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Lifeline on Lockdown

Increased U.S. Detention of Asylum Seekers

July 2016



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.

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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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COVER PHOTO: AP Photo/Rebecca Blackwell

“Being in detention is one of the most devastating experiences I have experienced, you feel so desolate and at times you lose hope, but worst of all is the uncertainty of not knowing what will happen.”

–Sandra from Colombia–pro bono client of Human Rights
First who spent six months in U.S. detention before an
immigration judge granted her asylum

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Summary and Recommendations

War, repression, terrorism, and rampant human rights violations have conspired to produce what's commonly called the global refugee crisis. There are more than 20 million refugees in the world today. But this crisis isn't just a matter of numbers. It is also a crisis of governance: the widespread failure of nations to live up to their legal obligations to respect the human rights of refugees and to share the responsibility of assisting and hosting them.

On September 20, 2016, President Obama will host a Leaders' Summit on Refugees to encourage the world's nations to do more. But for the United States to lead, it must lead by example. Despite its legal obligations under human rights and refugee protection conventions, and despite its support for refugees globally, the United States is falling far short at home. Refugees who request protection at U.S. airports and borders are often subjected to "mandatory detention" under a flawed "expedited removal" process and sent to facilities with conditions typical of those in criminal prisons. 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. 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 policy.

In the first year of the Obama Administration, the Department of Homeland Security (DHS) issued an Asylum Parole Directive confirming that an asylum seeker found to have credible fear of persecution 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. Prior asylum parole guidance has been issued periodically since the early 1990s through various memoranda. 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 Immigration and Customs Enforcement (ICE) field offices and officers are failing to follow the Asylum Parole Directive, in many cases leaving asylum seekers in detention for months or longer. This problem reflects in part 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. But it is not only the limited number of "arriving" asylum seekers covered by the Asylum Parole Directive who have faced greater difficulty securing release from detention. Human Rights First found that ICE and the immigration courts, which are overseen by the Department of Justice (DOJ), routinely demand bond amounts that are impossible for indigent asylum seekers and other immigrants to pay, leaving many in detention for months or longer.

The shifts in detention and release practices for asylum seekers also 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. Both moves reflected the Obama administration's political calculation that portraying recent border arrivals as threats to security and prioritizing their detention and removal would help advance broader immigration reform measures, including through executive action. But in both cases, the administration failed to adequately adhere to—and safeguard through its written policies and public statements—U.S. legal obligations to those seeking refugee protection.

As a result, the detention of asylum seekers has increased and many refugees and asylum seekers have been denied release and held in U.S. immigration detention for lengthy periods of time, including:

- A transgender woman from Honduras detained for six months in Texas until she was granted asylum, due to the fact that she could not afford to pay the \$12,000 bond set by the immigration judge
- An asylum seeker from Burkina Faso detained in New Jersey for over six months before she was granted asylum
- A survivor of severe domestic violence who fled the Dominican Republic held in detention in New Jersey for five months before being granted asylum, even though she had several strong U.S. citizen ties, including her fiancé who is a U.S. citizen and a police officer
- A Syrian torture survivor with 13 forms of identification denied parole, detained for 9 months in a detention facility in New Jersey, and held even after an immigration court found him credible and at risk of torture
- A journalist and human rights activist from Egypt held in U.S. immigration detention for seven months, even after an immigration court ruled he was entitled to asylum
- A torture survivor from Togo held in U.S. immigration detention for over two years and counting
- A Chinese woman who sought asylum on grounds of a forced abortion denied parole in Miami on the basis of being an "irregular maritime arrival"
- An Afghan interpreter for the U.S. military held in U.S. immigration detention facilities in Alabama and Texas for over one year after seeking protection from the Taliban

From December 2015 to June 2016, Human Rights First conducted in-depth research on detention policies and practices relating to adult asylum seekers. We also have deep expertise on these issues from nearly thirty years providing pro bono legal representation to asylum seekers and related research and advocacy. Our findings include:

- **The number of asylum seekers sent to and held in immigration detention has 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—77 percent of all asylum seekers in court proceedings.
- **Asylum seekers subject to the 2009 Asylum Parole Directive are often needlessly held in detention by ICE—for many months or longer—despite meeting the relevant release criteria.** Nonprofit attorneys who assist arriving asylum seekers report that ICE is failing to properly apply the Asylum Parole Directive, with

91 percent stating that ICE denies parole in cases where asylum seekers appear to meet all the criteria for release. Only 47 percent of parole requests were granted in the first nine months of 2015, according to data released by ICE in response to a Freedom of Information Act (FOIA) request by the American Civil Liberties Union and the Center for Gender and Refugee Studies. By contrast, 80 percent of arriving asylum seekers found to have a credible fear were granted parole from detention in fiscal year 2012 (a period fairly soon after the Directive went into effect in early 2010), according to government data provided to the U.S. Commission on International Religious Freedom.

- **In some cases, ICE has refused to release from detention asylum seekers who sought protection at the U.S. border or a port of entry claiming that they are considered enforcement “priorities.”** The 2014 DHS enforcement priorities memorandum has been interpreted by some ICE officers and field offices to mean that recently apprehended or arriving asylum seekers are considered a “category 1” priority for removal, by virtue of their recent apprehension or arrival at a U.S. border or port of entry where they have requested protection. (Other category 1 threats include terror or public safety threats.) For instance, a husband and grandfather who fled persecution in Colombia were separated from their wife and granddaughter at the airport, detained for six months in Georgia, and denied parole as enforcement “priorities.” A Honduran woman who fled rape, torture, and abuse for resisting an abortion was detained for six months and told she was not eligible for parole as she was an enforcement “priority.”
- **Some detention and release decisions appear to be based on a desire to deter asylum seekers from seeking U.S.**

protection. Some of ICE’s decisions to continue detention and/or deny parole appear to be motivated by a legally impermissible objective of deterrence. For instance, one of Human Rights First’s pro bono asylum clients, a victim of political persecution from Bangladesh, was told by ICE that he would not be released because “no one from Bangladesh will be released from detention until they have been inside for at least six months,” and a Chinese woman who sought asylum was denied release from detention because she was an “irregular maritime arrival.” Many Central American families have been sent to detention facilities created to send a deterrent message. As detailed in this report and in a comprehensive legal analysis prepared for Human Rights First by the Allard K. Lowenstein International Human Rights Clinic at Yale Law School in June 2016, the prolonged detention and penalization of asylum seekers due to their manner of entry, or based on an objective of deterring others, is prohibited by the Refugee Convention, its Protocol, and the International Covenant on Civil and Political Rights (ICCPR).

- **Asylum seekers who request protection at U.S. airports and other official “ports of entry” are not provided access to prompt immigration court custody hearings, leaving many languishing in detention for months, despite international law requirements of prompt court review.** Under U.S. immigration regulations, individuals classified as “arriving aliens” are not afforded a prompt opportunity to contest their confinement before an immigration judge, making ICE effectively both judge and jailor. (Other categories of immigrants in removal proceedings do have access to immigration court custody reviews, including asylum seekers who present themselves to or are apprehended by immigration enforcement officers after crossing the border, between ports

of entry.) Under Article 9 of the ICCPR, “everyone has the right to liberty and security person” and a person who is detained must have prompt access to a court to review the need for detention in the particular individual’s circumstances.

- **ICE and the immigration courts often require asylum seekers in detention to pay monetary bonds—ranging from \$1,500 to \$40,000 and above—that indigent individuals and families cannot afford, leaving some in detention for months.** Of the attorneys Human Right First surveyed across the country, 84 percent indicated that immigration judges largely ignore their authority to release individuals on conditional parole, requiring payment of a monetary bond instead. Many asylum seekers cannot afford to pay bonds because they are indigent, forcing them to remain in detention or to seek the services of bail bondsman companies, which may charge exorbitant fees or even place their own GPS monitors on immigrants desperate to be free from detention. For example, one of Human Rights First’s pro bono clients was obliged to engage a commercial bond surety company that charged an up-front fee of more than \$2,000 and a monthly fee of over \$400 to cover the cost of the GPS monitor. Unduly high bonds, from \$1,500 to \$100,000, have left many immigrants in detention in the Los Angeles area, according to court filings in *Hernandez v. Lynch*. As the Department of Justice, which oversees the Executive Office for Immigration Review (EOIR) that houses the immigration courts, has made clear in the criminal justice context, failing to consider an individual’s ability to pay when issuing custody decisions based on payment of bond can amount to a violation of the Equal Protection Clause of the Fourteenth Amendment.

- **ICE increasingly relies on onerous or intrusive conditions of release, including parole conditioned on bond payments and the use of electronic ankle monitors.**

Nonprofit legal offices around the country report that ICE has shifted toward practices that include a heavier reliance on “hybrid” conditions of release. For example, in areas where arriving asylum seekers were often paroled without payment of bond, ICE has begun requiring a bond payment, which indigent asylum seekers are often not able to pay. As a result, they remain in longer-term detention. Information revealed in a FOIA request by the University of Texas at Austin indicated that the San Antonio ICE field office employs blanket bond rates of \$7,500 for arriving asylum seekers granted parole, without further consideration of individual circumstances, including ability to pay. Nonprofit attorneys also report that in some areas, ICE makes blanket determinations with respect to the use of electronic monitoring devices as a condition of release, without conducting a meaningful assessment as to its necessity. As with detention determinations, all decisions to impose restrictions on liberty—including electronic monitoring devices—must be considered on an individualized basis, including by evaluating factors signaling a person’s risk of flight, such as community ties.

- **Detention undermines access to legal counsel, harms the health of asylum seekers, and unnecessarily wastes taxpayer funds.** Recent shifts in policy and practice have left many asylum seekers needlessly in detention, where they are five times less likely to obtain legal counsel and five-and-a-half times less likely to be successful on their asylum claims. Medical research shows that detention harms asylum seekers and other immigrants, as well as their families and the broader immigrant community. In particular, children of

detailed asylum seekers and immigrants often suffer emotional and psychological repercussions, which can impact their long-term development. Immigration detention now costs U.S. taxpayers over \$2 billion per year. At a daily detention cost of \$126, it would roughly cost \$23,000 to detain an asylum seeker for six months, and \$35,000 to detain an asylum seeker for nine months. However, various members of Congress have made clear that they expect ICE to detain a significant number of individuals, as Congress has provided funding for 34,000 detention beds—a quota approach to the deprivation of liberty that has been sharply criticized by a diversity of voices.

Not only do these policies violate U.S. human rights and refugee protection commitments; they also undermine U.S. global leadership on refugee protection and set a poor example for frontline states around the world struggling to host significant numbers of refugees and other forcibly displaced people.

Recommendations

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.

The U.S. Department of Homeland Security, Immigration and Customs Enforcement, and the Department of Justice’s EOIR should take steps to significantly reduce the use of immigration detention and assure effective, fair, and prompt release processes that do not penalize asylum

seekers for their manner of entry, lack of legal representation, or lack of financial resources. These steps include:

- **DHS and ICE should clarify to all ICE field offices that the 2009 Directive—*Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*—remains in full force and must be followed, including in the wake of DHS Secretary Johnson’s 2014 Enforcement priorities memorandum.**

Without guidance from DHS and ICE, local field offices have failed to properly implement the parole directive and have misinterpreted the 2014 enforcement priorities memorandum such that some asylum seekers are considered a priority for detention and removal. The DHS Secretary and ICE Director should issue clarification confirming the Asylum Parole Directive is still in effect, and that asylum seekers are not a top enforcement and detention priority within the meaning of the Secretary’s enforcement priorities memorandum. The clarification should make clear that it is not “unlawful” to request asylum and that an individual who expresses a fear of persecution or torture or an intention to apply for protection should not be considered an enforcement priority. In this context, DHS, with engagement from the Office of Civil Rights and Civil Liberties, General Counsel’s Office, and UNHCR, should train ICE and Customs and Border Protection (CBP) officers on U.S. obligations to protect the right to seek asylum and ensure that policies and practices do not penalize asylum seekers based on their manner of entry.

- **Given the pattern of inconsistent application of parole policies for over 20 years, DHS and DOJ should codify the core requirements of the 2009 Parole Directive into regulations.**

While ICE officers at any given field office may implement the parole directive effectively for a

period of time, the directive is merely in memoranda and can easily be disregarded, as illustrated by the findings in this report and a multitude of reports relating to prior asylum parole guidance. DHS should put these guidelines into regulations, as the U.S. Commission for International Religious Freedom (USCIRF) recommended in its 2005 report and subsequent reports. In its 2013 report on the U.S. detention of asylum seekers, USCIRF noted that the 2009 parole guidance was in line with USCIRF's previous recommendations, and—yet again—recommended that it be codified into regulations: “USCIRF continues to recommend that the [2009] parole process and criteria, under which most asylum seekers found to have credible fear of persecution are paroled rather than detained, be codified into regulations.” Moreover, such regulations should apply to all asylum seekers, not only those who are deemed “arriving aliens” and who have gone through the expedited removal process.

- **Revise regulations to provide immigration court custody hearings for “arriving” asylum seekers.** DOJ and DHS should 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 in a bond hearing before an immigration court. This reform would give arriving asylum seekers the same access to immigration court custody determination hearings provided to many other immigrants, including asylum seekers who are apprehended or who present themselves after crossing the border, and would help ensure that individuals are not detained unnecessarily for months without having an immigration court assess the need for continued detention. The ICCPR

requires prompt court review of detention and UNHCR's 2012 Guidelines on Detention emphasize that detained asylum seekers should “be brought promptly before a judicial or other independent authority to have the detention decision reviewed” within 24 to 48 hours. The U.N. Special Rapporteur on the Human Rights of Migrants, concluding that the U.S. detention system lacked safeguards necessary to prevent detention from being arbitrary, recommended that DHS and DOJ “revise regulations to make clear that asylum seekers can request [...] custody determinations from immigration judges.”

- **DHS and DOJ should provide automatic immigration court custody hearings in cases of prolonged detention.** DHS and DOJ should also provide by regulation for automatic bond hearings for *all* immigrants held in detention for six months under 8 U.S.C. §1231, § 1225(b), § 1226(a), and § 1226(c). This approach would be consistent with rulings of the Courts of Appeals for the Second and Ninth Circuits and is an issue pending before the Supreme Court. Requiring that these custody reviews be conducted automatically ensures that individuals who do not have legal representation will have their custody status reviewed by a judge. (The provision of access to a bond hearing for immigrants in detention at six months, however, is not a substitute for prompt court review after initial detention, as already available to certain categories of immigrants in detention.)
- **EOIR and ICE should instruct immigration judges and ICE officers, respectively, that they must consider ability to pay in cases where bond is required for release, and EOIR should implement a policy favoring conditional parole without payment of bond.** The U.S. Department of Justice has made clear, in the criminal justice context, that bond

should not be too high for indigent individuals to afford. Secretary Johnson acknowledged that immigration bonds should be affordable in June 2015 when he announced steps to ensure bond for detained families would be set at a “reasonable” amount and based on an assessment of ability to pay. Immigration judges have clear statutory authority to release immigrants on conditional parole without the payment of a bond, and extensive research in the criminal justice context shows that payment of bond often serves only to hold indigent individuals in detention. EOIR should instruct immigration judges to (1) impose bond only when release on conditional parole or other less restrictive measures, including reporting requirements, would not mitigate flight risk, and (2) consider ability to pay to avoid keeping individuals in detention based on their economic circumstances.

- **Congress and DHS should reduce over-reliance on costly immigration detention by eliminating the bed quota approach and instead implementing community-based case management alternative-to detention programs, access to counsel, and a Legal Orientation Program at the border.** Congress should end its quota approach to detention and increase support for more prudent and cost-effective measures instead, such as community-based alternatives to detention, legal orientations, and legal counsel. A quota-based approach is inconsistent with U.S. international legal obligations that prohibit arbitrary detention. Community-based alternative to detention programs, legal information, and legal counsel can all serve to ensure asylum seekers appear for court hearings and provide necessary social and legal support. Many asylum seekers have relatives in the United States with whom they can live. Some may, after an individualized

determination, need additional support to ensure their appearance. In these cases, ICE should utilize community-based programs like those operated by leading faith-based groups with expertise in supporting refugees and immigrants. Rather than automatically placing electronic monitoring devices on asylum seekers, ICE should limit the use of these intrusive and stigmatizing devices to rare cases when an individualized assessment using a validated instrument shows that less restrictive measures cannot ensure appearance. The use of such measures should be regularly reviewed, including by a court. In addition, EOIR and DHS should implement legal orientation programs at the border to inform asylum seekers of their legal rights and obligations, including information about future court hearings and reporting requirements. DHS should ensure full access to counsel and permit attorneys to participate in any discussions between ICE and represented individuals regarding their options for release from detention. In June 2016, DHS created the new position of “Legal Access Coordinator,” a positive step toward increasing access to legal assistance and counsel in detention centers.

- **DHS and DOJ should provide public statistics, and both agencies’ civil rights offices should investigate disparities in detention decisions based on nationality, religion, race, and other indicators of potential discrimination.** DHS and DOJ should regularly provide statistics on a range of relevant data, including the number of asylum seekers in detention; the number placed in expedited removal proceedings, reinstatement, or regular removal proceedings; the nature of the proceedings against individuals (e.g., whether charged as an “arriving alien” or present in the United States without being admitted or paroled); representation rates; and

rates of release and removal. In addition, ICE should abide by its obligation in the Haitian Refugee Immigration Fairness Act to provide annual reports to Congress on asylum seekers in detention, release these reports promptly and publicly, and improve the quality of the data it provides. For example, ICE should clearly articulate the period of time within which data was extracted and according to what criteria. All terms should be clearly defined and all detention and release statistics should be disaggregated by ICE field office, nationality, and other demographic factors to ensure a non-discriminatory approach to detention and release decisions. For example, while nationality statistics are provided with respect to overall detention numbers, they are not provided with respect to length of detention or release decisions. In addition, civil rights offices should review statistics and assess whether detention and release policies are discriminatory. While Human Rights First did not have access to data disaggregated by nationality and other factors, attorneys representing asylum seekers across the country raised concerns about release denials of asylum seekers from countries in Africa and Asia—including from countries with horrendous human rights records.

Background on the Detention and Release of Asylum Seekers

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. The 1951 Convention relating to the Status of Refugees and its 1961 Protocol prohibit the United States from

returning refugees to persecution, and the 1980 Refugee Act set up a formal process for applying for asylum in the United States.

Importantly, the Refugee Convention recognizes that asylum seekers often have no choice but to arrive at or enter a country of refuge without immigration documentation and should not be penalized as a result.¹ 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.² 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.”³

Since the early 1990s, U.S. immigration authorities have laid out criteria that should be followed in assessing whether to continue to detain an asylum seeker who requests protection at a U.S. airport or other formal border entry point (referred to as an “arriving asylum seeker”) or whether to release that asylum seeker on “parole” after passing a screening interview. These criteria have generally included sufficiently establishing identity, demonstrating community ties or lack of flight risk, and posing no danger to the community. However, the criteria have been specified in a series of memoranda and policy directives, rather than in binding regulations.⁴ The former Immigration and Naturalization Service (INS) and the U.S. Department of Homeland Security (DHS) have declined to put release safeguards for arriving asylum seekers into regulations despite repeated recommendations made in 2005, 2007, and 2013 by the bipartisan U.S. Commission on International Religious Freedom (USCIRF), as well as others.⁵

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),

which imposed “mandatory detention” on certain immigrants, including “arriving” asylum seekers. This led to the automatic initial detention of many asylum seekers as well as a significant expansion of U.S. detention capacity. IIRIRA also increased the minimum statutory amount for release on bond from \$500 to \$1,500, and the burden moved to the immigrant to prove that she or he did not pose a flight risk. While the various asylum parole memoranda issued in the wake of IIRIRA have all made clear that arriving asylum seekers determined to have credible fear and therefore pass out of “expedited removal” and into the regular removal process can be assessed for parole eligibility, inconsistencies in implementation have led to many asylum seekers lingering in detention despite being eligible for release.

Over the years, with the asylum parole guidance included only in memoranda and without the safeguard of prompt immigration court custody review, the same problem arises again and again. Some local ICE (and prior to that INS) field offices begin to ignore or misinterpret the parole guidance, inconsistencies emerge, and asylum seekers are detained for prolonged periods of time. Each time this happens, various agencies or entities, such as UNHCR, USCIRF, the United Nations and international human rights authorities, the media, as well as Human Rights First and other non-governmental organizations, make recommendations for reform. Moreover, when detention and release policies become increasingly unfair and unjust, detention centers see greater unrest, with more frequent hunger strikes and other forms of protests.

In late 2009, ICE issued a new policy directive outlining in greater detail the asylum parole criteria for arriving asylum seekers, entitled “Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture.” The policy, which is based largely around federal regulations that allows for release of individuals

“whose continued detention is not in the public interest,” instructs ICE personnel to parole arriving asylum seekers who have sufficiently established their identity and demonstrated that they are not a flight risk and do not present a danger to the community. USCIRF welcomed the guidance, but again urged that it be put into regulations.⁶

In 2014, the evolving global refugee crisis grabbed international attention as the United Nations reported record numbers of displaced persons. Rather than adopting a refugee protection approach at the southern U.S. border, where record numbers of children and families from Central America were seeking protection, the Obama Administration launched an “aggressive deterrence strategy” aimed at stopping or decreasing future migration.⁷ On June 20, 2014, ironically World Refugee Day, Secretary of Homeland Security Jeh Johnson announced a plan to significantly expand detention capacity to detain and quickly deport families from Guatemala, El Salvador, and Honduras in an attempt to “send a message” to other asylum seekers and migrants coming to the United States. ICE also began basing release and bond assessments on the desire to deter, resurrecting 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.

Mothers and children in family detention who had received positive “credible fear” decisions filed a class action lawsuit alleging that the government had in effect adopted a “no-release policy” which 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 U.S. District Court for the District of Columbia ordered a preliminary injunction in the case, *RILR v. Johnson*, which enjoined the government from using deterrence as a factor in custody decisions concerning

families. The government filed a motion to reconsider, but later notified the court that it had decided “to discontinue, at this time, invoking deterrence as a factor in custody determinations in all case involving families, irrespective of the outcome of this litigation,” but maintained its position that it could lawfully reinstate the policy. While the government ceased its practice of invoking general deterrence in individual custody determinations involving families, the administration continues to send families to the very detention facilities created to deter others from coming to the United States.⁸

On November 20, 2014, the same day that President Obama announced his plan to offer relief from deportation to approximately five million undocumented individuals living in the United States, DHS Secretary Johnson issued a new set of priorities for the apprehension, detention, and removal of noncitizens. Included in a list of “Priority 1” threats are individuals “apprehended at the border or ports of entry while attempting to unlawfully enter the United States.” The 2014 enforcement priorities did not include the 2009 Asylum Parole Directive on the list of policies it supersedes or rescinds. Language providing that detention should not be used when not in the “public interest”—the policy basis for the Parole Directive—is buried in the document.

Asylum seekers have raised their own concerns about harsh detention policies and ICE’s refusal to release them on parole or a reasonable bond. In October 2015, 54 asylum seekers from Bangladesh, India, Afghanistan, and Pakistan refused food and water in the El Paso Processing Center in El Paso, Texas.⁹ In November,

Detention, Deterrence and International Law

The use of immigration detention to deter future asylum seekers or other migrants from entering a country is prohibited under international law. Under Article 9 of the International Covenant on Civil and Political Rights, individuals are guaranteed freedom from arbitrary detention. An individual’s detention pursuant to a policy employed to deter future migrants is inherently arbitrary, as it sidesteps the requirement to assess the need for detention based on the individual’s particular circumstances. In addition, under Article 31 of the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Optional Protocol, states may not penalize asylum-seekers for irregular entry or presence in the country.

Seeking asylum is a legal act and asylum seekers must not be penalized on the basis of their “illegal” entry into a country. International law and standards recognize that asylum seekers often are not in a position to gather identity documents and seek permission to legally immigrate to the country of asylum—there is no “visa” or immigration document for the purpose of entering a country to seek asylum. In fact, some asylum seekers who have arrived on visas have been sent to immigration detention based on the view that they had an immigrant intent invalidating the visa.

approximately 150 asylum seekers in six detention centers in Alabama, California, Colorado, and Texas joined in solidarity hunger strikes to protest their indefinite detention, echoing earlier calls for release.¹⁰ Soon after, 27 women began a hunger strike in the T. Don Hutto Residential Center in Taylor, Texas, a detention facility for women.

From December 2015 to May 2016, Human Rights First engaged in fact-finding to determine how ICE and EOIR release practices and policies were impacting asylum seekers in immigration

detention. Human Rights First conducted a structured, 27-question survey of 50 legal service providers who serve immigrants in detention around the country, followed by interviews with attorneys to seek more specific information related to their responses. Human Rights First visited detention centers in California, Texas, Louisiana, and New Jersey to interview asylum seekers, speak with government officials, and interview additional experts on detention policies and practices. On March 18, 2016, Human Rights First submitted a Freedom of Information Act (FOIA) request to ICE seeking reports on the detention of asylum seekers, which are required under the Haitian Refugee Immigration Fairness Act (HRIFA) of 1998. As of the publication of this report, ICE had not produced the fiscal year 2015 report.

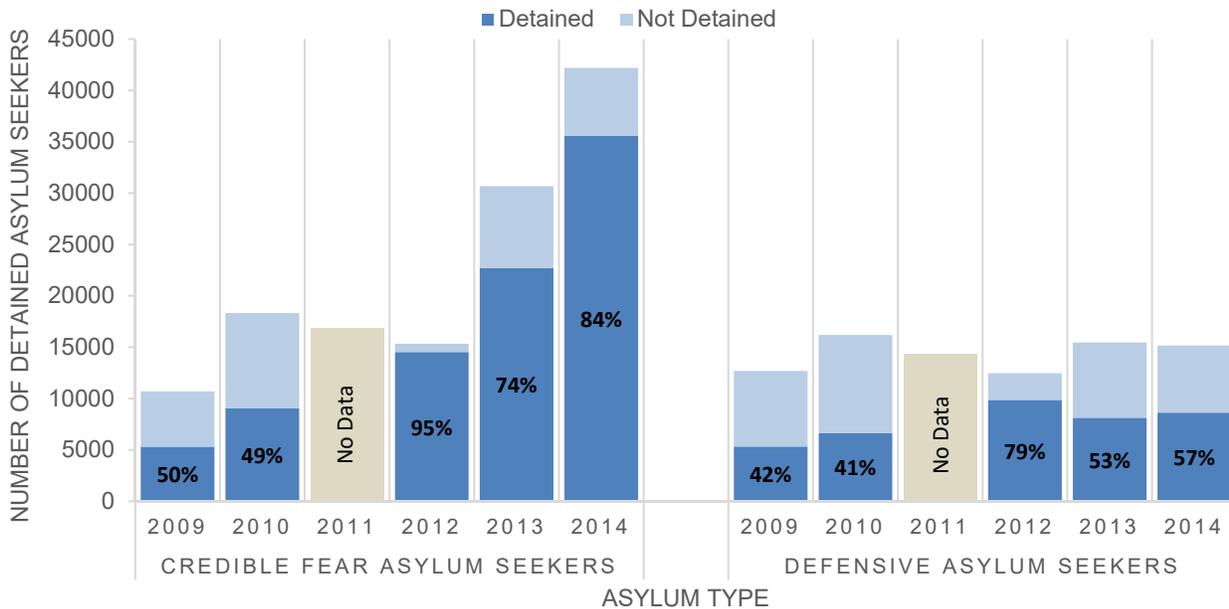
The Numbers: U.S. Detention of Asylum Seekers

Lack of data provided by the former INS led Congress to require U.S. immigration authorities

to provide data on the number of asylum seekers in detention, country of origin, gender, detention facilities, average lengths of stay in detention, and rates of release.¹¹ But nearly 20 years after passage of that requirement (included in the Haitian Refugee Immigration Fairness Act), data deficiencies remain, making detention trends and challenges difficult to track and analyze. For one, ICE does not complete the reports in a timely manner. At the time of this writing, ICE had not completed the FY 2015 report, more than nine months after the close of the fiscal year. ICE has also failed to provide the FY 2011 report to Congress. The annual reports are also typically difficult for the public to extricate from ICE even through the filing of a FOIA request.¹² Moreover, some of the information presented is not well-defined and the methodologies for collecting and reporting information appear to vary from year to year, making it difficult to make year-over-year comparisons.¹³

In recent years, ICE has increased its detention of asylum seekers. In fiscal year 2014, ICE held

Detention of Asylum Seekers FY09-14



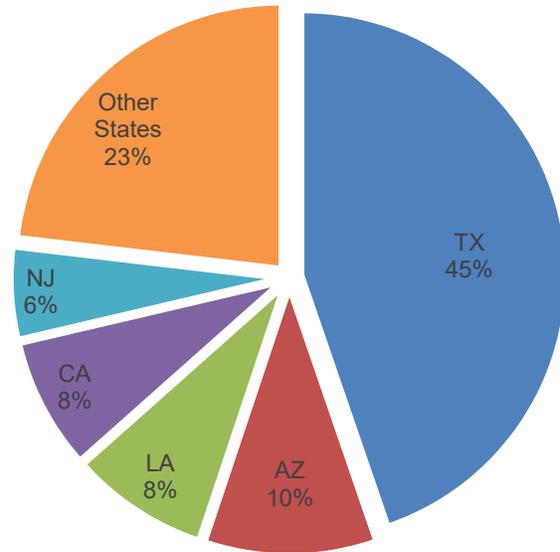
Data Source: U.S. Immigrations and Customs Enforcement, "Detained Asylum Seekers" Reports FY09-14

44,270 asylum seekers in immigration detention facilities, nearly a three-fold increase from 2010, when the agency detained 15,769 asylum seekers.¹⁴ While the number of individuals seeking asylum in the United States has increased over the past several years, which, according to UNHCR is part of a global trend that reflects the increase in displaced people fleeing persecution, war, and deteriorating security, the percentage of asylum seekers sent to detention has also increased.¹⁵ In 2010, ICE detained 41 percent of defensive asylum seekers (those who are in removal proceedings before the Executive Office for Immigration Review) and 49 percent of those with positive credible fear determinations; in 2014 ICE detained 57 percent of defensive applicants and 84 percent of credible fear asylum seekers.

■ Texas has the most asylum seekers held in ICE or ICE-contracted detention centers—19,806 in FY 2014. The states with the next highest numbers were Arizona (4,600), Louisiana (3,674), California (3,504), and New Jersey (2,445). Among these, the states that saw the largest increases were Louisiana, where the population of detained asylum seekers nearly doubled between 2013 and 2014, and New Jersey, where it more than tripled. In previous years, Texas, Arizona, and California were consistently at the top of this list.

FY14 Detained Asylum Seekers by State

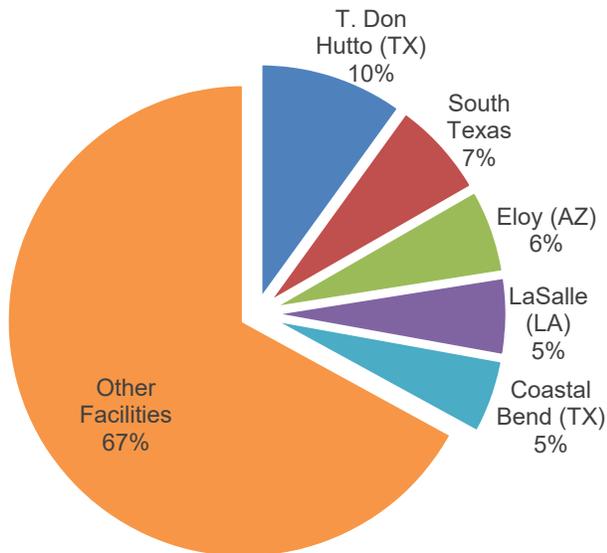
Data Source: U.S. Immigrations and Customs Enforcement, "Detained Asylum Seekers" Report FY14



■ In FY 2014, five ICE detention facilities—out of more than two hundred—housed nearly a third of all detained asylum seekers nationwide. The detention center with the highest number was the T. Don Hutto Residential Center in Taylor, Texas—an all-female detention facility—with 4,142 asylum seekers detained. Hutto alone housed more detained asylum seekers than facilities in 48 states combined. Three of the top five asylum detention facilities were found in Texas: Hutto, the South Texas Detention Complex in Pearsall, and the Coastal Bend Detention Facility in Robstown. Coastal Bend increased its detainee population from just 42 in 2013 to 2,268 in 2014. The other facilities in the top five for detained asylum seekers in 2014 were the Eloy Detention Center in Eloy, Arizona and the LaSalle Detention Facility in Jena, Louisiana. Of the five detention centers, neither Hutto nor Coastal Bend provide detainees with access to the EOIR Legal Orientation Program.

FY14 Detained Asylum Seekers by Facility

Data Source: U.S. Immigrations and Customs Enforcement, "Detained Asylum Seekers" Report FY14



There has also been a shift in the manner in which asylum seekers present themselves to immigration authorities upon arriving at or entering the United States. The number apprehended by or presenting themselves to border agents between ports of entry—as opposed to at ports of entry—has increased. In FY 2015, 71 percent of credible fear requests received by USCIS came from non-port of entry cases. By contrast, in 2005, these cases made up only ten percent of credible fear requests.¹⁶ This information is not reported in the HRIFA reports (but is regularly reported by the USCIS Asylum Division with respect to those asylum seekers who pass through the credible fear screening process). Since the nature of the proceedings significantly impact release options—non-port of entry cases do not benefit from the Asylum Parole Directive, while port-of-entry cases do not have access to prompt immigration court custody review—this information should be reported in ICE’s HRIFA reports and release data should be disaggregated according to these categories.

Asylum Seekers Who Meet the Parole Criteria Are Denied Release

The Parole Directive provides that an arriving asylum seeker determined to have a credible fear of persecution should generally be paroled from detention if his or her “identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release.”¹⁷ Yet, Human Rights First’s research reveals that many asylum seekers have been denied parole even when they meet these criteria. For one, government data on parole shows a sharp decline from 2011 to 2015:

In 2012, ICE granted parole to **80 percent** of arriving asylum seekers who passed CFI.¹⁸

In 2015, ICE granted parole to **47 percent** of arriving asylum seekers who passed CFI.¹⁹

Nonprofit and pro bono attorneys working in local detention centers observed a similar decline in parole grants. In a national survey conducted by Human Rights First of nonprofit (pro bono) lawyers who assist asylum seekers and immigrants in detention, over half of those who had been in the field for at least three years reported that ICE was denying a higher percentage of parole applications than it did in previous years. And among the most experienced practitioners—those who have been in the field for more than 10 years—*all* indicated that ICE was denying more parole applications. An overwhelming majority indicated that ICE is denying parole applications that appear to meet all the criteria detailed in the Parole Directive. Among attorneys who had at least three years of experience, 91 percent said ICE denied parole despite asylum seekers providing ample evidence to establish their identities and proving that they did not pose a flight risk or security risk.

Parole Denials that Claim to be Based on Lack of Identity

In some cases, ICE has denied parole based on a purported failure to establish identity even when asylum seekers have submitted considerable documentation of their identities. The Parole Directive recognizes that “individuals who arrive in the United States fleeing persecution or torture may understandably lack valid identity documentation...” and specifies that in cases where an asylum seeker lacks a government-issued document showing his or her identity, ICE personnel should “ask whether the [asylum seeker] can obtain government-issued documentation of identity.” The current policy goes on to explain that when an asylum seeker “cannot reasonably provide valid government-issued evidence of identity (including because the alien does not wish to alert that government to his or her whereabouts),” the applicant may provide alternate forms of identification verification, including sworn third-party affidavits accompanied by valid identification documents of the affiants. Even when third-party affiants are unavailable, the Parole Directive allows ICE officers to evaluate identity based on credible statements by the asylum seeker.

Yet, nonprofit attorneys surveyed by Human Rights First report that in some jurisdictions ICE has imposed identification requirements that go well beyond the policy in the 2009 Parole Directive. Some survey respondents indicated that ICE requires original identity documents with security features (such as passports), an onerous requirement for some asylum seekers, especially those from war-torn or other African countries where this kind of documentation is impossible or difficult to obtain. One nonprofit attorney in Miami reported repeated cases of ICE denying parole to Somali asylum seekers due to insufficient identity documents, despite the fact that “a government did not even exist in the 90s when many of the

asylum seekers were born so there is no official government document registering their birth.”²⁰ This attorney also noted that ICE denied parole to an Ethiopian asylum seeker based on his failure to prove his identity when the asylum seeker feared contacting his embassy due to persecution by the Ethiopian government. In south Texas, a nonprofit attorney reported that the ICE San Antonio Field Office requires identification documents with security features and has sometimes required that the document be verified by the consulate. Asylum seekers cannot reasonably be expected to approach the government that persecuted them to request documentation or verification of documentation, as recognized by the Parole Directive.

The following cases are examples of asylum seekers denied parole even though they had sufficient evidence of their identity:

- **Syrian torture survivor with 13 forms of identification held in U.S. immigration detention for nine months and denied parole.** “Akram” fled torture in Syria in September 2015 to seek protection in the United States. He presented himself to immigration authorities at the airport and expressed his intention to seek asylum. He was then sent to the Elizabeth Contract Detention Facility in New Jersey, where USCIS determined he had a credible fear. Through his lawyer at Human Rights First, Akram submitted 13 documents to establish his identity. He also submitted a letter of support from First Friends, a social service organization that has a long history of supporting and housing asylum seekers paroled from New Jersey detention centers. Despite this evidence, ICE denied parole stating that Akram had failed to establish his identity and was a flight risk. Akram withstood the pressures of detention in hopes of a relatively speedy resolution of his case, but after court adjournments, he lost confidence in

the system, stopped eating, and had to be taken to the hospital. He continues to be held in detention even though he was found credible by the immigration court which concluded that he faced a risk of torture if returned to Syria.²¹

- **Guinean asylum seeker detained for nearly a year in Texas because she did not have an original passport or ID document.** “Mila,” who was a victim of severe sexual violence due to her ethnicity, fled Guinea and arrived in April 2015 at a Texas port-of-entry, and expressed her intention to apply for asylum. She was then sent to an immigration detention center in Texas where she passed her credible fear interview. She had arrived with a copy of her Guinean photo identity card, which she provided to ICE. In addition, the formal CFI worksheet prepared by USCIS officers who interviewed her indicated that Mila’s identity had been established by her own credible statements. Mila also submitted a letter of support from a U.S. citizen friend, a copy of the friend’s citizenship documents, proof of the friend’s income, and proof of the friend’s address. ICE denied parole on the basis that Mila had not established her identity. When attorneys at a local nonprofit legal organization that was assisting Mila followed up with her deportation officer on her behalf, the ICE officer explained that Mila was denied parole because she did not have an original passport or identification document. As a result, she remained in detention for nearly one year until she was released on an order of supervision.²²

- **Victim of religious persecution denied parole in Miami due to lack of passport.** “Abdullahi,” a Kenyan national, sought U.S. protection on the basis of persecution for his conversion to Christianity. He arrived at a U.S. port of entry to seek asylum in early 2016 and has been detained for approximately six months, first at the Broward Transitional Center

in Florida, and later at Krome Detention Center in Miami. Abdullahi requested parole and submitted a copy of his birth certificate, a copy of his national ID card from Kenya, and an original UNHCR refugee certificate with his photo. ICE denied the parole request in May, indicating that Abdullahi had not sufficiently established his identity. When a nonprofit attorney providing assistance to Abdullahi sent an email to his ICE deportation officer to inquire about the parole denial, the deportation officer responded, “The only documents we use to verify identity would be an original passport, cedula [identity card], or letter from the consulate.”²³

In the above cases, ICE appears to ignore the Directive’s guidance that various forms of evidence, including affidavits and credible statements, can satisfy identity requirements. Instead, ICE has denied parole to asylum seekers even though they have or could have provided alternative evidence of their identities. In many cases it appears that ICE is refusing to release asylum seekers who have forms of identification but do not have a passport with security features. Even though the Parole Directive clearly allows for other evidence of identity in cases where asylum seekers should not reasonably be expected to have, or to try to obtain, government-issued identification, and provides that alternative evidence of identification can in some cases be sufficient, many asylum seekers—particularly those from Africa—continue to find themselves held in immigration detention for many months.

Parole Denials that Claim to be Based on Flight Risk

In many cases asylum seekers who appear to have every incentive to show up for their immigration appointments are held in detention and denied parole based on an unexplained assertion that they constitute a flight risk. Human Rights First’s survey of attorneys assisting asylum

seekers in detention indicated “flight risk” as the top reason given by ICE to deny parole. Some nonprofit legal offices reported an increasing trend in denials based on flight risk even when asylum seekers present considerable evidence of community ties and other equities. In other words, nonprofit attorneys assisting asylum seekers in detention have noted that cases that would have previously been determined to satisfy the Parole Directive’s flight risk criteria—including cases in which sponsor letters were provided and ties to churches, family members, and community organizations were confirmed—were suddenly denied parole. One experienced nonprofit attorney in Pennsylvania indicated, “In the responses I’ve seen [from ICE], everyone is a flight risk.”

Under the Parole Directive, factors for considering whether an asylum seeker presents a flight risk include community and family ties. At a minimum, the asylum seeker must provide an address where he or she will be residing. In cases of doubt, ICE officers are instructed to consider whether setting a “reasonable bond” or requiring participation in an alternative-to-detention program “would provide reasonable assurances” that the asylum seeker will comply with immigration proceedings. (As discussed later in this report, research demonstrates that alternative measures, such as community-based case management programs, are effective in addressing any actual flight risk concerns.)

Despite this clear guidance, asylum seekers who do not present flight risks are often detained for many months. The following examples illustrate ICE’s failure to adhere to the Parole Directive by improperly denying parole based on what appears to be a baseless, unexplained, or unjustified “flight risk” assertion:

- **Victim of severe domestic violence held in detention five months despite four U.S. citizen sponsors, including police officer.** “Carla” fled the Dominican Republic to escape

years of severe domestic violence from her former partner. She arrived at a New York airport in March 2015, expressed a fear of return to her country, and was detained at the Delaney Hall Detention Center in New Jersey, a facility opened in 2010 that aimed to provide a better model of “civil” immigration detention, which closed in May 2016. After Carla was determined to have a credible fear of persecution, her nonprofit attorney submitted a parole request, supported by letters from four U.S. citizens, including Carla’s U.S. citizen cousin who is a New York City police officer, and her U.S. citizen fiancé. All of her sponsors lived in the New York City area, where she intended to reside with her fiancé. Moreover, Carla had a valid passport that proved her identity and no criminal history. ICE denied Carla’s parole request indicating that she was a “flight risk.” Carla was ultimately granted asylum at the end of July 2015 after spending nearly five months in detention.²⁴

- **Victim of rape and torture, abused for resisting abortion, detained for six months and denied parole despite strong community ties.** In her native Honduras, “Ana” was beaten with a belt, burned with hot ember, and forced to work starting when she was six years old. As an adult, her domestic partner raped her, beat her bloody, punched her in the stomach while she was pregnant, and tried to yank her baby out when she refused to get an abortion. Ana fled the abuse and presented herself to immigration officials at a U.S. port of entry along the southern border in May 2015. She was sent to the Mesa Verde Detention Facility in Bakersfield, California, where she passed her credible fear screening interview. Ana’s five parole requests were supported by evidence that she would live with a close family friend who is a lawful permanent resident, that she had a U.S. citizen mother who lived near

the family friend, and that she suffered from chronic headaches due to an injury that made her detention unbearable. A sponsor letter, financial records, identity documents of her sponsor, and medical documents relating to medical care received in detention were all submitted to ICE on five different occasions, both via email and fax. Each of the written parole denials provided to Ana contained boilerplate language stating, "You have not established to ICE's satisfaction that you will appear as required for immigration hearings, enforcement appointments, or other matters, if you are paroled from detention." In December 2015, Ana was finally released by the immigration court on a *Rodriguez* bond, an avenue for potentially securing release available within the 9th Circuit after six months of detention. The bond was in the amount of \$1,500, which the family was able to gather with the help of friends.²⁵

Parole Denials Without Parole Interviews or Sufficient Explanation

Some nonprofit legal providers report that ICE fails to automatically interview all asylum seekers determined to have credible fear. The Parole Directive requires ICE officers to provide each asylum seeker determined to have credible fear with a "parole advisal and scheduling notification" form, informing the asylum seeker that she or he will be interviewed for parole consideration and the deadline for submitting documents supporting the parole request. This was considered a major step forward from previous policies, as it meant that even asylum seekers not represented by counsel—and therefore less likely to know about parole procedures—would be duly considered for release. However, it appears that ICE is no longer properly implementing this aspect of the directive. In data provided to the American Civil Liberties Union and the Center for Gender and Refugee Studies, ICE reported only 3,505 total cases

considered for parole pursuant to the Parole Directive during the nine-month period from January to September 2015.²⁶ However, USCIS data shows that in the same period, asylum officers issued 7,118 favorable decisions in credible fear determinations for arriving asylum seekers who had entered at a port-of-entry—and therefore should have been considered under the Parole Directive, if they were detained.²⁷ While there may be slight differences in the date parameters used by ICE and USCIS in the way they record data, and while ICE may not detain all asylum seekers in the credible fear process, it is unlikely that these nuances would account for a more than twofold difference.²⁸

Moreover, even when ICE does consider an arriving asylum seeker for parole, ICE officers sometimes fail to provide a clear answer—or at times, any explanation—for denials. Any asylum seeker denied parole must be provided with written notification of the denial, including an explanation of the reasons for denial and information regarding the procedure to request a redetermination of parole eligibility based on changed circumstances or additional evidence.²⁹ However, only 17 percent of lawyers surveyed stated that ICE regularly provides these written responses.³⁰ One experienced attorney in south Texas expressed concern that immigrants in detention are not notified of parole denials. Asylum seekers held in facilities in New Jersey, Texas, California, and Pennsylvania have also failed to receive written parole denials. A nonprofit attorney working with immigrants detained at the Mesa Verde facility in California noted that written responses are provided in rare instances only after multiple telephonic and written follow up requests to ICE. In some instances, ICE provides written notification that parole has been denied without indicating a clear reason for the denial. For example:

- **Asylum seeker with extensive U.S. ties denied parole without explanation and detained for six months.** “Yanira,” a 19-year old victim of severe gang-based violence in El Salvador, arrived at a port-of-entry in Hidalgo, Texas and requested asylum in November 2015. She was placed in expedited removal proceedings and detained at the Tri-County Detention Center in Ullin, Illinois where she was determined to have credible fear of persecution. Yanira did not receive an advisal concerning parole or an automatic interview as required under the Parole Directive. Her attorney later sought parole on her behalf, submitting a copy of her national identification card, and citing her lack of any criminal history, and her strong community ties. Both of her parents live in Manassas, Virginia, have stable jobs, and Yanira’s U.S. citizen uncle provided a letter of support stating he would sponsor her. Four days later, Yanira’s attorney received a faxed, one-sentence denial stating, “Your parole request for xxx-xxx-xxx has been denied.” Yanira ultimately spent over six months in detention.³¹
- **Political asylum seeker from Belarus denied parole without adequate explanation and detained for four months.** “Marko” was detained at the Pulaski County Detention Center in February 2016 after fleeing persecution—including imprisonment and beatings by the police—in Belarus for his participation in political demonstrations against the incumbent Belarusian president. Similar to Yanira, Marko did not receive an automatic parole interview. After he proactively requested parole, he was also provided a one-sentence parole denial from ICE. After spending four months in detention, Marko was finally released on parole after considerable advocacy by a local nonprofit legal organization which brought the denial to the attention of the St. Louis ICE

Field Office, citing the failure to follow the Parole Directive. Subsequent to his release on parole, Marko moved to Pennsylvania to reside with his sponsor. When he checked in with the Philadelphia ICE Field Office, they placed him on a GPS ankle monitor.³²

- **Refugee from Egypt denied parole without adequate explanation, held for 9 months in detention, even after immigration court ruled eligible for asylum.** “Amon” fled his native Egypt after he was pursued by the police for his journalistic and human rights activities. He arrived at a port of entry in November 2015 and was sent to the York County Detention Center in Pennsylvania, where he was found to have credible fear. Amon was never interviewed for parole, as required by the 2009 directive. Instead, before his first court hearing, he received a letter from the ICE Field Office Director stating that he would not be released because he was both a flight and security risk—with no additional detail or explanation. The letter also stated that this decision could not be appealed. In April 2016, after nearly six months of detention, the immigration judge granted Amon’s application for asylum. However, ICE has continued to hold Amon in detention. Amon submitted numerous requests for release after being granted asylum, to no avail. ICE responded with a decision stating that Amon would not be released from ICE custody due to the fact that Amon was “subject to mandatory detention as an arriving alien,” even though he had already passed out of the expedited removal process, and that the judge’s “decision to grant you asylum may be overturned on appeal.” Since then, Amon has submitted numerous additional requests, including letters from his community ties—such as a close U.S. citizen friend who would sponsor him. He also submitted a copy of his Egyptian passport, along with a copy of his Egyptian national

identification card. In a June letter, the deputy field office director indicated that Amon would be detained for the duration of his BIA appeal and that this “administrative decision is final and may not be appealed.”³³

- **Togolese asylum seeker never provided a reason for parole denial, detained in New Jersey for over two years.** “Emmanuel” sought U.S. asylum after suffering torture in his home country of Togo due to his political opinion. He fled Togo and arrived by plane in the United States in March 2014, requested protection at the airport, was classified as an “arriving alien,” and was sent to the Elizabeth Contract Detention Center. Emmanuel was found to have a credible fear of persecution and was placed in removal proceedings. Emmanuel’s *pro bono* attorneys at a local nonprofit organization helped him prepare a parole request with supporting documents, including his passport and affidavits from community members who knew him. ICE denied his parole request, stating, “After a thorough review of all factors in his case it has been determined that your request for release from ERO custody will be denied at this time.” Emmanuel’s asylum application was denied by an immigration judge in 2014, but the BIA remanded his case to the immigration judge for redetermination in 2015. Emmanuel’s *pro bono* attorneys submitted two additional parole requests to ICE over the past two years; each was denied for undisclosed reasons. Emmanuel has been in detention for 28 months.³⁴

Asylum Seekers Detained for Months and Labeled Top Enforcement Priority

Secretary Jeh Johnson’s Enforcement Priorities memorandum—titled DHS Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants and issued on November 20, 2014—directs DHS personnel to prioritize the use of detention space for cases deemed “enforcement priorities.” The Enforcement Priorities memorandum defines “Priority 1” threats to national security, border security, and public safety as “aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security,” various categories of immigrants convicted of criminal offenses or who have participated in illegal gang activities, and “aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States.”

As detailed below, many ICE officers appear to be treating asylum seekers who request protection at U.S. airports and borders as individuals “attempting to unlawfully enter the United States” and as a result as “Priority 1” for detention. Seeking asylum is not an unlawful act. The United States has agreed to abide by the Refugee Convention and its Protocol and the U.S. Congress enacted laws that set up a process for seeking asylum. In addition, the Refugee Convention prohibits states from penalizing asylum seekers—which would include holding them in detention unnecessarily—due to their illegal entry. Moreover, the Human Rights Committee has found that, under the International Covenant on Civil and Political Rights, all decisions to detain immigrants “must consider relevant factors case by case and not be based on a mandatory rule for a broad category.”³⁵

The Enforcement Priorities memorandum does not list the Parole Directive as one of the various prior governmental memoranda that it supersedes or rescinds. It states, much later in the document, that while detention resources should “as a general rule” be used to support the enforcement priorities, “field office directors should not expend detention resources on aliens [...] whose detention is otherwise not in the public interest.” The Parole Directive explains in detail why the continued detention of asylum seekers who meet the eligibility criteria is not generally in the “public interest.” But the Enforcement Priorities memorandum’s clarifying language on “public interest” is buried in the document. Without greater instruction and a specific reference to the Parole Directive on asylum seekers, it has left some ICE officers with the impression that the government views asylum seekers as top detention priorities.

Overall, 45 percent of nonprofit attorneys surveyed by Human Rights First indicated that the 2014 Enforcement Priorities have been a reason for denying parole to asylum seekers. These nonprofit offices represented asylum seekers detained in various parts of the country, dealing with ICE offices located in Arizona, Georgia, California, New Jersey, and Florida. The following examples illustrate how asylum seekers have been treated in some cases as a “Priority 1” for detention and enforcement and removal:

- **Husband and grandfather from Colombia detained for six months in Georgia and denied parole as enforcement “priorities.”** “Rodrigo” arrived at the Atlanta International Airport with his daughter, his six-year-old granddaughter, and his son-in-law “Francisco” in late 2014. All four members of the family had valid passports and visitor visas, but after stating that they intended to seek asylum to escape persecution in Colombia by paramilitary groups that had already murdered another

family member, ICE separated the family members and placed them in detention. Rodrigo and Francisco were sent to the Irwin County Detention Center in Georgia. They were denied parole despite passing their credible fear interviews, and presenting evidence to support their parole application, including copies of their national identity cards and a letter of support from the Latin American Community Baptist Church in Gainesville, Georgia. When the family’s lawyer contacted the ICE Field Office in Atlanta inquiring about the parole denials (no written denials were provided in this case), the attorney was told by the ICE Assistant Field Office Director that the decision to deny parole would not be changed since the two asylum seekers were considered “priorities.” Additional advocacy secured their release after they spent six months in detention. The daughter and the six-year-old granddaughter (who were initially separated for three weeks while the little girl was in Office of Refugee Resettlement custody) were held at the Berks County family detention facility in Pennsylvania and only released after three-and-a-half months.³⁶

- **Family of adult refugees held in U.S. immigration detention for ten months, denied parole as “priority 1” for removal.** A family of seven fled Mexico after being kidnapped by a criminal organization in their country. Police in their home country rescued them and the case was widely publicized, with their names included in news reports. As a result, they continued to receive threats, even after relocating within their country. When the authorities informed them they could not protect them, the family fled to the United States and presented themselves at a southern border port of entry where they requested protection and were detained at the Eloy Detention Center. Several family members requested parole with

the help of a local nonprofit legal organization, but their requests were denied. All seven family members were forced to remain in immigration detention while seeking asylum and only two were able to afford private legal counsel. The two represented family members were able to secure release from detention. The other five family members—who were representing themselves pro se in their asylum cases—were eligible for a bond hearing after six months in detention pursuant to the decision in *Rodriguez*. However, by this point, since their cases were expedited as a result of their detention, an immigration judge had denied their asylum applications (as is the case with the majority of pro se asylum applicants in detention). The immigration judge set bonds at \$40,000 to \$45,000 in each case. None could afford to pay these exorbitant amounts and had to remain in detention for the pendency of their appeals. Two of the family members eventually withdrew their appeals due to the trauma of prolonged detention. The other three were granted asylum outright by the Board of Immigration Appeals and were released from detention after 10 months inside Eloy Detention Center.³⁷

- **Asylum seeker with U.S. citizen daughter-in-law denied parole from facility in Arizona as “enforcement priority,” even though her husband and children were paroled after presenting the same evidence of identity and community ties.** “Maria” fled Mexico with her husband and two adult children after receiving death threats—accompanied by assaults against her son and daughter—from a transnational criminal organization. In December 2015, the family presented themselves to authorities at a port of entry along the southern border and requested protection. They were designated arriving aliens, placed in expedited removal proceedings, and detained. Maria was sent to a

facility in Arizona while the other three were held in detention centers in San Diego. Soon after passing credible fear, Maria’s three family members were released on parole to live in Virginia with Maria’s eldest son, who is married to a U.S. citizen. Maria, however, was denied parole despite submitting a sponsor letter from her U.S. citizen daughter-in-law, who promised to ensure her future appearance at immigration hearings and appointments. She also submitted evidence to ICE that a pro bono attorney in Virginia had committed to take her case if she were released. Finally, the parole request included evidence of her husband’s dialysis treatment and her role as his primary caregiver, as well as her own medical heart condition and hypertension, supported by a letter from an independent medical professional who concluded that continued detention would be detrimental to Maria’s health. Maria also asserted that she had no criminal history, a claim that ICE did not deny, and provided evidence of her identity. The ICE office in Arizona denied Maria’s parole request, though they failed to provide a written notification. When a nonprofit organization assisting Maria contacted the ICE office to inquire about the denial, the ICE officer responded that Maria was an “enforcement priority.” Maria later submitted a second parole request, outlining how her health had worsened in detention since her first request and including further evidence of hardship to her family, including letters from a social worker and her husband’s doctor stating that his health would likely deteriorate without Maria’s assistance. ICE again denied the parole request. Because Maria was detained in the Ninth Circuit, she became eligible for a *Rodriguez* bond hearing after six months in detention. Maria was released from ICE detention after nearly 7 months with a \$5,500 bond.³⁸

A nonprofit attorney in Arizona explained that after seeing many cases denied on the basis of the “Priority 1” designation, local attorneys raised concerns with deportation officers and the local ICE field office. They stressed that labeling arriving asylum seekers who present themselves at ports of entry as an enforcement priority is a misinterpretation of the November 2014 memorandum. However, their efforts went unheeded, with ICE citing to the general language of the memorandum. Similarly, in Miami, a pro bono attorney reported that the local ICE office stated that recent entrants are a priority, as indicated in the Enforcement Priorities memorandum, and that when they tried to point out that asylum seekers were an exception, local ICE officers did not agree.

In other parts of the country, nonprofit legal providers have reported that while ICE does not directly indicate that an individual was denied parole due to being an “enforcement priority,” follow up communications with ICE have revealed that the enforcement priorities memorandum was either the reason for the parole denials, or had set a new tone that led to a decrease in parole grants. For example:

In the case of “Ana” (described above), who had been detained at the Mesa Verde Detention Facility in California, parole was denied based on an alleged flight risk. Each of the notifications (responding to her multiple parole requests) indicated, “You have not established to ICE’s satisfaction that you will appear as required for immigration hearings, enforcement appointments, or other matters, if you are paroled from detention.” However, when an attorney at a local nonprofit organization telephoned ICE to inquire further, the ICE deportation officer stated that in fact Ana was a “priority” for deportation and would therefore not be eligible for parole.

In Newark, New Jersey, nonprofit legal service providers reported that parole grants have

decreased considerably over the past two years, with ICE officers citing “flight risk” as the reason, even when asylum seekers show strong community ties, identity confirmation, and other equities. When pro bono legal groups raised concerns with ICE, the Newark Field Office confirmed that the Enforcement Priorities memorandum had influenced their decision-making.

ICE also appears to be denying parole to attempt to deter asylum seekers from seeking protection in the United States. For example, U.S. immigration law clearly defines maritime arrivals as arriving aliens, who would therefore be subject to automatic parole review under the 2009 parole directive, like all arriving asylum seekers. Moreover, under international law, an asylum seeker’s manner of entry may not be the basis for penalization. But earlier this year, a Chinese woman who had fled after a forced abortion was denied parole by the ICE field office in Miami despite having strong family ties in the United States (three immediate family members who were all lawful permanent residents) due to her status as an “irregular maritime arrival.”

Arriving Aliens Are Denied Prompt Court Review of their Custody

Under the International Covenant on Civil and Political Rights (ICCPR)—which the United States has ratified—all individuals in immigration detention “shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”³⁹ As detailed in a legal analysis prepared for Human Rights First by the Allard K. Lowenstein International Human Rights Clinic at

Yale Law School, the ICCPR requires prompt court review of the need for the use of migration detention in each individual case.⁴⁰ UNHCR's 2012 Guidelines on Detention emphasize that detained asylum seekers should "be brought promptly before a judicial or other independent authority to have the detention decision reviewed" within 24 to 48 hours.⁴¹ The U.N. Special Rapporteur on the Human Rights of Migrants, concluding that the U.S. detention system lacked safeguards necessary to prevent detention from being arbitrary, recommended that DHS and DOJ "revise regulations to make clear that asylum seekers can request [...] custody determinations from immigration judges."⁴²

Yet "arriving" asylum seekers sent to U.S. immigration detention after requesting protection at formal border entry points or airports (known as "ports of entry") are not given prompt access to immigration court custody hearings. While immigration judges can review ICE custody decisions for other immigrants in detention not classified as arriving aliens, they are precluded under regulatory language from reviewing the detention of "arriving aliens."⁴³ For these "arriving" asylum seekers, ICE effectively acts as both judge and jailer. If parole is denied by ICE, the decision cannot be appealed to a judge—even an immigration judge.

Limited exceptions to this rule have evolved under recent case law in the Ninth and Second Circuits, allowing arriving asylum seekers and other immigrants access to immigration court custody hearings, but only after six months of detention. In *Rodriguez v. Robbins*, the U.S. Court of Appeals for the Ninth Circuit held that noncitizens in immigration detention are entitled to an automatic review of their custody by the immigration court after six months of detention.⁴⁴ In *Lora v. Shanahan*, the U.S. Court of Appeals for the Second Circuit similarly ruled that immigrants held in prolonged detention must have a bond hearing

before the immigration court within six months of detention.⁴⁵ But arriving asylum seekers detained in other parts of the country are not afforded any immigration court review of their detention whatsoever. And even in the Second and Ninth Circuits, immigration court custody hearings are available only after six months of detention, which is likely contrary to the ICCPR's requirement for prompt court review.

The lack of prompt immigration court custody review leaves many asylum seekers unnecessarily detained for many months or longer in the United States (see case summaries of "Akram," "Mila," "Amon," "Ana," "Rodrigo," "Francisco," and "Emmanuel"). Additional case examples gathered by Human Rights First that illustrate the detrimental impact of denying arriving asylum seekers access to prompt court hearings include:

- **Political activist from Bangladesh with U.S. ties and identity documentation released from detention after seven months due to immigration court custody hearing.**

"Ibrahim," now represented pro bono by Human Rights First, fled Bangladesh due to political persecution. After presenting himself to authorities at a formal port of entry along the southern U.S. border and requesting protection, Ibrahim was classified as an arriving alien, placed in expedited removal, and detained in California. After passing his credible fear interview, he provided ICE with letters of support from three close family friends, all U.S. citizens living in New York, who were willing to house him and ensure his appearance at immigration hearings and appointments. Ibrahim spoke to his ICE deportation officer who told him parole was denied due to insufficient evidence of his identity. In response, Ibrahim obtained a birth certificate from family in Bangladesh and provided it to the officer. According to Ibrahim, the officer responded that

“no one from Bangladesh will be released from detention until they have been inside for at least six months.” Ibrahim did not receive a written parole denial. After Ibrahim was detained for about seven months, Human Rights First learned of his case and represented him in a *Rodriguez* bond hearing before an immigration judge in California. The judge set his bond at \$13,000, which was more than Ibrahim could afford. His family had to borrow money to pay the bond. Ibrahim was released from detention after seven-and-a-half months.⁴⁶

- **Female asylum seeker separated from three-year old daughter and detained at Adelanto for over 4 months after ICE lost her passport and denied parole.** After suffering ongoing persecution in Honduras at the hands of the MS-13 international criminal gang, “Gina” fled her country and arrived at a port-of-entry in San Ysidro, California in February 2016. Gina was sent to the Adelanto Detention Facility in California, where she was determined by a USCIS officer to have credible fear. In late March, she requested parole. Gina was never provided with a written denial and was later told by her ICE deportation officer that she would not be released on parole because she did not have identification documents. However, Gina had in fact provided her passport to ICE when she was detained; ICE lost the original, but had retained copies. Gina’s pro bono attorney contacted the ICE field office to contest the parole denial. In May, her attorney submitted another parole request, a 46-page letter brief that included evidence that Gina had presented a Honduran birth certificate and national identification card to CBP as proof of her nationality and identity, email communications with her ICE deportation officer suggesting that DHS had in fact lost the original identity documents, and letters of support from Ms. Paz-Rodriguez’s U.S. citizen sponsors in

Texas. In June, ICE denied the parole request, indicating that Gina was previously denied parole and had not submitted documentation showing significant changed circumstances that would change ICE’s previous determination. Without access to a court hearing until she has been detained for six months (since she is in California and therefore within the protection of *Rodriguez*), Gina has been detained and separated from her young daughter—who is residing with her U.S. citizen sponsors in Texas—for more than four months.

Some arriving asylum seekers may be referred into the regular removal process (without having a credible fear interview) and as a result not receive an automatic assessment of parole eligibility under the Parole Directive. For example, pro bono attorneys in south Texas noted that some asylum seekers are transferred into regular removal proceedings after failed attempts to secure an interpreter for a fear screening. While regular removal proceedings afford individuals a higher level of due process than expedited removal, the Parole Directive only requires automatic parole review for arriving asylum seekers determined to have credible fear. ICE officers have authority to parole asylum seekers if they fit the criteria in the regulations regardless of whether they passed a fear screening, but this authority is discretionary, and therefore subject to the practices of a particular field office, leaving these asylum seekers without the safeguard of an automatic parole review. As a result, arriving asylum seekers in regular removal proceedings can be left in detention for many months, without a meaningful opportunity to seek parole—or court review of their custody.

High Bonds Keep Asylum Seekers in Detention, or Cause Undue Hardship to Individuals and Families

Both ICE and the immigration courts often use monetary bond payments when setting conditions for release from detention. Payment of bond is meant to secure an individual's appearance at future hearings or appointments—not to keep more people in detention due to their economic circumstances. In practice, however, ICE and the immigration courts fail to consider individuals' ability to pay, leaving those with fewer financial means behind walls. Others—in desperation to be free from confinement and rejoin their families—turn to unscrupulous bond companies or other lenders which charge exorbitant interest rates and fees and may even place electronic monitoring and surveillance devices on the client, which come with a monthly fee on top of the client's debt.

Secretary Johnson acknowledged the need for bonds to be affordable in the context of family detention in June 2015, when he announced that he had worked with Director of ICE Sarah Saldana to ensure that bond would be set at an amount that is “reasonable,” and based on an assessment of the family's ability to pay.⁴⁷ However, 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 do not indicate that any such policy has been implemented.

Nearly 70 percent of attorneys surveyed by Human Rights First reported that ICE sets bond too high for asylum seekers and immigrants to

pay. Nearly one third of survey respondents indicated that ICE never sets bond at the detention center they cover. Instead, deportation officers have suggested to local attorneys that the detained individuals will have to wait until the immigration judge sets a bond. Several survey respondents remarked that ICE deportation officers say they are “too busy” to set bond. This leads some asylum seekers and immigrants to waste even more potentially needless time in detention, until they are able to get a hearing with a judge, which may also result in a bond too high for them to pay. For example:

- **Transgender asylum seeker detained for six months due to no bond from ICE and high bond from judge.** “Pilár” is a Garifuna transgender woman from Honduras who faced persecution because of her sexual orientation and gender identity. She endured months of repeated sexual abuse by a group of men who referred to her as their “sex slave.” After her complaints to the police were ignored, she fled for the United States and sought protection at the U.S. southern border in March 2014. Border Patrol agents apprehended Pilár and placed her in removal proceedings. In an ICE custody determination in April 2014, ICE did not set bond. Pilár received limited legal assistance from a leading LGBTQ immigrant rights organization in her custody redetermination hearing before a judge. The judge set the bond at \$12,000—an amount that Pilár and her family were unable to pay. As a result, Pilár had to endure the length of her asylum proceedings in detention. In September 2014, Pilár was granted asylum by the immigration judge and was finally released from detention, after spending six months detained due to her lack of financial resources.⁴⁸

Arriving asylum seekers granted parole by ICE may also be required to pay bond as a condition to release on parole. While ICE has authority to

release asylum seekers on parole without additional conditions—other than to appear for immigration interviews and proceedings—the Parole Directive allows officers to attach conditions, such as participation in an alternative-to-detention program or payment of a “reasonable bond,” to mitigate flight risk. However, as with all release determinations, such decisions must be made based on an assessment of the particular circumstances of the individual. A clinical law professor in Texas noted that female asylum seekers at the T. Don Hutto Residential Center in Texas are routinely required to pay a bond of \$7,500 as a condition to parole, which many cannot afford. Communications between ICE personnel in the San Antonio field office in 2013—obtained by the University of Texas at Austin through a FOIA request—confirmed that ICE indeed has a policy of standardized bond amounts for parole cases. According to ICE communications, asylum seekers at the Hutto facility who had passed CFI and had identification would be offered a standard bond amount of \$7,500.⁴⁹ The following example illustrates the burdens placed on families to come up with bond amounts they cannot afford, and how this sometimes puts them in precarious positions vis-a-vis lenders:

■ **After three months’ detention, asylum seeker’s desperate family is paying exorbitant interest on a loan to pay her parole bond.** “Yvonne” fled Honduras in fear for her life after her brother-in-law was murdered by a transnational criminal organization. She arrived at a port of entry at the southern U.S. border in June 2015 and requested asylum. Yvonne was first detained at the McAllen Processing Center and then sent to the T. Don Hutto Residential Center, a detention center for women north of Austin, Texas, where she was determined to have a credible fear of persecution. However, Yvonne

was not released from detention on parole until after three months of detention, and the parole was conditioned on payment of a \$7,500 bond. Knowing that Yvonne was struggling in detention, her family, who lives in Miami, came up with \$3,500. Yvonne’s attorney, a law professor, contacted the ICE deportation officer and informed him that this was all the family could afford; however, ICE did not lower the bond amount. Desperate to get Yvonne out of detention, the family borrowed money from Yvonne’s brother-in-law’s employer. The employer charges interest at a rate of \$100 per month (or \$1,200 per year) for every \$1,000 borrowed—an amount that many would call exploitative and which he takes out of the brother-in-law’s paycheck automatically.⁵⁰

■ **Nigerian who fled Boko Haram was held in U.S. detention for six months despite submitting multiple forms of identification.** After his wife and oldest child were killed by Boko Haram militants, “Chinua” fled Nigeria for the United States. He arrived at a port-of-entry in Hidalgo, Texas in January 2016 and was detained at the South Texas Detention Complex in Pearsall. After passing his credible fear interview, Chinua requested parole with assistance from a local nonprofit legal organization. Despite submitting his birth certificate and a police identification card, ICE denied parole stating that Chinua had failed to establish his identity. Chinua was later able to obtain and submit his original national Nigerian identity card in a subsequent parole request. ICE ultimately granted parole conditioned on payment of a \$7,500 bond. Without the funds to pay this amount, Chinua has been in detention for nearly six months.⁵¹

Nonprofit legal service providers in other parts of the country similarly reported that ICE is relying more heavily on bond or has recently introduced it as a condition to parole. An experienced legal

service provider who assists immigrants at the Santa Ana City Jail in southern California noted that this past year was the first time, to this attorney's knowledge, that ICE had begun requiring payment of bond as a condition to parole. "I worked with an asylum seeker who was issued a \$5,000 parole bond. He was unable to pay and remains detained." According to this pro bono attorney's observation, ICE is more inclined to require bond from African asylum seekers than from others housed at that facility.

The U.S. Department of Justice (DOJ)—which oversees the immigration courts of the Executive Office for Immigration Review—has taken a firm stance against state justice systems that lead to the prolonged incarceration of indigent defendants who cannot afford to pay bail. In the opening line of its brief to an Alabama federal court, the DOJ states, "Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment." Yet immigration judges also appear to fail in many cases to take into account an individual's ability to pay when setting bond amounts, making them responsible for the prolonged incarceration of indigent immigrants in U.S. immigration detention who cannot afford the high bonds.

Eighty percent of attorneys surveyed by Human Rights First indicated that immigration judges set bonds too high for indigent asylum seekers to pay. Moreover, immigration judges have the authority to release asylum seekers and other immigrants on conditional parole without the payment of a monetary bond whatsoever, but not all judges exercise this authority.⁵² The U.S. District Court for the Western District of Washington recently clarified in *Rivera v. Holder* that judges do in fact have legal authority to grant release on parole as an alternative to release on a monetary bond.⁵³ However, 83 percent of survey respondents

indicated that judges in the courts where they practice still do not release immigrants on parole or recognizance. Only one service provider in Washington State noted that after *Rivera*, some judges will consider release on parole.

There is no public data available on bond amounts issued by ICE or the immigration courts. Court filings in a recently filed lawsuit reveal that some immigrants remain detained for over a year on bonds as low as \$1,500 (the statutory minimum), while others are given bonds as high as \$100,000.⁵⁴ On April 6, 2016, the American Civil Liberties Union filed a class action lawsuit with the U.S. District Court for the Central District of California on behalf of at least 100 immigrants detained in the Los Angeles area because they cannot pay the bond set by the immigration judge. Cesar Matias, one of the named plaintiffs, remains detained after four years because he cannot afford the \$3,000 bond amount set by a judge.⁵⁵

Even the statutory minimum bond amount of \$1,500 may be too much for asylum seekers to pay and can lead to their prolonged incarceration. By way of example, in New York City in 2013, 31 percent of non-felony defendants remained imprisoned pretrial because they couldn't pay bail of only \$500 or less.⁵⁶ The situation has become so dire for asylum seekers in detention that some nonprofits and faith-based groups have set up funds—soliciting contributions from private individuals and law firms—to pay bonds.

Criminal justice experts have said that lowering bail amounts is not enough and that the use of monetary bond or bail should be abolished altogether.⁵⁷ In fact, research over decades has shown that the use of quantitative and qualitative risk assessments are much better predictors of actual flight risk than setting bond.⁵⁸ In Washington, D.C., considered a model jurisdiction, monetary bail has been nearly eliminated (and private bail bondsmen are illegal). Monetary bail is used only as a last resort and

when defendants can actually afford to pay it—only five percent of cases—and the vast majority, 80 percent, of people charged with an offense are released on nonfinancial options, such as release on recognizance or community supervision. Kentucky, another model jurisdiction, has increased rates of release without monetary bail while maintaining appearance rates and improving public safety by using validated risk assessment tools and supporting pretrial release advocacy education for public defenders.

The following case examples illustrate how bonds keep indigent asylum seekers unnecessarily detained, or cause families to borrow money or seek funds from bondsmen, who sometimes engage in exploitative practices.

■ **Former soldier targeted for persecution in Central America required to pay unduly high bond, only released due to bond fund set up by nonprofit organization and volunteers to help asylum seekers.** “Michael” fled El Salvador after enduring death threats and attacks by members of a notorious transnational criminal organization that targeted him because he was formerly a soldier in the national military. Michael’s wife and minor son fled the country before him and were detained at a family detention center for several months before being released to live with U.S.-based family members. Michael was detained at the Joe Corley Detention Facility in Texas. After he was determined to have credible fear, ICE set Michael’s bond at \$12,000, which he could not afford. He requested a bond hearing before an immigration judge and provided supporting letters from his family. He also provided a letter from the attorneys who represented his wife and child, saying they would provide pro bono representation to Michael if he was released. The family’s letters of support detailed their limited income and inability to pay a high bond. The immigration judge lowered Michael’s bond

only to \$8,000, still too high for him to afford. Despite requests from the attorney representing Michael at his bond hearing for a lower amount given the facts involved in Michael’s case, the immigration judge refused. Michael’s wife was able to borrow \$2,500 and a bond fund set up by a nonprofit and volunteers provided the remaining \$5,500.⁵⁹

- **Nineteen-year-old victim of gender-based violence stuck in detention because family cannot pay \$7,500 bond.** When “Nina” was 18 years old she was raped, and after the police did little to help her, she continued to be threatened. Nina fled Honduras in October 2015 and sought protection in the United States. She was apprehended and detained at the border near McAllen, Texas and soon after passed her credible fear interview. ICE did not set an initial bond in Nina’s case. In March 2015, a nonprofit legal organization representing Nina sought a bond redetermination hearing and presented evidence of her community ties, including a letter from her uncle saying she could reside with him in Connecticut. The immigration judge, failing to consider Nina and her family’s ability to pay, set bond at \$7,500. Nina was unable to post the bond and has been detained for eight months.⁶⁰
- **Gay man from Ghana who fled attacks released after ten months’ detention with a \$15,500 bond secured by a surety company and an ankle monitoring device.** “Abdul” was brutally beaten and his partner killed by attackers who targeted them due to their sexual orientation in Ghana. Abdul arrived at a port of entry at the southern U.S. border in March 2015 seeking protection. Abdul was detained at the Eloy detention center in Arizona and was determined to have a credible fear of persecution. He submitted a parole request pro se (without legal help), including a letter of

support from his U.S. citizen cousin, along with a copy of his cousin's U.S. passport, and proof of his own identity in the form of a Ghanaian national identity card. Abdul's parole request was denied. After spending more than six months in detention, he was given a bond hearing pursuant to *Rodriguez*. The immigration judge set bond at \$15,500, an amount neither Abdul nor his cousin could afford. Abdul spent an additional four months in detention before engaging the services of a surety company. The company charged Abdul an initial "customer service fee" plus a monthly fee of over \$400 per month. It also required him to wear an electronic ankle monitoring device until the bond was paid off in full. At the time of his interview with Human Rights First, Abdul had had the device on his ankle for seven months because he cannot afford to pay the monthly installments.⁶¹

- **Asylum seeker separated from family at border and forced to engage surety company that placed ankle monitoring device.** "Carlos" fled persecution by transnational criminal organizations in El Salvador with his wife and their children in late 2014. Upon arriving at the U.S. southern border, the family presented themselves to Border Patrol authorities and indicated they would like to seek asylum. Carlos' wife and children were released with an order of release on recognizance, while Carlos was transferred to a detention facility in upstate New York, where he was later determined to have credible fear. ICE set Carlos' bond at \$7,500—too high for Carlos and his family to pay. As a result, Carlos engaged the services of a private immigration bond company that does not require collateral but instead places electronic monitoring devices on individuals. The company charged Carlos an initial "customer service fee" of over \$2,000 and a monthly fee of

nearly \$400 for "use" of the GPS monitoring device, which they require him to wear until the bond is paid in full or until his case is completed before the immigration court. Carlos, who has not been able to work since he arrived in the United States, has struggled to pay the high monthly fees. The little money he and his family had has gone to pay these fees, causing them to nearly be evicted from their apartment.⁶²

- **Refugees held in detention in Arizona for ten months before granted asylum due to demand of about \$200,000 in bonds they could not afford.** In Arizona, an immigration judge set bonds at \$40,000 to \$45,000 in each case for a family of five asylum seekers from Mexico. None could afford to pay these exorbitant amounts and as a result the family remained in detention for the pendency of their appeals. Two of the family members eventually withdrew their appeals due to the trauma of prolonged detention, while the other three were released only after the Board of Immigration Appeals granted their asylum applications outright.

Several attorneys surveyed by Human Rights First reported that immigration judges consistently set bonds at unduly high amounts or determined the bond amount based upon the respondent's nationality. Nonprofit attorneys practicing in Arlington said they had never seen a bond below \$8,000 over a course of two years. Some attorneys noted differences in bond amounts according to the asylum seeker's country of origin. For example, pro bono attorneys serving asylum seekers detained in south Texas found that asylum seekers without immediate relatives in the United States often received bonds of \$30,000 or higher, particularly if they were nationals of India or China. Another provider in Arizona noted that Central Americans generally are offered bond in the range of \$7,500 to \$20,000, while men from India have bond set at around \$20,000 to

\$35,000. Others also observed that individuals from India, Bangladesh, and China often receive higher bonds. Finally, one legal service provider in California noted that women detained in the same facility as men are offered lower bonds.

Detention Comes at a High Cost to Taxpayers, Immigrants, and their Families

The Detention Bed Quota and High Cost of Detention

Since 2010, Congress has instructed ICE to maintain nearly 34,000 immigration detention beds--known as the "detention bed quota."⁶³ 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.⁶⁴ 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.

The following case examples illustrate the cost created for U.S. taxpayers of needless, long-term detention of individuals seeking protection.

- **Translator from Afghanistan, who worked with a US military general who was willing to attest to his service and identity, detained for about a year in detention facilities in Texas and Alabama at a cost of \$45,360.**⁶⁵
- **Syrian asylum seeker detained for ten months at a cost of \$39,000.** "Akram," mentioned above, has been detained at the

Elizabeth Detention Center since September 2015 at a cost of approximately \$39,000.⁶⁶

- **Refugee from Burkina Faso detained over six months at a cost of more than \$20,000 before asylum grant.** "Florence" fled Burkina Faso in late 2014 and was detained at Delaney Hall Detention Facility in New Jersey after arriving at JFK airport in New York to seek protection. Despite presenting a valid passport and a letter from her U.S. citizen uncle, with whom she would be able to reside with in New York, her parole was denied and she was forced to remain in detention for 187 days before being granted asylum, costing U.S. taxpayers \$20,196.⁶⁷
- **Colombian refugee detained six months at cost of nearly \$19,000 before asylum grant.** "Sandra," from Colombia was detained at Delaney Hall Detention Facility in New Jersey for a total of 174 days in 2015 until she was granted asylum, costing U.S. taxpayers \$18,792.⁶⁸
- **Guinean asylum seeker detained for nearly a year at a cost of \$45,000.** "Mila," mentioned above, was detained in Texas for nearly a year at a cost of approximately \$45,000.⁶⁹

The bed quota is not only costly, but fails to take into account the actual need for detention. While DHS has maintained that congressional language does not create a mandate to actually *fill* that number of detention beds, but only to maintain the available bed space, language from appropriations reports confirms that some in Congress have pushed for those beds to be filled. For example, the Senate Appropriation Committee's report on DHS appropriations for 2016 states:

"The Committee [...] notes that ICE maintained an average daily population of 27,234 aliens as of May 11, 2015, while funding was provided for an average daily population of 34,000 adult

detention beds and 3,732 family unit beds. Operating in 2015 with nearly 10,000 beds fewer than the level funded by this Committee begs questions regarding the policies driving ICE's enforcement of immigration laws [...] The Committee's recommended funding level [for 2016] provides resources necessary to maintain 34,000 detention beds, and expects ICE to vigorously enforce all immigration laws under its purview..."⁷⁰

On March 15, 2016, Representatives Theodore Deutch (D-FL) and Bill Foster (D-IL), along with 55 other members of Congress, wrote a letter urging the House DHS Appropriations Subcommittee to eliminate the language that some view as a detention bed mandate. "Removing the mandate language from the appropriation's bill would bring ICE in line with the best practices of law enforcement agencies. These best practices focus on using detention beds based on actual need. The savings from removing the detention bed mandate would permit the Agency to focus limited resources on its many other responsibilities. . ."⁷¹ The Obama Administration's FY 2017 budget request seeks a reduction in the "bed quota" from 34,000 to 30,913 detention beds.⁷² But even a lower bed quota will continue to lead to unnecessary detention, as it encourages many ICE officers to base detention decisions on the availability of beds rather than an individual's circumstances, with alternatives considered before resorting to detention.

Some experts interviewed by Human Rights First noted that decreases in parole grants might be connected to an increase in available detention bed space. This has been the case in the past as well. A few years ago, ICE assistant field office director Wesley J. Lee stated in a deposition that parole decisions are ultimately based on the availability of bed space.⁷³ With unauthorized immigration at an all-time low since 1972 and deportations declining as well (after years of

increases under the Obama Administration), the average daily population during FY 2015 was 28,449, down from 32,805 in FY 2013.⁷⁴

Detention Raises Serious Health Concerns

Mass incarceration is increasingly seen by experts as a major public health challenge facing the United States.⁷⁵ A recent study by the Vera Institute of Justice called the large-scale expansion of incarceration "one of the major contributors to poor health outcomes in communities." Beginning with the conditions of confinement, which often involve overcrowding, violence, sexual victimization, and lower standards of medical care, those subject to imprisonment see a decline in their health. Mass incarceration has also impacted the social and economic fabric of societies, leading to diminished educational opportunities, fractured families, decreased economic mobility, and housing challenges.

Some experts have called immigration detention the "largest mass incarceration movement in U.S. history,"⁷⁶ affecting families and entire communities, which suffer the "ripple effects" of immigration enforcement policies.⁷⁷ For example, a recent study by Human Impact Partners found that an estimated 43,000 U.S. citizen children will experience poorer health outcomes as a result of the threat of detention and deportation of a parent.⁷⁸ Behavioral outcomes, educational achievement, future earnings, and even life expectancy diminish when parents are detained and/or deported.

Asylum seekers may be particularly vulnerable to the negative health consequences of detention due to their past experiences of persecution and trauma. 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 await immigration decisions in the community.⁷⁹ 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.”⁸⁰ Making matters worse, Physicians for Human Rights has found that many asylum seekers have survived physical or sexual violence and trauma, making them particularly vulnerable to re-traumatization when detained.⁸¹ While studies have found that health conditions worsen with prolonged detention, simply decreasing lengths of stay in detention is not the solution. 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.”⁸²

Immigrants who suffer from acute or chronic conditions requiring medical treatment often receive sub-standard care while detained. Earlier this year, the ACLU, Detention Watch Network, and the National Immigrant Justice Center released a report documenting systemic failures in medical care in eight cases of in-custody deaths, finding that the Obama Administration had failed to fulfill its stated commitment to reform the detention system and improve conditions, including essential services like healthcare.⁸³ In May 2016, 61 immigrants detained at the Hudson County Correctional Facility in New Jersey filed a complaint with the DHS Office of Civil Rights and Civil Liberties alleging substandard medical treatment, including one instance in which a man

with a brain tumor was denied medication needed to shrink the tumor.⁸⁴

- In December 2015, Human Rights First interviewed a young asylum-seeking woman at the Mesa Verde Detention Facility in Bakersfield, California, who described a serious gynecological issue, recounting that she had bled profusely from her vagina for ten days. She reported that she requested treatment to stop the bleeding from facility medical and other staff repeatedly but was only given adult diapers. Finally, after ten days she was taken to a hospital. However, no one spoke to her in her native Spanish to explain they were going to give her a pap smear. The woman recounted that as the hospital staff started the procedure, she thought they were raping her and she started to scream. She was terrified and visibly traumatized as she told Human Rights First staff of this ordeal at the hospital. She felt ashamed and embarrassed because there were detention facility staff in the hospital room throughout her treatment. Following the trip to the hospital, she was told in Spanish by detention facility medical staff that she needed to take certain hormones for her gynecological condition. Human Rights First staff spoke with her seven days after she went to the hospital and she was still waiting for her medication.

Detention Impedes Access to Counsel

A national study on access to counsel in immigration proceedings found that while only 14 percent of detained immigrants were represented, 69 percent of those who had been released obtained counsel.⁸⁵ This disparity has a tremendous impact on the likelihood of a successful case outcome. The study found that the odds were 15 times greater that immigrants with representation, as compared to those without, sought relief, and five-and-a-half times greater that they received it. Given the complexity

of immigration law and near impossibility of success when appearing without a lawyer, particularly for asylum claims, immigrants unable to secure legal counsel may abandon viable legal claims to relief, as demonstrated by the story of the family of seven detained at the Eloy Detention Center, described above.

Many detention centers are located in rural areas or small cities, where there are few immigration lawyers or law firms. One of the largest immigration detention facilities in the country, which has capacity to detain 1,940 adults, is in Adelanto, California, a city of about 30,000 located two hours from downtown Los Angeles. The South Texas Detention Facility, which has 1,904 detention beds, is in Pearsall, a city of fewer than ten thousand located one-hour from San Antonio, the nearest metropolitan area.⁸⁶ The national study on access to counsel found that only ten percent of individuals detained in facilities in small cities (with populations less than 50,000) obtain counsel.⁸⁷

Even where local nonprofits have developed robust pro bono legal assistance models to assist individuals in detention, individual facility operators, which in effect set their own rules regulating attorney access to facilities, sometimes impede access to counsel. Some facilities, for example, don't allow attorneys to bring in laptops or access phones. In some cases, the same facility operator will have different rules for the different detention centers that they operate for ICE. For example, Corrections Corporation of America (CCA) runs both the South Texas Family Residential Center in Dilley and the Elizabeth Detention Center in New Jersey. CCA has allowed attorneys to bring laptops with internet access into the Dilley detention center but refuses to allow attorneys to do the same at Elizabeth. Attorneys representing immigrants detained at the Stewart Detention Center in Georgia have reported that CCA, contracted to operate that

facility, consistently erects barriers to attorney-client communications, including by requiring attorneys to speak to their clients through a plexiglass screen using a telephone that often does not work.⁸⁸

Alternatives Are Cost-Effective and Must Be Rights-Respecting

The government has many humane and fiscally responsible tools to use instead of detention. Community-based alternative-to-detention programs provide necessary social and legal support and use case management systems to ensure that asylum seekers appear for court hearings. Various studies and government data show that asylum seekers have a high rate of appearance out of detention, despite myths to the contrary.⁸⁹ 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.

For individuals determined to need additional support to assure their appearance, research shows that immigrants who have been placed in alternative to detention case management programs appear for their court hearings at very high rates. For example, the Vera Institute of Justice piloted a program funded by the former Immigration Naturalization Service, providing services to over five hundred noncitizens, and found that 93 percent of asylum seekers who received intensive supervision services fully complied with all of their hearings.⁹⁰ Last year, Lutheran Immigration and Refugee Service (LIRS) and the U.S. Conference of Catholic Bishops'

Migration and Refugee Services piloted community-based models, showing promising initial results with compliance rates of 96 to 97 percent.⁹¹

DHS and ICE have relied heavily on alternative-to-detention measures that continue to impinge on individual liberty, requesting \$126 million in its FY 2017 budget to monitor 53,000 average daily participants. The largest operating alternative-to-detention program is the ICE-funded Intensive Supervision Appearance Program (ISAP), which is run by BI Incorporated, a wholly owned subsidiary of The Geo Group, Inc., the second largest U.S. company providing correctional, detention, and residential treatment services to government agencies. ISAP includes several forms of supervised release, which often include GPS monitoring through an ankle monitor. Legal service providers have reported that electronic ankle monitors are sometimes imposed automatically by ICE, without effective assessments of the need to impose such an extraordinary and intrusive measure. Such blanket policies violate due process and international human rights law and 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 individualized assessment. Even out-of-detention programs, depending on the level of restriction of liberty, may constitute an unlawful restriction on the right to movement or liberty.⁹²

Nearly half of survey respondents indicated that paroled asylum seekers are given ankle monitors, sometimes in addition to paying a bond. A non-profit legal provider in Florida noted, “We now have this very strange hybrid of receiving parole on the condition of paying a \$15K [sic] bond, 7500K [sic] if you have an immediate relative that is [a lawful resident or U.S. citizen].” The legal provider further noted discrepancies depending on the release location and the apparent variations in

practices among ISAP offices. In one case where an asylum seeker was released to Philadelphia, the ISAP immediately removed the ankle monitor, purportedly since this asylum seeker had paid a \$15,000 bond. However, the legal provider noted that it is common to see released asylum seekers in Miami subject to high bond payments, ankle shackles, home visits, check-ins at the ISAP office, and check-ins at the ICE ERO office combined.

In September 2015, ICE announced it had signed an \$11 million-a-year contract with Geo Care LLC to operate a federal pilot program in Los Angeles, New York City, Miami, Chicago, and the Baltimore-Washington area to serve 300 families released from ICE detention or released at the border. While ICE’s initial plan to pursue a case management-based alternative to detention program was a welcome step, ICE’s decision to award the contract to a subsidiary of the same for-profit company that operates 15 immigration detention centers across the country, as well as correctional facilities, was criticized due to the contractor’s lack of experience working with refugee communities and concerns that the affiliation with detention facilities would limit the ability of the program to build the level of community trust necessary to successfully operate the program.

Alternatives are also much less expensive than detention, with studies showing that the cost of even intensive community-based programs is only 20 percent that of detention.⁹³ Detaining individuals costs the government approximately \$126.46 per day, which means that it costs roughly \$23,000 to detain an individual asylum seeker for six months, and \$35,000 to detain an asylum seeker for nine months. Community-based programs cost much less. An intensive pilot program run by LIRS last year cost \$50 per day per family. For a six-month program, this equals \$9,100.⁹⁴ Even if participants are also enrolled in

the ICE-contracted ISAP program, at a cost of \$8.37 per day for the full-service component, this will bring the program cost up to \$10,623, still far below the cost of detention.⁹⁵ ■

Appendix: Methodology

This report is based on Human Rights First's nearly 30 years of experience providing pro bono representation to and advocacy on behalf of asylum seekers and refugees in the United States. In gathering information for this report from late 2015 to June 2016, Human Rights First conducted the following fact-finding and research related to U.S. detention of asylum seekers and release policies and practices:

- Visits to immigration detention centers in California, Texas, Louisiana, and Pennsylvania.
- Outreach with lawyers from nonprofit organizations and law school clinical programs who work with asylum seekers and immigrants in immigration detention.
- Dissemination of a 27-question survey on several national lists, as well as through targeted outreach to legal organizations that assist asylum seekers in detention, which yielded a total of 50 responses. Ten responses were eliminated as incomplete or unresponsive, leaving 40 responses from attorneys around the country on which to base our analysis. In-depth follow-up communications and interviews were later conducted with attorneys to gain more detailed information related to their survey responses.
- Outreach and communications with over 60 attorneys across the United States from nonprofit organizations and law school clinical programs to collect case examples, many of which are featured in the report. In addition, Human Rights First collected case examples from our Refugee Representation Program, which provides pro bono legal representation to asylum seekers and refugees in the New York / New Jersey area; Washington, D.C.; Houston, Texas; and Los Angeles, California.
- A Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement seeking annual reports on the U.S. detention of asylum seekers, as required by the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA). As of the publication of this report, Human Rights First had not received the documents requested from ICE, despite the fact that HRIFA indicates that these reports shall be made available to the public.
- Review of government data provided by U.S. Citizenship and Immigration Services, as well as Syracuse University's Transactional Records Access Clearinghouse, which regularly reports on immigration system trends based on government data it gathers through FOIA requests.
- Desk research of immigration policies and practices related to detention and release of asylum seekers and other immigrants. ■

Endnotes

- ¹ A report developed during the drafting of the Convention stated, “A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.” Guy S. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection, UNHCR, October 2001, citing Draft Report of the Ad hoc Committee on Statelessness and Related Problems, Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950, Annex I (draft Article 26); Annex II (comments. p. 57).
- ² Convention Relating to the Status of Refugees, arts. 39, 26, opened for signature July 28, 1951, 189 U.N.T.S. 150; International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also Eleanor Acer, Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention, *Georgetown Immigration Law Journal* (Vol. 24, 2010) p. 513; International Detention Coalition, *Legal Framework and Standards Relating to the detention of Refugees, Asylum Seekers and Migrants: A Guide*, (2011).
- ³ Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), ¶ 18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) (citing Human Rights Comm., *Tarlie v. Canada*, Communication No. 1551/2007, at ¶¶ 3.3, 7.6, U.N. Doc. CCPR/C/95/D/1551/2007 (2009)).
- ⁴ INS Memorandum from Gene McNary, INS Commissioner, Parole Project for Asylum Seekers at Ports of Entry and in INS Detention (April 20, 1992); INS Memorandum, Expedited Removal: Additional Policy Guidance (Dec. 30, 1997) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, reproduced in 75 Interpreter Releases 270 (Feb. 23, 1998); INS Memorandum, INS Detention Use Policy, (Oct. 7, 1998) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, reproduced at 75 Interpreter Releases 1505, 1523 (Nov. 2, 1998); ICE Memorandum, Expedited Removal Guidance 3 (Sept. 14, 2004) from Victor X. Cerda, ICE DRO Acting Director; ICE Policy Directive No. 7-1.0, “Parole of Arriving Aliens Found to Have a ‘Credible Fear’” (Nov. 6, 2007); ICE Policy Directive No. 11002.1, “Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture,” (Dec. 8, 2009) [hereinafter Asylum Parole Directive].
- ⁵ U.S. Commission on International Religious Freedom (USCIRF), *Report on Asylum Seekers in Expedited Removal*, (Feb. 2005), Executive Summary: Recommendation Three, p. 8; USCIRF, *Expedited Removal Study Report Card: Two Years On* (2007); USCIRF, *Special Report: Assessing the U.S. Government’s Detention of Asylum Seekers: Further Action Needed to Fully Implement Reforms* (Apr. 2013), pp. 1-2, 10.
- ⁶ USCIRF (2013), *supra* note 5, pp. 1-2, 10.
- ⁷ Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations, July 10, 2014.
- ⁸ Julia Preston, “Detention Center Presented as Deterrent to Border Crossings,” *New York Times* (Dec. 15, 2014) (reporting on the opening of the South Texas Family Residential Center in Dilley, TX: “Standing on a dirt road lined with cabins in a barren compound enclosed by fencing, Mr. Johnson delivered a blunt message to families without legal papers considering a trip to the United States: ‘It will now be more likely that you will be detained and sent back.’”).
- ⁹ Esther Yu-His Lee, “The Hunger Strike You Haven’t Heard About,” *Think Progress* (Oct. 21, 2015).
- ¹⁰ Samantha Michaels, “Here’s Why Hundreds of Immigrants in Detention Have Gone on Hunger Strike,” *Mother Jones* (Dec. 3, 2015) (reporting on the reasons for which more than 1,000 detained asylum seekers went on hunger strike across the country).
- ¹¹ Haitian Refugee Immigration Fairness Act of 1998 (Pub. L. No. 105-277H.R.) § 903.
- ¹² See e.g., Human Rights First, U.S. Detention of Asylum Seekers (2009).
- ¹³ For example, while the FY09-12 reports include data on the number of asylum seekers still detained at the end of the fiscal year alongside the field office release data, this information does not appear in the FY13-14 reports. Moreover, the lack of clarity is particularly evident in the data on length of stay in detention. In 2014, the report footnotes explain that the data represents case dispositions (e.g., released or detained) as of January 31, 2015. However, the length of stay “is calculated from the time of initial book-in to final book-out, or to September 30, 2014, if still detained at year-end.” Taken together, this would mean that an asylum seeker who was detained on August 1, 2014 and released on January 30, 2015 would be categorized as released, but her stay in detention would be recorded in the report as lasting less than 90 days (ending September 30) when it in fact lasted 182 days. Moreover, if the total number of detained asylum seekers for FY 2014 does not include individuals who remained in detention from the previous year, the actual duration of this asylum seeker’s detention would never be reported to Congress.

- ¹⁴ See U.S. Department of Homeland Security, *Detained Asylum Seekers: Fiscal Year 2014 Report to Congress*, September 9, 2015.
- ¹⁵ United Nations High Commissioner for Refugees (UNHCR), “Worldwide displacement hits all-time high as war and persecution increase,” news release, June 18, 2015, *available at* <http://www.unhcr.org/558193896.html>.
- ¹⁶ See U.S. Citizenship and Immigration Services, *Credible Fear Workload Report Summary*, FY 2015.
- ¹⁷ Asylum Parole Directive, *supra* note 4, § 6.2 (providing that “when an arriving alien found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors (as described in paragraph 8.3 of this directive), parole the alien on the basis that his or her continued detention is not in the public interest”).
- ¹⁸ USCIRF (2013), *supra* note 5, pp. 9-10.
- ¹⁹ This information was provided by ICE to the American Civil Liberties Union and the Center for Gender and Refugee Studies in response to a Freedom of Information Act request. The data covered the first nine months of calendar year 2015.
- ²⁰ Survey response, on file with Human Rights First.
- ²¹ Information provided by Anwen Hughes, Deputy Legal Director, Human Rights First July 14, 2016. Case on file with Human Rights First.
- ²² Email correspondence with Julie Pasch, Managing Attorney, South Texas Pro Bono Asylum Representation Project (ProBAR), May-June 2016.
- ²³ Email correspondence with Jessica Shulruff Schneider, Supervising Attorney, Americans for Immigrant Justice, April-June 2016.
- ²⁴ Telephone conversation with Michelle Gonzalez, Detention Attorney, FRINJ, American Friends Service Committee, July 13, 2016, and subsequent email communications.
- ²⁵ Telephone conversation with Niloufar Khonsari, Executive Director, Pangea Legal Services, March 28, 2016, and subsequent email follow-up communications.
- ²⁶ The October 5, 2015 request for data submitted by the American Civil Liberties Union and the Center for Gender and Refugee Studies sought “[m]onthly reports by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the result of those adjudications; and the underlying basis to grant or deny parole” pursuant to paragraph 8.11 of the Parole Directive. It is possible that more than 3,505 arriving asylum seekers determined to have credible fear were in fact interviewed for parole, but whose information was not properly recorded, as required by the directive.
- ²⁷ U.S. Citizenship and Immigration Services, *Credible Fear Workload Report Summary*, FY 2015 Port of Entry (POE) Caseload.
- ²⁸ For example, the FY 2014 DHS report on *Detained Asylum Seekers* indicates that 35,598 out of 42,187 credible fear asylum applicants were detained, or 84 percent of the total. Assuming that detention decisions for arriving asylum seekers are similar to those for asylum seekers who are apprehended between ports of entry and placed in expedited removal, the approximately 16 percent of credible fear applicants who are not detained would not explain why the number of parole decisions reported by ICE in the first nine months of 2015 reflect less than half of port-of-entry credible fear cases.
- ²⁹ Asylum Parole Directive, *supra* note 4, § 6.5 (proving that “DRO shall provide every alien subject to this directive with written notification of the parole decision, including a brief explanation of the reasons for any decision to deny parole. When DRO denies parole under this directive, it should also advise the alien that he or she may request redetermination of this decision based upon changed circumstances or additional evidence relevant to the alien’s identity, security risk, or risk of absconding. DRO shall ensure reasonable access to translation or interpreter services if notification is provided to the alien in a language other than his or her native language and the alien cannot communicate effectively in that language.”).
- ³⁰ Some legal service providers surveyed for this report primarily provide pro se assistance. Therefore, some were not aware as to whether ICE is providing written notification to asylum seekers when parole is denied.
- ³¹ Email correspondence with Claudia Valenzuela, Detention Project Director, National Immigrant Justice Center, May-June 2016.
- ³² *Id.*
- ³³ Email and telephone correspondence with Tamara Shehadeh-Cope, Staff Attorney, Pennsylvania Immigrant Resource Center, June 2016.
- ³⁴ Email and telephone correspondence with Alexandra Goncalves-Pena, Staff Attorney, American Friends Service Committee, May-July 2016.
- ³⁵ General Comment No. 35, *supra* note 3, ¶ 18.
- ³⁶ Case information on file with Human Rights First.
- ³⁷ Email communications with legal service provider, April-July 2016, on file with Human Rights First.

³⁸ Id.

³⁹ ICCPR, *supra* note 2, art. 9(4).

⁴⁰ Lara Domínguez, Adrienne Lee, and Elizabeth Leiserson, Allard K. Lowenstein International Human Rights Clinic at Yale Law School, “U.S. Detention and Removal of Asylum Seekers: an International Human Rights Law Analysis, prepared for and at the request of Human Rights First,” June 20, 2016; *see also* Eleanor Acer (2010), *supra* note 2 (noting that the “basic right to court review of a decision to detain is well-established in human rights law”); *Baban v. Australia*, U.N. Human Rights Comm., U.N. Doc CCPR/C/78/D/1014/2001, ¶ 7.2 (2003), stating that “Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.”); *Torres v. Finland*, No. 291/1988, U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, U.N. Doc. A/44/40 (1990).

⁴¹ Office of the U.N. High Comm’r for Refugees, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR, (2012).

⁴² U.N. Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America, A/HRC/7/12/Add.2, para. 122-23 (March 5, 2008).

⁴³ *See* 8 C.F.R. § 1003.19(h)(2)(I) (2011) (limiting EOIR jurisdiction to consider certain aliens for bond).

⁴⁴ *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015).

⁴⁵ *Lora v. Shanahan*, No. 14-2343, -- F.3d --, 2015 WL 6499951 (2d Cir. Oct. 28, 2015).

⁴⁶ Case information on file with Human Rights First.

⁴⁷ Statement by Secretary Jeh C. Johnson On Family Residential Centers (Jun. 24, 2015) (“Further, Director Saldaña has also presented me with criteria for establishing a family’s bond amount at a level that is reasonable and realistic, taking into account ability to pay, while also encompassing risk of flight and public safety. I have accepted and approved this plan”).

⁴⁸ Case on file with Human Rights First.

⁴⁹ Email correspondence with Denise Gilman, Clinical Professor and Director of Immigration Clinic, University of Texas at Austin, June 3, 2016.

⁵⁰ Telephone conversation with Lauren Gilbert, Professor of Law, St. Thomas University School of Law, June 7, 2016.

⁵¹ Email correspondence with Noah Feldman, Equal Justice Works Americorps Paralegal, and Mohammad Abdollahi, Advocacy Director, Refugee and Immigrant Center for Education and Legal Services (RAICES) on May 25, 2016.

⁵² Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a).

⁵³ *Rivera v. Holder*, 2015 WL 1632739 (W.D. Wa. 2015).

⁵⁴ Declaration of Michael Tan, *Hernandez v. Lynch*, Case No. 5:16-CV-00620 (C. D. Cal., filed on April 22, 2016.)

⁵⁵ Michael Tan, “Immigrants Shouldn’t Be Locked Up for Being Poor,” American Civil Liberties Union, April 6, 2016, *available at* <https://www.aclu.org/blog/speak-freely/immigrants-shouldnt-be-locked-being-poor>.

⁵⁶ Vera Institute of Justice, *Incarceration’s Front Door: The Misuse of Jails in America* (February 2015) (citing New York Criminal Justice Agency, New York Criminal Justice Agency Annual Report (New York: Criminal Justice Agency, 2013), 30).

⁵⁷ *See, e.g.*, Justice Policy Institute, *Bail Fail: Why the U.S. should end the practice of using money for bail* (September 2012).

⁵⁸ Vera Institute of Justice, *New Areas for Bail Reform: A report on the Manhattan Bail Reevaluation Project* (June 1966 - August 1967) (1968); Conference of State Court Administrators, 2012-2013 Policy Paper: Evidence-Based Pretrial Release.

⁵⁹ Case information on file with Human Rights First.

⁶⁰ Email correspondence with Claudia Valenzuela, Detention Project Director, National Immigrant Justice Center, May-July, 2016.

⁶¹ Case information on file with Human Rights First.

⁶² Case information on file with Human Rights First.

⁶³ The DHS Appropriations Act of 2010 mandated that DHS “maintain a level of not less than 33,400 detention beds.” This number was maintained the following year and in 2012, Congress raised the level to 34,000 beds with the Consolidated Appropriations Act of 2012.

⁶⁴ U.S. Department of Homeland Security, *Budget-in-Brief: Fiscal Year 2017*.

⁶⁵ This calculation was based on a nationwide average cost of \$126 per day.

- ⁶⁶ According to ICE data release pursuant to a FOIA request in 2016, the average daily cost at the Elizabeth Contract Detention facility is \$130.81 for the first 285 individuals detained. If the facility surpasses 285 individuals, the cost per individual decreases, thereby providing an incentive to keep the facility at or near full capacity.
- ⁶⁷ According to ICE data, the daily cost of detention at the Delaney Hall Detention Facility is \$108. Cost was estimated as \$108 per day x 187 days = \$20,196.
- ⁶⁸ According to ICE data, the daily cost of detention at the Delaney Hall Detention Facility is \$108. Cost was estimated as \$108 per day x 174 days = \$18,792.
- ⁶⁹ According to ICE data, the daily cost of detention at Port Isabel \$125.69 for the first 800 individuals detained. (The cost appears to be \$0 per person for each person detained after the population has reached 800, up to a maximum capacity of 1,175.) Cost was estimated as \$125.69 per day x 365 days = \$45,876.85 for Mila's case.
- ⁷⁰ Senate Report, Department of Homeland Security Appropriations Bill, 2016, Report 114-68, June 18, 2015.
- ⁷¹ National Immigrant Justice Center, Bed Quota Letter (Mar. 16, 2016), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/FY17AppropsHouseQuotaLetter2016_03_15_0.pdf.
- ⁷² Specifically, the budget request sought funding to maintain 29,953 adult beds at an average rate of \$126.46 per day and 960 family beds at an average rate of \$161.36 per day. See DHS Budget-in-Brief 2017, p. 38.
- ⁷³ Deposition of Wesley J. Lee, January 12, 2012, in Petitioners-Appellees/Cross Appellants' Public Filing of Documents Previously Filed Under Seal, *Rodriguez v. Robbins*, Case No. CV 07-3239-TJH (RNB) (9th Cir., March 3, 2015).
- ⁷⁴ DHS Budget-in-Brief FY 2017; U.S. Government Accountability Office, Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards, October 2014.
- ⁷⁵ New York Times Editorial Board, "Mass Imprisonment and Public Health," Nov. 26, 2014.
- ⁷⁶ Anita Sinha, "Slavery by Another Name: 'Voluntary' Immigrant Detainee Labor and the Thirteenth Amendment," *Stanford Journal of Civil Rights and Civil Liberties*, Vol. XI, No. 1, 2015.
- ⁷⁷ See Urban Institute, *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, October 2003, revised June 2005.
- ⁷⁸ Human Impact Partners. June 2013. *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families*. Oakland, CA.
- ⁷⁹ See Zachary Steel, Belinda J. Liddell, Catherine R. Bateman-Steel, Anthony B. Zwi, "Global Protection and the Health Impact of Migration Interception," *PLOS Medicine* 8(6) (2011); Tania Storm and Marianne Engberg, "The impact of immigration detention on the mental health of torture survivors is poorly documented—a systematic review," *Dan. Med. J* 60(11): A4728 (2013).
- ⁸⁰ Zachary Steel, Belinda J. Liddell, Catherine R. Bateman-Steel, Anthony B. Zwi, "Global Protection and the Health Impact of Migration Interception," *PLOS Medicine* 8(6) (2011).
- ⁸¹ Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, "From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers" (Jun. 2003); Tahirih Justice Center, "Righting the Wrong: Why Detention of Asylum-Seeking Mothers and Children in America Must End Now" (Oct. 2015).
- ⁸² Human Rights First, "Family Detention: Still Happening, Still Damaging" (Oct. 2015).
- ⁸³ American Civil Liberties Union, Detention Watch Network, and the National Immigrant Justice Center, "Fatal Neglect: How ICE Ignores Deaths in Detention" (Feb. 2016).
- ⁸⁴ Nina Bernstein, "Health Care at New Jersey Immigrant Jail Is Substandard, Watchdog Groups Say," *New York Times* (May 11, 2016).
- ⁸⁵ Ingrid Eagly and Steven Shafer, A National Study of Access to Counsel in Immigration Court, *University of Penn L R* (2015) Vol 164 No 1.
- ⁸⁶ DHS, Office of Detention Oversight Compliance Inspection, South Texas Detention Complex Pearsall, Texas (Apr. 21-23, 2015).
- ⁸⁷ Eagly and Shafer, *supra* note 85, p. 41.
- ⁸⁸ Rhonda Brownstein, "The Corrections Corporation of America is Blocking Immigrants from Seeing Their Lawyers at a Georgia Detention Center," *Huffington Post Blog*, July 5, 2016.
- ⁸⁹ Human Rights First, Factsheet (July 2015), *available at* <http://www.humanrightsfirst.org/sites/default/files/MythvFact-Immigrant-Families.pdf>; American Immigration Council, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers* (July 2015), *available at* <http://immigrationpolicy.org/special-reports/humane-approach-can-work-effectiveness-alternatives-detention-asylum-seekers>

- ⁹⁰ Megan Golden, Oren Root and David Mizner, *The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision*, Vera Institute of Justice (1998).
- ⁹¹ Lutheran Immigration and Refugee Service, *Community Support Initiative Overview*, April 2015; telephone conversation with Nathalie Lummert, former Director, Special Programs, Migration and Refugee Services, United States Conference of Catholic Bishops, June 5, 2015.
- ⁹² Ophelia Field, *Alternatives to Detention of Asylum Seekers and Refugees*, U.N. High Commissioner for Refugees, April 2006 (noting that unconditional release should be the starting point).
- ⁹³ Oren Root, "The Appearance Assistance Program: An Alternative to Detention for Noncitizens in U.S. Immigration Removal Proceedings," Vera Institute of Justice, April 30, 2000.
- ⁹⁴ Lutheran Immigrant and Refugee Services, *Family Placement Alternatives: Promoting Compliance with Compassion and Stability through Case Management Services* (2016).
- ⁹⁵ DHS, *U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised)* (Feb. 4, 2015), p. 4.



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