexico according to reports from the UNHCR,¹⁵ confirming that there is a regional refugee crisis.

As of May 18, 2015, pro bono lawyers working with the American Immigration Lawyers Association have secured asylum for mothers and children in 77 percent (17 out of 22) of the cases they represented originating at the Artesia facility.

They won three out of three cases at the newly operational Dilley facility. The vast majority, 87.9 percent, of mothers who underwent credible fear screening interviews in the first quarter of 2015 were found to have a “credible fear” of persecution,¹⁶ confirming that the majority of these families have a significant possibility of establishing eligibility for asylum or other protection.

Yet the Obama Administration has thrown a series of steep, and in some cases insurmountable, barriers in the paths of Central American asylum seekers. In June 2014, President Obama directed DHS to take aggressive steps to “deter” adults and children from taking the journey to the U.S. southern border and to “quickly return unlawful migrants to their home countries.” He also requested support for “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”¹⁷

DHS Secretary Johnson repeatedly emphasized that U.S. immigration authorities would quickly send back Central American adults and children. ICE officials announced that proceedings would be fast-tracked, signaling that the vast majority of border crossers would be immediately deported under expedited removal and that few would pass credible fear screenings.¹⁸ As a result, many mothers and children were rushed through the “credible fear” screening process, which asylum seekers must pass to even file an application for asylum, without even an opportunity to consult with an attorney.¹⁹

In early 2014, following criticism from a few members of the House of Representatives about the pass rates for credible fear screening interviews, U.S. Citizenship and Immigration Services issued new training guidance on credible fear interviews. This move, and the very public and politicized attention to the issue, was quickly followed by a steep drop in overall credible fear pass rates, which fell from 83.1 percent in January

down to 62.7 in July 2014.²⁰ The pass rate for Central American mothers was even lower: only 37.8 percent passed during the first seven weeks that the Artesia facility was in operation—about half the average pass rate at the time.²¹

These sharp declines in the credible fear screening pass rates raise serious questions about the 2014 guidance, the use of remote detention locations like Artesia, and the rapid deportations of mothers and children without access to counsel. These steep drops no doubt led the United States to return some legitimate asylum seekers back to danger, and certainly led to a barrage of mistaken credible fear denials that had to be quickly corrected on review.

Some mothers were blocked from even applying for asylum because Border Patrol—an agency within U.S. Customs and Border Protection (CBP)—“reinstated” prior “expedited removal” orders. Yet border officers’ initial screenings, which can lead to expedited removal orders, have a long history of deficiencies. The U.S. Commission on International Religious Freedom found that officers failed to inform individuals that they could ask for protection if they feared returning to their countries in about half the cases their experts observed, and ordered the deportation of individuals who expressed a fear of return in 15 percent of observed cases.²²

Human Rights Watch also concluded that the cursory screening conducted by CBP fails to effectively identify people fleeing serious risks to their lives and safety. Many of those deported in expedited removal had no reasonable opportunity to make an asylum claim.²³ Mothers who were previously deported under expedited removal, but returned to seek U.S. protection, have been blocked from asylum when CBP “reinstates” their prior removal orders. Without asylum, even if their removal is “withheld,” their children cannot become derivative asylees and the entire family is prevented from becoming legal residents. ICE

also regularly does not release or set bonds for mothers and children who are subject to “reinstatement” of removal, holding these families in detention for over a year in some cases.

Detention itself impedes access to asylum. It is very difficult for detained asylum seekers to secure legal counsel or the evidence needed to prove their cases, especially given the remote location of many detention facilities. Even with legal counsel, proving their cases from detention can be unnecessarily challenging. For instance, finding a medical expert to confirm torture or trauma is not easy when such experts cannot easily travel to distant facilities. Communication with family and others who may help gather documentary evidence is limited.

Recently, several pro bono lawyers who represent mothers were denied the necessary time to adequately prepare and gather evidence in support of their clients’ asylum claims. This process often takes several months, as it often involves gathering evidence from abroad, identifying and securing expert testimony, tracking down witnesses, and sorting through complex legal arguments. Instead, the attorneys were given three weeks or less to prepare their cases.

The administration often characterizes these asylum seekers as “illegal border crossers,” or “illegal migrants,” rather than as asylum seekers or refugees. For instance, ICE’s May 13 announcement stated: “Following last summer’s unprecedented spike in illegal migration of unaccompanied minors and adults with children at the Rio Grande Valley, [...] Homeland Security Secretary Jeh Johnson has made it clear that our borders are not open to illegal migration, and that individuals apprehended crossing the border illegally are a Department priority and that ICE should allocate enforcement resources accordingly, consistent with our laws and values.” This kind of rhetoric sends a message to

immigration officers at all levels that they are not to treat these individuals as asylum seekers.

Detention Impedes Access to Counsel for Families

Immigrants in detention face much greater difficulties securing legal counsel. Studies show that approximately 80 percent of immigrants held in detention do not have legal representation.²⁴ Legal counsel can vastly improve an individual’s chances of obtaining relief from removal. A recent study revealed that people in New York immigration courts with a lawyer are 500 percent more likely to win their cases than those without representation, and another study found that representation was the single biggest factor in the outcome of an asylum case.²⁵

It is much more difficult for mothers with children held in immigration detention to secure legal counsel. Without an attorney, a mother has almost no chance of receiving asylum. According to data from Syracuse University’s Transactional Records Access Clearinghouse (TRAC), 98.5 percent of lawyer-less women with children were ordered deported, even when the government had determined they had a credible fear of persecution if returned home. With a lawyer, mothers were 17 times more likely to receive relief. While it can mean the difference between life and death, few asylum seekers have the resources to hire a lawyer.

The family detention facilities are all located far from major urban centers with substantial non-profit legal services. The makeshift Artesia facility was a three to four hour drive from Albuquerque or El Paso, Texas. The Dilley and Karnes facilities are an hour or more from San Antonio, where only one major immigration legal representation organization was based at the time of the border surge.

The federal government does not provide funds for the representation of mothers and children, even when they are held in immigration detention. As the President of the American Bar Association emphasized in a March 26, 2015 letter to DHS Secretary Johnson, detention “makes it challenging for families to obtain representation and places a serious burden on the resources of *pro bono* legal service providers seeking to serve this uniquely vulnerable population.”

Pro bono lawyers go to extraordinary steps to represent some of these women and children, with volunteer lawyers flying across the country at their own expense or their private law firm’s expense. Yet these volunteers face a range of challenges accessing the detention centers. Attorneys, who traveled across the country to represent asylum seekers at the makeshift Artesia facility, found no appropriate space to conduct confidential meetings. Instead, two non-soundproofed “cubicles” with high partition walls, amidst chaotic spaces where other detained mothers and children were waiting, were the only places for a lawyer to meet with a client.

In an April 20, 2015 letter to ICE Director Sara Saldaña, pro bono attorneys raised concerns about barriers to counsel, including delays in permission to meet with clients, “pre-clearance” and advance notice requirements for attorneys and legal assistants, and bars on some “technology necessary to provide efficient and effective representation.” Steve Schulman of Akin Gump noted on behalf of a consortium of pro bono lawyers: “Vice President Biden asked private lawyers in August 2014 to respond to the influx of Central Americans seeking protection in the United States by providing pro bono representation. We have answered that call, but have unfortunately encountered unnecessary obstacles that diminish the effectiveness and efficiency of pro bono representation, and,

ultimately, threaten to discourage pro bono volunteerism to assist these families.”

In its May 13th announcement of “actions,” ICE said that it would provide “dedicated work spaces for pro bono attorneys” and make “available additional attorney-client meeting rooms.” But a few weeks after this announcement Human Rights First legal volunteers experienced several challenges accessing mothers and children at the Dilley facility. For example, a Human Rights First lawyer and legal assistant, along with other legal volunteers, were locked out of the facility at 6:45 a.m.—the usual time for attorney volunteers to arrive at the facility to meet with clients scheduled for court appearances and credible fear interviews that begin at 8:00 a.m.

The legal volunteers were finally allowed into the facility after 8 a.m. However, this delay caused two mothers to miss their credible fear interviews, which had to be rescheduled. Vanessa Allyn, a Human Rights First attorney volunteering in Dilley, noted that the private contractor operating the facility essentially “changed the rules every day,” placing unnecessary burdens on the volunteer legal teams and causing additional anxiety to detained asylum seekers.

Even if ICE’s “actions” are implemented and additional steps are taken to facilitate access to counsel, the underlying challenges will remain. Providing the majority of these women with legal counsel is impossible if they are held in immigration detention. And without representation, those with real claims to asylum or other relief risk being returned to danger.

Detention is Costly, Alternatives are More Humane and Cost-Effective

The financial cost of immigration detention, especially family detention, is staggering. For fiscal year 2016 alone, DHS requested an

additional \$345.3 million to fund the escalation of family detention. This is in addition to the roughly \$2 billion already spent on immigration detention *each year*. As Alex Nowrasteh of the Cato Institute pointed out in December 2014 at Human Rights First's annual human rights summit, the Dilley facility, run by Corrections Corporation of America, will cost the U.S. government over \$300 a day per person held in the facility. That amounts to over \$260 million each year for that facility alone.

By contrast, community-based support programs and other alternative measures, proven to secure appearance for immigration hearings and deportation, are much more fiscally prudent. Alternatives cost \$10.55 per person per day on average. Some cost as little as 17 cents per day.²⁶

Alternatives to detention have demonstrated their effectiveness, reporting very high appearance rates for asylum seekers. The Vera Institute of Justice piloted a community-based model over a three-year period that provided services and intensive supervision to over 500 noncitizens, and 93 percent of asylum seekers who received intensive supervision services attended all of their hearings.²⁷ Lutheran Immigration and Refugee Service and the U.S. Conference of Catholic Bishops' Migration and Refugee Services are currently piloting community-based models, which show promising initial results with appearance rates around 96 or 97 percent.

The ICE funded monitoring program, Intensive Supervision Appearance Program (ISAP), run by a private contractor, achieved over a 99 percent appearance rate for individuals enrolled in the full-service component of the program between fiscal years 2011 and 2013.²⁸ In Canada, community-based programs, which receive referrals from other nonprofits as well as from Citizenship and Immigration Canada on behalf of individuals released from detention, have had a 99.9 percent appearance rate for asylum seekers.²⁹

The government is expanding family detention capacity to hold up to 3,700 individuals. If the government referred mothers and children to alternative programs, *rather than* placing them in costly detention centers, it would save taxpayers roughly \$400 million in detention costs this year.³⁰

The Council on Foreign Relations Independent Task Force on Immigration Policy, co-chaired by former Florida Governor Jeb Bush and former Clinton White House Chief of Staff Thomas "Mack" McLarty, noted in its 2009 report that alternatives to detention can "ensure that the vast majority of those facing deportation comply with the law, and at much lower costs." In fact, criminal justice systems—prompted by reformers like the Texas Public Policy Foundation, home to Right on Crime—are increasingly tapping alternatives due to their effectiveness and cost savings.

Faith leaders have also come out in support of alternatives to detention. In their March 26, 2015 letter to President Obama, a group of U.S. faith leaders urged the administration to "implement alternatives for all families in immigration detention which are humane and uphold the human rights of this vulnerable population," stressing that "our faith communities are ready and willing to welcome and assist families seeking refuge."

The Department of Homeland Security has significantly ramped up its use of alternatives to detention, expanding the number of mothers monitored through these programs. It has not however used alternatives in place of detention, to release mothers from detention and decrease the number of family or other detention beds. Alternatives to detention should be implemented humanely, and based on individualized determinations about the level of monitoring, if any, necessary in each case. Reports of mothers being slapped with ankle bracelets, regardless of their individual situations, do not reflect the kind of individualized assessments that should be made

before intrusive mechanisms like ankle bracelets are employed.

Local faith-group volunteers report that mothers often do not understand why ankle bracelets are being put on their legs. Some have reported that the monitors are highly uncomfortable and sometimes painful. One Human Rights First client broke her right ankle, precisely where her ankle monitor was worn, while stepping out of the shower. The young woman had to have the ankle monitor removed in the hospital, and the supervision program quickly placed a new monitor on her left ankle. She then struggled to use crutches with the weight of the new ankle monitor on her good leg, while facing mounting debt from the medical bills she incurred for treatment of the ankle fracture.

Faith Leaders, Bar Associations, Others Oppose U.S. Detention of Children and Families

U.S. faith leaders, bar associations, pro bono leaders, medical experts, and members of Congress have all expressed their opposition to the detention of children and families seeking asylum. So too have groups dedicated to the protection of children, such as First Focus, and organizations focused on the protection of women from violence, as well as leading women's groups like the National Organization for Women (NOW), Legal Momentum, the Women's Legal Defense and Education Fund, and the National Council of Jewish Women.

After touring the detention facility in Dilley, Texas in March 2015, a delegation of faith leaders expressed deep concerns about U.S. detention of asylum-seeking families. In a March 26 letter to President Obama, faith leaders from across the country called for an end to family detention and the use of detention to deter families from seeking asylum:

As faith leaders representing churches, synagogues, and faith-based organizations in the United States who are deeply committed to upholding this country's moral leadership to protect children and the sanctity of the family, we call on you to end the harsh policy of family detention and employ alternatives to detention where deemed necessary. We believe this practice to be inhumane and harmful to the physical, emotional, and mental well-being of this vulnerable population.

The faith leaders asked the President to "consider whether you are prepared for your legacy to include the purposeful detention of innocent mothers and babies in furthering an ineffective policy of deterrence that violates fundamental tenants of our faiths and the American ideal of providing freedom and refuge to the persecuted." "The incarceration of vulnerable mothers and children fleeing violence in their home countries is a stain on the record of this Administration," they added. Bishop Eusebio Elizondo of Seattle, the chairman of the United States Conference of Catholic Bishops' Committee on Migration, said in December 2014: "It is inhumane to house young mothers with children in restrictive detention facilities as if they are criminals.... Many of these families are fleeing persecution and should be afforded the full benefit of domestic and international law."

In a May 2015 report, Migration and Refugee Services of the U.S. Conference of Catholic Bishops and the Center for Migration Studies concluded that six years after the Obama Administration committed to reform the immigration detention system, the number of immigration detainees has risen, and "the overwhelming majority of persons in the custody of the Department of Homeland Security (DHS) have remained in prisons, jails and other secure facilities where they are subject to standards designed for criminal defendants and, in many

ways, treated more harshly than criminals.” The Catholic Bishops’ report recommends that the United States dismantle its flawed immigration detention system and instead rely primarily on case management and other alternative measures to assure that a person appears for immigration proceedings where needed.

In a March 26 letter to DHS Secretary Johnson, American Bar Association President William C. Hubbard urged DHS to end the detention of families, cease the expansion of family detention at the Karnes and Dilley facilities, abandon deterrence based detention policies, facilitate access to counsel, and use alternatives to detention in cases where some appearance support is determined necessary. Similarly, the Association of the Bar of the City of New York issued a letter on May 26, 2015 calling for an end to family detention, stating that detention harms children and their parents, raises due process concerns, and does not achieve its stated goals.

Members of Congress have also weighed in. In February 2015, Senator Richard Blumenthal (D-CT) wrote that the explosion in family detention is “unacceptable for a nation of laws that is also a nation of immigrants.” In March 2015, Senator Patrick Leahy (D-VT) said, “Incarcerating women and children fleeing violence runs contrary to our long history as a nation that offers refuge to those most in need.”

In a May 27, 2015 letter, 136 House Democrats, including Democratic leader Nancy Pelosi (D-CA) and Democratic Whip Steny Hoyer (D-MD), urged Secretary Johnson to end family detention, stressing their concerns that detention “is detrimental to mothers and children and is not reflective of our values as a Nation.” The population in detention, they wrote, “is largely comprised of refugees fleeing violence and persecution in their home countries.” Soon after, on June 2, 33 Senate Democrats, including Senate Minority Leader Harry Reid, sent a letter to

Public Support for Alternatives to Detention

A recent poll, conducted by polling firm Public Opinion Strategies for Human Rights First, confirmed that the public supports the use of alternatives rather than detention. In a poll of voters in twenty-five of the most competitive congressional districts, as well as voters in South Carolina and New Hampshire, 62 percent said that rather than holding asylum seekers in jails and detention facilities, the United States should increase the use of alternatives to detention. Voters across nearly every major demographic, including party and ideological lines, believe the asylum and refugee system needs to be improved and strengthened to better protect refugees.

Secretary Johnson stating, “we do not believe there is any system of mass family detention that will work or is consistent with our moral values and historic commitment to provide safe and humane refuge to those fleeing persecution.”

On May 5, 2015, former Secretary of State Hillary Clinton called for reform of the U.S. immigration detention system, stating: “I don’t think we should put children and vulnerable people into big detention facilities because I think they’re at risk.”

Administration Continues to Defend Ashcroft Approach to Use of Detention

The Obama Administration and the Department of Homeland Security’s decision to resurrect family detention was aimed at deterring other potential asylum seekers and migrants. Both the president and Secretary Johnson clearly stated that the administration would adopt an aggressive strategy to deter Central American adults and children from traveling to the U.S. southern border. In

December 2014, Secretary Johnson held a press conference in front of the Dilley, Texas detention facility, then under construction. In his statement the Secretary said: “The message should be clear: as a result of our new emphasis on the security of the southern border, it will now be more likely that you will be apprehended; it will now be more likely that you will be detained and sent back.” He told the *New York Times*: “I believe this is an effective deterrent.”³¹

Not only did the administration decide to send families to immigration detention facilities based on its desire to deter Central American children and families from coming to the United States, but ICE also began basing release and bond assessments on the desire to deter. As a result, even if an individual asylum seeker were likely to appear for her removal hearing, or could be released with the support of alternative monitoring measures, under this approach, she and her children would *still* be detained in order to “send a message” to other potential asylum seekers and migrants.

In support of this approach, government lawyers resurrected a ruling by former Attorney General John Ashcroft in the 2003 case *Matter of D-J-* to justify denying and opposing release from detention to try to deter others from migrating. In immigration court custody hearings, ICE attorneys even submitted copies of Ashcroft’s decision in *Matter of D-J-*, along with supporting affidavits from ICE officials, to oppose mothers’ requests for bond. The Ashcroft rationale was used to defend the months-long detention of mothers and children even in cases where they were otherwise eligible for release on bond and presented no flight risk based on their individual circumstances.

Immigration custody decisions should be based on truly individualized assessments. Immigration officials should be asking, “Is this particular person a flight risk? If so, can measures other than detention, like community-based support

programs or other alternatives, address that risk?” This is a fundamentally different approach from the Kafkaesque “individualized” assessment the government argued for—with each mother receiving an “individualized determination” of whether “the individual is part of a mass migration,” thus triggering the Ashcroft deterrence reasoning. The outcomes of these assessments were essentially pre-determined and allowed the continued detention of mothers and children for months, even if they presented no flight risk—simply to “send a message” to other potential asylum seekers.

In February 2015, a U.S. District Court in Washington, D.C. ruled in the case of *RILR v. Johnson* that a strategy of deterrence does not justify the deprivation of individual liberty, rejecting the claim that “one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration.” The court granted a preliminary injunction that prohibits DHS from detaining families seeking asylum “for the purpose of deterring future immigration to the United States and from considering deterrence of such immigration as a factor in custody determinations.”

In a March 26 letter to President Obama, faith leaders from across the country called on Obama to end detention to deter asylum seeking families, stressing, “it is inappropriate and unjust to seek to deter anyone, especially a woman and her children, from fleeing violence in their homeland to seek safe haven in the United States,” and pointing out that the “recent decision by the U.S. District Court in Washington, D.C., which issued an injunction halting the detention of families, agreed with this assessment, concluding that a strategy of deterrence does not warrant the deprivation of individual liberty.”

William C. Hubbard, the president of the American Bar Association, wrote in his March 25, 2015 letter to Secretary Johnson:

Detention is neither effective nor justifiable as deterrence to migration of families and individuals fleeing violence. Such detention violates basic principles requiring that any deprivation of liberty be justified based on individual circumstances and instead serves an impermissible punitive function that should be reserved for those convicted of crimes.

The Ashcroft approach to detention as a deterrence method also impedes access to legal counsel, as pointed out in a September 2014 letter to Vice President Biden from the Association of Pro Bono Counsel (APBCo), which includes pro bono leaders at many of the nation's major law firms, along with Human Rights First and other legal groups.

In March 2015, the Obama Administration decided to continue defending the Ashcroft approach to detention by asking the federal district court to reconsider its February ruling in the *RILR* case. Arguing in favor of “family residential centers” to deter “mass migration,” U.S. government lawyers asserted that the court “owes deference” to the decision of former Attorney General Ashcroft in *Matter of D-J*.

ICE affirmed in its May 13 announcement of “actions” that it “has presently determined that it will discontinue invoking general deterrence as a factor in custody determinations in all cases involving families.” And, in June 8 remarks, DHS Secretary Johnson confirmed that “we have discontinued invoking general deterrence as a factor in custody determinations in all case involving families.” However, the government is continuing to pursue its motion to reconsider in the *RILR* case, and left open the possibility of using the Ashcroft deterrence approach again in the future. Moreover, the administration continues

to send mothers and children to detention. And the Dilley facility—the very place where Secretary Johnson stood when he sent his “deterrence” message—was just scaled up, as of the end of May, to hold up to 2,400 asylum seekers.

U.S. Detention Policies Violate U.S. Obligations under International Law

U.S. immigration detention policies, including the automatic and often prolonged detention of mothers and children seeking asylum, are inconsistent with U.S. obligations under international law. The International Covenant on Civil and Political Rights (ICCPR) provides that “Everyone has the right to liberty and security of person,” and, “No one shall be subjected to arbitrary arrest or detention.”³² Detention is arbitrary when it is not reasonable or necessary in the circumstances of the particular case, or not proportional to the end sought; this assessment must be based on the circumstances of the individual case.³³

Article 31(1) of the U.N. Convention Relating to the Status of Refugees prohibits states from penalizing refugees for their illegal entry or presence, and Article 31(2) prohibits states from applying restrictions to the movement of refugees other than those that are “necessary.” Both provisions protect asylum seekers as well as refugees.³⁴ The Executive Committee of UNHCR, of which the United States is a member, concluded that detention should “normally be avoided.” The UNHCR, in its guidelines on the detention of asylum seekers, stresses that “the use of detention is, in many instances, contrary to the norms and principles of international law.” The guidelines—noting the right to seek asylum under Article 14 of the Universal Declaration of Human Rights—specifically confirm the general principle that “asylum seekers should not be detained.”

The administration's use of detention to "deter" asylum seekers and migrants also runs afoul of U.S. refugee protection and human rights commitments. A detention policy based on deterrence—by definition—precludes the fair review of the individual circumstances of the case, as called for under the Refugee Convention, its Protocol, and the ICCPR. UNHCR's guidelines on detention of asylum seekers also make clear that "detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms." Setting aside the legal prohibition, researchers have also concluded that there is significant evidence that detention is ineffective as a deterrent.³⁵

In a March 2015 report, Juan E. Mendez, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, called on states to "expeditiously and completely, cease the detention of children, with or without their parents, on the basis of immigration status," concluding, "The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity," and "becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children." The May 2015 report of the U.N. Human Rights Council, following its review of U.S. human rights practices in connection with the Universal Periodic Review, adopted a

recommendation (made by Sweden) to "halt the detention of immigrant families and children, seek alternatives to detention and end use of detention for reason of deterrence."

As Human Rights First and other groups wrote in a November 2014 letter to President Obama, "These policies of detention and attempts at deterrence violate U.S. human rights and refugee protection commitments." Instead, "U.S. border policies should respect basic human rights standards and set an example for other countries faced with much greater challenges."

While countries around the world face staggering numbers of refugees—there are more in the world today than at any time since World War II—the numbers at the U.S. southern border are relatively small. In fact, DHS Secretary Johnson confirmed in congressional testimony in April that "apprehensions are in fact at their lowest rate since the 1970s," and "the number of unaccompanied children apprehended at the southern border, month-to-month, are the lowest it has been in several years." Meanwhile, Jordan, Turkey, and Lebanon are each hosting over 1 million Syrian refugees. The United States undermines its own global leadership, and its ability to persuade other states to comply with their human rights obligations, when it does not respect its own human rights commitments at home. ■

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- ¹⁸ As stated by Homeland Security Secretary Jeh Johnson on July 10, 2014 before the Senate Committee on Appropriations, “Then there are the adults who brought their children with them. Again, our message to this group is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited removal orders are effectuated.”
- ¹⁹ See Wil S. Hyton, *The Shame of America’s Family Detention Camps*, *The New York Times Magazine*, February 4, 2015; Jason Buch, *Advocates say deportation may disrupt due process*, *Houston Chronicle*, July 19, 2014.
- ²⁰ Human Rights First, *Percentage Credible Fear Rates with Positive Finding*, based on data from U.S. Citizenship & Immigration Service, available at <http://www.humanrightsfirst.org/sites/default/files/credible-fear-grant-rate-august-2014.pdf>.
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- ²² USCIRF, *Asylum Seekers in Expedited Removal*, Vol. I, p. 51, 54, Vol. II, p. 14, 20; See also Eric Schmitt, "When Asylum Requests are Overlooked." *The New York Times*, August 15, 2001, at A6; John Moreno Gonzales, "Amityville Woman Seeks \$8 Million in JFK Mix-Up," *Newsday*, July 12, 2000.
- ²³ Human Rights Watch, *US Trauma in Family Immigration Detention*, May 15, 2015; Human Rights Watch, "You Don't Have Rights Here," October 16, 2014.
- ²⁴ One study that reviewed nationwide data found that 86 percent of immigrants in detention had not had legal representation at any point during their immigration proceedings. Nina Siulc, et al, *Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II*, Vera Institute of Justice, May 2008. More recent studies have shown higher rates of representation. For example, a study conducted in New York in 2011 revealed that immigrants detained in New York are represented in 40 percent of cases, immigrants detained in Newark, New Jersey, are represented in 22 percent of cases, and immigrants who are apprehended in New York but later transferred to detention facilities in locations outside of New York are represented in only 19 percent of cases. *New York Immigrant Representation Study, Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, December 2011.
- ²⁵ *New York Immigrant Representation Study Report: Part II, Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings*, December 2012; Philip Schrag, Andrew Schoenholtz, and Jaya Ramji-Nogales, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, NYU Press, 2011.
- ²⁶ For example, the contractor for the government-funded Intensive Supervision Appearance Program (ISAP) charges \$0.17 per day per participant for telephonic only monitoring; \$4.41 per day for GPS monitoring; and an average of \$8.37 per day per participant for full-service supervision, which includes case management as well. U.S. Department of Homeland Security Office of Inspector General, "U.S. Immigration and Customs Enforcement's Alternatives to Detention," February 4, 2015, OIG-15-22. The Government Accountability Office found, in February 2015, that in fiscal year 2013, ICE-funded ATD programs cost, on average, \$10.55 per person per day. The GAO's estimate included the cost of ICE personnel, whereas previous DHS estimates have only included the cost billed by the contractor operating the program. U.S. Government Accountability Office, *Report to Congressional Committees, Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, November 2014.
- ²⁷ Eileen Sullivan, et al, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program Volume 1: Final Report to the Immigration and Naturalization Service*, August 1, 2000.
- ²⁸ U.S. Government Accountability Office, *Report to Congressional Committees, Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, November 2014, p. 30.
- ²⁹ Ophelia Field and Alice Edwards, *Alternatives to Detention of Asylum Seekers and Refugees*, UNHCR, April 2006. The LIRS program has achieved a 96 percent continuing compliance rate with a small initial sample of 46 participants. Lutheran Immigration and Refugee Service, *Community Support Initiative Overview*, April 2015. USCCB's Migration and Refugee Service initiated a pilot program in Boston, Massachusetts and Baton Rouge, Louisiana last year, which has served 39 immigrants to-date, of which only one has not complied fully with the program, yielding a 97 percent compliance rate. Telephone conversation with Nathalie Lummert, Director, Special Programs, Migration and Refugee Services, United States Conference of Catholic Bishops, June 5, 2015.
- ³⁰ This cost savings figure was calculated based on a daily cost of family detention of \$343 per person, with 3,700 beds anticipated for the upcoming year, costing a total of **\$463 million**. (Note that the DHS budget request for FY2016 was \$345.3 million. At that time, the Administration planned to expand detention capacity to 2,760 beds; it later increased planned capacity to 3,700 family beds.) Assuming that families spend an average of 2 to 4 months in detention, between 11,000 and 22,000 individuals will cycle through the family detention facilities over the course of one year. The cost of alternatives is based on statistics available in a February 2015 Government Accountability Office report, which found that the ICE-funded Intensive Supervision Appearance Program (ISAP) costs on average \$10.55 per day per participant, and that participants remain in the program on average for 383 days. If between 11,000 and 22,000 families were referred to the ATD program, rather than being held in detention, the government would spend **between \$44 and \$89 million** on the ATD program, **saving roughly \$400 million** in detention costs. (Note that the cost of the ATD program, for purposes of this estimate, is calculated per individual, and that existing data on the cost of the ATD program is based on services provided to individuals, not families. Presumably, when families are referred to ISAP, only the mother is supervised, thereby lowering the cost per individual. This estimate, therefore, may over-estimate the cost of placing families on ISAP.)
- ³¹ Julia Preston, "Detention Center Presented as Deterrent to Border Crossings," *New York Times*, Dec. 15, 2015.
- ³² International Covenant on Civil and Political Rights, art. 9, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 371.
- ³³ See Guy S. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection, October 2001, *available at* <http://www.unhcr.org/3bcfdf164.pdf>; Eleanor Acer and Jake Goodman, Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers and Refugees in Immigration Detention, *Georgetown Immigration Law Journal*, 2001, *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1001&context=imbr_2010.
- ³⁴ UNHCR, *Summary Conclusions of Expert Roundtable on Article 31*, November 2001, *available at* <http://www.unhcr.org/419c783f4.pdf>.
- ³⁵ International Detention Coalition, *Captured Childhood: Introducing a new model to ensure the rights and liberty of refugee, asylum seeker, and irregular migrant children affected by immigration detention*, 2012.



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