

# U.S. Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis

prepared for and at the request of Human Rights First

Lara Domínguez  
Adrienne Lee  
Elizabeth Leiserson

Supervised by Hope Metcalf and James Silk

Allard K. Lowenstein International Human Rights Clinic  
Yale Law School

June 20, 2016

## Table of Contents

Introduction .....	1
I. U.S. Detention of Families and Asylum Seekers: The Statutory Background .....	6
II. International Law Prohibits States from Criminally Penalizing Migration and Strictly Limits Immigration Detention .....	11
A. Detention May Be Used Only in Limited Contexts, Based on Individualized Assessment, and as a Last Resort .....	16
B. States May Not Detain Asylum Seekers to Penalize Entry or to Deter Entry by Others.....	18
C. States Must Use Alternatives to Detention, Where Possible .....	20
D. All Detainees Must Have Access to Prompt Judicial Review .....	22
E. Punitive Conditions of Immigration Detention Are Impermissible .....	22
III. International Law Prohibits Administrative Detention of Migrant Children.....	23
A. The “Best Interests of the Child” Standard Prohibits States from Placing Children and Their Families in Immigration Detention .....	25
B. Children Must Not Be Separated From Their Parents and Should Be Placed Only in Open-Accommodation Facilities .....	29
IV. U.S. Summary Removal Proceedings Are Incompatible with the International Legal Presumption Against Immigration Detention and the Principle of <i>Non-Refoulement</i> .....	31
A. U.S. Summary Removal Procedures Violate the International Presumption Against Immigration Detention.....	33
B. U.S. Summary Removal Proceedings Create an Unacceptably High Risk That Individuals with Valid Asylum Claims Will Be Returned to Their Country of Persecution.....	35
1. CBP Process Carries High Risk of Erroneous Deportation .....	36
2. Inconsistent and Opaque Summary Removal Proceedings Carry High Risk of Erroneous Deportation .....	38
Conclusion .....	41
Appendix: List of Abbreviations.....	43

## INTRODUCTION

This paper, requested by and prepared for Human Rights First, provides a legal analysis of the treatment of families and other asylum seekers apprehended by the U.S. Department of Homeland Security (DHS) at the U.S.-Mexico border. In particular, it examines the obligations that the United States has toward these asylum seekers under international human rights and refugee law.

In recent years, violence of “epidemic levels” has swept across the Northern Triangle of Central America (Honduras, El Salvador, and Guatemala) and parts of Mexico, driving many people to flee these countries and seek protection in the United States and other countries in the region.<sup>1</sup> The number of people apprehended at the southwestern border—largely women and children fleeing for their lives—increased sharply in 2014.<sup>2</sup> The U.N. High Commissioner for Refugees (UNHCR)<sup>3</sup> has recognized that these asylum seekers are fleeing some of “the most dangerous places on earth” and “present a clear need for international protection.”<sup>4</sup> Even U.S. immigration authorities have concluded that eighty-two percent of the women arriving at the border from Northern Triangle countries and Mexico in fiscal year 2015 had potential claims for protection.<sup>5</sup>

This paper details the U.S. obligation to treat these and other asylum seekers in ways that comport with international human rights and refugee protection commitments. The United States helped to draft the 1951 Convention Relating to the Status of Refugees (Refugee Convention) in

---

<sup>1</sup> *Women on the Run: First Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico: A Study Conducted by the United Nations High Commissioner for Refugees*, UNHCR 2 (2015) [hereinafter *Women on the Run*], <http://www.unhcrwashington.org/sites/default/files/Women%20on%20the%20Run%20Executive%20Summary%20ENG%20for%20Web%20Nov%202015.pdf>.

<sup>2</sup> *See id.*; see also *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection: A Study Conducted by the United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean*, UNHCR 4 (2015) [hereinafter *Children on the Run*], [http://www.unhcrwashington.org/sites/default/files/UAC\\_UNHCR\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/UAC_UNHCR_Children%20on%20the%20Run_Full%20Report.pdf) (noting that the rise in numbers of unaccompanied children arriving in the United States began as early as 2011).

<sup>3</sup> The UNHCR is the international body charged with overseeing and coordinating the implementation of the Refugee Convention. Although the UNHCR does not have the treaty-based advisory power of human rights treaty bodies—for example, the Human Rights Committee, the mandate of which includes interpreting the International Covenant on Civil and Political Rights—its interpretations of the requirements of the Convention Relating to the Status of Refugees are nonetheless generally considered authoritative. See James C. Hathaway et al., *Supervising the Refugee Convention*, 26 J. REFUGEE STUD. 323, 324 (2013) (“[I]t is clear that UNHCR is not simply entitled to facilitate a process by which the understanding of and respect for the obligations of state parties are furthered, but may indeed be expected to do so.”).

<sup>4</sup> *Women on the Run*, *supra* note 1, at 2 (“The region has come under increasing control by sophisticated, organized criminal armed groups, often with transnational reach, driving up rates of murder, gender-based violence, and other forms of serious harm. According to data from the UN Office on Drugs and Crime, Honduras ranks first, El Salvador fifth, and Guatemala sixth for rates of homicide globally. Furthermore, El Salvador, Guatemala, and Honduras rank first, third, and seventh, respectively for rates of female homicides globally. In large parts of the territory, the violence has surpassed governments’ abilities to protect victims and provide redress. Certain parts of Mexico face similar challenges.” (emphasis omitted)).

<sup>5</sup> In FY 2015, U.S. immigration officials determined that 13,116 of the 16,077 women arriving from El Salvador, Guatemala, Honduras, and Mexico had a significant possibility of establishing eligibility for asylum or protection under the Convention against Torture. *Women on the Run*, *supra* note 1, at 12, n.2.

the wake of World War II and has committed to comply with the provisions of the Refugee Convention.<sup>6</sup> The United States is also a party to the International Convention on Civil and Political Rights (ICCPR), which places strict limits on acceptable uses of detention.

On June 20, 2014, the Obama Administration announced its response to the increase in asylum requests at the southern border, including its decision to send families with children to immigration detention facilities.<sup>7</sup> DHS labeled the asylum seekers a national security threat.<sup>8</sup> In doing so, the agency resurrected a 2003 advisory opinion, authored by former Attorney General John Ashcroft, that justified immigration detention on the grounds that it serves to deter future asylum seekers from coming to the United States.<sup>9</sup> DHS expanded detention capacity and, for many families, refused to consider them for release on bond or other conditions, even when they demonstrated a credible fear of persecution and met other release criteria.<sup>10</sup> The U.S. Secretary of Homeland Security, Jeh Johnson, called DHS detention policies “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”<sup>11</sup> DHS implemented the detention policies as a “message” to “those who try to illegally cross our borders: you will be sent back home.”<sup>12</sup> DHS placed more than 4,800 women and children in family detention facilities between June 2014 and April 2015.<sup>13</sup> Many of those families spent several months in detention.<sup>14</sup>

---

<sup>6</sup> Although the United States has not ratified the Refugee Convention itself, it has ratified the 1967 Protocol Relating to the Status of Refugees. Article I of the 1967 Protocol declares, “The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the [1951 Refugee] Convention . . .” Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

<sup>7</sup> See Office of the Press Sec’y, *Fact Sheet: Unaccompanied Children from Central America*, WHITE HOUSE (June 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-unaccompanied-children-central-america> (announcing, under the heading “Increased Enforcement,” that the Department of Justice and DHS “are surging government enforcement resources to increase our capacity to detain individuals and adults who bring their children with them”); Office of the Press Sec’y, *Press Call on Efforts to Enhance Enforcement on the Southwest Border*, WHITE HOUSE (June 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/20/press-call-efforts-enhance-enforcement-southwest-border> (describing the same surge in resources and adding that DHS “is actively working to secure additional space to detain adults with children apprehended crossing the border” and noting that “[w]ith very few exceptions, all individuals apprehended, including adults with children, are placed in removal proceedings”).

<sup>8</sup> Stephen W. Manning, *Ending Artesia: The Artesia Report*, INNOVATION LAW LAB (Jan. 20, 2014), <https://innovationlawlab.org/the-artesia-report>.

<sup>9</sup> See *In re D-J-*, 23 I. & N. Dec. 572, 580-81 (A.G. 2003). According to then Attorney General Ashcroft, deterring future migration is a legitimate national security interest that justifies denying release on bond to a class of persons without individualized review. *Id.* at 579; see also Complaint at 2, *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (No. 1:15-cv-00011); Manning, *supra* note 8.

<sup>10</sup> Complaint, *supra* note 9, at 2.

<sup>11</sup> *Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations*, DHS (June 10, 2014), <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.

<sup>12</sup> *Id.*; see also Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES, Dec. 15, 2014, <http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>.

<sup>13</sup> *The Detention of Immigrant Families*, IMMIGRANT JUST. (June 2015), [https://immigrantjustice.org/sites/immigrantjustice.org/files/FamilyDetentionBackgrounder\\_June2015.pdf](https://immigrantjustice.org/sites/immigrantjustice.org/files/FamilyDetentionBackgrounder_June2015.pdf)

<sup>14</sup> From June 20, 2014, until May 2015, when ICE announced it was changing its detention policies (see *infra* notes 53-56 and accompanying text), ICE refused to set bonds for women who had passed their credible fear screenings or set bonds they could not afford (\$15,000-\$30,000), thus barring these women from seeking release. As a result,

In the wake of public outcry and court rulings,<sup>15</sup> DHS has formally abandoned its use of deterrence as a consideration in custody and bond decisions and has called for bond amounts to be set at a level that takes into account a family's ability to pay.<sup>16</sup> Nevertheless, the agency continues to send many families to the same immigration detention centers opened and used as part of its deterrence strategy<sup>17</sup> and to set bond amounts higher than many families can afford to pay.<sup>18</sup> Many reports have documented the ways in which the continued detention of families is harmful to women and children and inconsistent with U.S. ideals and human rights commitments.<sup>19</sup>

These families are not the only asylum seekers detained by the United States. Asylum seekers who request protection at U.S. airports, at border entry points, and in border areas are regularly subjected to expedited removal and sent to jails and detention facilities across the country.<sup>20</sup> The majority of these facilities have conditions that are similar to those used in prisons and correctional facilities in the United States.<sup>21</sup> Human Rights First has reported that arriving asylum seekers are not given access to prompt immigration court custody hearings, that they are often denied parole and bond, even when they meet the appropriate criteria, and that, when bond is offered, it is often higher than they can afford to pay.<sup>22</sup>

This paper addresses how current and recent detention policies and practices applied to asylum seekers, including in the context of summary removal proceedings, violate U.S. obligations under international law. Much of this study focuses on the circumstances of families who are sent to immigration detention facilities, a practice that has constituted one of the U.S. immigration regime's most serious violations of international law. However, U.S. detention

---

many women remained in detention for months, with several families in detention for six to eleven months before they were released. *See U.S. Detention of Families Seeking Asylum: A One-Year Update*, HUM. RTS. FIRST 2 (2015) [hereinafter *A One-Year Update*], <https://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf>.

<sup>15</sup> *See infra* notes 47-53 and accompanying text.

<sup>16</sup> *Statement by Secretary Jeh C. Johnson on Family Residential Centers*, U.S. Dep't Homeland Security (June 24, 2015), <https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>.

<sup>17</sup> Compare Preston, *supra* note 12, with *On International Women's Day, Renewed Calls for End to Family Detention*, HUM. RTS. FIRST (Mar. 8, 2016), <http://www.humanrightsfirst.org/press-release/international-women-s-day-renewed-calls-end-family-detention>.

<sup>18</sup> Although Secretary Jeh Johnson announced reforms that would establish "bond amount[s] at a level that is reasonable and realistic, taking into account ability to pay," *supra* note 16, ICE officers in Texas have, in practice, "either ignor[ed] the directive or appl[ied] it so arbitrarily that there might as well be no policy." Joseph Sorrentino, *Asylum Under Assault*, 100REPORTERS (Oct. 21, 2015), <https://100r.org/2015/10/18654/>. Although ICE officials refer to a "Bond Determination Checksheet" to help determine the amount of bond, "nowhere on that sheet is anything about a person's ability to pay." *Id.*

<sup>19</sup> *See, e.g., Children on the Run, supra* note 2; *Family Detention: Still Happening, Still Damaging*, HUM. RTS. FIRST (Oct. 2015) [hereinafter *Still Happening, Still Damaging*], <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>; *Locking Up Family Values, Again*, LUTHERAN IMMIGR. & REFUGEE SERV. & WOMEN'S REFUGEE COMMISSION 22 (2014) [hereinafter *Locking Up Family Values, Again*], [http://lirs.org/wp-content/uploads/2014/11/LIRSWRC\\_LockingUpFamilyValuesAgain\\_Report\\_141114.pdf](http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUpFamilyValuesAgain_Report_141114.pdf); *Women on the Run, supra* note 1.

<sup>20</sup> *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, HUM. RTS. FIRST (2009) [hereinafter *Seeking Protection*], <https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

<sup>21</sup> *Id.* at 17-31.

<sup>22</sup> *Id.* at 63-68.

policies and practices affecting asylum seekers are inconsistent with international legal standards in a number of significant ways. These international legal standards also call into question the lawfulness of summary removal procedures that have become pervasive in recent times.<sup>23</sup>

Part I of this paper outlines the statutory background of detention policies in the United States, focusing on family detention and giving a brief overview of how the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) affects noncitizens whom DHS encounters “at the border.” This Part also provides a snapshot of U.S. immigration procedures and policies applied to asylum seekers and explains how family immigration detention has evolved in the wake of recent orders issued by federal courts.

Part II analyzes the international legal principles that constrain states’ use of immigration detention. Under international law, the rights to liberty and security of the person are fundamental rights, reflected in the international prohibition against arbitrary detention and supported by the right to freedom of movement.<sup>24</sup> Immigration detention must be the exception to the rule and the state’s last resort, and a state generally may not hold asylum seekers in detention. Under those principles, immigration infractions are subject to administrative rather than criminal sanction.<sup>25</sup> States may not make unauthorized entry into their territory a crime. Thus, international law requires states to treat immigrants with a presumption of liberty—the right of the migrant to remain at liberty while his or her immigration proceedings are pending—and to justify each measure taken to restrict liberty, no matter how severe. Furthermore, a state may neither implement detention policies to deter future entry of refugees nor penalize asylum seekers for their unauthorized presence.<sup>26</sup> To ensure that any detention is not impermissibly arbitrary, a state must justify confinement by demonstrating that less restrictive alternative measures are not available.<sup>27</sup> When detained, migrants and asylum seekers must have prompt access to an independent court to review the need for their detention.<sup>28</sup> If detention is found to be

---

<sup>23</sup> In 2013, the United States deported 438,421 people. In 363,279 of these cases (approximately eighty-three percent), “the individuals did not have a hearing, never saw an immigration judge, and were deported through cursory administrative processes where the same presiding immigration officer acted as prosecutor, judge, and jailor.” *American Exile: Rapid Deportations that Bypass the Courtroom*, ACLU 2 (2014) [hereinafter *American Exile*], [https://www.aclu.org/sites/default/files/field\\_document/120214-expeditedremoval\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/120214-expeditedremoval_0.pdf) (citing John F. Simanski, Office of Immigration Statistics, *Annual Report on Immigration Enforcement Actions: 2013*, U.S. DEP’T HOMELAND SECURITY (2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf)); see also Sara Campos & Joan Friedland, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, AM. IMMIGR. COUNCIL 9-11 (2014), [http://www.immigrationpolicy.org/sites/default/files/docs/asylum\\_and\\_credible\\_fear\\_claims\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf); U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 1 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS AND RECOMMENDATIONS (2005) [hereinafter USCIRF REPORT, vol. 1]. The USCIRF report was published in two volumes; the title of the second volume differs slightly from the first volume’s title. See U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS AND RECOMMENDATIONS: EXPERT REPORTS (2005) [hereinafter USCIRF REPORT, vol. 2]. Both reports are available at <http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>.

<sup>24</sup> *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR, at Introduction, ¶ 1 (2012) [hereinafter UNHCR Detention Guidelines], <http://www.unhcr.org/505b10ee9.html>.

<sup>25</sup> See *infra* note 90.

<sup>26</sup> See *infra* Section II.B.

<sup>27</sup> See *infra* Section II.C.

<sup>28</sup> See *infra* Section II.D.

justified, the conditions must not be punitive. International law makes clear that crossing international borders without proper paperwork is not a crime, so subjecting an asylum seeker to punitive detention conditions is prohibited.<sup>29</sup>

Part III analyzes international legal prohibitions on immigration detention of children and their families. The placement of children in immigration detention is incompatible with the “best interests of the child” standard found in the Convention on the Rights of the Child (CRC) and other international instruments. In giving content to this standard, international courts and treaty bodies have concluded that immigration policies that result in the detention of children and the separation of families violate this standard.<sup>30</sup> To the extent that a state provisionally detains children at all, it should only do so in open-accommodation facilities and not prison-like holding centers.

Part IV examines the architecture of U.S. summary removal proceedings and their impact on asylum seekers. It concludes that many aspects of these proceedings are incompatible with the international legal presumption against immigration detention and the principle of *non-refoulement*. First, for noncitizens arriving at the border, U.S. summary removal proceedings effectively require detention after only cursory review by a Customs and Border Protection (CBP) officer.<sup>31</sup> A brief interview with security personnel, without the benefit of counsel, adequate translation services, or even a basic understanding of the stakes, does not meet the requirement for individualized and impartial judicial hearings that the Refugee Convention and ICCPR set out.<sup>32</sup> Second, summary removal procedures put the United States at risk of violating the principle of *non-refoulement*, which forbids states from forcibly repatriating individuals who have legitimate claims for international protection. To satisfy its obligations under the Refugee Convention, the United States must provide arriving noncitizens a genuine opportunity to pursue asylum claims prior to their removal. Detention decisions, operating in concert with processing procedures at the border that “invite, and guarantee, error,”<sup>33</sup> create an impermissibly high risk that the United States will remove people that international law requires it to protect.<sup>34</sup>

As this paper demonstrates, the international legal principles that make U.S. family detention impermissible also place constraints on many other aspects of U.S. detention and processing policies toward asylum seekers. The Refugee Convention and the ICCPR impose overlapping minimum standards that protect immigrants and asylum seekers; the conventions prohibit states from penalizing illegal entry, impose procedural safeguards, and prohibit arbitrary

---

<sup>29</sup> See *infra* Section II.E.

<sup>30</sup> Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 (Aug. 19, 2014) [hereinafter Rights and Guarantees of Children]; see also Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17 (Aug. 28, 2002) [hereinafter Juridical Condition and Human Rights of the Child].

<sup>31</sup> See *infra* notes 35-43 and accompanying text.

<sup>32</sup> This is all the more concerning given that there are reports that CBP officers dissuade, intimidate, misinform and berate many undocumented immigrants who cross the U.S. border to seek asylum. Campos & Friedland, *supra* note 23, at 9-11; see also *infra* notes 221, 256.

<sup>33</sup> *American Exile*, *supra* note 23, at 3.

<sup>34</sup> USCIRF REPORT, vol. 2, *supra* note 23, at 34 (“DHS procedures designed to identify and refer asylum seekers subject to Expedited Removal are not always followed by immigration inspectors. Since these procedures are not always followed, *it is impossible not to conclude that some proportion of individuals with a genuine asylum claim are turned away.*” This violates U.S. obligations under the Refugee Convention and the principle of *non-refoulement*) (emphasis added).

detention or deportation. These core principles require states to treat all people with dignity, to respect the right to liberty and security of the person, and to provide refuge to those fleeing persecution.

## I. U.S. DETENTION OF FAMILIES AND ASYLUM SEEKERS: THE STATUTORY BACKGROUND

In 1996, Congress created expedited removal, a summary removal process that allowed immigration officers, rather than immigration judges, to order the deportation of individuals arriving at formal ports of entry without documents or with invalid documents. Although the use of expedited removal was initially restricted to airports and other ports of entry, it was subsequently expanded; new federal regulations authorized its use within 100 miles of the border for those who cannot prove they have been in the United States for at least fourteen days prior to the encounter.<sup>35</sup> Once an immigration enforcement officer decides that an individual has violated section 212(a)(6)(c)<sup>36</sup> or section 212(a)(7)<sup>37</sup> of the Immigration and Nationality Act (INA), the officer can order that person removed.<sup>38</sup> Under expedited removal, “the officer shall order the alien removed from the United States without further hearing or review *unless* the alien indicated either an intention to apply for asylum . . . or a fear of persecution.”<sup>39</sup> Removal takes place without a hearing before an immigration judge. In the words of one advocate,

If two enforcement officers agree that a removal order should be entered, then the noncitizen is deported. No judge. No court. An expedited removal can happen in a couple of hours. It can happen in a matter of minutes. It is arrest, conviction and sentence all at once and all by the same officers.<sup>40</sup>

CBP can deny entry to a noncitizen who does not express a fear of return.<sup>41</sup> If, however, a noncitizen expresses such a fear and CBP places her in expedited removal proceedings, that noncitizen “shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”<sup>42</sup> CBP transports immigrants whom they have decided to detain to holding facilities that Spanish-speaking asylum seekers call “*hieleras*,” or

---

<sup>35</sup> 8 C.F.R. § 287.1 (2015). This expansion is not required by statute.

<sup>36</sup> INA § 212(a)(6)(c) (noncitizens who have made material misrepresentations in order to secure admission into the United States).

<sup>37</sup> INA § 212(a)(7) (noncitizens arriving at the border without proper documentation).

<sup>38</sup> See *Frequently Asked Questions: Asylum Seekers and the Expedited Removal Process*, HUM. RTS. FIRST (Nov. 2015), <http://www.humanrightsfirst.org/sites/default/files/FAQ-asylum-seekers-and-the-expedited-removal-process.pdf>.

<sup>39</sup> INA § 235(b)(1)(A)(i) (emphasis added).

<sup>40</sup> Manning, *supra* note 8; see also *American Exile*, *supra* note 23, at 2 (noting that in 2013, approximately eighty-three percent of people deported “did not have a hearing, never saw an immigration judge, and were deported through cursory administrative processes where the same presiding immigration officer acted as the prosecutor, judge, and jailor”).

<sup>41</sup> See INA § 235(b); see also INA § 235(a)(4) (allowing noncitizens “to withdraw the application for admission and depart immediately from the United States”).

<sup>42</sup> INA § 235(b)(1)(B)(iii)(IV).

“freezers,” because of their uncomfortably low temperatures.<sup>43</sup> When enforcement officers decide not to summarily deport individuals and refer them instead to the fear-determination process, DHS transports these asylum seekers to more permanent immigration detention facilities.

The United States holds adult asylum seekers in immigration units within jails and in jail-like facilities around the country. Conditions are similar to prisons: many detained asylum seekers must wear uniforms, and movement, visitation, and activities are strictly limited.<sup>44</sup> Although families in immigration detention are not required to wear prison uniforms and some of the facilities have play areas and games for the children, these facilities are unmistakably detention facilities. In addition, ICE has separated families. ICE typically sends women and children to one of three currently operating family detention centers, located in Dilley, Texas; Karnes, Texas; and Berks County, Pennsylvania. The agency sends men (including husbands and partners) to facilities in other areas of the country, often very far away.<sup>45</sup> Human Rights First has reported on a range of flaws in the policies DHS initiated in 2014, including lengthy detention of families, detention based on deterrence, and unnecessary detention of children where less restrictive alternatives are available.<sup>46</sup>

In 2015, in the wake of a pair of federal court decisions and extensive public criticism, DHS modified its approach to family detention procedures. In February 2015, a federal district court in Washington, D.C., issued a preliminary injunction barring DHS from attempting to deter future immigration to the United States by detaining families who have a credible fear of persecution.<sup>47</sup> This ruling called into serious question the government’s reliance on the advisory opinion of former Attorney General John Ashcroft in *Matter of D-J*.<sup>48</sup> As Judge Boasberg noted, “[i]ncantation of the magic words ‘national security’ without further substantiation is simply not enough to justify significant deprivations of liberty.”<sup>49</sup> Five months later, Judge Gee, a federal district judge in California, ruled that family detention policies violated the terms of the 1997 *Flores* settlement agreement<sup>50</sup> that had established a general policy favoring release “without

---

<sup>43</sup> Advocates have documented a number of serious human rights violations, beyond uncomfortable temperatures, at these holding facilities. See *The “Hieleras”: A Report on Human & Civil Rights Abuses Committed by U.S. Customs and Border Protection Agency*, AMERICANS FOR IMMIGRANT JUST. (2013), [http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/391/attachments/original/1398795271/The\\_Hieleras\\_A\\_Report.pdf](http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/391/attachments/original/1398795271/The_Hieleras_A_Report.pdf).

<sup>44</sup> *Seeking Protection*, *supra* note 20, at 1-4.

<sup>45</sup> According to Human Rights First, as of April 2016, some husbands and fathers were detained with their families in the Berks County detention center.

<sup>46</sup> See, e.g., *Still Happening, Still Damaging*, *supra* note 19; *A One-Year Update*, *supra* note 14, at 10-12, 14.

<sup>47</sup> *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015).

<sup>48</sup> 23 I. & N. Dec. 572 (A.G. 2003). In *R.I.L.-R.*, the court flatly rejected the U.S. government’s deterrence argument that “one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration.” *R.I.L.-R.*, 80 F. Supp. 3d at 188-89. The court concluded that such an argument is “out of line with analogous Supreme Court decisions” that ruled, in the context of “civil commitment more broadly,” that “such ‘general deterrence’ justifications [are] impermissible.” *Id.* at 189. The court found that, even if, for the sake of argument, deterrence was a legitimate rationale, “a general deterrence rationale seems less applicable where . . . neither those being detained nor those being deterred are certain wrongdoers, but rather individuals who may have legitimate claims to asylum in this country.” *Id.*

<sup>49</sup> *R.I.L.-R.*, 80 F. Supp. 3d at 190.

<sup>50</sup> See *Flores v. Lynch*, No. CV 85-04544 DMG (EX), 2015 WL 9915880, at \*1 (C.D. Cal. Aug. 21, 2015) (affirming the Court’s July 24, 2015, order enforcing the terms of the 1997 Flores Settlement Agreement).

unnecessary delay.”<sup>51</sup> The *Flores* settlement agreement mandated that children may be held only in safe, sanitary facilities that are licensed to care for children.<sup>52</sup> The government agreed to comply with both orders but has appealed the ruling.<sup>53</sup>

As a result of these two federal rulings, ICE “determined that it [would] discontinue invoking general deterrence as a factor in custody determinations in all cases involving families.”<sup>54</sup> At the same time, ICE “implement[ed] a review process for any families detained beyond 90 days.”<sup>55</sup> ICE also began setting lower bond amounts and offering some women in family detention the option to be released subject to electronic monitoring.<sup>56</sup>

However, DHS has continued placing many asylum seekers in expedited removal and sending them to detention facilities. The Department of Justice (DOJ) has left Attorney General Ashcroft’s advisory opinion in place, which means that a future administration could revert to deterrence-oriented detention policies.<sup>57</sup> Moreover, the expedited removal procedures by which DHS continues to deport arriving immigrants and individuals subjected to expedited removal outside of ports of entry are inconsistent with international law both because they preempt an individualized assessment of the decision to detain asylum seekers and because they deprive them of a meaningful opportunity to pursue their claims. Due to DHS’s decision to utilize IIRIRA’s expedited removal provisions in border areas, more than two-thirds of all deportations nationwide in 2013 took place through summary removal proceedings.<sup>58</sup>

The summary removal process involves several agencies within DHS and DOJ. Each stage of the process relies on information collected from previous stages, although there are serious impediments to inter-agency communication and information sharing, even within DHS.<sup>59</sup> The summary removal process can be broken down into four stages and begins with an immigrant’s first encounter with CBP agents at the border or a port of entry:

- (1) **The CBP interview.** If a CBP officer invokes expedited removal, CBP may order the individual removed unless he or she expresses a desire to apply for asylum or a fear of

---

<sup>51</sup> Stipulated Settlement Agreement at 9-10, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), [https://www.aclu.org/files/pdfs/immigrants/flores\\_v\\_meese\\_agreement.pdf](https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf).

<sup>52</sup> *Id.*

<sup>53</sup> See *ICE Announces Enhanced Oversight for Family Residential Centers*, USCIS (May 13, 2015), <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers> (“ICE has complied with [the February 2015] injunction, but has moved for reconsideration of the Court’s ruling. Notwithstanding that, ICE has presently determined that it will discontinue invoking general deterrence as a factor in custody determinations in all cases involving families. This would affect not only families covered by the injunction, but also families from non-Central American countries and families who have established either a credible fear or reasonable fear of removal.”); Josh Gerstein, *Feds Appeal Ruling Limiting Detention of Immigrant Kids*, POLITICO (Sept. 18, 2015), <http://www.politico.com/blogs/under-the-radar/2015/09/feds-appeal-ruling-limiting-detention-of-immigrant-kids-21384>.

<sup>54</sup> *ICE Announces Enhanced Oversight for Family Residential Centers*, *supra* note 53.

<sup>55</sup> *Id.*

<sup>56</sup> See Sorrentino, *supra* note 18.

<sup>57</sup> *Matter of D-J-*, 23 I. & N. Dec. 572 (A.G. 2003).

<sup>58</sup> Immigration Policy Center, *Removal Without Recourse: The Growth of Summary Deportations from the United States*, AM. IMMIGR. COUNCIL 1 (2014) [hereinafter *Removal Without Recourse*], [http://www.immigrationpolicy.org/sites/default/files/docs/expedited\\_removal\\_fact\\_sheet\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/expedited_removal_fact_sheet_final.pdf).

<sup>59</sup> USCIRF REPORT, vol. 1, *supra* note 23, at 4-5.

persecution in her or his country of origin.<sup>60</sup> If the individual expresses either such a fear or a desire to apply for asylum, CBP must refer the asylum seeker to a credible fear interview with a U.S. Citizenship and Immigration Services (USCIS) officer.<sup>61</sup> The asylum seeker “shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”<sup>62</sup>

- (2) **The Credible Fear Interview.** An asylum officer at USCIS conducts a credible fear interview to determine whether there is a “significant possibility” that the applicant could establish eligibility for asylum.<sup>63</sup> If the officer finds there is such a possibility, the asylum officer refers the asylum seeker into the regular immigration court removal process, in which the asylum seeker can formally request asylum at a removal hearing before an immigration judge. If the individual does not meet the credible fear standard, the USCIS officer issues a negative decision. If an immigration judge affirms that negative decision, ICE can enforce a removal order against that person.<sup>64</sup>
- (3) **Detained or paroled by ICE.** If the credible fear screening decision is favorable, ICE has discretion to release the asylum seeker on parole.<sup>65</sup> ICE guidance states, “An alien should be paroled under this directive if [Detention and Removal Operations] determines . . . that the alien’s identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release of the alien.”<sup>66</sup> U.S. law is clear that, at this stage, noncitizens in removal proceedings must not be detained or required to pay bond unless they pose a demonstrated public-safety or flight risk.<sup>67</sup> However, many noncitizens who establish that they meet these criteria are not released.<sup>68</sup>

---

<sup>60</sup> INA § 235(b)(1)(A)(i)-(ii).

<sup>61</sup> *Id.*; 8 C.F.R. § 235.3(b)(4) (2015).

<sup>62</sup> INA § 235(b)(1)(B)(iii)(IV).

<sup>63</sup> INA § 235(b)(1)(B)(v). If the applicant receives a negative determination, immigration judges are available to review the determination.

<sup>64</sup> INA § 235(b)(1)(B)(iii).

<sup>65</sup> The precise nature of relief available depends on the noncitizen’s status. “Arriving aliens”—those who attempt to enter at a port of entry—are not given prompt access to immigration court custody hearings and are typically detained without bond hearings pending the final determination of their asylum claims. Noncitizens who “enter without inspection,” including families apprehended near the border (i.e., between ports of entry) and sent to detention facilities, can petition an immigration judge for release on bond and will be afforded a custody hearing.

<sup>66</sup> *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, ICE ¶ 8.3 (Dec. 8, 2009), [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf); see also *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, U.S. Dep’t State ¶ 214 (2011) [hereinafter *Fourth Periodic Report*], <http://www.state.gov/j/drl/rls/179781.htm>. As described in the *Fourth Periodic Report*, the practice of paroling (i.e., releasing) arriving noncitizens who do not pose a flight risk, after detaining them for a short period of time to confirm their identity, complies with existing international standards under the Refugee Convention. However, the problem with the U.S. no-release policy is that women and children are held for prolonged periods of time and detention is itself used to deter future noncitizens from coming to the United States. Both of these practices are proscribed by existing international law.

<sup>67</sup> *Matter of Patel*, 15 I. & N. Dec. 666, 666 (B.I.A. 1976).

<sup>68</sup> See, e.g., Eleanor Acer, *Deserving Asylum Seekers Are Trapped in Detention, Like Military Interpreter Samey*, HUM. RTS. FIRST (Apr. 5, 2016), <http://www.humanrightsfirst.org/blog/deserving-asylum-seekers-are-trapped-detention-military-interpreter-samey> (describing the continued detention of an Afghan asylum seeker). For a

- (4) **The Defensive Asylum Hearing.** The immigration judge, who is employed by DOJ's Executive Office for Immigration Review,<sup>69</sup> grants or denies asylum, withholding of removal, or relief under CAT. An ICE attorney participates in these hearings.

Reinstatement of removal for recent arrivals at the border, like expedited removal, is a summary process that is designed to prevent some migrants from accessing the immigration courts. If the government “finds that an immigrant has reentered the United States without authorization after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed.”<sup>70</sup> Like expedited removal, the process starts with a CBP interview. Once the enforcement officer verifies that there is a pre-existing removal order, DHS reinstates it without considering the individual's current situation, reasons for returning to the United States, or the presence of flaws in the original removal proceedings.<sup>71</sup> If the immigrant in custody expresses a fear of return, CBP officers refer them to a reasonable fear interview, which imposes a higher standard of proof than a credible fear screening.<sup>72</sup> People in reinstatement-of-removal proceedings are barred by statute from applying for asylum.<sup>73</sup> Unless DHS vacates the original removal order, which it rarely does, asylum seekers in reinstatement are eligible only for withholding of removal under the Refugee Convention or for protection under CAT,<sup>74</sup> neither of which provides a path to permanent residence or access to other immigration benefits.<sup>75</sup>

---

description of the limited availability of parole prior to the issuance of the 2009 ICE guidance, see *Seeking Protection*, *supra* note 20, at 31-41. Human Rights First is gathering information on parole of asylum seekers for an upcoming report.

<sup>69</sup> Unlike administrative law judges, immigration judges can be fired and, therefore, are not independent or insulated from the administrative hierarchy.

<sup>70</sup> INA § 241(a)(5).

<sup>71</sup> There are reports of undocumented noncitizens with valid asylum claims who did not make it past the initial CBP interview or credible fear interview with an asylum officer, were deported, and returned to the United States because they were afraid. See Campos & Friedland, *supra* note 23, at 10. When such a case is re-adjudicated under a reasonable fear standard and the noncitizen is granted withholding of removal, she or he is nonetheless unable to challenge the original credible fear determination, even if it was erroneous. See *id.*; see also INA § 241(a)(5) (noting that, in reinstatement of removal proceedings, “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed,” and providing no exceptions to the rule).

<sup>72</sup> To establish a reasonable fear of persecution or torture, the applicant must establish a “reasonable possibility” of persecution or torture if the applicant returns to her or his home country. 8 C.F.R. § 208.31(c) (2015). This is a higher standard than the “significant possibility” standard used to assess applicants’ eligibility during credible fear screenings. See Asylum Division, *Asylum Officer Basic Training Course: Reasonable Fear of Persecution and Torture Determinations*, USCIS 8 (Aug. 6, 2008), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Reasonable-of-Persecution-Torture-Determinations-31aug10.pdf>.

<sup>73</sup> INA § 241(a)(5) (noting that an alien who has been removed “is not eligible and may not apply for any relief under” the Immigration and Nationality chapter of the U.S. Code).

<sup>74</sup> 8 C.F.R. § 208.31(c) (2015).

<sup>75</sup> See 8 C.F.R. § 208.16(f) (2015) (clarifying that withholding of removal does not prevent “remov[al of] an alien to a third country other than the country to which removal has been withheld or deferred”); see also DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:11 (“Those who are granted INA § 241(b)(3) withholding of removal or protection under the Torture Convention have no status *per se* and therefore have no eligibility for permanent resident status or to reunite with family.”).

## II. INTERNATIONAL LAW PROHIBITS STATES FROM CRIMINALLY PENALIZING MIGRATION AND STRICTLY LIMITS IMMIGRATION DETENTION

The main sources of international law that govern U.S. immigration detention practices are the ICCPR, the Refugee Convention and Protocol, the American Declaration on the Rights of Man (American Declaration), and the Convention Against Torture (CAT). The United States has ratified the ICCPR,<sup>76</sup> the CAT,<sup>77</sup> and the Refugee Protocol.<sup>78</sup> The Refugee Protocol applies the terms of the Refugee Convention without the Convention's temporal and geographical limitations.<sup>79</sup> Although the American Declaration is not a legally binding treaty, it is a source of legal obligation for every member of the Organization of American States (OAS), including the United States.<sup>80</sup> The OAS Charter recognizes the Inter-American Commission on Human Rights as the Charter's primary human rights monitoring body. Since the statute creating the Inter-American Commission defines the term "human rights" by explicit reference to the American Declaration,<sup>81</sup> the Commission applies the terms of the American Declaration to all OAS member states whether or not they are parties to the American Convention on Human Rights.

International law prohibits states from making the unauthorized entry of immigrants a crime<sup>82</sup> and recognizes the right of all people to seek and receive asylum in a foreign territory.<sup>83</sup> Article 9 of the ICCPR states, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure [sic] as are established by law."<sup>84</sup> Moreover, the Refugee Convention specifically provides that states may not penalize asylum

---

<sup>76</sup> *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec).

<sup>77</sup> *Convention Against Torture*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en).

<sup>78</sup> *Protocol Relating to the Status of Refugees*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en).

<sup>79</sup> Article I of the Protocol provides, "The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the [Refugee] Convention to refugees as hereinafter defined." Refugee Protocol, *supra* note 6, art. 1.

<sup>80</sup> "The Statute provides that . . . the [Inter-American Commission on Human Rights] is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights. For the purpose of the Statute, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights." Roach & Pinkerton v. United States, Case 9647, Inter-Am. Comm'n H.R., Report No. 3/87, ¶ 49 (1987), <http://www.cidh.org/annualrep/86.87eng/EUU9647.htm>.

<sup>81</sup> O.A.S. G.A. Res. 447 (IX), Statute of the Inter-American Commission of Human Rights (Oct. 31, 1979), Article 1(2)(b), *reprinted in* SECRETARIAT OF THE INTER-AM. COURT OF HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 133 (Feb. 2012) ("For purposes of the present Statute, human rights are understood to be: (a) The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; (b) The rights set forth in the American Declaration of the Rights of Man, in relation to other member states.").

<sup>82</sup> *See infra* note 90.

<sup>83</sup> Universal Declaration of Human Rights art. 14, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights] (guaranteeing the "right to seek and enjoy in other countries asylum from persecution"); Ninth International Conference of American States, American Declaration of the Rights and Duties of Man art. XXXI, 1948, O.A.S. Res. XXX, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, *supra* note 81, at 19 [hereinafter American Declaration].

<sup>84</sup> 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].

seekers for their unauthorized entry or presence in a foreign territory.<sup>85</sup> Under these basic principles, the right to liberty and security of the person requires states to treat noncitizens with a presumption of liberty and to justify each measure taken to restrict liberty, no matter how severe. Because deprivation of liberty is always the most restrictive means available, detention of immigrants, particularly asylum seekers, must be a measure of last resort. This means that states may not detain asylum seekers—even as a precautionary measure—based solely on their entry or presence without valid entry papers in the country of refuge.<sup>86</sup> States must, therefore, establish legal regimes premised on the right of asylum seekers to remain at liberty while their immigration proceedings are pending, rather than building immigration systems with a presumption of detention.

The Human Rights Committee—the body established by the ICCPR to monitor states’ compliance with the treaty—has made clear that “the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”<sup>87</sup> The ICCPR thus protects all immigrants from any form of arbitrary detention, including arbitrary immigration detention. The Human Rights Committee<sup>88</sup> has interpreted Article 9 of the ICCPR to require that detention, which explicitly includes administrative immigration detention, be “reasonable, necessary, and proportionate” in light of the particular circumstances of each case.<sup>89</sup> Any immigrants detained by a state for any reason are also entitled to a variety of procedural protections, including access to courts and counsel and periodic review of their situation. Moreover, according to authoritative human rights bodies, international law prohibits states from imposing criminal penalties on immigrants who enter their territory without authorization.<sup>90</sup>

---

<sup>85</sup> Convention Relating to the Status of Refugees (Refugee Convention), art. 31, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

<sup>86</sup> See *infra* Section II.A.

<sup>87</sup> Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), <http://www.refworld.org/docid/478b26ae2.html> (citing Human Rights Comm., General Comment No. 15: The Position of Aliens Under the Covenant, U.N. Doc. HR1/GEN/1/Rev.1 (Apr. 11, 1986), <http://www.refworld.org/docid/45139acfc.html>).

<sup>88</sup> Under its mandate, the Human Rights Committee investigates cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the ICCPR. In such cases and in its general comments, it interprets the scope of states’ obligations under the treaty.

<sup>89</sup> 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) [hereinafter General Comment No. 35], (citing Human Rights Comm., *A. v. Australia*, Communication No. 560/1993, at ¶¶ 9.3-9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997); Human Rights Comm., *Jalloh v. Netherlands*, Communication No. 794/1998, at ¶ 8.2, U.N. Doc. CCPR/C/74/D/794/1998 (Apr. 15, 2002); Human Rights Comm., *Nystrom v. Australia*, Communication No. 1557/2007, at ¶¶ 7.2-7.3, U.N. Doc. CCPR/C/102/D/1557/2007 (Sept. 1, 2011)), <http://www.refworld.org/docid/553e0f984.html>.

<sup>90</sup> Migrants who cross borders without authorization may be subjected only to administrative, rather than criminal, sanctions. The Working Group on Arbitrary Detention has concluded that “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.” Human Rights Council, Report of the Working Group on Arbitrary Detention, ¶ 53, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement>. The Inter-American Court of Human Rights has also held that laws that permit states to impose punitive sanctions for the violation of immigration laws do not have a “legitimate purpose according to the [Inter-American] Convention.” *Vélez Loo v. Panama*, Preliminary Objections, Merits, Reparations,

Accordingly, a state must show, *before* it detains an asylum seeker, that, in the individual case, there are no less coercive alternatives to detention available to achieve a legitimate government purpose.<sup>91</sup> A policy of mandatory administrative detention, which entails placing asylum seekers in detention without meaningful individualized determinations of the necessity of detention (i.e., a case-by-case, least-restrictive-means assessment of the reasons underlying the decision to detain), violates that requirement.<sup>92</sup>

---

and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 169 (Nov. 23, 2010). The Commissioner for Human Rights of the Council of Europe has also expressed “increasing concern [at the] trend to criminalize the irregular entry and presence of migrants as part of a policy of ‘migration management.’ Such a method of controlling international movement corrodes established international law principles. It also causes many human tragedies without achieving its purpose of genuine control.” Thomas Hammarberg, *It Is Wrong To Criminalize Migration*, COUNCIL EUR. (Sept. 29, 2008), <http://www.refworld.org/docid/48e34d8a2.html>.

<sup>91</sup> See Brief for the United Nations High Commissioner for Refugees as *Amicus Curiae* at 13, Flores et al., v. Lynch, No. 15-56434 (9th Cir. argued June 7, 2016), available at <http://www.refworld.org/docid/57447b784.html>. Under international law, states may detain people only to satisfy a legitimate government purpose. The UNHCR Detention Guidelines make clear that there are only three purposes for which detention of an asylum seeker in an individual case might be legitimate under international law: public order, public health, or national security. See *infra* note 118. In addition, any use of detention must be limited to the period of time strictly necessary to achieve the designated purpose and must be subject to judicial review. UNHCR Detention Guidelines, *supra* note 24, at ¶¶ 44-47. States must further show that detention is necessary, reasonable, and proportional in each individual case. *Id.* at ¶ 34. Necessity is determined “in light of the purpose of detention,” and states cannot act beyond what is “strictly necessary to achieve the pursued purpose in an individual case.” *Id.* Reasonableness requires states to assess “any special needs or considerations in an individual’s case.” *Id.* Proportionality requires “that a balance be struck [in each case] between the importance of respecting the rights to liberty and security of the person and freedom of movement and the public policy objectives of limiting or denying these rights.” *Id.* “Importantly, both necessity and proportionality are subject to a least-restrictive-means test, which judges whether there were less coercive measures (i.e., alternatives to detention) that could have applied as effectively in the individual case.” Brief for the United Nations High Commissioner for Refugees as *Amicus Curiae* at 13, Flores et al., v. Lynch, No. 15-56434 (citing UNHCR Detention Guidelines *supra* note 24, at ¶ 34.).

<sup>92</sup> According to the UNHCR, necessity and proportionality are subject to a least-restrictive-means test. Brief for the United Nations High Commissioner for Refugees as *Amicus Curiae* at 13, Flores et al., v. Lynch, No. 15-56434 (citing UNHCR Detention Guidelines *supra* note 24, at ¶ 34.). This approach is related to necessity and proportionality analysis that states must undertake to determine the lawfulness of deprivations of liberty under the ICCPR. The ICCPR explicitly prohibits arbitrary detention. ICCPR, *supra* note 84, art. 9(1). The Refugee Convention’s non-penalization clauses, Refugee Convention, art. 31(1)-(2) *supra* note 85, also prohibit arbitrary detention. See Introductory Note by the Office of the United Nations High Commissioner for Refugees, *IN CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES* 2, 3 (Dec. 2010), <http://www.unhcr.org/3b66c2aa10.html> (“Prohibited penalties might include being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum.”). Nevertheless, both the ICCPR and the Refugee Convention allow states to *temporarily* hold individuals in administrative detention only insofar as it is “necessary” for public order, national security, or public health. ICCPR, *supra* note 84, art. 12 (stipulating that freedom of movement “shall not be subject to any restrictions except those which are provided by law, are *necessary* to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” (emphasis added)). Although Article 12 applies to the freedom of movement of persons lawfully admitted to a state, the interpretation of the term “necessary” is also relevant to undocumented immigrants protected by the terms of Article 9 of the ICCPR and Article 31(2) of the Refugee Convention. In a commentary commissioned by the UNHCR as a background paper for an expert roundtable on Article 31 of the Refugee Convention, which prohibits penalizing illegal entry, Guy Goodwin-Gill observed, “As Manfred Nowak remarks in his commentary to the ICCPR, the requirement of ‘necessity’ is subject to objective criteria, the decisive criterion for evaluating whether this standard has been observed in a given case being proportionality. Every restriction thus requires a precise balancing between the right to freedom of movement and those interests to be protected by the

The Refugee Convention and Protocol provide an additional layer of protection to address the special vulnerabilities of refugees and asylum seekers. The Convention requires that states “*shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization.*”<sup>93</sup> The basic principles derived from the Refugee Convention include non-discrimination, non-penalization, and *non-refoulement* (which prohibits the expulsion or return of refugees to territories where their lives or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group).<sup>94</sup> Ultimately, because asylum seekers and refugees have a special protected status under international law, once they enter the territory of a state that has ratified the Refugee Convention or Protocol, that state cannot take measures that penalize them for their presence or that discourage them from applying for asylum.<sup>95</sup>

Detention of asylum seekers is a narrowly tailored exception to the presumption of liberty, and the UNHCR has adopted Detention Guidelines to define the permissible scope of measures that restrict the liberty of asylum seekers. The UNHCR Detention Guidelines reaffirm

---

restriction. Consequently, a restriction is ‘necessary’ when its severity and intensity are proportional to one of the purposes listed in this Article and when it is related to one of these purposes.” Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 185, 223 (Erik Feller et al., eds. 2003) (citing MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 211 (1993)), <http://www.unhcr.org/419c778d4.pdf>.

<sup>93</sup> Refugee Convention, *supra* note 85, art. 31 (emphasis added).

<sup>94</sup> *Id.* arts. 3, 31-33.

<sup>95</sup> Even in humanitarian emergencies, when states face a mass influx of people seeking refuge within their territory, states must uphold their *non-refoulement* obligations and must not penalize unauthorized entry or reject people at the border. According to the UNHCR, “In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity. In all cases the fundamental principle of *non-refoulement*—including non-rejection at the frontier—must be scrupulously observed.” *Conclusions Endorsed by the Executive Committee on Protection of Asylum-Seekers in Situations of Large-Scale Influx*, U.N. GAOR, 36th Session, Supp. No. 12A, at 17, U.N. Doc. A/36/12/Add.1, § II.A (1981) [hereinafter, Executive Comm. Conclusion No. 22 (XXXIII)]. Even in situations of mass influx, states must nevertheless ensure that refugees receive certain minimum protections under the Refugee Convention. *See id.* at § II.B. Executive Comm. Conclusion No. 22 provides a solid basis for most of the essential aspects of protection during mass influxes of refugees. Beyond the principles of *non-refoulement*, non-penalization, and non-discrimination, states must guarantee the fundamental civil rights of refugees and ensure family unity, access to courts, recognition of persons before the law, access to basic necessities, and the safe location of settlements. *Id.* A more recent UNHCR Executive Committee document emphasizes the importance of admitting refugees and avoiding *refoulement*, elaborating that states also have an obligation to ensure the protected status of asylum seekers; the provision of documents; non-penalization of unauthorized entry; family reunification; freedom of movement; special provisions for unaccompanied minors; access to education and employment; and social assistance. *The Scope of International Protection in Mass Influx*, Executive Comm. of the High Comm’r Programme, 46th Sess., June 2, 1995, U.N. Doc. EX/1995/SCP/CRP.3, <http://www.unhcr.org/en-us/excom/scip/3ae68cc018/scope-international-protection-mass-influx.html>. While there is no universally accepted definition of what constitutes a mass influx (*see* Jean-François Durieux and Jane McAdam, *Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 16 INT’L J. REFUGEE L. 4, 5 at n.6 (2004)), the standard is very high. In the past, most situations of mass influx have involved large numbers of displaced persons who come from a specific country or geographic area as a result of an armed conflict. The Central American refugees crossing the U.S. border are unlikely to be found to meet this standard.

the basic human right to seek and enjoy asylum, and they require governments to take into account the unique position of asylum seekers before restricting their freedom of movement.<sup>96</sup> Because entering a country to seek refuge is an act that, by its nature, often necessarily involves entry without authorization,<sup>97</sup> the Guidelines take as a central presumption that “seeking asylum is not an unlawful act, [so] any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review.”<sup>98</sup> The Guidelines also reiterate that states must not use detention as a punitive or disciplinary measure or as a means of discouraging refugees from applying for asylum.<sup>99</sup> Although the Detention Guidelines are not binding, they are considered authoritative on questions about the detention of asylum seekers<sup>100</sup> and draw heavily on human rights protections enshrined in the Refugee Convention and the ICCPR.<sup>101</sup>

Administrative detention of asylum seekers beyond the time necessary to establish identity is an impermissible penalty under the Refugee Convention, except in the rare situations in which there are compelling reasons of safety or flight risk.<sup>102</sup> Convention protections, as interpreted in the UNHCR Detention Guidelines, include a general presumption against detention of asylum seekers and note that the use of detention in order to deter future asylum seekers from

---

<sup>96</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 1, ¶ 1.1; *see also* Universal Declaration of Human Rights art. 14, *supra* note 83.

<sup>97</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 1, ¶ 1.1.

<sup>98</sup> *Id.* at Introduction, ¶ 2 (“Detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. Respecting the right to seek asylum entails instituting open and humane reception arrangements for asylum-seekers, including safe, dignified and human rights-compatible treatment.”).

<sup>99</sup> *Id.* at Guideline 4.1.4, ¶ 32 (“Detention that is imposed in order to deter future asylum-seekers . . . is inconsistent with international norms. Furthermore, detention is not permitted as a punitive—for example, criminal—measure or a disciplinary sanction for irregular entry or presence in the country. Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.” (call numbers omitted)).

<sup>100</sup> *See, e.g.*, JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, sec. 4.2.4 (2005) (repeatedly citing the Detention Guidelines to explain and support limitations on detention under the Refugee Convention); Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants, and Stateless Persons, *Summary Conclusions*, UNHCR 1 (Sept. 24-26, 2012), <http://www.refworld.org/pdfid/515178a12.pdf> (noting that discussions were informed by the Detention Guidelines); Letter from Guenet Guebre-Christos, Reg’l Representative, UNHCR, to Rebecca Sharpless, Fla. Immigrant Advocacy Ctr. 3-4 (Apr. 15, 2002), <http://www.refworld.org/pdfid/3d1c87fe4.pdf> (citing the Detention Guidelines for “additional guidance” in a response to a request for an advisory opinion from the UNHCR on the permissibility of detaining asylum seekers).

<sup>101</sup> UNHCR Detention Guidelines, *supra* note 24, at Scope, ¶ 4.

<sup>102</sup> Article 31 of the Refugee Convention provides that governments shall not impose penalties on refugees on account of their illegal entry or presence in the territory of the state. The term “penalties” under Article 31 includes subjecting asylum seekers to administrative detention. *See* Expert Roundtable Organized by the United Nations High Commissioner for Refugees & the Graduate Institute of International Studies, *Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR, U.N. Doc. A/55/383, ¶¶ 11(a)-(b) (Nov. 8-9, 2001) [hereinafter *Art. 31 Summary Conclusions*], <http://www.unhcr.org/419c783f4.pdf> (discussing detention of asylum seekers as falling under the umbrella of Article 31(2) and specifying that “there is no distinction between restrictions on movement ordered or applied administratively, and those ordered or applied judicially”). UNHCR commentator Goodwin-Gill further notes, “To impose penalties [including immigration detention or enforcement actions] without regard to the merits of an individual’s claim to be a refugee will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.” Goodwin-Gill *supra* note 92, at 187; *see also supra* note 92 and accompanying text.

entering the country is “generally unlawful”<sup>103</sup> and “inconsistent with international norms.”<sup>104</sup> Like the ICCPR, the Convention permits only narrow exceptions to the presumption against immigration detention.<sup>105</sup> Detention determinations must be made on a case-by-case basis and be subject to meaningful court review, particularly since detention “should normally be avoided and be a measure of last resort.”<sup>106</sup> Thus, detention of asylum seekers, based solely on their unauthorized entry or to deter unauthorized entry by others, violates international law.

All members of the OAS, including the United States, must guarantee critical protections for migrants. Many of the protections that are obligatory for OAS members duplicate those found in the ICCPR and the Convention on Refugees, including robust procedural requirements for detaining migrants.<sup>107</sup>

#### **A. DETENTION MAY BE USED ONLY IN LIMITED CONTEXTS, BASED ON INDIVIDUALIZED ASSESSMENT, AND AS A LAST RESORT**

The rights to liberty and security of the person and to freedom of movement, well established under international law, entail a presumption of liberty for asylum seekers and strictly limit acceptable purposes for civil immigration detention. The Human Rights Committee has specified that “[a]sylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.”<sup>108</sup> 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.”<sup>109</sup> As the Inter-American Court of Human Rights has explained, these principles create a presumption of liberty, indicating that immigration detention should be the exception, not the rule.<sup>110</sup>

---

<sup>103</sup> UNHCR Detention Guidelines, *supra* note 24, at Introduction, ¶ 3.

<sup>104</sup> *Id.* at Guideline 4.1.4, ¶ 32.

<sup>105</sup> See *infra* notes 115-123 and accompanying text.

<sup>106</sup> UNHRC Detention Guidelines, *supra* note 24, at Introduction, ¶ 2.

<sup>107</sup> See, e.g., *Vélez Loor v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 169 (Nov. 23, 2010) (holding that an undocumented immigrant was subject to human rights guarantees under the American Convention and the American Declaration, including the rights to humane treatment, personal liberty, judicial protection, and a fair trial).

<sup>108</sup> General Comment No. 35, *supra* note 89, ¶ 18 (citing Human Rights Comm., *Bakhtiyari v. Australia*, Communication No. 1069/2002, at ¶¶ 9.2-9.3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014)).

<sup>109</sup> General Comment No. 35, *supra* note 89, ¶ 18 (citing Human Rights Comm., *Tarlue v. Canada*, Communication No. 1551/2007, at ¶¶ 3.3, 7.6, U.N. Doc. CCPR/C/95/D/1551/2007 (2009); Human Rights Comm., *Ahani v. Canada*, Communication No. 1051/2002, at ¶ 10.2, U.N. Doc. CCPR/C/80/D/1051/2002 (2004)).

<sup>110</sup> For an explanation of the two seminal cases incorporating this principle, which arises from the right to liberty and security of the person (a fundamental right enshrined in various international human rights treaties, including the ICCPR), see Inter-Am. Comm’n H.R., *Human Rights of Migrants and Other Persons in the Context of Mobility in Mexico*, ORG. AM. STATES ¶¶ 430-31 (Dec. 30, 2013), OEA/Ser.L/V/II, doc. 48/13, <http://www.oas.org/en/iachr/migrants/docs/pdf/Report-Migrants-Mexico-2013.pdf> (discussing *Vélez Loor*, Inter-Am. Ct. H.R. (ser. C) No. 218 and *Rafael Ferrer-Mazorra et al v. United States*, Case 9903, Inter-Am. Comm’n H.R., Report No. 51/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 1188 (2000)). The Inter-American Commission has also maintained that, based on the presumption of liberty, “[m]easures aimed at the automatic detention of asylum seekers are therefore impermissible under international refugee protections. They may also be considered arbitrary and, depending upon the characteristics of persons affected by any such restrictions, potentially discriminatory under

The decision to detain asylum seekers may never be automatic or “based on a mandatory rule [that applies to] a broad category” of persons.<sup>111</sup> Instead, the decision to detain “must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.”<sup>112</sup> This rule applies broadly to all individuals placed in immigration detention, regardless of whether they are seeking asylum. The U.N. Working Group on Arbitrary Detention has formulated the prohibition even more strongly: “[T]he detention of asylum seekers and irregular migrants should be a last resort and permissible only for the shortest period of time.”<sup>113</sup>

Article 31 of the Refugee Convention—which prohibits states from penalizing refugees and asylum seekers for unauthorized entry or stay—encompasses a presumption against detaining asylum seekers in the absence of compelling reasons to do so.<sup>114</sup> A legal expert commissioned by the UNHCR to analyze the scope of Article 31 protections has asserted:

In most cases, *only if an individual’s claim to refugee status is examined before he or she is affected by an exercise of State jurisdiction (for example, in regard to penalization for ‘illegal’ entry), can the State be sure that its international obligations are met.* Just as a decision on the merits of a claim to refugee status is generally the only way to ensure that the obligation of *non-refoulement* is observed, so also is such a decision essential to ensure that penalties are not imposed on refugees, contrary to Article 31 of the 1951 Convention. To impose penalties without regard to the merits of an individual’s claim to be a refugee will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.<sup>115</sup>

As a result, the UNHCR Detention Guidelines stipulate that the “detention of asylum-seekers should normally be avoided and be a measure of last resort.”<sup>116</sup> Like ICCPR General Comment No. 35, the UNHCR Guidelines also emphasize that states may resort to detention only “when it is determined to be necessary, reasonable in all the circumstances and

---

international human rights law.” Inter-Am. Comm’n H.R., *Report on Terrorism and Human Rights*, ORG. AM. STATES ¶ 380 (Oct. 22, 2012), OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., <http://www.cidh.org/terrorism/eng/toc.htm>.

<sup>111</sup> General Comment No. 35, *supra* note 89, ¶ 18 (citing Human Rights Comm., *Baban v. Australia*, Communication No. 1014/2001, at ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2001 (2003); Human Rights Comm., *Bakhtiyari v. Australia*, Communication No. 1069/2002, at ¶¶ 9.2-9.3, U.N. Doc. CCPR/C/79/D/1069/2002 (2003)); *see also* UNHCR Detention Guidelines, *supra* note 24, at Guideline 4.3 & annex A).

<sup>112</sup> General Comment No. 35, *supra* note 89, ¶ 18.

<sup>113</sup> Human Rights Council, Report of the Working Group on Arbitrary Detention, ¶ 77, U.N. Doc. A/HRC/27/48 (June 30, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/068/65/PDF/G1406865.pdf?OpenElement>.

<sup>114</sup> Article 31 applies to refugees and asylum seekers who “have come directly from territories where their life or freedom was threatened, but also to those who transited through other countries.” Eleanor Acer & Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 GEO. IMMIGR. L.J. 507, 514 n.32 (2010) (citing *Art. 31 Summary Conclusions*, *supra* note 102, at ¶ 10(b)-(c); Goodwin-Gill, *supra* note 92, at 195 n.28, 226-27 nn.104-05; UNHCR Detention Guidelines, *supra* note 24, ¶ 4).

<sup>115</sup> Goodwin-Gill, *supra* note 92, at 187 (emphasis added); *see also Art. 31 Summary Conclusions*, *supra* note 102, ¶¶ 5-6.

<sup>116</sup> UNHCR Detention Guidelines, *supra* note 24, at Introduction, ¶ 2.

proportionate to a legitimate purpose.”<sup>117</sup> In particular, detention of asylum seekers “may exceptionally be resorted to for a legitimate purpose,” only in cases involving serious threats to national security, public health, or public order.<sup>118</sup> This language explicitly mirrors that of the ICCPR, under which the requirement of necessity has been strictly limited to these narrow, particularized exceptions.<sup>119</sup>

To the extent a state finds it “necessary” to detain asylum seekers, it must both limit deprivations of liberty to “exceptional circumstances” and assess the individual’s specific circumstances according to the criteria established by law.<sup>120</sup> The Convention stipulates that restrictions on the rights of asylum seekers, including the right to freedom of movement, must not be “prolonged” or “indefinite.”<sup>121</sup> The UNHCR has observed that under the necessity exception, states must ensure that restrictions on humanitarian protections are proportional to a legitimate purpose.<sup>122</sup> For these reasons, as well, detention of asylum seekers for deterrence purposes is “generally unlawful”<sup>123</sup> and “inconsistent with international norms.”<sup>124</sup>

## **B. STATES MAY NOT DETAIN ASYLUM SEEKERS TO PENALIZE ENTRY OR TO DETER ENTRY BY OTHERS**

The Detention Guidelines and Article 31 of the Refugee Convention prohibit states from using detention “as a punitive . . . measure or a disciplinary sanction for irregular entry or presence in the country.”<sup>125</sup> Such “punitive measures” include administrative detention of asylum seekers and immigrants.<sup>126</sup> Thus, civil immigration detention based solely on the unauthorized

---

<sup>117</sup> *Id.* at Guideline 4.2.

<sup>118</sup> *Id.* at Guidelines 4.1-4.4, ¶¶ 21-33 (stating that in “the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order, public health or national security” (emphasis omitted)); *see also* Refugee Convention, *supra* note 85, arts. 9, 32.

<sup>119</sup> *See supra* note 92 and accompanying text.

<sup>120</sup> Article 9 of the Refugee Convention provides, “Nothing in this Convention shall prevent a Contracting State, in time of war or other *grave and exceptional circumstances*, from taking *provisionally* measures which it considers to be essential to the national security *in the case of a particular person*, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.” Refugee Convention, *supra* note 85, art. 9 (emphasis added); *see also* UNHCR Detention Guidelines, *supra* note 24, at Guideline 6.

<sup>121</sup> *Id.*; *see also* Refugee Convention, *supra* note 85, arts. 9, 26.

<sup>122</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 4.2. For a more detailed explanation of how the factors in the balancing analysis must be weighed, *see supra* note 91; *see also* Goodwin-Gill, *supra* note 92, at 223 (discussing necessity and proportionality under ICCPR Art. 12, which “applies to any person lawfully within a territory” and noting that “the interpretation of the term ‘necessary’ is also of relevance for the application of Article 31(2) of the 1951 Convention”).

<sup>123</sup> UNHCR Detention Guidelines, *supra* note 24, at Introduction, ¶ 3.

<sup>124</sup> *Id.* at Guideline 4.1.4, ¶ 32.

<sup>125</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 4.1.3, ¶ 32; *see also* Refugee Convention, *supra* note 85, art. 31 (“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”). *See also infra* Section II.E.

<sup>126</sup> The UNHCR Detention Guidelines clarify that detention often constitutes an unlawful penalty under Article 31 of the Refugee Convention. “Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement . . . . Furthermore, *detention is not permitted as a punitive—for*

entry of an asylum seeker or to defer future arrivals violates the Refugee Convention.<sup>127</sup> That is, international law requires states not to detain or deport asylum seekers while their claims are being considered, regardless of their manner of arrival. In the United States, however, simply because some asylum seekers are apprehended after “unlawful” arrival, they are accorded lesser rights, contrary to the terms of the 1951 Convention and the 1967 Protocol. Indeed, U.S. immigration regulations create a presumption of detention, rather than a presumption of liberty, for immigrants who reach the United States without authorization.

The ICCPR’s requirement that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court”<sup>128</sup> guarantees the right to individualized review of all immigrants’ detention orders. The Human Rights Committee has found that, under the ICCPR, all immigration detention must be “justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time . . . . The decision [to detain] must consider relevant factors case by case and not be based on a mandatory rule for a broad category.”<sup>129</sup> Where immigration detention does not meet these conditions, it is arbitrary and thus unlawful under international law. A detention-as-deterrence policy bases the decision to detain not on the individual detainee’s case and circumstances, but on whether detaining that individual will have the desired deterrent impact on decisions of other asylum seekers considering entrance. This contravenes the core requirements of individualized review and constitutes arbitrary detention under the ICCPR.

In the case of asylum seekers, a deterrence policy is directly at odds with the goal of safe refuge. The UNHCR Detention Guidelines clearly state that “detention *policies aimed at deterrence are generally unlawful* under international human rights law as they are not based on

---

*example, criminal—measure or a disciplinary sanction for irregular entry or presence in the country.* Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.” UNHCR Detention Guidelines, *supra* note 24, at Guideline 4.1.4, ¶ 32 (emphasis added) (citations omitted). In a commentary commissioned by the UNHCR on the scope of Article 31 immunity from penalization for unauthorized entry, Guy Goodwin-Gill notes that “the term penalties takes into account the object and purpose of the treaty, as well as the interpretation of the term ‘penalties’ incorporated in other human rights treaties.” Goodwin-Gill, *supra* note 92, at 189. After examining the drafting history, Goodwin-Gill further clarifies that enforcement actions taken against presumptive refugees prior to a final determination on the merits of their claims are also likely to constitute unlawful penalties. “Although expressed in terms of the ‘refugee’, [Article 31] would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers or . . . to ‘presumptive refugees’. This necessary interpretation, which takes account also of the declaratory nature of refugee status, has obvious implications, not only for the general issue of immunity, but also for the moment at which proceedings might be commenced or penalties imposed. *If Article 31 is to be effectively implemented, clear legislative or administrative action is required to ensure that such proceedings are not begun or, where they are instituted, to ensure that no penalties are in fact imposed for cases falling within Article 31(1).* [Nevertheless], many States do not make adequate legislative or administrative provision to ensure delay or postponement in the application of enforcement measures.” *Id.* (emphasis added) (citations omitted). Goodwin-Gill has also emphasized that to impose penalties—including administrative detention and enforcement measures—prior to a final determination on the merits of an asylum claim likely violates the Refugee Convention. *Id.* at 187; *see also supra* notes 102, 115 and accompanying text.

<sup>127</sup> According to the UNHCR Detention Guidelines, “Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms.” This may amount to collective punishment. UNHCR Detention Guidelines, *supra* note 24, at Guideline 4.14, ¶ 32, Guideline 6; *see also id.* at Introduction, ¶ 3.

<sup>128</sup> ICCPR, *supra* note 84, art. 9(4).

<sup>129</sup> General Comment No. 35, *supra* note 89, ¶ 18.

an individual assessment as to the necessity to detain.”<sup>130</sup> In the refugee context, the use of “[d]etention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms.”<sup>131</sup>

### C. STATES MUST USE ALTERNATIVES TO DETENTION, WHERE POSSIBLE

A state must justify restrictions on liberty and use the least coercive measure necessary to achieve a particular, legitimate, state objective. Therefore, under the Refugee Convention and the ICCPR, individual detention determinations are subject to a least-restrictive-means standard, even in cases involving asylum seekers who entered without authorization. The UNHCR Detention Guidelines specify, “*It must be shown that in light of the asylum-seeker’s particular circumstances, there were not less invasive or coercive means of achieving the same ends.*” Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken.”<sup>132</sup>

The Human Rights Committee has also emphasized the importance of implementing alternatives to administrative detention in the immigration context.<sup>133</sup> To justify a decision to detain, states are required to demonstrate that “there were not less invasive means of achieving the same ends.”<sup>134</sup> Less invasive means may include reporting obligations or systems of bail payments.<sup>135</sup>

Alternatives to detention are not permitted to become “alternative *forms* of detention.”<sup>136</sup> Rather, authorities may impose alternatives to detention only following a particularized finding of their necessity. The Tokyo Rules, an authoritative international source of guidance on criminal justice measures, specify that the “selection of a non-custodial measure shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence [as well as] the personality [and] background of the offender, the purposes of sentencing and the rights of victims.”<sup>137</sup> The rules continue by noting that “[d]iscretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full

---

<sup>130</sup> UNHCR Detention Guidelines, *supra* note 24, at Introduction, ¶ 3 (emphasis added).

<sup>131</sup> *Id.* at Guideline 4.1.4, ¶ 32.

<sup>132</sup> *Id.* at Guideline 4.3, ¶ 35 (citing Human Rights Comm., *C. v. Australia*, Communication No. 900/1999, at ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2000), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3f588ef00>) (emphasis added); *see also* ExCom, Alternatives to Detention, ¶ 1, U.N. Doc. EC/66/SC/CRP.12 (June 3, 2015), <http://www.unhcr.org/559643e59.pdf> (noting that detention of asylum seekers should “be a measure of last resort” and promoting the use of alternatives to detention).

<sup>133</sup> *See, e.g.*, Human Rights Comm., Concluding Observations on the Second Periodic Report of Malta, ¶ 16, U.N. Doc. CCPR/C/MLT/CO/2 (Nov. 21, 2014), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMLT%2fCO%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMLT%2fCO%2f2&Lang=en); *see also* sources cited *infra* note 134.

<sup>134</sup> Human Rights Comm., *C. v. Australia*, Communication No. 900/1999, at ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2000); *see also* General Comment No. 35, *supra* note 89, ¶ 18.

<sup>135</sup> General Comment No. 35, *supra* note 89, ¶ 18; *see also* Human Rights Comm., *C. v. Australia*, Communication No. 900/1999, at ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2000).

<sup>136</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 4.3, ¶ 38; *see also* *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons*, UNHCR ¶ 19 (May 11-12, 2011) [hereinafter *Global Roundtable on Alternatives to Detention*], <http://www.refworld.org/docid/4e315b882.html>.

<sup>137</sup> United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) ¶ 3.2, G.A. Res. 45/110, U.N. Doc. A/45/49 (Dec. 14, 1990), <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>.

accountability and only in accordance with the rule of law.”<sup>138</sup> Administrative detention, which is not a form of punishing criminal wrongdoing, must provide, at least, this degree of protection.

The various alternatives to detention are not equivalent under international law. The UNHCR Detention Guidelines specifically note that some “forms of electronic monitoring—such as wrist or ankle bracelets—are considered harsh, not least because of the criminal stigma attached to their use[,] and should as far as possible be avoided.”<sup>139</sup> At the 2011 Global Roundtable on alternatives to detention for asylum seekers and refugees—a meeting organized by the UNHCR and the Office of the U.N. High Commissioner on Human Rights that convened thirty-eight participants from nineteen countries drawn from governments, international organizations, human rights mechanisms, national human rights institutions, NGOs, and academic experts—participants criticized electronic tagging (such as ankle or wrist bracelets) “as being particularly harsh.”<sup>140</sup> The Special Rapporteur on the Human Rights of Migrants has said that ankle and wrist bracelets “can be particularly intrusive, and may violate the right to freedom of movement provided by article 12 of the International Covenant on Civil and Political Rights.”<sup>141</sup> Instead of permitting states to set a default requirement in favor of electronic monitoring, the Detention Guidelines emphasize “the principle of minimum intervention.”<sup>142</sup> Under this principle, systems of bond or bail are preferred over electronic monitoring as less intrusive and less restrictive on liberty.

The Guidelines also note possible areas of concern for systems that rely on bond or bail payments. First, “[f]or bail to be genuinely available to asylum-seekers, bail hearings would preferably be automatic.”<sup>143</sup> Second, bail and bond systems “tend to discriminate against persons with limited funds, or those who do not have previous connections in the community.”<sup>144</sup> In the words of the Special Rapporteur on the Human Rights of Migrants, “[b]ail, bonds and sureties must be reasonable, and must not create an excessive or unrealistic burden on the individual.”<sup>145</sup>

To avoid these possible pitfalls, bail or bond hearings must be universally available and payment amounts must be tailored to individual circumstances. “Systematically requiring asylum-seekers to pay a bond . . . , with any failure to be able to do so resulting in detention (or its continuation), would suggest that the system is arbitrary and not tailored to individual circumstances.”<sup>146</sup> These requirements dovetail with the recommendations of the U.S. Commission on International Religious Freedom. The Commission recommended that ICE use “less restrictive (yet secure) facilities” whenever detention is absolutely necessary and that “the criteria for release of asylum seekers on parole be put into regulations.”<sup>147</sup> ICE must adopt

---

<sup>138</sup> *Id.* ¶ 3.3.

<sup>139</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 4.3, ¶ 40 (citing *Global Roundtable on Alternatives to Detention*, *supra* note 136, ¶ 21).

<sup>140</sup> *Global Roundtable on Alternatives to Detention*, *supra* note 136, ¶ 21.

<sup>141</sup> Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, ¶ 63, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) [hereinafter Crépeau Report], [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf)

<sup>142</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 4.3, ¶ 39.

<sup>143</sup> *Id.* at Annex A, ¶ vi.

<sup>144</sup> *Id.*

<sup>145</sup> Crépeau Report, *supra* note 141, ¶ 59.

<sup>146</sup> UNHCR Detention Guidelines, *supra* note 24, at Annex A, ¶ vi.

<sup>147</sup> *Seeking Protection*, *supra* note 20, at 4 (citing USCIRF REPORT, vol. 1, *supra* note 23, at 68).

standards for release and for alternatives to detention that are uniform and adaptable to individual circumstances and that comply with international law.

#### **D. ALL DETAINEES MUST HAVE ACCESS TO PROMPT JUDICIAL REVIEW**

ICCPR Article 9(4) provides, “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a *court*, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>148</sup> This requirement is not limited to criminal detention imposed by the judiciary, but includes administrative and immigration detention.<sup>149</sup>

The Human Rights Committee and the UNHCR confirm that under the ICCPR and the Refugee Convention, states must promptly bring immigrants and asylum seekers who are in custody before a judicial or other independent review authority for a determination on whether continued detention is necessary in that individual’s circumstances.<sup>150</sup> The Detention Guidelines provide, “This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker.”<sup>151</sup> As a result, to the extent refugees and asylum seekers are provisionally detained in order to verify identity and assess flight risk,<sup>152</sup> the Human Rights Committee has stated that continued deprivation of liberty becomes “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.”<sup>153</sup> Immigration detention is also considered arbitrary when the government fails to conduct “periodic re-evaluation of the justification for continuing the detention.”<sup>154</sup> Thus, if an immigrant or asylum seeker languishes in detention despite meeting criteria for parole and release, such arrest is arbitrary and contravenes international law.

#### **E. PUNITIVE CONDITIONS OF IMMIGRATION DETENTION ARE IMPERMISSIBLE**

The ICCPR, the American Declaration, and the CAT regulate detention conditions. Under the ICCPR, “cruel, inhuman or degrading treatment or punishment” is prohibited, and detainees must “be treated with humanity and with respect for the inherent dignity of the human person.”<sup>155</sup> The American Declaration prohibits “cruel, infamous or unusual punishment.”<sup>156</sup> The CAT requires every party “to take effective legislative, administrative, judicial or other measures

---

<sup>148</sup> ICCPR, *supra* note 84, art. 9(4) (emphasis added). For a detailed discussion of the nature of the court required, see Human Rights Comm., *Torres v. Finland*, Communication No. 291/1988, U.N. Doc. CCPR/C/38/D/291/1988 (Apr. 2, 1990); Eleanor Acer & Jake Goodman, *supra* note 114, at 520-22.

<sup>149</sup> General Comment No. 35, *supra* note 89, ¶ 5.

<sup>150</sup> *Id.* ¶ 18; UNHCR Detention Guidelines, *supra* note 24, at Guideline 7, ¶ 47(iii) (citing Human Rights Comm., *A. v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997); Human Rights Comm., *C. v. Australia*, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2000)).

<sup>151</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 7, ¶ 47(iii).

<sup>152</sup> The Human Rights Committee has specified that “[a]sylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.” General Comment No. 35, *supra* note 89, ¶ 18.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* ¶¶ 12, 18.

<sup>155</sup> ICCPR, *supra* note 84, arts. 7, 10.

<sup>156</sup> American Declaration, *supra* note 83, art. XXVI.

to prevent acts of torture in any territory under its jurisdiction.”<sup>157</sup> Individually and together, these overlapping protections require that asylum seekers be housed in facilities that do not have penal or prison-like conditions.<sup>158</sup>

The prohibition on punitive measures against asylum seekers for entering the country of refuge illegally requires that states detain asylum seekers only in facilities that are appropriate for civil detainees—i.e., facilities that do not replicate prison-like conditions or, in fact, also serve as jails.<sup>159</sup> This prohibition entails an obligation to provide sanitary conditions, access to adequate medical treatment, and adequate nutrition.<sup>160</sup> The UNHCR Detention Guidelines also stipulate that detainees must be able to make regular contact with relatives, friends, and NGOs; have the opportunity to engage in physical exercise; have access to educational and vocational opportunities; practice their religion; and have access to basic necessities.<sup>161</sup> Staff operating detention centers must have appropriate training.<sup>162</sup> In cases involving members of vulnerable populations, such as women and children, the UNHCR has determined that even more robust safeguards apply.<sup>163</sup> As a result, and as will be discussed further in Part III, the UNHCR has concluded that the detention of children and their families is prohibited.<sup>164</sup>

### III. INTERNATIONAL LAW PROHIBITS ADMINISTRATIVE DETENTION OF MIGRANT CHILDREN

Children and, by proxy, their families have a uniquely protected status under international law. This protective ethos is codified in the Universal Declaration of Human Rights,<sup>165</sup> the American Declaration on the Rights of Man,<sup>166</sup> the ICCPR,<sup>167</sup> the Refugee Convention,<sup>168</sup> and, of

---

<sup>157</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art. 2, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987).

<sup>158</sup> The international standards for criminal detention are set out in the U.N. Standard Minimum Rules for the Treatment of Prisoners, U.N. Econ. & Soc. Comm. on Crime Prevention and Criminal Justice, 24th Sess., U.N. Doc. E/CN.15/2015/L.6/Rev.1 (May 21, 2015) [hereinafter U.N. Standard Minimum Rules for the Treatment of Prisoners], [http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ\\_Sessions/CCPCJ\\_24/resolutions/L6\\_Rev1/ECN152015\\_L6Rev1\\_e\\_V1503585.pdf](http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_24/resolutions/L6_Rev1/ECN152015_L6Rev1_e_V1503585.pdf). These rules set minimum requirements in the areas of health care, sanitation, and nutrition, among others.

<sup>159</sup> Human Rights Council, Additional Briefing Materials Submitted to the UN Special Rapporteur on the Human Rights of Migrants, U.N. Doc. A/HRC/CRP.3 (Mar. 7, 2008); *see also* UNHCR Detention Guidelines, *supra* note 24, at Guideline 8.

<sup>160</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 8, ¶ 48; *see also* U.N. Standard Minimum Rules for the Treatment of Prisoners, *supra* note 158.

<sup>161</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 8, ¶ 48.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at Guidelines 9.2-9.3, ¶¶ 51-61.

<sup>164</sup> *Id.* at Guideline 9.3, ¶ 58; INTER-PARLIAMENTARY UNION & UNHCR, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW 75 (2001), [http://www.ipu.org/pdf/publications/refugee\\_en.pdf](http://www.ipu.org/pdf/publications/refugee_en.pdf).

<sup>165</sup> Universal Declaration of Human Rights, *supra* note 83, art. 25(2) (“Motherhood and childhood are entitled to special care and assistance.”).

<sup>166</sup> American Declaration, *supra* note 83, art. VII (“[A]ll children have the right to special protection, care and aid.”).

<sup>167</sup> ICCPR, *supra* note 84, art. 24 (providing, among other child-specific provisions, that every child has “the right to such measures of protection as are required by his status as a minor”).

<sup>168</sup> Refugee Convention, *supra* note 85, at Introduction, Part IV.B (“Principle of unity of the family”).

course, the Convention on the Rights of the Child (CRC). The CRC invokes the “best interests of the child” standard to inform government measures that affect children.<sup>169</sup> In the context of child migration, states must not detain children or their family members, even as a precautionary measure, because detention—or, in the alternative, family separation—is never in the child’s best interest. As the Committee on the Rights of the Child, the body established by the CRC to monitor states’ compliance, has explained, there is a broad consensus that international law mandates that “no migrant child should be detained, whatever the circumstances,” including whether the child is accompanied or unaccompanied.<sup>170</sup> As a result, the Commission concluded, “States should expeditiously and completely cease the detention of children on the basis of their immigration status.”<sup>171</sup>

Although the United States has not ratified the CRC, it is nevertheless bound to comply with the “best interests of the child” standard as a matter of both treaty and customary law. The United States is the only country in the world that has not ratified the CRC,<sup>172</sup> but, as a signatory, it is “obliged to refrain from acts which would defeat the object and purpose of [the] treaty.”<sup>173</sup> When the United States adopts regulatory measures that contravene the “best interests of the child” as part of its immigration management policy, the United States subverts the object and purpose of the CRC.

Various treaty and other international bodies have adopted the “best interests of the child” principle and determined that detention of migrant children is *never* in their best interest. The UNHCR has explicitly concluded that children “should in principle not be detained at all” and that pregnant women and nursing mothers should also not be detained.<sup>174</sup> The UNHCR and the Inter-American Court of Human Rights have prioritized family unity as one of the fundamental principles underlying the “best interests of the child” standard, recognizing that to separate children from their families undermines their best interests.<sup>175</sup> With few exceptions, states must, therefore, endeavor “to preserve and maintain the family unit.”<sup>176</sup> Accordingly,

---

<sup>169</sup> Convention on the Rights of the Child art. 3, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention on the Rights of the Child].

<sup>170</sup> Comm. on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, ¶ 10 [hereinafter Comm. on the Rights of the Child: 2012 Day of General Discussion], [www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf).

<sup>171</sup> *Id.* ¶ 78.

<sup>172</sup> Somalia and South Sudan both ratified the Convention on the Rights of the Child in 2015, leaving the United States as the only country that has not ratified the treaty. *Convention on the Rights of the Child*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en); see also *Hailing Somalia’s Ratification, U.N. Renews Call for Universalization of Child Rights Treaty*, U.N. NEWS CENTRE (Oct. 2, 2015), <http://www.un.org/apps/news/story.asp?NewsID=52129#.VwkkOz9RJOA>.

<sup>173</sup> Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention on the Law of Treaties].

<sup>174</sup> UNHCR Detention Guidelines, *supra* note 24, at Guidelines 9.2, ¶ 51, and 9.3, ¶ 58; see also INTER-PARLIAMENTARY UNION & UNHCR, *supra* note 164, at 75.

<sup>175</sup> Rights and Guarantees of Children, *supra* note 30; see also UNHCR Detention Guidelines, Guideline 9.2, ¶ 51.

<sup>176</sup> *Id.* ¶ 158; see also Convention on the Rights of the Child, *supra* note 169, arts. 5, 8, 16; UNHCR Detention Guidelines, *supra* note 24, at Guidelines 9.2, ¶ 51; statements made by François Crépeau, the Special Rapporteur on the Human Rights of Migrants at the annual Day of General Discussion of the Committee on the Rights of the Child held on September 28, 2012, on the rights of all children in the context of international migration. Comm. on the Rights of the Child: 2012 Day of General Discussion, *supra* note 170, ¶ 5 (stating that “detaining migrant children

prohibitions against the administrative detention of migrant children extend to their parents since the principle of family unity trumps government interests in curbing migration flows.

Despite these restrictions under international law, the U.S. government operates detention centers specifically intended to hold immigrant children and their mothers. According to USCIS, the agency interviewed more than 3,500 families in family detention centers between July 2014 and March 2015.<sup>177</sup> Since June 2014, DHS has detained thousands of children with their parents.<sup>178</sup> This practice of family detention contravenes international law. Administrative detention of children, including immigration detention with their parents, is generally prohibited under international law. Moreover, because of international law protections that prioritize family unity, separating families by releasing children and detaining parents is also impermissible. The practice of separating mothers and children from fathers and partners is also unlawful.

#### A. THE “BEST INTERESTS OF THE CHILD” STANDARD PROHIBITS STATES FROM PLACING CHILDREN AND THEIR FAMILIES IN IMMIGRATION DETENTION

As a signatory of the CRC, the United States has an international legal obligation “to refrain, in good faith, from acts which would defeat the object and the purpose of the treaty.”<sup>179</sup> Article 3(1) of the CRC provides, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>180</sup> This provision is fundamental to the CRC’s object and purpose. According to the Committee on the Rights of the

---

with their parents on the premise of maintaining family unity violated the principle of the best interests of the child”).

<sup>177</sup> Asylum Division, *Family Facilities Reasonable Fear, Family Facilities Credible Fear*, USCIS (2015), <http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-FY2015Q2.pdf> (showing 3,493 credible fear referrals and 102 reasonable fear referrals at the four family detention facilities during the 2014 fiscal year).

<sup>178</sup> See *United States of America: NGO Assessment of U.S. Government Actions Since Review, CERD Shadow Report*, HUM. RTS. FIRST (2015), <http://www.humanrightsfirst.org/sites/default/files/CERD-follow-up-shadow-report.pdf>.

<sup>179</sup> Vienna Convention on the Law of Treaties art. 18, *supra* note 173; see also *Glossary*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1\\_en.xml](https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml) (“The signature . . . creates an obligation [on the signatory state] to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.”). Although the United States has not ratified the Vienna Convention on the Law of Treaties, it recognizes many of its provisions as codifying customary international law. See, e.g., *Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) (stating that the court “rel[ies] upon the Vienna Convention here ‘as an authoritative guide to the customary international law of treaties’ . . . [b]ecause the United States ‘recognizes the Vienna Convention as a codification of customary international law’ . . . and [it] acknowledges the Vienna Convention as, in large part, ‘the authoritative guide to current treaty law and practice’”) (internal citations omitted); *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (“The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”). The State Department has described article 18 as being recognized as customary international law and cited it in response to a Senate inquiry. See Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 299 & n.82 (1988) (citing, *inter alia*, Sec’y of State Rogers’ Report to the President, Oct. 18, 1971, 65 DEP’T ST. BULL. 684, 685 (1971); Hansell, Off. of Legal Advisor, U.S. Dep’t of State, Memorandum of Law on the Legal Status of the SALT II Documents, 1979 Digest of United States Practice in International Law, at 706 n.18).

<sup>180</sup> Convention on the Rights of the Child, *supra* note 169, art. 3(1).

Child, the best-interests standard is one of the four general principles of the Convention<sup>181</sup> and an expression of “one of the fundamental values of the Convention.”<sup>182</sup> Moreover, the CRC was designed to implement the 1959 Declaration of the Rights of the Child, the “paramount consideration” of which was “the best interests of the child.”<sup>183</sup> Accordingly, as a signatory of the CRC, the United States may not disregard the best interests of the child in any action, including its implementation of immigration policy.

Respect for the best interests of the child, as codified in the CRC, is well on its way to becoming an accepted principle of customary international law. Every country in the world, including the United States, has signed the CRC, and every country in the world except the United States has ratified it. The United States has made no objection to the use of the best-interests standard and has even codified the standard in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).<sup>184</sup> According to the Child Welfare Information Gateway, a service of the U.S. Department of Health and Human Services’ Administration for Children and Families, “[a]ll States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes requiring that the child’s best interests be considered whenever specified types of decisions are made regarding a child’s custody, placement, or other critical life issues.”<sup>185</sup> As a result, U.S. courts and commentators have increasingly recognized “best interests of the child” as a source of binding customary international law.<sup>186</sup>

---

<sup>181</sup> Comm. on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, ¶ 12, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003), <http://www.refworld.org/docid/4538834f11.html>; Comm. on the Rights of the Child, General Comment No. 12: The Right of the Child to be Heard, ¶ 2, U.N. Doc. CRC/C/GC/12 (July 20, 2009), <http://www.refworld.org/docid/4ae562c52.html>.

<sup>182</sup> Comm. on the Rights of the Child, General Comment No. 14: The Rights of the Child to Have His or Her Interests Taken as a Primary Consideration (art. 3, para. 1), ¶1, U.N. Doc. CRC/C/GC/14 (May 29, 2013), <http://www.refworld.org/docid/51a84b5e4.html>.

<sup>183</sup> Declaration of the Rights of the Child principle 2, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

<sup>184</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(c), 122 Stat. 5044 (2008) (codified in major part at 8 U.S.C. § 1232 (2012)) (“[A]n unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child.”).

<sup>185</sup> *Determining the Best Interests of the Child*, CHILD WELFARE INFORMATION GATEWAY 1 (Nov. 2012), [https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf](https://www.childwelfare.gov/pubPDFs/best_interest.pdf).

<sup>186</sup> See *Sadeghi v. INS*, 40 F.3d 1139, 1147 (10th Cir. 1994) (Kane, J., dissenting) (arguing that the entire Convention on the Rights of the Child is customary); *Nicholson v. Williams*, 203 F. Supp. 2d 153, 234 (E.D.N.Y. 2002) (noting that courts have recognized that provisions from the Convention on the Rights of the Child dealing with family integrity have the force of customary international law); *Beharry v. Reno*, 183 F. Supp. 2d 584, 600-01 (E.D.N.Y. 2002) (“While the [Convention on the Rights of the Child] is relatively new, it contains many provisions codifying longstanding legal norms. It states that ‘the family . . . should be afforded the necessary protection and assistance’ and that ‘in all actions concerning children . . . the best interests of the child shall be a primary consideration’ . . . . Given its widespread acceptance, to the extent that it acts to codify longstanding, widely-accepted principles of law, the Convention on the Rights of the Child should be read as customary international law.”), *rev’d on other grounds sub nom Beharry v. Ashcroft*, 329 F.3d 51, 63 (2d Cir. 2003) (alteration in original); see also *Jurisdiction Research—50 States and Territories*, REPRESENTING CHILDREN WORLDWIDE (Dec. 2005), [http://islandia.law.yale.edu/representingchildren/rcw/jurisdictions/am\\_n/usa/united\\_states/frontpage.htm](http://islandia.law.yale.edu/representingchildren/rcw/jurisdictions/am_n/usa/united_states/frontpage.htm).

Finally, as a matter of U.S. law, the TVPRA codifies the best interests of the child standard specifically in the context of child migration.<sup>187</sup> Since the TVPRA imposes the best interests of the child on administrators in the Department of Health and Human Services in the context of immigration detention of children, the government is bound under its own law to consider the scope of its obligations under that standard. Because the “best interests of the child” is a well-established international legal standard codified in the CRC, authoritative international commentary is a critical source for the United States to rely on to give content to that standard. The Committee on the Rights of the Child, the U.N. Special Rapporteur on Torture, and the U.N. Special Rapporteur on the Human Rights of Migrants have specifically concluded that detention of migrant children is never in their best interest.<sup>188</sup> The Committee on the Rights of the Child has emphasized that “[d]etention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”<sup>189</sup> The Committee ultimately concluded that “detention because of their or their parent’s migration status constitutes a child rights violation and *always* contravenes the best interests of the child.”<sup>190</sup>

International courts, treaty bodies, and experts have, therefore, consistently called for the release of children confined in administrative immigration detention. Juan Méndez, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has called on all states to, “expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status.”<sup>191</sup> The Committee on the Rights of the Child has made almost identical recommendations.<sup>192</sup> The European Court of Human Rights (European Court) has also concluded that “even short term detention of migrant children is a violation of the prohibition on torture and other ill-treatment [because] a child’s vulnerability and best interests outweigh the Government’s interest in halting illegal immigration.”<sup>193</sup>

The Inter-American Court of Human Rights has made similar findings, holding that under the “best interest of the child” standard, the detention of migrant children and their

---

<sup>187</sup> See § 235(c), 122 Stat. 5044 (2008) (codified at 8 U.S.C. § 1232(c) (2012)).

<sup>188</sup> Comm. on the Rights of the Child: 2012 Day of General Discussion, *supra* note 170, ¶ 78; Human Rights Council, Report Submitted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, ¶ 80, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) [hereinafter UN Special Rapporteur on Torture 2015 Report], <http://www.refworld.org/docid/550824454.html> (concluding that deprivation of liberty in the context of administrative immigration enforcement “can never be construed as a measure that complies with the child’s best interests”); see also Comm. on the Rights of the Child: 2012 Day of General Discussion, *supra* note 170, ¶ 5.

<sup>189</sup> See Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, ¶ 61, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter, CRC General Comment No. 6], <http://www.refworld.org/docid/42dd174b4.html>.

<sup>190</sup> Comm. on the Rights of the Child: 2012 Day of General Discussion, *supra* note 170, ¶ 78 (emphasis added).

<sup>191</sup> U.N. Special Rapporteur on Torture 2015 Report, *supra* note 188, ¶ 80.

<sup>192</sup> Comm. on the Rights of the Child: 2012 Day of General Discussion, *supra* note 170, ¶ 78.

<sup>193</sup> UN Special Rapporteur on Torture 2015 Report, *supra* note 188, ¶ 62 (citing *Popov v. France*, App. Nos. 39472/07 & 39474/07 (Eur. Ct. H.R. Jan. 19, 2012), <http://hudoc.echr.coe.int/eng?i=001-108710>; *Rahimi v. Greece*, App. No. 8687/08 (Eur. Ct. H.R. Apr. 5, 2011), <http://hudoc.echr.coe.int/eng?i=001-104366>; *Mubilanzila Mayeka & Kaniki Mitunga v. Belgium*, 46 Eur. Ct. H.R. 23 (2006)).

families is unlawful under Articles VII and XXV of the American Declaration.<sup>194</sup> Article XXV prohibits arbitrary arrest. Article VII stipulates that pregnant and nursing women and all children are entitled “to special protection, care and aid.” In an advisory opinion on the rights of child migrants, the court stated that in the context of child migrants, this “special protection” requires states to “choose measures that promote the care and well-being of the child . . . rather than the deprivation of her or his liberty.”<sup>195</sup> The court further specified that the scope of the state’s obligations acquire content “in light of the best interests of the child . . . depending on the child’s particular situation.”<sup>196</sup> If the child crosses the border with his or her parents, governments must take measures that preserve family unity and preclude family immigration detention.<sup>197</sup> If the child is unaccompanied, immigration detention is also inappropriate.<sup>198</sup> The court has thus recognized that the “best interests of the child” is one of the Inter-American system’s guiding principles to which states must give priority in the course of implementing government policy, including immigration policy.<sup>199</sup>

---

<sup>194</sup> The Court noted that detention may be appropriate and necessary to achieve a legitimate government purpose. However, when the necessary and proportionate analysis is combined with the best interests of the child, “the Court finds that the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure *is not absolutely essential* in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order. Adding to this, the Court finds that the deprivation of liberty of a child in this context can *never be understood as a measure that responds to the child’s best interest*. Thus the Court considers that measures exist that are less severe and that could be appropriate to achieve such objective and, at the same time, satisfy the child’s best interest. In sum, the Court finds that the deprivation of liberty of a child migrant in an irregular situation, ordered on this basis alone, is arbitrary and, consequently, contrary to both the Convention and the American Declaration.” Rights and Guarantees of Children, *supra* note 30, ¶ 154. (emphasis added) (citations omitted).

<sup>195</sup> *Id.* ¶ 155.

<sup>196</sup> *Id.* ¶ 156.

<sup>197</sup> *Id.* ¶¶ 69-70 (“[A]s a guideline, the principle of the best interest entails both its priority consideration in the design of public policies and the drafting of laws and regulations concerning childhood, and in its implementation in all spheres that related [sic] to the life of the child. In the context of migration, any immigration policy that respects human rights, as well as any administrative or judicial decision concerning the entry, stay or expulsion of a child, or the detention, expulsion or deportation of her or his parents associated with their own migratory status, must give priority to the assessment, determination, consideration and protection of the best interest of the child concerned.”). The court emphasized that the right to family unity means that “when the child’s best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents. . . . Evidently, this entails a correlative State obligation to design, adopt and implement alternative measures to closed detention centers in order to preserve and maintain the family unit and to promote the protection of the family without imposing an excessive sacrifice on the rights of the child by the deprivation of liberty of all or part of the family.” *Id.* ¶ 158.

<sup>198</sup> *Id.* ¶ 157 (reasoning that detention of unaccompanied children is inappropriate “because in this situation, the State is obliged to give priority to facilitating the measures of special protection based on the best interest of the child, assuming its position as guarantor with the greatest care and responsibility”).

<sup>199</sup> The court found that “when designing, adopting and implementing their immigration policies for persons under the age of 18 years, the State must accord priority to a human rights-based approach, from a crosscut perspective that takes into consideration the rights of the child and, in particular, the protection and comprehensive development of the child. The latter should prevail over any consideration of her or his nationality or migratory status, in order to ensure the full exercise of her or his rights.” *Id.* ¶ 68. *See also* Juridical Condition and Human Rights of the Child, *supra* note 30, ¶ 91 (holding that “the State has the duty to adopt positive measures to fully ensure effective exercise of the rights of the child”). The Committee on the Rights of the Child has come to similar conclusions. *See* Comm. on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, ¶ 12, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter CRC General Comment No. 5],

The UNHCR maintains that, as a general rule, asylum-seeking children, whether accompanied or unaccompanied, must not be detained.<sup>200</sup> “Overall, an ethic of care—and not enforcement—needs to govern interactions with asylum-seeking children, including children in families.”<sup>201</sup> Because children are extremely susceptible to the effects of detention, even when they are confined with their caregivers, states must consider all alternative care arrangements before deciding to hold a child in confinement.<sup>202</sup> Human rights law dictates that no immigrant child—accompanied or not—be detained, except as a measure of last resort and for the shortest period of time possible.<sup>203</sup> Consequently, to the extent a state has no alternative but to detain children, “[a]ll efforts, including prioritization of asylum processing, should be made to allow for the *immediate release* of children from detention and their placement in other forms of appropriate accommodation.”<sup>204</sup>

## **B. CHILDREN MUST NOT BE SEPARATED FROM THEIR PARENTS AND SHOULD BE PLACED ONLY IN OPEN-ACCOMMODATION FACILITIES**

Under international law, presumptions against detaining children in immigration proceedings extend to their families.<sup>205</sup> International law recognizes that the family unit is entitled to respect and protection<sup>206</sup> and that family separation must be avoided unless there are compelling and particular reasons to separate parents from children.<sup>207</sup> Like the UNHCR Detention Guidelines,<sup>208</sup> the Inter-American Court has held that under the American Declaration, “when the child’s best interest requires keeping the family together, the imperative requirement

---

<http://www.refworld.org/docid/4538834f11.html>; Comm. on the Rights of the Child, General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Article 3, paragraph 1), ¶ 6(c), U.N. Doc. CRC/C/CG/14 (May 29, 2013) [hereinafter CRC General Comment No. 14], <http://www.refworld.org/docid/51a84b5e4.html>; see also statements made by Mr. François Crépeau, the Special Rapporteur on the Human Rights of Migrants at the annual Day of General Discussion of the Committee on the Rights of the Child. Comm. on the Rights of the Child: 2012 Day of General Discussion, *supra* note 170, ¶ 5.

<sup>200</sup> See UNHCR Detention Guidelines, *supra* note 24, at Guideline 9.2.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* (citing Convention on the Rights of the Child, *supra* 169, art. 37).

<sup>204</sup> *Id.*, at Guideline 9.2, ¶ 57 (emphasis added).

<sup>205</sup> Comm. on the Rights of the Child: 2012 Day of General Discussion, *supra* note 170; see also *supra* note 194 and accompanying text.

<sup>206</sup> The Universal Declaration of Human Rights, *supra* note 83, art. 16(3) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”); ICCPR, *supra* note 84, art. 23(1) (same); Organization of American States, American Convention on Human Rights art. 17(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (same); European Social Charter art. 16 *opened for signature* Oct. 18, 1961, C.E.T.S. No. 035 (“With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life. . . .”); African Charter on Human and Peoples’ Rights article 18(1), *opened for signature* June 27, 1981, 21 I.L.M. 58 (1982) (“The family shall be the natural unit and basis of society. It shall be protected by the State[,] which shall take care of its physical and moral health.”).

<sup>207</sup> See, e.g., Rights and Guarantees of Children, *supra* note 30, ¶ 273 (quoting Juridical Condition and Human Rights of the Child, *supra* note 30, ¶ 77) (“[T]he child must remain in its nuclear family, unless there are decisive reasons, based on the child’s best interests, to decide to separate the child from the family.”). In any case, separation must be exceptional and preferably temporary. *Id.*; see also Convention on the Rights of the Child, *supra* 169, art. 9 (codifies the right of children not to be separated from their parents against their will); UNHCR Detention Guidelines, *supra* note 24, at Guideline 9.2, ¶ 51.

<sup>208</sup> See UNHCR Detention Guidelines, *supra* note 24, at Guideline 9.2.

not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.”<sup>209</sup>

The U.N. Human Rights Committee has confirmed that states have an affirmative obligation to adopt “appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”<sup>210</sup> Scholars have noted that although customary international law concerning family unity is not yet fully formed, one “can see the outlines of a customary international norm against family separation taking shape.”<sup>211</sup> Detaining parents while releasing children violates both an evolving customary norm and the obligations articulated by the Human Rights Committee, the Inter-American Court, and the UNHCR. Placing children in family detention centers to avoid separating mothers and children violates the international prohibition against detaining migrant children. Furthermore, the practice of separating fathers and partners from children and mothers by sending men to separate immigration detention facilities also contravenes the obligation to protect family unity.

The Inter-American Court of Human Rights has found that the principle of the “non-deprivation of liberty of children”—that is, the impermissibility of depriving children of their liberty because of their status as migrants—extends to their parents under the “best interests of the child” standard, which prioritizes family unity. As a result, immigration detention of migrant children and their parents should be implemented *only* as a measure of last resort and *never* as a precautionary measure during immigration proceedings. Given the special protected status of children under international law, the presumption against detaining migrant children and their families is even stronger than the presumption against immigration detention under the ICCPR and the Refugee Convention. As a result, immigration detention, either as a means of deterrence or as a precautionary measure, is especially violative of the rights of children who are placed in family detention centers with their parents or separated from their family members in the course of immigration proceedings.<sup>212</sup> The Inter-American Court has emphasized the very exceptional and temporary basis upon which children can be separated from their parents<sup>213</sup> concluding that unless “there are determining reasons, based on the child’s best interests, to decide to separate him or her from the family,” such practices must be avoided.<sup>214</sup>

---

<sup>209</sup> Rights and Guarantees of Children, *supra* note 30, ¶ 158 (citations omitted).

<sup>210</sup> Human Rights Comm., General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 5, (July 27, 199), <http://www.refworld.org/docid/45139bd74.html>.

<sup>211</sup> Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 285 (2003).

<sup>212</sup> *See* Rights and Guarantees of Children, *supra* note 30, ¶ 160 (“States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings; nor may States base this measure on failure to comply with the requirements to enter and to remain in a country, on the fact that the child is alone or separated from her or his family, or on the objective of ensuring family unity, because States can and should have less harmful alternatives and, at the same time, protect the rights of the child integrally and as a priority.”).

<sup>213</sup> Rights and Guarantees of Children, *supra* note 30, ¶¶ 176-79; *see also* Juridical Condition and Human Rights of the Child, *supra* note 30, ¶¶ 71-77.

<sup>214</sup> *Id.* ¶ 77.

The Inter-American Court has further concluded that if states must place children in centers or provide accommodation to children and their families, these measures must (i) uphold the right to family unity; (ii) utilize open-accommodation centers<sup>215</sup>; (iii) ensure centers are certified for the care of children; and (iv) guarantee the protection of the special rights of children.<sup>216</sup> Open-accommodation centers are facilities that allow people to enter and exit the facility at will.

Currently, U.S. immigration authorities do not use such open-accommodation centers for migrant and asylum-seeking families. Moreover, this system does not respect the best interests of the child. Immigration authorities separate families and hold children in prison-like detention centers, and no special mechanisms are in place to ensure that the rights of children are upheld as required under international law.

#### **IV. U.S. SUMMARY REMOVAL PROCEEDINGS ARE INCOMPATIBLE WITH THE INTERNATIONAL LEGAL PRESUMPTION AGAINST IMMIGRATION DETENTION AND THE PRINCIPLE OF *NON-REFOULEMENT***

The current U.S. system of summary removal violates international law in two significant ways. First, asylum seekers frequently experience detention that is pervasive, prolonged, and arbitrary, in violation of the guarantees of the Refugee Convention and the ICCPR. Second, the cursory review provided to refugees at the border creates a substantial risk that the United States has deported and is continuing to deport individuals who are likely to be persecuted in their home countries, in violation of U.S. obligations under international and domestic law.<sup>217</sup>

Pursuant to summary removal procedures, the United States has detained and deported thousands of asylum seekers with limited due process and judicial oversight.<sup>218</sup> Under IIRIRA, which established the current summary removal framework, the same immigration officer has the authority to arrest, detain, charge, and deport an unauthorized immigrant.<sup>219</sup> Asylum seekers who are not turned away at the border, deported immediately, or issued notices to appear are placed in summary removal procedures in which detention is mandatory pending a credible fear interview.<sup>220</sup> Reports have documented that asylum seekers confront a host of problems in CBP custody that significantly impair their ability to pursue legitimate asylum claims.<sup>221</sup> The

---

<sup>215</sup> Rights and Guarantees of Children, *supra* note 30, ¶ 180; *see also* Comm. on the Rights of the Child: 2012 Day of General Discussion, *supra* note 170, ¶ 39. Although the use of open-accommodation centers for child migrants has not been firmly established as a requirement under international law, the United States should incorporate the human rights standards that the Inter-American Court has identified as required under the American Declaration.

<sup>216</sup> Rights and Guarantees of Children, *supra* note 30, ¶¶ 175-84. *See also* Order Re Plaintiffs' Motion to Enforce Settlement of Class Action and Defendants' Motion to Amend Settlement Agreement, *Flores v. Johnson*, No. 85-4544 (C.D. Cal. July 24, 2015), at 14-15.

<sup>217</sup> *See* INA § 208(a). For an analysis of the legislative history demonstrating U.S. congressional efforts to bring U.S. laws into compliance with the requirements of the Refugee Convention, *see* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

<sup>218</sup> *American Exile*, *supra* note 23, at 2-3.

<sup>219</sup> *See id.* at 3.

<sup>220</sup> For a brief overview of the statutory framework behind summary removal, *see* Part I, *supra*.

<sup>221</sup> *See, e.g.*, Michele R. Pistone & John J. Hoeffner, *Rules Are Made To Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167 (2006) (reporting widespread sources of error in CBP

consequences of CBP non-compliance with internal rules and regulations are significant and have resulted in removal of individuals with valid claims for international protection under the Refugee Convention and CAT.<sup>222</sup> But the obstacles asylum seekers face in establishing their eligibility for protection are not limited to those they face directly in their encounter with CBP. During detention, after release, and even at their asylum hearings, many encounter procedural and bureaucratic hurdles that increase the risk of wrongful deportation, including deportation in absentia.<sup>223</sup> Moreover, “[b]y the end of the process—the asylum hearing—unreliable and/or incomplete documentation from CBP and USCIS is susceptible to being misinterpreted by the ICE [t]rial attorney, misapplied by the Immigration Judge, and may ultimately result in the denial of the asylum-seeker’s claim.”<sup>224</sup>

---

screening procedures, including that: (i) the record established by secondary CBP inspectors is incomplete and unreliable; (ii) CBP inspectors fail to communicate required information to immigrants; (iii) enforcement officers order expedited removal based on incomplete statements; (iv) CBP inspectors issue removal orders to individuals who express fear during secondary inspections; (v) CBP inspectors falsely attribute statements to applicants; (vi) CBP inspectors fail to include important information conveyed by applicants; (vii) inspectors fail to provide adequate interpretive assistance; (viii) supervisory review of expedited removal process is ineffective; (ix) supervisors accept incomplete sworn statements; (x) supervisors fail to review expedited removal orders; (xi) there are instances of supervisory reviews conducted by unauthorized officials; (xii) supervisors rely on inadequate telephonic review of records; and (xiii) high-level managers and supervisors have confused the standard to be applied when applicants express fear in the secondary inspections interview); “*You Don’t Have Rights Here*”: *U.S. Border Screening and Returns of Central Americans to Risk of Serious Harm*, HUM. RTS. WATCH 26-29 (2014) [hereinafter *You Don’t Have Rights Here*], [https://www.hrw.org/sites/default/files/reports/us1014\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1014_web_0.pdf) (documenting various violations throughout CBP processing procedures in McAllen Border Patrol station in Texas, including (i) failure to inform deportees of availability of protection or to refer asylum seekers who expressed a fear of return to a credible fear interview as required by statute; (ii) CBP screening interviews conducted in public settings without confidentiality; (iii) brief screening interviews during which CBP officers failed to adequately explore or elicit detainees’ fears of return; and (iv) CBP officering detainees to sign deportation orders in a language they did not understand).

<sup>222</sup> See USCIRF REPORT, vol. 1, *supra* note 23, at 54-55; Pistone & Hoeffner, *supra* note 221, at 175, 179; American Exile, *supra* note 23, at 31-43; see also *id.* (“[I]n some cases, people are unjustly deported not because of a misunderstanding about the law but due to coercion, intimidation, and misinformation from immigration officers whose focus on accelerating and multiplying deportations comes at the expense of basic fairness and people’s lives.”); Campos & Friedland, *supra* note 23, at 9-10 (documenting pervasive instances of CBP officers harassing, misinforming, and berating people in order to dissuade them from applying for asylum, and stating that credible fear determinations lack consistency and sometimes result in conflicting determinations based on the same facts that result in some family members being deported while others are permitted to remain in the United States).

<sup>223</sup> See USCIRF REPORT, vol. 1, *supra* note 23, at 56-62. Human Rights First has also documented a series of flaws not only with CBP processing, but also with USCIS credible fear screening procedures and ICE bond and release protocols. *Seeking Protection* *supra* note 20 at 31-38. Many asylum seekers have experienced long delays before securing credible fear interviews and have had to remain in detention facilities waiting for USCIS to schedule their interviews. *Id.* at 37. This, in turn, leads to delays in asylum seekers’ eligibility for parole. *Id.* Many asylum seekers suffer unnecessarily prolonged detention terms, for a host of reasons, even after they have become eligible for parole. *Id.* at 38-41. Asylum seekers in detention face coercive conditions and lack of legal representation, as well as greater hurdles in preparing and presenting their cases. All of these factors affect their ability to win asylum and drive many to abandon their claims while they are in detention. *Id.* 42-46. See also *Myth vs. Fact: Immigrant Families Appearance Rates in Immigration Court*, HUM. RTS. FIRST (July 2015), <http://www.humanrightsfirst.org/resource/myth-vs-fact-immigrant-families-appearance-rates-immigration-court> (observing that clerical errors, court backlogs, defective notice, and lack of legal representation often contribute to asylum seekers’ failure to appear at their immigration court hearings).

<sup>224</sup> USCIRF REPORT, vol. 1, *supra* note 23, at 5.

## A. U.S. SUMMARY REMOVAL PROCEDURES VIOLATE THE INTERNATIONAL PRESUMPTION AGAINST IMMIGRATION DETENTION

For noncitizens seeking asylum, the DHS practice of either summarily deporting asylum seekers without adequate process or detaining them without an individualized review of the reasons for their confinement violates U.S. obligations under the Refugee Convention and the ICCPR.<sup>225</sup>

The decision whether or not to detain an asylum seeker apprehended at or near the border occurs at two stages.<sup>226</sup> First, for individuals whom CBP officers have decided to enter into summary removal under section 212(a)(6)(c) or 212(a)(7), detention is automatic.<sup>227</sup> The INA does not require judicial review of this period of detention.<sup>228</sup> Since many of the asylum seekers at the southwestern border have credible claims for protection and do not pose a threat to national security or public order, their detention without individualized assessments of the reasons underlying their confinement is inconsistent with U.S. obligations under Article 31 of the Refugee Convention, which prohibits states from penalizing asylum seekers and refugees for unauthorized entry.<sup>229</sup> This detention is also impermissibly arbitrary because DHS restricts peoples' liberty without court review, which violates Article 9 of the ICCPR.

Second, once an individual passes the credible fear screening, the decision to detain is, by statute, discretionary.<sup>230</sup> In practice, however, a combination of ICE's inconsistent application of custody determination criteria and the setting of high bond amounts has caused asylum seekers to "languish in detention for months, if not years."<sup>231</sup>

The U.S. government does not provide asylum seekers in summary review proceedings with meaningful access to periodic and individualized review of their detention, as required by the ICCPR and the Refugee Convention.<sup>232</sup> According to the Human Rights Committee, when states impose administrative detention—as is the case with civil immigration detention in the United States—Article 9 of the ICCPR requires "[p]rompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary,"

---

<sup>225</sup> In particular, such practices violate U.S. obligations under the ICCPR, which prohibits arbitrary detention, pursuant to its guarantee of the right to liberty and security of the person, and the criminalization of immigration status, pursuant to its guarantee of the right to freedom of movement. *See* ICCPR, *supra* note 84, arts. 9, 12. Moreover, "[t]o impose penalties without regard to the merits of an individual's claim to be a refugee will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction." Goodwin-Gill, *supra* note 92, at 187. *See also* American Declaration, *supra* note 83, art. XXV (providing protection against arbitrary arrest, protection against detention for civil violations, the right to judicial review of detention, and the right to humane conditions of detention).

<sup>226</sup> As explained above, *see supra* note 65, the exact nature of relief depends on the status of the asylum seeker. "Arriving aliens" are subject to detention pending the credible fear interview and typically do not have the opportunity for bond pending final adjudication before an immigration judge. Asylum seekers apprehended within 100 miles of the border, i.e., "entry without inspection" (EWI), are also detained pending the credible fear interview but are eligible for bond determinations pending the immigration hearing.

<sup>227</sup> INA § 235(b)(1)(B)(iii)(IV).

<sup>228</sup> INA § 235(b)(1)(B)(iii)(IV).

<sup>229</sup> Refugee Convention, *supra* note 85, art. 31.

<sup>230</sup> INA § 236(a).

<sup>231</sup> Campos & Friedland, *supra* note 23, at 7.

<sup>232</sup> General Comment No. 35, *supra* note 89, ¶¶ 18, 19; UNHCR Detention Guidelines, *supra* note 24, at Guideline 7, ¶ 47.

“access to independent legal advice,” and “disclosure to the detainee of, at least, the essence of the evidence on which the decision [to detain] is taken.”<sup>233</sup> Like the immigration detention standard formulated by the Human Rights Committee in General Comment No. 35, the UNHCR Detention Guidelines state, “To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose.”<sup>234</sup> Such a determination requires an individualized finding of necessity prior to deciding to detain or, failing that, prompt review after detention begins.<sup>235</sup> This is critical not only for extended terms of detention, but also for relatively short detention periods. Even short periods of time in detention cause children significant physical and psychological harm.<sup>236</sup> And short-term detention runs the risk of re-traumatizing adult asylum seekers who have already experienced severe trauma in their home countries.<sup>237</sup>

In 2008, the U.N. Special Rapporteur on the Human Rights of Migrants observed that U.S. immigration detention policies did not conform to international standards. After a visit to the United States, the Special Rapporteur recommended that “[m]andatory detention should be eliminated; the Department of Homeland Security should be required to make individualized determinations of whether or not a non-citizen presents a danger to society or a flight risk sufficient to justify their [sic] detention.”<sup>238</sup> The Human Rights Committee’s 2014 concluding observations on the U.S. periodic report on compliance with the ICCPR expressed a similar

---

<sup>233</sup> General Comment No. 35, *supra* note 89, ¶ 15-16.

<sup>234</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 4; General Comment No. 35, *supra* note 89, ¶ 18 (“Detention in the course of proceedings for the control of immigration . . . must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time”). *See also* Concluding Observations on the Second Periodic Report of Malta, *supra* note 133, ¶ 16; Human Rights Comm., Concluding Observations on the Sixth Periodic Report of Finland, ¶ 10, U.N. Doc. CCPR/C/FIN/CO/6 (Aug. 22, 2013); Human Rights Comm., Concluding Observations on the Third Periodic Report of the Czech Republic, ¶ 17, U.N. Doc. CCPR/C/CZE/CO/3 (Aug. 22, 2013).

<sup>235</sup> *See supra* Part II.D.

<sup>236</sup> Detention of children for less than two weeks is associated with negative health outcomes and potential long-term health and developmental consequences. In a July 2015 letter, the American Academy of Pediatrics told DHS Secretary Johnson, “The act of detention or incarceration itself is associated with poorer health outcomes, higher rates of psychological distress, and suicidality[,] making the situation for already vulnerable women and children even worse.” *Still Happening, Still Damaging*, *supra* note 19, at 1; *see also* U.N. Special Rapporteur on Torture 2015 Report, *supra* note 188, at ¶ 16 (“[E]ven very short periods of detention can undermine a child’s psychological and physical well-being and compromise cognitive development. Children deprived of liberty are at heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder. Reports on the effects of depriving children of liberty have found higher rates of suicide and self-harm, mental disorder and developmental problems.”).

<sup>237</sup> Campos & Friedland, *supra* note 23, at 7-8; *see also Locking Up Family Values, Again*, *supra* note 19, at 22 (“Thousands of women and children fleeing violence are at risk of permanent psychological trauma and return to persecution if these policies continue.”); Center for Victims of Torture et al., *Tortured & Detained: Survivor Stories of U.S. Immigration Detention*, UNITARIAN UNIVERSALIST SERV. COMMITTEE (Nov. 2013), [http://www.uusc.org/sites/default/files/report\\_torturedanddetained\\_nov2013.pdf](http://www.uusc.org/sites/default/files/report_torturedanddetained_nov2013.pdf); Letter from Karen Lucas, Am. Immigration Lawyers Ass’n, et al. to Megan Mack, Off. of Civil Rights & Civil Liberties, Dep’t of Homeland Sec. (June 30, 2015), <https://www.womensrefugeecommission.org/images/zdocs/CRCL-Complaint-Psych-Impact-of-Family-Detention.pdf> (submitting complaints based on the creation or exacerbation of trauma while in family detention).

<sup>238</sup> Human Rights Council, Report Submitted by the Special Rapporteur on the Human Rights of Migrants, Jorge G. Bustamante, ¶ 110, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/112/81/PDF/G0811281.pdf?OpenElement>.

concern that “under certain circumstances mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the Covenant.”<sup>239</sup> Like the Special Rapporteur, the Human Rights Committee recommended that the United States revise its immigration laws to incorporate individualized review, in line with the prohibition, under article 9 of the ICCPR, of arbitrary detention and deprivation of liberty without due process of law.<sup>240</sup>

The United States has taken some steps to alleviate these concerns.<sup>241</sup> However, attorneys representing asylum seekers have reported to Human Rights First that asylum seekers who are eligible for parole under ICE’s parole guidance have been denied parole and, instead, held in detention for months.<sup>242</sup>

## **B. U.S. SUMMARY REMOVAL PROCEEDINGS CREATE AN UNACCEPTABLY HIGH RISK THAT INDIVIDUALS WITH VALID ASYLUM CLAIMS WILL BE RETURNED TO THEIR COUNTRY OF PERSECUTION**

The right to be free from arbitrary detention encompasses a number of procedural rights that the United States violates in its system of mandatory detention pending expedited removal. Under the ICCPR and the Refugee Convention, immigrants and refugees have the right to be informed, in a language they understand, both of the reason for their detention and of their rights in connection with the detention order, including the right to challenge the lawfulness of their detention.<sup>243</sup> All persons in immigration detention must have access to asylum procedures, and detention itself must not be used as an obstacle to making an asylum application.<sup>244</sup> As detailed in Part I above, U.S. immigration detention policies fail to ensure that these procedural safeguards are in place. International law requires states to implement procedures that allow even illiterate asylum seekers to make submissions; such procedures must include measures to facilitate asylum seekers’ requests to meet with lawyers, doctors, visitors, and other parties who are providing assistance.<sup>245</sup>

Errors stemming from failures to comply with federal regulations and with policies designed to implement the government’s obligations under the Refugee Convention create an unacceptably high risk that individuals with valid claims for protection will be turned away from the border or, for those the U.S. detains, deported. These removals violate the *non-refoulement* obligations that the United States has taken on under Article 33 of the Convention.<sup>246</sup>

---

<sup>239</sup> Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 15, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), <http://www.refworld.org/docid/5374afcd4.html>.

<sup>240</sup> *Id.*

<sup>241</sup> See *supra* notes 54-55, 66 and accompanying text.

<sup>242</sup> See sources cited *supra* note 68.

<sup>243</sup> General Comment No. 35, *supra* note 89, ¶¶ 24, 39-48; UNHCR Detention Guidelines, *supra* note 24, at Guideline 7, ¶ 47.

<sup>244</sup> UNHCR Detention Guidelines, *supra* note 24, at Guideline 7, ¶ 47.

<sup>245</sup> *Id.*

<sup>246</sup> See generally Elizabeth Kennedy, *No Children Here: Why Central American Children Are Fleeing Their Homes*, AM. IMMIGR. COUNCIL (2014), [http://www.immigrationpolicy.org/sites/default/files/docs/no\\_childhood\\_here\\_why\\_central\\_american\\_children\\_are\\_fleeing\\_their\\_homes\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf). Kennedy’s complete study is forthcoming.

## 1. CBP Process Carries High Risk of Erroneous Deportation

If a noncitizen does not express either a desire to apply for asylum or a fear of persecution in her country of origin, CBP may order her removed.<sup>247</sup> If the asylum seeker expresses a fear of return, the INA requires CBP to refer her to a credible fear interview with a USCIS asylum officer. The initial CBP interview does not provide the types of procedural protections that are required to guard against deportation of immigrants entitled to relief under the Refugee Convention.<sup>248</sup> In fact, multiple researchers, over many years, have documented failures by U.S. border officers to identify asylum seekers and refer them for credible fear interviews.<sup>249</sup>

Summary removal procedures do not provide for access to an immigration judge unless the immigrant expresses a fear of return, and CBP officers are the gatekeepers to asylum and other protection-oriented immigration relief, a role that gives the officers enormous power. They provide the first—and potentially only—form of individualized review that undocumented immigrants will ever receive before being summarily removed. Advocates have reported various forms of negligent and outright hostile conduct by CBP officers toward immigrants;<sup>250</sup> such conduct calls into question the accuracy and impartiality of the screening process. Turning away refugees at our border, without allowing them to apply for asylum, is a breach of U.S. obligations under the Refugee Convention.

Observers have raised serious concerns about the quality and efficacy of the initial screenings conducted by CBP officers. Federal regulations require CBP officers to “create a record of the facts of the case and statements made by the alien.”<sup>251</sup> Federal regulations also require CBP officers to read a statement to undocumented immigrants that informs them of their right to seek protection if they are afraid to return to their country of origin.<sup>252</sup> In practice,

---

<sup>247</sup> INA § 235(b)(1)(A)(i); *see also* *Removal Without Recourse*, *supra* note 58, at 2.

<sup>248</sup> *Women on the Run*, *supra* note 1, at 2.

<sup>249</sup> *See supra* notes 221-224 and accompanying text; *see also infra* notes 254-261 and accompanying text.

<sup>250</sup> *Id.*

<sup>251</sup> 8 C.F.R. 235.3(b)(ii)(2) (2015) (“In every case in which the expedited removal provisions will be applied and before removing an alien from the United States pursuant to this section, the examining immigration officer shall create a record of the facts of the case and statements made by the alien. This shall be accomplished by means of a sworn statement using Form I-867AB, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act. The examining immigration officer shall read (or have read) to the alien all information contained on Form I-867A. Following questioning and recording of the alien’s statement regarding identity, alienage, and inadmissibility, the examining immigration officer shall record the alien’s response to the questions contained on Form I-867B, and have the alien read (or have read to him or her) the statement, and the alien shall sign and initial each page of the statement and each correction.”).

<sup>252</sup> 8 C.F.R. 235.3(b)(ii)(2) (2015) also mandates that the CBP officer read to the immigrant, in a language he or she understands, all of the information contained in Form I-867A, which includes the following statement:

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Furthermore, Form I867B requires that the interviewing officer ask and record the answer to the question, “Do you have any fear or concern about being returned to your home country or being removed from the United States?”

observers have reported that CBP officers often fail to comply with federal regulations and, as a result, asylum seekers entitled to protection under the Refugee Convention and CAT are denied credible fear interviews and, thus, erroneously removed.<sup>253</sup>

Indeed, as part of a 2005 report, the United States Commission on International Religious Freedom (USCIRF) documented “serious implementing flaws [with expedited removal procedures] which place asylum seekers at risk of being returned from the U.S. to countries where they may face persecution.”<sup>254</sup> Despite these findings, DHS has done little to address documented flaws in the agency’s implementation of expedited removal procedures. Two years after the USCIRF published its report and issued recommendations to various agencies—including CBP—the Commission released a follow up “report card.” CBP received an overall grade of F because the agency failed to take any steps to institute the report’s recommendations.<sup>255</sup>

Since then, advocates and attorneys working on behalf of asylum seekers at the border have continued to document similar flaws in CBP screening procedures. Shortcomings in screening procedures include well-documented reports that CBP officers have failed to ask the required questions about fear of return, misrepresented the law, and otherwise interfered with the ability of people who have expressed a fear of return to secure credible fear interviews.<sup>256</sup>

---

Forms I-867A and I-867B are available in Appendix A of Charles Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in USCIRF REPORT, vol. 2, *supra* note 23, at 232, 252.

<sup>253</sup> In a study conducted by the ACLU, fifty-five percent of the immigrants that researchers interviewed who encountered CBP at the border reported they were never asked if they had a fear of persecution or torture. Forty percent of those who reported that they were asked and had responded they had a fear were ordered deported without seeing an asylum officer. *American Exile*, *supra* note 23, at 30-31. *See also* USCIRF REPORT, vol. 2, *supra* note 23, at 33 (noting that because CBP often does not follow mandated procedures, “it is impossible not to conclude that some proportion of individuals with a genuine asylum claim are turned away”); *see also supra* note 221.

<sup>254</sup> U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *Expedited Removal Study Report Card: 2 Years Later 2* (2007) [hereinafter *USCIRF Expedited Removal Report Card*], [http://www.uscirf.gov/sites/default/files/resources/stories/pdf/scorecard\\_final.pdf](http://www.uscirf.gov/sites/default/files/resources/stories/pdf/scorecard_final.pdf) (summarizing the overall findings of the 2005 USCIRF REPORT, vols. 1 & 2, *supra* note 23).

<sup>255</sup> *Id.* at 4. USCIRF’s recommendations to CBP were: “[i] Expand existing videotape systems to all ports of entry and border patrol stations; have ‘testers’ verify that procedures are correctly followed. [ii] Reconcile conflicting field guidance to clarify the requirement that any alien expressing fear be referred for a credible fear interview. [iii] Inform Immigration Judges that forms used at ports of entry and the border are not verbatim transcripts of the alien’s entire asylum claim, despite their appearance, so that they can be given the proper weight. [iv] Save scarce detention resources by not placing asylum seekers with valid travel documents in Expedited Removal. [v] Improve monitoring so that existing border procedures are correctly followed.” *Id.* CBP failed to take steps to implement any of the Commission’s recommendations. *Id.*

<sup>256</sup> USCIRF REPORT, vol. 2, *supra* note 23 at 28 (reporting the “frequent failure on the part of CBP officers to provide required information to aliens during the Secondary Inspection interview, occasional failures to refer eligible aliens for Credible Fear interviews when they expressed a fear of returning to their home countries, inconsistencies between the official records prepared by the investigating officers and the observations made by our research team, and on a handful of occasions, overt attempts to coerce aliens to retract their fear claim and withdraw their applications for admission”). The study also documented “serious problem behaviors” by CBP officers who committed errors and departed from protocols despite the presence of researchers, who, for purposes of the study, were charged with documenting CBP compliance with regulations. The authors noted that “it certainly seems likely that compliance with the required policies could be greater and inappropriate behaviors would be fewer when observers were monitoring their interviews” and that, as a result, “it is likely that *our observations represent some degree of underestimation of the problems observed in this study.*” *Id.* at 30-31 (emphasis added). Attorneys

Observers have also reported that CBP officers have tried to intimidate and coerce applicants to retract their claims and sign deportation orders.<sup>257</sup> Transcripts of initial CBP interviews reveal that officers recorded boilerplate answers that did not capture what the applicant actually said in response to the questions that are designed to elicit fear and, thus, lead to protection under the Refugee Convention and CAT.<sup>258</sup> According to these reports, officers also conduct interviews “too rapidly, without confidentiality,” and without properly providing language interpretation for interviews or translating documents into applicants’ languages.<sup>259</sup> According to attorneys working on behalf of individuals who have experienced these problematic interview practices, the U.S. government has used the “resulting discrepancies, such as erroneous birth dates . . . against applicants in court.”<sup>260</sup> Furthermore, officers do not adequately inform asylum seekers of their right to various forms of immigration relief or that they have the right to counsel.<sup>261</sup>

CBP’s failure to disclose available legal options effectively denies credible fear interviews to many immigrants at the southwestern border and, consequently, bars them from applying for asylum. Because these immigrants have not been referred for a credible fear determination, the U.S. government deports them without first assessing whether they should be allowed, at least, to apply for asylum.<sup>262</sup> CBP officers’ conduct at this point in the proceedings adds to the already unacceptably high risk that asylum seekers entitled to seek protection in the United States under the Refugee Convention will be returned to their country of origin. In fact, reports have already confirmed that the United States has unlawfully deported “some proportion of individuals with genuine asylum claims” in violation of the principle of *non-refoulement*.<sup>263</sup>

## **2. Inconsistent and Opaque Summary Removal Proceedings Carry High Risk of Erroneous Deportation**

Since the passage of IIRIRA, the number of summary removals the United States has carried out has increased sharply. During summary removal proceedings, those noncitizens who

---

representing undocumented immigrants at the southwestern border have also reported that during the initial encounter with CBP, their clients expressed fear of return to their home countries, to which CBP officers have responded that the United States does not give Mexicans asylum. They then turned these immigrants back. According to these advocates, “CBP doesn’t do its job and ask the right questions about fear of return.” Campos & Friedland, *supra* note 23, at 10; *You Don’t Have Rights Here*, *supra* note 221, at 26-29.

<sup>257</sup> USCIRF REPORT, vol. 2, *supra* note 23, at 28; *see also* Campos & Friedland, *supra* note 23, at 10 (“Some advocates complained that clients were harassed, threatened with separation from their families or long detentions, or told that their fears did not amount to asylum claims.”).

<sup>258</sup> Attorneys have reported seeing “identical boilerplate statements in [CBP] officers’ reports,” indicating that “officers often failed to record asylum seekers’ statements even though clients told attorneys they had provided specific information to officers.” Campos & Friedland, *supra* note 23, at 10.

<sup>259</sup> *Id.*; *see also* Pistone & Hoeffner, *supra* note 221; *American Exile*, *supra* note 23, at 31; *You Don’t Have Rights Here*, *supra* note 221, at 26-29. Providing adequate interpretation services is required in 8 C.F.R. § 235.3(b)(2) (2015), but advocates express concern that interpretation is not available, especially for detainees who do not speak Spanish. *See Locking Up Family Values, Again*, *supra* note 19, at 16-17.

<sup>260</sup> Campos & Friedland, *supra* note 23, at 10.

<sup>261</sup> *See Removal Without Recourse*, *supra* note 58, at 2.

<sup>262</sup> In FY 2013, ICE deported 101,000 people through expedited removal procedures governed by INA § 235(b). *Removal Without Recourse*, *supra* note 58, at 2.

<sup>263</sup> USCIRF REPORT, vol. 1, *supra* note 23, at 34; *see also* Campos & Friedland, *supra* note 23, at 10; *You Don’t Have Rights Here*, *supra* note 221, at 5.

do not receive and pass a credible fear screening do not have access to a full removal hearing before an immigration judge and are denied access to counsel in the proceedings. As a result, undocumented immigrants in summary proceedings are often ill informed about their legal rights and forms of available immigration relief. Under expedited removal and reinstatement of removal, immigration officers “serve as both prosecutor and judge—often investigating, charging, and making a decision all within the course of one day.”<sup>264</sup> In other words, the functions of prosecutor, judge, and jailer are consolidated in a single government actor who has little incentive to rule in favor of the applicant for admission into the United States. The speedy conclusion of these deportation decisions often fails to account for “many critical factors,” such as “whether the individual is eligible to apply for lawful status” and whether he or she has “long-standing ties” to the United States or “U.S.-citizen family members.”<sup>265</sup>

After summary deportation by CBP, some asylum seekers quickly return to the United States because they are still afraid to remain in their home countries.<sup>266</sup> If these returning asylum seekers are again apprehended after entering the United States illegally—even if they voluntarily present themselves to immigration authorities—they are often put into reinstatement of removal proceedings.<sup>267</sup> Undocumented immigrants in reinstatement proceedings face a statutory bar to claiming asylum; the bar applies without regard to the merits of the original asylum claim,<sup>268</sup> even if the earlier deportation was erroneous or due to CBP negligence.<sup>269</sup> The only relief available in reinstatement proceedings is withholding of removal, but before an immigrant can even seek this relief in immigration court, he or she must first, as a threshold, pass a reasonable fear screening. During reasonable fear screenings,<sup>270</sup> asylum officers impose a higher standard of proof than in credible fear interviews.<sup>271</sup> Unlike asylum, withholding of removal does not allow recipients to request derivative status for their children and does not offer recipients a path to apply for permanent residence.<sup>272</sup> The bar to claiming asylum thus precludes both the right to independent and impartial review of CBP determinations and the right to a legal remedy under the ICCPR.

Immigrants subject to reinstatement of removal who apply for withholding of removal may face long periods of administrative detention because DHS deems them ineligible to seek

---

<sup>264</sup> *Removal Without Recourse*, *supra* note 58, at 1.

<sup>265</sup> *Id.*

<sup>266</sup> See Campos & Friedland, *supra* note 23, at 10 (“People are removed under expedited removal and then come right back because they are afraid.”).

<sup>267</sup> Reinstatement of removal (INA §241(a)(5)) is a procedure that applies to previously deported noncitizens who have returned to the United States illegally. DHS “reinstates” the original removal order without considering the individual’s current situation, reasons for returning to the United States, or the presence of flaws in the original removal proceedings.” *Removal Without Recourse*, *supra* note 58, at 3. In FY 2013, the government deported 159,634 people under reinstatement of removal proceedings, a 270% increase from 2005 levels. *Id.* at 2.

<sup>268</sup> INA §241(a)(5).

<sup>269</sup> *Removal Without Recourse*, *supra* note 58, at 3.

<sup>270</sup> 8 C.F.R. § 208.31(c) (2015) (requiring that “the alien establish[] a reasonable possibility that he or she would be persecuted” to be eligible for withholding).

<sup>271</sup> See Asylum Division, *supra* note 72, at 8.

<sup>272</sup> USCIS & Exec. Office of Immigration Review, *Instructions for Form I-589: Application for Asylum and for Withholding of Removal*, DHS & DOJ 3, (Dec. 29, 2014), <http://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf>; Exec. Office of Immigration Review, *Fact Sheet: Asylum and Withholding of Removal Relief, Convention Against Torture Protections*, DOJ 6 (Jan. 15, 2009), <http://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf>.

bond.<sup>273</sup> Since July 2015, ICE has paroled families who receive positive reasonable fear determinations,<sup>274</sup> yet adults who are in reinstatement proceedings often are not as fortunate. Even after articulating a “reasonable fear” of persecution or harm, immigrants in reinstatement of removal proceedings often face detention throughout the lengthy process of adjudicating their withholding-of-removal claims in immigration court.

DHS policy imposes a number of procedural barriers to applying for asylum, even for applicants who are not subject to reinstatement of removal. In February 2015, USCIS revised the credible fear guidelines, effectively imposing a heightened standard of review.<sup>275</sup> The credible fear determination under domestic law is designed as a threshold determination that screens applicants whose claims will be subsequently reviewed on the merits (either by an immigration judge or an asylum officer). The availability of a proceeding on the substantive merits of their claims gives applicants the opportunity to collect evidence to meet the standard required to prove asylum eligibility. Asylum filings include extensive evidence of country conditions, witness testimony, and articulation of claims.<sup>276</sup> Under the Refugee Convention, until their claims have been fully adjudicated on the merits (including exhaustion of appeal procedures), asylum seekers have a right to remain in the state where they seek refuge.<sup>277</sup> Procedures that obstruct or truncate screening mechanisms, effectively blocking asylum seekers who are otherwise entitled to judicial review of their substantive claims, breach U.S. obligations under the Refugee Convention.

Although USCIS officers must ensure that applicants understand the credible fear process,<sup>278</sup> they are not required to advise applicants on what follows their credible fear interviews, “leaving individuals in the dark as to how to pursue their claims.”<sup>279</sup> Furthermore, U.S. immigration authorities often fail to provide noncitizens who are paroled into the United States (either on bond or at ICE’s discretion) with proper notices to appear in immigration court. Because the notice to appear stipulates the date of each individual’s hearing, many noncitizens

---

<sup>273</sup> DHS arrests people who are subject to reinstatement of removal and keeps them in custody throughout the reinstatement proceedings, without the opportunity to seek bond.

The process is designed to allow DHS to remove individuals immediately; the entire process (including the removal) may occur within 24 hours. Typically, the DHS officer conducts a short interrogation to determine whether the individual has a prior removal order, actually is the person identified in the prior order, and has unlawfully reentered. At the conclusion of the interrogation, the person is afforded an opportunity to make a statement and, thereafter, the officer typically issues the final order. The process usually happens too quickly for an individual to consult with a lawyer to assist in challenging the reinstatement.

*Removal Without Recourse*, *supra* note 58, at 3.

<sup>274</sup> *Statement By Secretary Jeh C. Johnson On Family Residential Centers*, DHS (June 24, 2015), <https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>.

<sup>275</sup> Memorandum from John Lafferty, Chief, Asylum Division, *Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations*, (Feb. 28, 2014), <http://cmsny.org/wp-content/uploads/credible-fear1.pdf>; *see also* Campos & Friedland, *supra* note 23, at 4; *How to Protect Refugees and Prevent Abuse at the Border: A Blueprint for U.S. Government Policy*, HUM. RTS. FIRST 12 (2014), <http://www.humanrightsfirst.org/sites/default/files/Asylum-on-the-Border-final.pdf>.

<sup>276</sup> 8 C.F.R. §§ 208.9, 208.12 (2015).

<sup>277</sup> *See supra* notes 115, 126 and accompanying text.

<sup>278</sup> 8 C.F.R. § 208.30(d)(2) (2015).

<sup>279</sup> Campos & Friedland, *supra* note 23, at 7.

paroled into the United States miss their hearings and may be subject to deportation in absentia.<sup>280</sup>

Throughout these proceedings, asylum seekers are not guaranteed access to counsel. Although the UNHCR Guidelines on Detention specify that states must provide refugees and asylum seekers with free legal representation to the extent similarly situated individuals are given free legal representation under domestic law,<sup>281</sup> there is, in practice, no access to counsel during large portions of summary removal proceedings. Even in family detention centers, access to legal representatives is often fraught with challenges.<sup>282</sup>

## CONCLUSION

Under the ICCPR, the Refugee Convention, and the American Declaration, permissible uses of immigration detention are strictly limited, especially for vulnerable populations. The detention of asylum seekers is permissible only as a last resort and must be accompanied by individualized judicial review. Children and their families generally may not be detained.

International law also places general limits on acceptable time frames, purposes, and methods of immigration detention and alternatives to detention. Detention that extends beyond the brief period necessary to verify identities and record claims is arbitrary and, thus, impermissible unless an assessment of an individual's particular circumstances indicates that detention is a necessary measure of last resort. Therefore, before placing asylum seekers in detention, states must take into account alternatives to detention, choosing the least restrictive means to achieve their permissible ends in each individual's case. Less coercive measures include systems that impose reporting obligations or bond payments on asylum seekers; bond must be set at reasonable amounts and should be universally available. The UNHCR maintains that states "should as far as possible" avoid more restrictive alternatives to detention, such as electronic monitoring.<sup>283</sup> Indeed, the Special Rapporteur on the Human Rights of Migrants has observed that using ankle and wrist bracelets may violate the rights of migrants under the

---

<sup>280</sup> 8 C.F.R. § 1003.26 (2015).

<sup>281</sup> Refugee Convention, *supra* note 85, art. 16(2); UNHCR Detention Guidelines, *supra* note 24, at Guideline 7, ¶ 47.

<sup>282</sup> According to a 2015 Human Rights First Report,

Only about 20 percent of immigrants held in detention are able to secure legal counsel, but [DHS] sent mothers and children to detention facilities located far from the major metropolitan areas where pro bono resources are more available. Without counsel, these mothers are 17 times less likely to succeed in their cases. In the weeks and months following the June 2014 [DHS policy] announcement, many mothers were blocked from the chance even to apply for asylum by inadequate credible fear screening interviews, and the credible fear pass rate in Artesia [a temporary immigration detention center for women and children that operated in New Mexico from June 24, 2014, until December 2014] was less than 40 percent in the initial weeks.

*A One-Year Update*, *supra* note 14, at 2. Even since June 2015, when Secretary Johnson indicated DHS would no longer seek to hold women and children to deter would-be immigrants and began reviewing the cases of women detained beyond 90 days, advocates have reported that "mothers and children continue to be sent to these [remote] facilities, continue to face an egregious lack of counsel, and continue to have even their limited access to counsel hampered by detention facility staff." *Id.*

<sup>283</sup> See *supra* note 139 and accompanying text.

ICCPR.<sup>284</sup> In all cases, the decision to impose an alternative to detention, like the initial decision to detain and the decision to continue detaining over time, must be subject to impartial judicial review. A finding that detention in an individual case is necessary must be grounded on the likelihood that the person will abscond or be a risk to public safety. The government may not detain or otherwise penalize asylum seekers or use detention to deter entry by others. Any immigration detention must be reasonable, necessary, and proportionate in light of the individual circumstances of a particular case. Immigration detention must take place in civil, not criminal, facilities and under non-punitive conditions.

Under international law, the United States must consider individuals who are subject to immigration detention on a case-by-case basis. The government, however, has grafted punitive immigration deterrence policies onto expedited removal procedures, thereby subjecting entire groups of asylum seekers to detention and deportation. The use of expedited removal should be limited and eventually ended by statute; it is particularly inappropriate for vulnerable populations such as families with children. Expedited removal puts asylum seekers at risk of mistaken deportation back to persecution. This violates U.S. law and obligations to which the United States has agreed under international law.

Because CBP agents have the power to execute removal orders without judicial oversight, some would-be asylum seekers are returned home without adequate review of the merits of their claims. If asylum seekers successfully pass CBP screening, they are automatically placed in detention in punitive facilities, with limited avenues of relief available to them, regardless of whether they have children with them or have medical or psychological needs that should preclude detention. Even if they successfully make their case in their interviews, many asylum seekers are still subjected to punitive alternatives to detention without any finding of necessity in their individual cases. At every stage of the screening and expedited removal process, the government's policies and practices are causing the United States to violate the rights of asylum seekers in contravention of U.S. law and U.S. commitments under international law.

---

<sup>284</sup> See *supra* note 141 and accompanying text.

## **APPENDIX: LIST OF ABBREVIATIONS**

CAT:	Convention Against Torture
CBP:	U.S. Customs and Border Protection
CRC:	Convention on the Rights of the Child
DHS:	U.S. Department of Homeland Security
ICCPR:	International Covenant on Civil and Political Rights
ICE:	U.S. Immigration and Customs Enforcement
IIRIRA:	Illegal Immigration Reform and Immigrant Responsibility Act of 1996
INA:	Immigration and Nationality Act
OAS:	Organization of American States
TVPRA:	Trafficking Victims Protection Reauthorization Act
UNHCR:	United Nations High Commissioner for Refugees
USCIS:	U.S. Citizenship and Immigration Services