

## UNHCR's Views on the Detention of Asylum Seekers

### *Using international law to advocate against detention of individuals seeking protection in the U.S.*

September 2022

The United Nations High Commissioner for Refugees (UNHCR) has had a longstanding interest in the situation of detained asylum seekers and the legality of detention of this population under international law. UNHCR takes the position that, consistent with international refugee and human rights law and standards, detention of asylum seekers generally should be avoided and considered only as a measure of last resort. Because seeking asylum is not a crime, an individual's status as an asylum seeker is not in and of itself a valid basis for detention. Instead, detention is an exceptional measure that can be justified only by a legitimate purpose and when its necessity, reasonableness, and proportionality are based on an individualized assessment for each person.

In the United States, UNHCR observes that asylum seekers, including children, continue to be subject to detention, in some cases for prolonged periods, and frequently face barriers to accessing legal assistance, representation, and language resources. Further, the ongoing use of immigration detention amidst the COVID-19 pandemic exacerbates the threats to the rights and safety of asylum seekers. Within this context, this note summarizes UNHCR's views on the detention of persons seeking international protection. It was prepared to provide guidance on relevant international legal standards to attorneys and other advocates working with asylum seekers who are detained or at risk of detention in the United States. The resources detailed at the end of this document expand upon the discussion.

### **I. Relevance of International Refugee Law in the United States**

UNHCR has been entrusted with the responsibility to protect refugees since 1950,<sup>1</sup> and, pursuant to the Statute of the Office of the UNHCR, is mandated to provide international protection, among other ways, by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”<sup>2</sup> The key international instruments governing the legal framework for refugee protection are the 1951 Convention Relating to the Status of Refugees (“1951 Convention”)<sup>3</sup> and its 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”).<sup>4</sup> These twin instruments derive from the institution of and right to seek and enjoy asylum,<sup>5</sup> which is enshrined in the Universal Declaration of Human Rights.<sup>6</sup> The 1951 Convention and 1967 Protocol define who is a “refugee” and outline the rights and protection to which refugees are entitled, including freedom from arbitrary deprivation of liberty.

By accession in 1968, the United States became a State party to the 1967 Protocol, which incorporates articles 2 to 34 of the 1951 Convention, and the United States has incorporated the substantive

---

<sup>1</sup> U.N. General Assembly, *Refugees and Stateless Persons*, G.A. Res. 319 (IV) A, at 1, U.N. Doc. A/RES/319 (Dec. 3, 1949); U.N. General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428 (V), annex, at 1, U.N. Doc. A/RES/428(V) (Dec. 14, 1950) [hereinafter UNHCR Statute].

<sup>2</sup> UNHCR Statute, at 8(a); *see also* U.N. General Assembly, *Convention Relating to the Status of Refugees*, 19 U.S.T. 6259, 189 U.N.T.S. 137, preamble, art. 35(1) (July 28, 1951) [hereinafter *1951 Convention*]; U.N. General Assembly, *Protocol Relating to the Status of Refugees*, art. 2, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967) [hereinafter *1967 Protocol*].

<sup>3</sup> *1951 Convention*.

<sup>4</sup> *1967 Protocol*.

<sup>5</sup> *See* UNHCR, Rep. of the Exec. Comm. of the Programme of the U.N. High Comm'r for Refugees on the Work of Its Forty-Ninth Session, ¶ (f) U.N. Doc. A/53/12/Add.1 (1998). “The institution of asylum, which derives directly from the right to seek and enjoy asylum from persecution set out in Article 14 of the Declaration, is among the most basic mechanisms for the protection of refugees.”

<sup>6</sup> U.N. General Assembly, *Universal Declaration of Human Rights*, art. 14(1), G.A. Res. 217 (III) A (Dec. 10, 1948).

provisions of the 1967 Protocol into U.S. domestic law.<sup>7</sup> As a State party, the United States has a duty to develop and implement laws, policies, and practices in a manner consistent with its international obligations. To support States' efforts to fulfill such duty, UNHCR has produced extensive interpretive guidance.<sup>8</sup> With respect to detention, UNHCR issued Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention ("Detention Guidelines").<sup>9</sup> Consistent with international refugee and human rights law, the Detention Guidelines detail how any decision to deprive an asylum seeker of his or her liberty must respect the right to seek asylum and the right to be free from arbitrary detention, and they advance reliance on alternatives to detention for this population.

International law can be used to argue against detention and in favor of alternatives for asylum seekers, and advocates may wish to include relevant materials in their submissions on behalf of detained asylum seekers, or those at risk of detention, to authorities for their consideration when applicable. UNHCR recognizes that an asylum seeker may need to affirmatively highlight relevant international legal standards to receive individualized consideration by U.S. courts and authorities in a particular case. These sources are cited throughout the document and compiled thematically in the final section.

## **II. International Human Rights Framework**

UNHCR draws upon the international human rights framework to inform and guide various aspects of refugee protection, including that related to detention. International human rights law protects the right to liberty and security of person by prohibiting the arbitrary deprivation of personal liberty for all individuals, including asylum seekers.<sup>10</sup> Under the International Covenant on Civil and Political Rights (ICCPR), "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."<sup>11</sup> The United Nations Human Rights Committee, the treaty body whose interpretation of the ICCPR is authoritative, has clarified that this applies to "all deprivations of liberty," including administrative detention for purposes of immigration control.<sup>12</sup> Thus, holding asylum seekers on immigration-related grounds is a form of deprivation of liberty that may amount to arbitrary detention in violation of international human rights law. The prohibition against arbitrary detention is absolute, not only under human rights treaties such as the ICCPR, but also as a non-derogable rule of customary international law.<sup>13</sup> As a State Party to the ICCPR, and pursuant to customary international law, the United States is bound by their provisions, including the prohibition against arbitrary detention.

## **III. International Legal Standards Governing Detention of Asylum Seekers**

This section provides an overview of international legal standards—key principles and criteria, including the principle of non-discrimination, minimum procedural safeguards, and standards

---

<sup>7</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

<sup>8</sup> See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, at 9, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019) [hereinafter Handbook].

<sup>9</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), <https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html> [hereinafter "Detention Guidelines"].

<sup>10</sup> Deprivation of liberty, or detention, occurs when a person is held, usually in a confined space, where one is unable to leave at will. Detention Guidelines, ¶ 5.

<sup>11</sup> International Covenant on Civil and Political Rights art. 9(1), *ratified* June 8, 1992, 999 U.N.T.S. 171 (entered into force Sept. 8, 1992) [hereinafter ICCPR].

<sup>12</sup> U.N. Human Rts. Comm., *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, ¶ 1 (June 30, 1982), <https://www.refworld.org/docid/4538840110.html>.

<sup>13</sup> U.N. Human Rts. Comm., *General Comment No. 5 on Migrants' Rights to Liberty and Freedom from Arbitrary Detention*, ¶ 17, U.N. Doc. CMW/C/GC/5 (Sept. 23, 2021).

regarding detention conditions—and considers whether or how United States detention policies and practices align with them.

#### a. Key Principles and Criteria

The 1951 Convention provides in Article 31 that, because seeking asylum is a lawful act, contracting states shall not restrict refugees' movements unless necessary.<sup>14</sup> UNHCR's Detention Guidelines emphasize this provision by reaffirming the right to seek asylum and underscore that the "detention of asylum-seekers should normally be avoided and be a measure of last resort."<sup>15</sup> When detention is used, it must not be arbitrary. Detention is arbitrary when the determination to detain is not necessary, proportionate, reasonable, or required by law.<sup>16</sup> In other words, to avoid arbitrariness, detention must meet each of the following four criteria:

- **Necessary** in the individual's case.<sup>17</sup> The principle of necessity requires that any State action not exceed what is strictly necessary to achieve the purported purpose.<sup>18</sup>
- **Proportionate** to a legitimate purpose.<sup>19</sup> The principle of proportionality requires balancing the individual's right to liberty and security of person with the public policy objective of limiting it.<sup>20</sup>
- **Reasonable** in all circumstances.<sup>21</sup> The principle of reasonableness requires that States use immigration detention only for a legitimate purpose—such as to protect public order, public health, or national security—the analysis of each of which applies to the individual in question.<sup>22</sup> Governments' operational concerns, such as availability of bed space in detention, should not guide detention decisions, as they do not account for the particulars of an individual's situation.<sup>23</sup> While States have a legitimate interest in protecting their territory and managing irregular migration, detaining an individual based solely on immigration status exceeds that interest, which would make detention on such grounds arbitrary,<sup>24</sup> and this type of arbitrary detention may amount to torture or ill-treatment, especially when it is indefinite.<sup>25</sup>
- **Prescribed by law.** Deprivation of liberty that is not in conformity with national law would be unlawful as a matter of both national and international law.<sup>26</sup> Nonetheless, national legislation is "not always the decisive element in assessing the justification of deprivation of liberty,"<sup>27</sup>

---

<sup>14</sup> 1951 Convention, art. 31(2).

<sup>15</sup> Detention Guidelines, ¶ 2.

<sup>16</sup> Detention Guidelines, Guideline 4.

<sup>17</sup> Detention Guidelines, ¶ 18.

<sup>18</sup> Detention Guidelines, ¶¶ 19, 34.

<sup>19</sup> Detention Guidelines, ¶ 18.

<sup>20</sup> Detention Guidelines, Guideline 4.1.

<sup>21</sup> Detention Guidelines, ¶ 18.

<sup>22</sup> Detention Guidelines, Guidelines 4.1, 4.2.

<sup>23</sup> UNHCR, *Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services) "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers"*, at 9 (Oct. 19, 2021) [hereinafter UNHCR Comments on CFI/AO Rule]. Approaching decisions to detain from a presumption of detention and permitting exceptions based on operational considerations, including the availability of bed space, would not fall within the permitted framework under international law. *Id.*

<sup>24</sup> U.N. General Assembly, *Report of the Working Group on Arbitrary Detention*, annex, ¶ 10, Human Rights Council, 39th Session, U.N. Doc. A/HRC/39/45 (July 2, 2018); U.N. General Assembly, *Report of the Working Group on Arbitrary Detention*, ¶ 58, Human Rights Council, 13th Session, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010); U.N. General Assembly, *Report of the Working Group on Arbitrary Detention*, ¶ 53, Human Rights Council, 7th Session, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008).

<sup>25</sup> Nils Melzer, *Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 26, U.N. Doc. A/HRC/37/50 (Nov. 23, 2018).

<sup>26</sup> Detention Guidelines, ¶ 15.

<sup>27</sup> Detention Guidelines, ¶ 15.

as detention that is prescribed by law may nonetheless be unnecessary, disproportionate, or unreasonable, and therefore arbitrary. Moreover, in addition to the above-mentioned key principles, another key factor that needs to be considered is “the underlying purpose of preventing persons being deprived of their liberty arbitrarily.”<sup>28</sup>

Consideration of alternative or less restrictive measures should be part of the overall assessment of whether detention is necessary, proportionate, and reasonable under the individual’s circumstances. Failure to consider less coercive or intrusive alternate means of restricting movement to achieve the desired purpose could render the detention arbitrary.<sup>29</sup>

Mandatory and indefinite detention are forms of arbitrary detention from which States are prohibited. Mandatory detention is always arbitrary because it is not based on an individualized determination of the necessity, proportionality, or reasonableness of detention.<sup>30</sup> In addition, indefinite detention is arbitrary because it may fail to meet the requisite criteria for the practice potentially to be considered permissible. The length of an otherwise lawful detention, for instance, may render it arbitrary when it becomes disproportionate to its alleged purpose.<sup>31</sup> States must exercise exceptional caution in the case of stateless persons, who are at increased risk of indefinite detention when there is no country to which they can be removed,<sup>32</sup> and a person’s status as stateless should be considered as a factor in detention decisions.<sup>33</sup> Maximum limits on duration should be established by law, and any decision to detain must be subject to independent, periodic review.<sup>34</sup> Both mandatory and indefinite detention impede access to asylum and can lead to refoulement.<sup>35</sup>

Furthermore, detention must not be discriminatory on the basis of race, color, sex, language, religion, political opinion, national or social origin, property, birth, or other status, such as whether an individual is an asylum seeker.<sup>36</sup> Among other things, this requires a State to have an objective and reasonable basis for distinguishing between non-citizens in this regard, and an individual must always have an opportunity to challenge his or her detention on these grounds.<sup>37</sup>

There exist longstanding discrepancies between the U.S. approach to detention of asylum seekers and the clear limitations to such practice under international law.<sup>38</sup> First, detention in the United States seems to be more of a routine rather than exceptional occurrence and used potentially for reasons not considered appropriate under international standards.<sup>39</sup> Following a visit to the United States, the Working Group on Arbitrary Detention expressed concern that detention “appeared to be

---

<sup>28</sup> Detention Guidelines, ¶ 15.

<sup>29</sup> Detention Guidelines, ¶ 18.

<sup>30</sup> Detention Guidelines, ¶ 20.

<sup>31</sup> Detention Guidelines, ¶ 44.

<sup>32</sup> U.N. Human Rts. Comm., *General Comment No. 35: Article 9 (Liberty and Security of Person)*, ¶ 18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

<sup>33</sup> UNHCR, *Representing Stateless Persons*, at 34 (Aug. 2017), <https://www.unhcr.org/59e799e04.pdf>.

<sup>34</sup> Detention Guidelines, ¶¶ 47(iii), 47(iv).

<sup>35</sup> U.N. Human Rts. Comm., *General Comment No. 35: Article 9 (Liberty and Security of Person)*, ¶ 18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

<sup>36</sup> Detention Guidelines, ¶ 43.

<sup>37</sup> Detention Guidelines, ¶ 43.

<sup>38</sup> UNHCR Comments on CFI/AO Rule, at 8-10.

<sup>39</sup> See UNHCR Comments on CFI/AO Rule, at 10; U.N. General Assembly, *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017) [hereinafter WGAD Report on Visit to USA]. UNHCR has expressed concern over the highly discretionary nature of parole and the possibility that it could be applied restrictively, leading to the widespread detention of asylum seekers throughout their proceedings. UNCHR Comments on CFI/AO Rule, at 9. Thus, UNHCR has recommended that, should a parole-based regime be utilized, the parameters of such framework be aligned with international law. *Id.* at 10. This would include a presumption of release, with an individualized assessment of the decision to detain in every case. *Id.* For example, ensuring automatic consideration for parole following a credible fear finding and creating a presumption of parole, balanced by any risks of flight, danger to the community or national security, would further protect against arbitrary detention. *Id.* at 11. UNHCR supported the parole guidelines issued by ICE in December 2009 because they included automatic consideration, a presumption of release, and built-in internal quality assurance mechanisms. *Id.*

implemented to deter individuals from continuing their immigration claims,” including asylum.<sup>40</sup> As deterrence is not a legitimate State aim to restrict individual rights, it is thus not reasonable to justify detention.<sup>41</sup>

Second, while international law prohibits the mandatory detention of asylum seekers, the statutory scheme in the United States requires the detention of certain non-citizens on criminal grounds, those in expedited removal, and those with final orders of removal—all of which are groups that may include asylum seekers.<sup>42</sup> Any decision to detain should be based on an individualized assessment of each asylum seeker’s circumstances, which mandatory detention does not.<sup>43</sup> Such mandatory detention does not contemplate alternative measures. The statutory scheme mandating detention is, therefore, an example of a standard prescribed by law that is nonetheless inconsistent with the principles of necessity, proportionality, and reasonableness.

Third, U.S. law neither limits the duration of detention nor provides for independent, periodic review of detention decisions.<sup>44</sup> While mechanisms exist that may allow individuals to be released while their case is pending—such as parole authority, bond, or alternatives to detention—the Working Group on Arbitrary Detention has observed that, in practice, “such relief is regularly denied to individuals or combined with conditions that make release impracticable (i.e., excessive bond amounts).”<sup>45</sup> This puts noncitizens, and especially stateless persons, at risk of indefinite detention and is inconsistent with international legal standards.

Finally, U.S. policy and practice concerning immigration detention may not uphold the principle of non-discrimination. UNHCR observes that Black immigrants are at a disproportionately high risk of detention by ICE,<sup>46</sup> face a higher risk of placement in solitary confinement than non-Black detainees,<sup>47</sup> and have experienced racism and abuse in detention.<sup>48</sup> The Working Group on Arbitrary detention has noted racial disparities at all stages of the *criminal* justice system in the United States, such as overrepresentation of Black and Hispanic detainees in prisons,<sup>49</sup> and such disparities may spill over and inform the immigration enforcement system.<sup>50</sup>

For these reasons, the detention of many asylum seekers under current law, policy, and practice in the U.S. may not align with international law.

---

<sup>40</sup> WGAD Report on Visit to USA, ¶ 27.

<sup>41</sup> See WGAD Report on Visit to USA, ¶ 43.

<sup>42</sup> INA §§ 235(b)(1)(B)(IV), 236(c), 241(a)(2).

<sup>43</sup> WGAD Report on Visit to USA, ¶ 27.

<sup>44</sup> While U.S. regulations allow individuals to request a review of a custody determination, such regulations are not codified by statute and therefore may be changed by a subsequent administration, which is inconsistent with international law. See e.g., 8 CFR § 1003.19 (providing for a review of custody and bond determinations in Immigration Court). Nevertheless, the regulations also allow U.S. detention authorities to indefinitely detain an individual who is deemed to pose a special danger to the public. 8 CFR § 1241.14.

<sup>45</sup> WGAD Report on Visit to USA, ¶ 28.

<sup>46</sup> NYU Immigrant Rights Clinic & Black Alliance for Just Immigration, *THE STATE OF BLACK IMMIGRANTS 24-26* (Sept. 2016), [sobi-fullreport-jan22.pdf](https://www.baji.org/sobi-fullreport-jan22.pdf) (baji.org).

<sup>47</sup> Rocco Fazzari, *U.S. Isolates Detained Immigrants from Majority-black Countries at High Rate, Study Finds*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, Apr. 21, 2020, <https://www.icij.org/investigations/solitary-voices/u-s-isolates-detained-immigrants-from-majority-black-countries-at-high-rate-study-finds/>. According to a recent study, ICE placed detained individuals from African and Caribbean countries in solitary confinement six times as often as the detained population at large. *Id.*

<sup>48</sup> Southern Poverty Law Center & Freedom for Immigrants Complaint to DHS Office of Civil Rights & Civil Liberties re Immigration and Customs Enforcement Officers’ Use of Torture to Coerce Immigrants into Signing Immigration Documents at Adams County Correctional Facility,

<https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5f7f17f39e044f47175204fb/1602164723244/Re+CRCL+Complaint+ICE%27s+Use+of+Torture+to+Coerce+Immigrants+to+Sign+Immigration+Documents+at+Adams+County+Correctional+Facility.pdf> (detailing a pattern of coercion and unwarranted use of physical force by ICE officers against Cameroonian immigrants in ICE detention).

<sup>49</sup> WGAD Report on Visit to USA, ¶ 59.

<sup>50</sup> *The State of Black Immigrants*, at 29.

## b. Minimum Procedural Safeguards

International law requires the provision of the following minimum procedural safeguards for asylum seekers at risk of detention and, for those who are detained, during their detention:

- **Right to information:** Asylum seekers are entitled to be informed of the reasons for their detention and their rights, including review procedures and access to counsel, in a language that they understand.<sup>51</sup>
- **Access to legal counsel:** Through its experience, UNHCR has observed that asylum seekers in detention often encounter greater obstacles to accessing counsel or support networks than those who are not detained and that they might face other challenges, such as trauma from being held in custody, that bear on the fairness of their proceedings.<sup>52</sup> States should therefore provide free legal assistance as soon as possible after arrest or detention to help the individual understand his or her rights.<sup>53</sup> Communication between a detained asylum seeker and their legal representative must be protected by attorney-client confidentiality principles, and legal representatives must have access to their client, the client’s records, and a private setting in which to meet with the client.<sup>54</sup>
- **Review of detention decision:** In addition to initial and automatic periodic reviews of the decision to detain by an authority independent of the detaining authority,<sup>55</sup> an asylum seeker should be able to exercise the right to challenge the lawfulness of detention before a court of law at any time.<sup>56</sup> The burden of proof to establish the lawfulness of the detention rests on the authorities in question, which must demonstrate “that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case.”<sup>57</sup> Where the justification to detain an individual is not or no longer valid, they should be released immediately.<sup>58</sup>
- **Access to asylum procedures:** Detained asylum seekers should be given access to asylum procedures, and such access must be realistic and effective.<sup>59</sup> This means, for example, “that timeframes for lodging supporting materials are appropriate for someone in detention.”<sup>60</sup> Moreover, asylum seekers must be afforded the opportunity and ability to contact and be contacted by UNHCR, and ideally other national bodies or agencies, such as ombudsman offices, human rights commissions, or NGOs.<sup>61</sup>

UNHCR observes that the United States has faced challenges in meeting some of the minimum procedural standards required under international law. Detained immigrants frequently encounter

<sup>51</sup> ICCPR, art. 9(2); Detention Guidelines, ¶¶ 47(i), 47(ii).

<sup>52</sup> See e.g., UNHCR, *Beyond Detention – A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees*, at 5 (June 2014); UNCHR Comments on CFI/AO Rule, at 10.

<sup>53</sup> Detention Guidelines, ¶ 47.

<sup>54</sup> Detention Guidelines, ¶ 47.

<sup>55</sup> Detention Guidelines, ¶¶ 47(iii), 47(iv); see also U.N. General Assembly, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 21, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) (stating that “the decision to keep the person detained must be reviewed periodically”); UNHCR, *Summary Conclusions of the Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons*, ¶ 2, Geneva, Switzerland (July 2011) (requiring that detention of asylum-seekers be subject to “periodic and judicial review”). For a more thorough discussion on UNHCR’s views on periodic review of detention decisions, see UNHCR Amicus Brief, *Jennings v. Rodriguez*, No. 15-1204, at 28-30 (Oct. 31, 2016), <https://www.refworld.org/docid/5821c8f64.html>.

<sup>56</sup> Detention Guidelines, ¶ 47(v).

<sup>57</sup> Detention Guidelines, ¶¶ 47(iii)-(v).

<sup>58</sup> Detention Guidelines, ¶ 45.

<sup>59</sup> Detention Guidelines, ¶ 47(vi).

<sup>60</sup> Detention Guidelines, ¶ 47(vi).

<sup>61</sup> Detention Guidelines, ¶ 47(vii).

difficulties accessing legal representation, for example, due to limited access to telephone, communication, and interpretation services, an issue exacerbated by the remote location of many detention facilities.<sup>62</sup> In addition, they may not have adequate access to asylum procedures. Beyond the lack of guaranteed access to legal assistance and representation, the short timeframe set forth under U.S. law governing the adjudication of asylum claims may prevent individuals from effectively preparing their application and gathering essential supporting evidence from their countries of origin.<sup>63</sup>

### c. Detention Conditions

Detained asylum seekers are entitled to certain minimum conditions of detention under international standards:

- Detention of asylum seekers should not be punitive, and the use of “prisons, jails, and facilities designed to operate as prisons or jails, should be avoided.”<sup>64</sup> In addition, detention can be lawful only in places officially recognized for that purpose (i.e., not police cells), and asylum seekers should be treated with dignity and in accordance with international standards.<sup>65</sup>
- Detainees’ information—including their name, the location of their detention, and the persons responsible for their detention—should be available and accessible to detainees’ relatives and legal representatives.<sup>66</sup> Detained asylum seekers should be able to make regular contact with and receive visits from relatives, friends, religious, international and/or NGOs, including through telephone and internet access.<sup>67</sup> Frequent transfers of asylum seekers from one detention facility to another typically should be avoided, “not least because they can hinder access to and contact with legal representatives.”<sup>68</sup>
- Detention authorities must provide basic necessities such as beds, climate-appropriate bedding, shower facilities, basic toiletries, and clean clothing, as well as appropriate food of nutritional value.<sup>69</sup> Asylum seekers should have access to some form of physical exercise through daily indoor and outdoor recreational activities and suitable outside space.<sup>70</sup>
- Appropriate medical treatment, including psychological counseling, must be provided.<sup>71</sup> Detention authorities should offer asylum seekers a medical and mental health examination promptly after arrival, and, while in detention, asylum seekers’ physical and psychological well-being should be assessed periodically by competent medical professionals.<sup>72</sup> Where asylum seekers in detention present medical or mental health concerns, they must be afforded suitable care and treatment, “including consideration for release.”<sup>73</sup>
- Detained asylum seekers must be able to exercise their right to practice one’s religion.<sup>74</sup>

---

<sup>62</sup> WGAD Report on Visit to USA, ¶ 37.

<sup>63</sup> Under the INA, the initial interview or hearing on the asylum application should take place no later than 45 days after the application was filed. INA § 208(d)(5)(A)(ii).

<sup>64</sup> Detention Guidelines, ¶ 48(iii).

<sup>65</sup> Detention Guidelines, ¶¶ 48(i), (ii).

<sup>66</sup> Detention Guidelines, ¶ 48(iv).

<sup>67</sup> Detention Guidelines, ¶ 48(vi).

<sup>68</sup> Detention Guidelines, ¶ 48(xv).

<sup>69</sup> Detention Guidelines, ¶¶ 48(x), (xi).

<sup>70</sup> Detention Guidelines, ¶ 48(viii).

<sup>71</sup> Detention Guidelines, ¶ 48(vi).

<sup>72</sup> Detention Guidelines, ¶ 48(iv).

<sup>73</sup> Detention Guidelines, ¶ 48(iv).

<sup>74</sup> Detention Guidelines, ¶ 48(ix).

- Detention authorities must put in place a non-discriminatory complaint mechanism or grievance procedure where asylum seekers can submit complaints directly or confidentially to the detention authority or an independent or oversight authority.<sup>75</sup> The procedure for lodging a complaint, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.<sup>76</sup>

Where private contractors operate detention facilities, “subjecting them to a statutory duty to take account of the welfare of detainees has been identified as good practice.”<sup>77</sup> Nonetheless, a State cannot contract out of their obligations under international refugee and human rights law and continue to be accountable for detention conditions.<sup>78</sup> States therefore must ensure that they can effectively oversee the activities of private contractors.<sup>79</sup> This may be achieved through “independent monitoring and accountability mechanisms, such as the termination of contracts or other work agreements where [the] duty of care is not fulfilled.”<sup>80</sup>

UNHCR notes that conditions in U.S. detention facilities may be out of step with international detention standards. Asylum seekers in the U.S. may be held in detention centers that are indistinguishable from those used for punishment in the criminal justice system.<sup>81</sup> Additionally, many detention centers in the United States are operated by private companies in substandard conditions, with poor quality of food and drinking water, limits on recreation time and access to medical services, a lack of books and information in diverse languages, and the practice of solitary confinement.<sup>82</sup> Such conditions do not meet minimum standards under international law, and the Working Group has urged the U.S. government to discontinue the use of private detention facilities.<sup>83</sup>

#### **IV. Detention of Groups with Special Needs**

##### **a. Children**

UNHCR has long been concerned with the detention of asylum-seeking children, both accompanied and unaccompanied. UNHCR’s position on the detention of children is informed by international refugee and human rights law, including child protection standards. The provisions governing international protection set forth in the 1951 Convention and 1967 Protocol are non-discriminatory and apply to all refugees, regardless of age. In addition, under the ICCPR, children are afforded special measures of protection incident to their status as minors.<sup>84</sup> Further, the Convention on the Rights of the Child (CRC)—the most comprehensive international treaty on children’s rights—provides special

---

<sup>75</sup> Detention Guidelines, ¶ 48(xv).

<sup>76</sup> Detention Guidelines, ¶ 48(xv).

<sup>77</sup> Detention Guidelines, ¶ 48(xvii).

<sup>78</sup> Detention Guidelines, ¶ 48(xvii).

<sup>79</sup> Detention Guidelines, ¶ 48(xvii).

<sup>80</sup> Detention Guidelines, ¶ 48(xvii).

<sup>81</sup> WGAD Report on Visit to USA, ¶ 27, citing American Immigration Lawyers Association, *Statutory Enforcement Report: the State of Civil Rights at Immigration Detention Facilities* (Washington, D.C., September 2015) (detailing the punitive conditions at such facilities.).

<sup>82</sup> WGAD Report on Visit to USA, ¶ 34.

<sup>83</sup> WGAD Report on Visit to USA, ¶ 33.

<sup>84</sup> ICCPR, art. 24: “Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to measures of protection as are required by his status as a minor.”



protections for children seeking refugee status<sup>85</sup> and requires States to take the best interests of the child as a primary consideration in any action concerning children.<sup>86</sup>

Detention is never in a child's best interest, and an ethic of care, not enforcement, should prevail in all actions concerning them.<sup>87</sup> When detention is used, it should be only as a measure of last resort and for the shortest possible period of time, with the best interests of the child as a guiding principle.<sup>88</sup> The best interests of the child should be assessed and determined for decisions on the detention of children, especially where possible family separation is implicated.<sup>89</sup> Children may never be detained on immigration grounds, regardless of their legal status or that of their parents,<sup>90</sup> which would constitute a child rights violation and contravene the best interests principle.<sup>91</sup> The detention of children on such grounds has consistently been found to be arbitrary.<sup>92</sup>

Children's rights to liberty and to family life must be respected,<sup>93</sup> and thus, for children accompanied by their parents or other adult caretakers, non-custodial care arrangements should be considered.<sup>94</sup> Detention of accompanied children risks family separation, which must be avoided except when such separation is necessary to protect the best interests of the child. Detention of asylum-seeking families can lead to separation, for example, when one parent is detained while the other parent and minor child(ren) are placed into family detention or paroled together.<sup>95</sup> Where a family includes minor and adult children, the adult child(ren) may be detained apart from their minor siblings and parent(s).<sup>96</sup> Such family separations resulting from the use of detention potentially complicate the family's pursuit of asylum.<sup>97</sup>

---

<sup>85</sup> U.N. General Assembly, *Convention on the Rights of the Child*, G.A. Res. 44/25, art. 22(1), U.N.T.S. vol. 1577 (Nov. 20, 1989) [hereinafter CRC]: "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties." The United States is the only country not to have ratified the CRC, and, while the United States has not ratified the treaty, it is bound to not defeat the Convention's object and purpose as a signatory. The most ratified human rights treaty, the CRC is considered customary international law.

<sup>86</sup> CRC, art. 3(1): "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." "Best interests" generally refers to the well-being of a child, determined by a variety of individual circumstances (e.g., age, level of maturity, etc.), and the Best Interests Procedure describes the standards and processes for managing cases of children at risk. While States have the primary responsibility for upholding and applying the best interests principle and corresponding procedures, UNHCR has issued guidelines relevant to incorporating and implementing those in asylum adjudication. UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021), <https://www.refworld.org/docid/5c18d7254.html>; see also, UNHCR Views on Child Asylum Claims.

<sup>87</sup> Detention Guidelines, ¶ 52.

<sup>88</sup> Article 37(b) of the CRC specifically prohibits arbitrary detention of children and permits the exceptional use of detention "only as a measure of last resort and for the shortest appropriate period of time."

<sup>89</sup> U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration*, ¶ 29, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).

<sup>90</sup> U.N. Committee on the Rights of the Child, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ¶ 61, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

<sup>91</sup> U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, ¶ 5, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

<sup>92</sup> U.N. General Assembly, *Report of the Working Group on Arbitrary Detention*, ¶ 40, Human Rights Council, 39th Session, U.N. Doc. A/HRC/39/45 (July 2, 2018).

<sup>93</sup> CRC, preamble; art. 37(b)

<sup>94</sup> Detention Guidelines, ¶ 53

<sup>95</sup> UNHCR, *Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families*, Docket No. DHS-2021-0051, at 14-15 (Jan. 25, 2022).

<sup>96</sup> UNHCR, *Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families*, Docket No. DHS-2021-0051, at 14-15 (Jan. 25, 2022).

<sup>97</sup> For example, where only one family member knows information material to their asylum claim, the others' inability to convey the same information in a fear screening may result in a negative fear determination.

In the United States, the custody, care, and release of children is governed by the *Flores* Settlement Agreement, into which the U.S. government and a class of asylum-seeking children in the government’s custody entered in 1997.<sup>98</sup> The settlement favors release of children from immigration detention and, where they cannot be released, requires placement in the least restrictive setting.<sup>99</sup> It applies to all children—both unaccompanied and accompanied—held in government custody.<sup>100</sup>

## b. Other Vulnerable Asylum Seekers

UNHCR recognizes the special needs of certain asylum seekers, including women, particularly those who are pregnant or nursing; victims of trauma, torture, or trafficking; disabled individuals; elderly individuals; or lesbian, gay, bisexual, transgender, intersex, or queer individuals.<sup>101</sup> The special circumstances and needs of asylum seekers in these vulnerable groups must be considered in decisions whether to detain and may favor the use of alternative measures. Events precipitating asylum seekers’ flight, for example, may cause them to experience mental health needs, which must be weighed when assessing potential detention.<sup>102</sup> States must provide reasonable accommodation to any detained asylum seekers with disabilities.<sup>103</sup> These might include communication of information, procedures, decisions and policies in an appropriate, accessible manner and the provision of specialized health and other services.<sup>104</sup>

## V. Alternatives to Detention

Part of the overall assessment of the necessity, proportionality and reasonableness of detention is the consideration of alternatives to detention (ATDs). An ATD is “legislation, policy or practice that allows asylum seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement.”<sup>105</sup> UNHCR supports the use of alternatives to detention that are more humane than detention, as well as often significantly more cost-effective.<sup>106</sup> In designing alternatives to detention, States should consider key principles and best practices:

- **Legal certainty:** ATDs must be governed by laws and regulations that specify and explain “the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement.”<sup>107</sup> This ensures that ATDs are not arbitrary restrictions on liberty or freedom of movement.
- **Minimum intervention:** in designing ATDs, States should observe the principle of minimum intervention and consider ATDs’ appropriateness for groups with special needs, such as children, pregnant women, the elderly, persons with disabilities or those experiencing

---

<sup>98</sup> Settlement Agreement, *Flores v. Reno*, No. cv-85-4544-RJK (C.D. Cal. 1997) [hereinafter *Flores* Agreement]; see also, UNHCR Amicus Brief, *Flores v. Lynch*, No. 15-56434 (9th Cir. Feb 23, 2016), <https://www.refworld.org/docid/57447b784.html>.

<sup>99</sup> *Flores* Agreement, ¶¶ 14, 23.

<sup>100</sup> *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016); see also UNHCR Amicus Brief, *Flores v. Lynch*, No. 15-56434 (9th Cir. Feb 23, 2016), <https://www.refworld.org/docid/57447b784.html>.

<sup>101</sup> Detention Guidelines, Guideline 9.

<sup>102</sup> Detention Guidelines, Guideline 9.1.

<sup>103</sup> Detention Guidelines, ¶ 63; see also Convention on the Rights of Persons with Disabilities, art. 14 (Dec. 13, 2006). Article 2 defines “reasonable accommodation” as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

<sup>104</sup> UNHCR Division of International Protection, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, at 49, U.N. Doc. PPLA/2011/01.Rev/1 (Apr. 2011), 4dc949c49.pdf (unhcr.org).

<sup>105</sup> Detention Guidelines, ¶ 8.

<sup>106</sup> Detention Guidelines, ¶ 36. Alternative measures to detention, must also not become alternative forms of detention. *Id.*, ¶ 38.

<sup>107</sup> Detention Guidelines, ¶ 36.

trauma.<sup>108</sup>

- **Human rights:** where they restrict liberty, alternatives to detention must still respect the asylum seeker’s human rights, including the rights to privacy, family life, and freedom from inhuman or degrading treatment.<sup>109</sup>
- **Documentation:** documentation is a necessary feature of ATDs to protect against (re-)detention and ensure that asylum seekers have evidence of their right to reside in the community.<sup>110</sup> Documents can also facilitate access to important services, such as health care, education, and employment.<sup>111</sup>
- **Other best practices:** ATDs are most effective when asylum seekers are treated with dignity, humanity, and respect throughout the asylum procedure; informed clearly and concisely at an early stage about their rights and duties and the consequences of non-compliance; provided with adequate material support, accommodation, and other reception conditions, as well as access to legal advice throughout the asylum procedure; and given individualized case management services in relation to their asylum claims.<sup>112</sup>

UNHCR observes that, in recent years, the United States has vastly expanded its use of ATDs.<sup>113</sup> Some of its programs, such as those that utilize community-based models supported by case management, advance international refugee and human rights law by respecting the right to seek asylum and avoiding arbitrary deprivation of liberty. Between 2016 and 2017, for example, the United States piloted the Family Case Management Program, which offered vulnerable asylum-seeking families—including those with young children and those who had experienced trauma—legal, medical, and social services through local organizations in five metropolitan areas.<sup>114</sup> This community-based case management program yielded a 99.3% appearance rate at immigration court proceedings.<sup>115</sup> More recently, it has developed the Extended Case Management Services (ECMS) program, which provides individuals with case managers who can facilitate referrals and offer information.<sup>116</sup>

Other ATDs that the United States utilizes, however, may not follow international principles and best practices. In addition to the above-mentioned programs, the United States relies on those like the Intensive Supervision Appearance Program (ISAP), which combines in-person monitoring, such as check-ins or home visits, and electronic monitoring, such as GPS tracking via ankle monitors or a smartphone application. Certain 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>117</sup> Moreover, the lack of transparency surrounding the administration and supervision of ankle monitors<sup>118</sup> is inconsistent with the international principle on legal certainty,

<sup>108</sup> Detention Guidelines, ¶ 39.

<sup>109</sup> Detention Guidelines, ¶ 37.

<sup>110</sup> Detention Guidelines, ¶ 42.

<sup>111</sup> Detention Guidelines, ¶ 42.

<sup>112</sup> Detention Guidelines, ¶ 41.

<sup>113</sup> From January 2021 to February 2022, the individuals enrolled in ATDs in the United States increased from 87,000 to over 180,000. TRAC, *Over 180,000 Immigrants Now Monitored by ICE’s Alternatives to Detention Program* (Feb. 28, 2022), <https://trac.syr.edu/immigration/reports/678/>.

<sup>114</sup> Congressional Research Service, *Immigration: Alternatives to Detention (ATD) Programs*, at 10-14 (July 8, 2019), <https://sgp.fas.org/crs/homesec/R45804.pdf>.

<sup>115</sup> Congressional Research Service, *Immigration: Alternatives to Detention (ATD) Programs*, at 10-14 (July 8, 2019), <https://sgp.fas.org/crs/homesec/R45804.pdf>.

<sup>116</sup> American Immigration Council, *Alternatives to Detention: An Overview* (Mar. 2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/alternatives\\_to\\_detention\\_an\\_overview.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/alternatives_to_detention_an_overview.pdf).

<sup>117</sup> Detention Guidelines, ¶ 40.

<sup>118</sup> Human Rights Watch, *Dismantling Detention – International Alternatives to Detaining Immigrants* (Nov. 3, 2021), <https://www.hrw.org/report/2021/11/03/dismantling-detention/international-alternatives-detaining-immigrants>. In 2022, citing a lack of transparency or clear public guidance on how ISAP is administered, the American Civil Liberties Union initiated a lawsuit seeking the release

which requires clear and specific guidance on the various alternatives to detention.<sup>119</sup> Finally, some ‘alternatives to detention,’ such as excessive bond amounts, ankle bracelets, and other forms of electronic monitoring, are not considered true alternatives and might not uphold other human rights, such as the principle of non-discrimination, presumption of innocence, and inherent dignity of individuals.<sup>120</sup>

## VI. UNHCR Resources on Detention of Asylum Seekers

For further discussion of key principles, standards, and guidance regarding detention of asylum seekers generally, see:

- [Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention \(2012\)](#)
- [Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons \(2011\)](#)
- [Beyond Detention 2014-2019: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees \(2014\)](#)
- [Global Strategy Beyond Detention Reports \(Nov. 2020\)](#)
- [UNHCR Amicus Brief, \*Jennings v. Rodriguez\* \(Oct. 2016\)](#)

For further discussion of key principles, standards, and guidance regarding detention of children and families seeking protection, see:

- [UNHCR’s Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families \(Jan. 2022\)](#)
- [UNHCR’s Position Regarding the Detention of Refugee and Migrant Children in the Migration Context \(Jan. 2017\)](#)
- [UNHCR Amicus Brief, \*Flores v. Lynch\* \(Feb. 2016\)](#)

---

of internal documents that clarify the supervision and case management of enrollees in the program. Complaint of the American Civil Liberties Union, *ACLU v. ICE*, 2:22-cv-01291, ¶¶ 12, 31 (C.D. Cal. 2022).

<sup>119</sup> Detention Guidelines, ¶ 36.

<sup>120</sup> WGAD Report on Visit to USA, ¶ 30.