

STATEMENT FOR THE RECORD OF ELEANOR ACER

Senior Director, Refugee Protection

HUMAN RIGHTS FIRST

On

“Oversight of U.S. Immigration and Customs Enforcement”

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House Judiciary Committee**

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About Human Rights First

Human Rights First is a non-profit, nonpartisan human rights advocacy and action organization that challenges America to live up to its ideals. For 35 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership, including the protection of the rights of asylum seekers and refugees. Human Rights First oversees one of the largest pro bono legal representation programs for refugees in the country, working in partnership with volunteer attorneys at U.S. law firms. Human Rights First also conducts extensive research and reporting on a range of refugee protection issues including U.S. detention of asylum seekers.

Overview

Over the last year Human Rights First has issued several reports on this country's escalating detention of asylum seekers. As detailed in those reports, Human Rights First has found that the United States has sharply increased its detention of asylum seekers and that U.S. detention policies and practices relating to families with children and adult asylum seekers violate U.S. human rights and refugee protection legal obligations. Given this country's global leadership on the protection of refugees, this country's recent—and massive—increase in the use of detention for asylum seekers sets a poor example for other countries.

In particular, Human Rights First has detailed in *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers*, that ICE is failing in many cases to follow its own parole guidance for asylum seekers and is often requiring indigent asylum seekers to pay bonds that are too high for them to afford. Many asylum seekers are now being detained for many months, and sometimes longer, in jails, prisons and immigration detention facilities. Our research, in collaboration with pediatricians and mental health professionals has documented the devastating impact of even short-term detention on children. Two recent reports documented the lengthy detention of asylum seeking families at the Berks County Residential Center in Pennsylvania, and the lack of access to parole, bond, and legal counsel for asylum seekers held at detention facilities in Georgia.¹

Human Rights First's recommendations, some of which are listed at the end of this report, include that DHS and ICE end the detention of families with children, end the over-reliance on detention and expedited removal of asylum seekers, effectively implement the parole directive for asylum seekers, implement a policy and practice of setting bond amounts that are reasonable and affordable, and provide access to immigration court custody hearings through a change in regulations. DHS and ICE should use community-based case management programs in cases

¹ See Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* (July 2016), available at <http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown.pdf>, Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania* (August 2016), available at <http://www.humanrightsfirst.org/sites/default/files/HRF-Long-Term-Detention-Brief.pdf>, and Human Rights First, *Georgia's Detention of Asylum Seekers*, available at <http://www.humanrightsfirst.org/sites/default/files/HRF-Georgias-Detention-of-Asylum-Seekers.pdf>; see also Family Detention: Still Happening, Still Damaging (October 2015), available at <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>.

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where an individualized assessment indicates that individuals need additional support to assure appearance. In addition to providing oversight of ICE policies and practices, Human Rights First recommends that Congress take steps to address the overuse of immigration detention, including the detention of asylum seekers in ways that violate U.S. obligations under the Refugee Convention, its Protocol, and the International Covenant on Civil and Political Rights (ICCPR).

The Growing U.S. Immigration Detention System and Increased Detention of Asylum Seekers

Over the last few years, the Obama Administration has significantly increased its use of immigration detention—both overall and in particular with respect to asylum seekers and families. In recent months, the detained population has reached record highs, remaining near 37,000 to 38,000 and surpassing the 34,000 “bed quota” at which Congress has funded the immigration detention system since 2011.

Private prisons, which have been linked to poor conditions, including substandard medical care, hold 73 percent of detained immigrants, up from 62 percent in 2014. The Department of Homeland Security massively increased its detention of asylum-seeking families in 2014, accounting for at least part of this expansion, with over 3,000 beds erected in just months by private prison facilities in Texas. This growing population of incarcerated adults and children has made U.S. Immigration and Customs Enforcement the biggest federal client of the private prison industry. While profiting the private prison industry, immigration detention costs taxpayers over \$2 billion annually.

Notably, asylum seekers (including adults, families, and children) make up a growing proportion of the detained population of immigrants, despite U.S. refugee protection commitments and international standards, which make clear that asylum seekers generally should not be detained. The number of asylum seekers sent to and held in immigration detention increased nearly threefold from 2010 to 2014. In FY 2010, 15,683 asylum seekers—or 45 percent of all asylum seekers in removal proceedings—were detained. In FY 2014, that number jumped to 44,228, representing 77 percent of all asylum seekers in court proceedings. The all-female detention center in Taylor, Texas held the highest number in FY 2014, detaining 4,142 asylum seekers—more than facilities in 48 states combined. ICE has failed to release more recent statistics, despite provisions in the Haitian Refugee Immigration Fairness Act requiring the agency to provide detailed annual reports to Congress, which may then be made available to the public, on its detention of asylum seekers.

More recently, there appears to have been an even sharper increase in the detention of asylum seekers. For example, as described in a recent Human Rights First report on immigration detention in Georgia, local lawyers who work regularly at the Stewart Detention Center stated that Stewart—the largest immigration detention facility in the country with capacity to hold approximately 2,100 immigrants—has essentially become “a detention center for asylum seekers.” This is particularly troubling given Human Rights First’s findings that lack of counsel, lack of parole, unduly high bonds, and the exceedingly high asylum denial rates at Georgia detention facilities—nearly double the national average—thwart access to asylum. Many asylum seekers detained in Georgia face the unbearable choice of long-term detention or accepting a

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deportation order to a country where they fear persecution. Reports from around the country have shown similar increases in the detention of asylum seekers in recent months.

ICE Has Failed to Implement Its Own Directive on Parole of Arriving Asylum Seekers

In the first year of the Obama Administration, the Department of Homeland Security (DHS) issued a directive, *Parole of Arriving Aliens Found to Have Credible Fear of Persecution or Torture*, confirming that an asylum seeker should generally be paroled if identity is sufficiently established and if the asylum seeker does not pose a danger to the community or a flight risk which cannot be mitigated. The 2009 Asylum Parole Directive was issued in the wake of numerous reports by entities such as the bipartisan U.S. Commission on International Religious Freedom (USCIRF), international human rights authorities, and groups such as Human Rights First that had documented the often lengthy, inconsistent, unnecessary, and costly detention of asylum seekers in the United States.

Yet, as we near the end of the Obama administration's second term, Human Rights First has found that some ICE field offices and officers fail to follow the Asylum Parole Directive, in many cases leaving asylum seekers who appear to meet all release criteria languishing in detention for months or longer. In some cases, ICE denied parole based on a purported failure to establish identity even when asylum seekers submitted considerable documentation of their identities. In other cases, ICE provided a denial letter with boilerplate language indicating the asylum seeker was viewed as a "flight risk," despite having submitted considerable evidence of community ties and other equities, which, according to the Asylum Parole Directive, should weigh in favor of release on parole.

Under current regulations, "arriving" asylum seekers (those who enter at an official port of entry) are not afforded prompt access to immigration court custody hearings. While immigration judges can review ICE custody decisions for other categories of immigrants in detention, including asylum seekers who enter between ports of entry, they are precluded from reviewing the detention of "arriving aliens." For these "arriving" asylum seekers, ICE effectively acts as both judge and jailer, meaning that when an ICE officer denies parole, that asylum seeker has no other forum in which to contest his or her continued detention. Moreover, asylum seekers and local attorneys reported that ICE often fails to provide a written denial, even though a written decision is required under the parole directive, making it challenging even to contest the decision with the ICE officer who issued it.²

Shifts in parole practices for asylum seekers follow—and appear to be influenced by—two major policy shifts announced by the Obama administration in 2014: a deterrence-based detention policy directed at Central American families seeking asylum in the United States and Secretary Jeh Johnson's November 2014 immigration enforcement priorities memorandum, which characterizes people "apprehended at the border or at ports of entry attempting to unlawfully enter the United States" as top enforcement priorities. In both cases, the administration failed to adequately adhere to—and safeguard through its written policies and public statements—U.S.

² For a full discussion of Human Rights First's findings on release of asylum seekers from immigration detention, see *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* (July 2016), <http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown.pdf>.

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legal obligations to those seeking refugee protection. The problem also reflects a systemic failure of the immigration detention bureaucracies to follow parole guidance spelled out only in memoranda, rather than in regulation—a pattern since the early 1990s.

ICE Sets Bonds Higher Than Indigent Asylum Seekers Can Afford, or Sets No Bond

On June 24, 2015, in the context of rising concerns over the detention of asylum seeking families, Secretary of Homeland Security Jeh Johnson acknowledged that bond—which is often used by both ICE and the immigration courts as a condition for release from detention—must be set “at a level that is reasonable and realistic, taking into account ability to pay, while also encompassing risk of flight and public safety.” This statement mirrors the growing recognition in the criminal justice field that bond or bail amounts that do not take into consideration ability to pay, and therefore leave individuals detained solely due to their economic status, are contrary to fundamental principles of fairness and certain constitutional rights.

Despite that statement, it is not clear whether ICE has issued any formal guidance to field offices instructing ICE officers how to assess an individual’s ability to pay—with respect to families in detention or individuals generally. Reports from attorneys serving asylum seekers and other immigrants in detention centers across the country do not indicate that any such policy has been implemented. Indeed, a recent report issued by the U.S. Commission for International Religious Freedom references a statement made by a high-ranking ICE official in an interview for the report, who explained that bond amounts are set according to bed space—when beds are available, bonds are high, when bed space is limited, bonds are low. As a result of such arbitrary practices, many asylum seekers remain in immigration detention for months or longer even after having been otherwise determined eligible for release, simply because their economic situation prevents them from paying the amount deemed necessary to acquire their freedom.

Human Rights First also learned that, in many cases, ICE does not set bond at all. Sometimes this appears to be due to ICE officers “not having time,” as reported by attorneys at local organizations that provide legal assistance to immigrants in detention. In other cases, ICE actively contests release on bond, both by not setting a bond amount initially, and later by contesting release at an immigration court custody hearing. According to recently released data, the failure to set bond appears to be widespread. Syracuse University’s Transactional Records Access Clearinghouse reported that in 94 percent of immigration court custody hearings, ICE had not set any bond amount.

Continuing Detention of Families with Children

Over the past two years, Human Rights First has visited all four family detention facilities—including the former detention facility in Artesia, New Mexico, as well as the existing facilities in Dilley and Karnes, Texas and Berks County, Pennsylvania—to provide legal counsel and/or to conduct research. On June 20, 2014—on World Refugee Day, ironically—when the Department of Homeland Security (DHS) announced plans to significantly increase its capacity to detain parents and children arriving at the southern border, the vast majority of whom were seeking asylum, it did so in order to “deter others from taking the dangerous journey and illegally crossing into the United States.” Since DHS Secretary Jeh Johnson’s 2014 announcement,

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several federal lawsuits and considerable advocacy have, to some extent, altered the landscape of family detention. For example, in June 2015, Secretary Johnson announced reforms that would aim to shorten the length of stay in family detention centers in recognition of the “sensitive and unique nature of detaining families.” Yet more than one year later, the government continues to send many families into immigration detention centers leaving some mothers and children detained for over a year at the Berks County detention center in Pennsylvania. As detailed in the following section, even short-term detention can have lasting negative health impacts on children. But research has also shown that the negative impacts of detention increase in direct relation to the period of time an individual is held, putting children in prolonged detention at even greater risk of long-term harm to their health and development.

The Harmful Health Impact of Detaining Asylum Seekers, Children, and Families

Numerous studies have documented the short-term and long-term health problems associated with immigration detention, with rates of mental health disorders significantly higher among those who are detained than among those permitted to pursue their immigration cases in the community. Asylum seekers are particularly vulnerable to the negative health consequences of detention due to past experiences of persecution and trauma. In a 2011 study, researchers noted that “[c]onfinement, isolation, lack of freedom, perceptions of being arbitrarily punished, uncertainty about the future, and fear of being returned to situations of danger all converge to create a pattern of deteriorating mental health that does not appear to be evident in community-based alternatives.”

There is also clear evidence that detention—even for relatively short periods of time of less than two weeks—is particularly damaging to the health and wellbeing of detained children and families. Studies show that children in immigration detention can have high rates of psychiatric symptoms, including self-harm, suicidal ideation, depression, developmental regressions, and post-traumatic stress disorder, and may suffer physical health problems, such as weight loss and frequent infections. Dr. Alan Shapiro, a pediatrician and clinical professor at the Albert Einstein College of Medicine at Montefiore Medical Center, says that detention of children and families “leads to isolation, helplessness, hopelessness and serious long-term medical and mental health consequences—even if it lasts for only a few weeks.” While ICE has touted its efforts to transform family detention centers into “humane” settings, research shows that deprivation of liberty is harmful in itself, meaning the only way to avoid the harmful effects of detention on children is to refrain from detention altogether. As stated by the American Academy of Pediatrics in a July 2015 letter to Secretary Johnson, the “act of detention or incarceration itself is associated with poorer health outcomes, higher rates of psychological distress, and suicidality making the situation for already vulnerable women and children even worse.”

Immigrants who require medical treatment often receive sub-standard care while detained. Human Rights First recently documented a series of cases in which ICE failed to provide children held with their mothers in long-term detention at the Berks County Residential Center in Pennsylvania with appropriate health and mental health care, including one child who was denied dental care despite having a painful oral infection, and a 9-year old girl (who was later diagnosed with post-traumatic stress disorder by an outside mental health professional) who suffered from nocturnal urinary incontinence, which the facility psychologist attributed to

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“nothing more than laziness” rather than referring her to a specialist. Adults in ICE detention suffer from inadequate healthcare as well. For example, in December 2015, Human Rights First interviewed a young asylum-seeking woman at the Mesa Verde Detention Facility, which is run by the GEO Group in Bakersfield, California, who suffered from a serious gynecological issue and recounted how she bled profusely from her vagina for ten days before being taken to a hospital, despite her repeated requests for treatment.

Alternatives to Detention

Asylum seekers—like all individuals—have a right to a presumption of liberty and generally should not be placed in detention. Seeking asylum from persecution is a human right enshrined in the Universal Declaration of Human Rights and the United States is obligated under the Refugee Convention and Protocol, as well as U.S. law, to safeguard refugees from return to persecution. Where asylum seekers are initially detained for a limited purpose—such as to verify identity—international standards require that detention be for the shortest time possible, with procedures in place to review custody decisions and to allow for release. According to the Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, detention beyond such a limited time frame would be “arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.” So-called “mandatory detention,” which is triggered by expedited removal proceedings, and other blanket policies such as a “bed quota,” which lead to placement and release decisions that are guided not by an individualized custody determination but rather by the amount of bed space available, are at odds with U.S. commitments under international refugee protection and human rights law, and fail to take into account whether or not detention is actually necessary to ensure an individual’s appearance at immigration hearings and appointments.

Various studies and government data show that the vast majority of immigrants released from detention appear for future court hearings. In fact, FY 2015 data analyzed by Syracuse University’s Transactional Records Access Clearinghouse show that 86 percent of immigrants who had been released from detention as a result of an earlier immigration court custody decision appeared for their final merits hearing. When families were able to obtain counsel, they have complied with their immigration court appearance requirements 98 percent of the time. Moreover, Human Rights First has noted, based on decades of experience providing pro bono representation in asylum matters, that asylum seekers have a strong desire to comply with immigration procedures. Many asylum seekers present themselves to authorities and simply need information related to the process.

Congress and DHS have rights-respecting and fiscally responsible tools available to use instead of detention. For example, an intensive pilot program run by the Lutheran Immigration and Refugee Service last year cost \$50 per day per family. For a six-month program, this equals \$9,100, which is far below the nearly \$125,000 it would cost to detain a two-person family for six months. Moreover, the LIRS program provided significant social support to the families it served, including subsidies for families in need of housing assistance.

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Unfortunately, DHS and ICE have relied overwhelmingly on the use of intrusive ankle monitoring devices, and appear to automatically require these devices as a condition to release for certain populations or at certain detention centers. The use of electronic ankle monitors should be limited to cases where case management supervision is deemed insufficient to ensure appearance at hearings—based on an assessment of the particular individual’s circumstances.

The Increase in Expedited Removal

A critical component of the U.S. Department of Homeland Security and ICE’s practice of detaining families and asylum seekers is its decision to invoke “expedited removal” under INA §235(b) rather than the regular removal process. Created by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, expedited removal allows immigration enforcement officers—rather than judges—to order the deportation of certain individuals. Given its summary nature and potentially devastating impact, expedited removal was for many years used only at “ports of entry”—airports or official land border entry points. A gradual expansion to areas between ports of entry beginning in 2004 allowed for a vast increase of the use of expedited removal.

Expedited removal, which triggers so-called “mandatory detention,” raises a number of concerns. Such automatic detention flies in the face of U.S. human rights and refugee protection commitments, which recognize that asylum seekers should generally not be detained, that alternative measures must be employed before detention, and that detention must be subject to prompt court review. Instead, asylum seekers are often held for months, and sometimes longer. Many are indigent and unable to secure legal counsel in these facilities, which are generally located far from urban centers. (Nationwide, only 14 percent of detained immigrants secure legal counsel.) Even those who actively request release through parole or bond hearings are often left to languish in detention due to bond amounts they cannot afford or the failure of authorities to follow release policies.

Since 2010, Congress has instructed ICE to maintain nearly 34,000 immigration detention beds—known as the “detention bed quota.” This quota bears a significant cost. DHS’s FY 2017 budget request allocates \$2.2 billion to immigration detention, which equates to roughly \$6 million per day to maintain the immigration detention system in the United States. The average daily cost of detention per person is \$126, though costs vary by facility. That means that it costs roughly \$23,000 to detain an asylum seeker for six months, and \$35,000 to detain an asylum seeker for nine months.

RECOMMENDATIONS

In order to address the growing number of asylum applicants seeking protection in the United States in a rights-respecting and cost-effective manner, Human Rights First recommends that lawmakers:

**REDUCE OVER-RELIANCE ON COSTLY IMMIGRATION DETENTION AND
DETENTION OF ASYLUM SEEKERS**

- Congress must ultimately rescind or limit the flawed expedited removal and “mandatory detention” system that is sending so many asylum seekers and immigrants automatically into immigration detention and wasting limited government resources. Detention should not be the default tool of U.S. migration management, and it certainly should not be automatic for asylum seekers. This flawed approach has caused too many to be sent unnecessarily into immigration detention, and left languishing there for months and sometimes years.
- Congress should urge ICE to abide by its 2009 Directive, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, and implement formal guidance on setting bond that requires ICE officers to take into consideration ability to pay, along with other factors proven to predict risk of absconding.
- Congress should encourage DHS and the Department of Justice to revise regulatory language in provisions located mainly at 8 C.F.R. §1003.19(h)(2)(i) and §212.5, as well as § 208.30 and § 235.3, to provide arriving asylum seekers and other immigrants the opportunity to have their custody reviewed by an immigration court. U.S. detention of arriving asylum seekers, without prompt court review of detention, is a violation of Article 9(4) of the ICCPR. If this change is not made by regulation, Congress should take steps to enact this reform.
- Congress should eliminate the “bed quota” and instead, urge DHS and ICE to abide by release policies and limit the use of detention to cases in which an individualized assessment, subject to prompt court review, determines that other measures will not assure appearance, and request funds for detention beds according to the actual need, as evidenced by data and best practice.
- In reducing detention, Congress should encourage DHS and ICE to reduce reliance on private prisons, similar to the recent announcement of the DOJ Bureau of Prisons, as well as reducing the use of county and local jails.

END THE DETENTION OF FAMILIES

- Congress should urge DHS and ICE to immediately end the detention of families with children and instead, refer families directly for full asylum interviews or into regular removal proceedings, rather than placing families into expedited removal.

**LAUNCH ALTERNATIVE TO DETENTION PROGRAMS AND INCREASE ACCESS
TO COUNSEL**

- Congress should fund community-based alternative to detention programs that utilize case management strategies and do not further restrict the liberty of individuals through electronic monitoring devices.
- Congress should fund legal counsel for vulnerable populations, including asylum seekers and other immigrants held in U.S. immigration detention.

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- Congress should fund a Legal Orientation Program at the border to inform asylum seekers of their legal rights and obligations, including information about future court hearings and reporting requirements.

PUBLIC STATISTICS ON DETENTION OF IMMIGRANTS AND ASYLUM SEEKERS

- Congress should ensure that ICE abide by its requirement in the Haitian Refugee Immigration Fairness Act to provide an annual report on the detention of asylum seekers and ensure that such reports are provided in a timely manner—for example, within 30 days of the close of the fiscal year.
- Congress should also seek regular, monthly statistics on immigration detention, which include data that illustrate ICE’s implementation of policies, such as: 1) parole grants and denials by field office and disaggregated by nationality, gender, and other characteristics; 2) bond amounts set by ICE by field office and disaggregated by nationality, gender, and other characteristics; and 3) total length of stay in detention, measured according to the total number of days spent in detention, with pending cases indicated as such, by field office, and disaggregated by nationality, gender, nature of the legal case, and other characteristics.