

**In The United States Court of Appeals  
for the Ninth Circuit**

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**JENNY LISETTE FLORES, et al.,**  
*Plaintiffs-Appellees,*

*v.*

**LORETTA E. LYNCH,**  
**ATTORNEY GENERAL,**  
*Defendant-Appellant.*

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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**THE UNITED NATIONS HIGH COMMISSIONER  
FOR REFUGEES' *AMICUS CURIAE* BRIEF  
IN SUPPORT OF APPELLEES**

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### OTHER AUTHORITIES

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## **INTEREST OF *AMICUS CURIAE***

The Office of the United Nations High Commissioner for Refugees (“UNHCR”)<sup>1</sup> has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and others of concern, and together with national governments, for seeking permanent solutions for refugees’ problems. Statute of the Office of the UNHCR ¶ 1, U.N. Doc. A/RES/428(v) (Dec. 14, 1950). UNHCR fulfills its mandate by, *inter alia*, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” *Id.*, ¶ 8(a). UNHCR’s supervisory responsibility is also reflected in the Preamble and Article 35 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (“*1951 Convention*”)<sup>2</sup> and Article 2 of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (“*1967 Protocol*”),<sup>3</sup> obligating States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR, which has won two Nobel Peace Prizes for its work, currently cares for 54.9 million people affected by forced displacement in some 125 countries. The views of UNHCR are informed by its more

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<sup>1</sup> UNHCR represents that Appellees consent to this filing, while Appellant takes no position. Further, no person or entity other than UNHCR and its outside counsel authored this brief or provided any funding related to it.

<sup>2</sup> <<http://www.unhcr.org/3b66c2aa10.html>>.

<sup>3</sup> <<http://www.unhcr.org/3b66c2aa10.html>>.



than six decades of experience supervising the treaty-based system of refugee protection. UNHCR's interpretation of the provisions of the *1951 Convention* and its *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees and others of concern. Accordingly, "[the] Supreme Court has consistently turned [to UNHCR] for assistance in interpreting [U.S.] obligations under the Refugee Convention." *N-A-M v. Holder*, 587 F.3d 1052, 1061–62 (10th Cir. 2009) (Henry, J., concurring) (per curiam) (collecting cases).

UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of international refugee instruments, in particular the *1951 Convention* and the *1967 Protocol*. UNHCR has long been concerned with the detention of asylum-seekers (including children). UNHCR Executive Comm. (ExCom), *Detention of Refugees and Asylum-Seekers*, Oct. 13, 1986, No. 44 (XXXVII) – 1986;<sup>4</sup> see also UNHCR ExCom, *General Conclusion on Int'l Protection*, Oct. 13, 1989, No. 55 (XL) – 1989, ¶ (g); UNHCR ExCom, *General Conclusion on Int'l Protection*, Oct. 9, 1998, No. 85 (XLIX) – 1998, ¶¶ (cc), (dd) and (ee); UNHCR ExCom, *General Conclusion on Int'l Protection*, Oct. 10, 2003, No. 89 (LI) – 2000.<sup>5</sup> In 1999, UNHCR issued the *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*,<sup>6</sup> which were

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<sup>4</sup> <<http://www.refworld.org/docid/3ae68c43c0.html>>.

<sup>5</sup> <<http://www.unhcr.org/41b041534.html>>.

<sup>6</sup> <<http://www.unhcr.org/4aa7646d9.pdf>>.

superseded in 2012 with the *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (“2012 Detention Guidelines”).<sup>7</sup>

Given UNHCR’s long engagement on the legality of the detention of asylum-seekers, it has a specific interest in this matter. The *2012 Detention Guidelines* in particular reflect the state of international law on the detention of asylum-seekers, implicating the claim at issue in this case. The *2012 Detention Guidelines* are relevant to the interpretation of the *1951 Convention* and the *1967 Protocol*, as implemented in U.S. law at section 101(a)(42) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42) (2006).

This case concerns the scope of the *Flores* Settlement Agreement (“Agreement”), a judicially-approved consent agreement between the United States and a plaintiff class of asylum-seeking children concerning the detention, release, and treatment of refugees and asylum-seekers. Plaintiffs-Appellees argue that the plain language of the Agreement makes clear that it applies to both unaccompanied children and children migrating with family members (“accompanied children”). Appellees’ Br. at 15–20. Appellees further argue that, if the four corners reading is not sufficiently clear, then extrinsic evidence compels the conclusion that the Agreement covers only accompanied

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<sup>7</sup> <<http://www.unhcr.org/505b10ee9.pdf>>. The *2012 Detention Guidelines* reflect current law. UNHCR, Briefing Notes, *UNHCR Releases New Guidelines on Detention of Asylum-Seekers* (Sept. 21, 2012), <<http://www.unhcr.org/505c461f9.html>> (“The [2012] guidelines, reflecting the current state of the international law, supersede the ones we last issued in 1999.”).

children. *Id.* at 20–32. UNHCR takes the position that applying the Agreement to all children—whether unaccompanied and accompanied—is in keeping with the United States’ international obligations. In particular, the principles contained in the *1951 Convention* and *1967 Protocol*, which the United States has implemented by law, prohibit the detention of children, except as an absolute last resort.

### SUMMARY OF ARGUMENT

International human rights and refugee law fundamentally rejects mandatory detention of asylum-seekers without review for the central reason that seeking asylum is not a crime. Accordingly, an individual’s status as a refugee or asylum-seeker is not in and of itself a basis for detention; rather, detention is an exceptional measure which can only be justified for a legitimate purpose and when the “necessity, reasonableness and proportionality” of detention are judged with respect to each individual person. *2012 Detention Guidelines*, ¶ 34.

These foundational principles apply *a fortiori* or with special force to children seeking asylum. Asylum-seeking children should never be detained, except as a last resort and for as short a duration as possible. If children are accompanied, and there are legal grounds for the detention of their parent(s), alternatives to detention should be applied to the entire family unit. *Id.*, ¶¶ 52–53. These principles are based on widely-accepted limits in international law on the State’s power to detain, as well as growing and significant evidence that detention negatively affects a child’s physical, mental, and emotional development.

The use of detention as deterrence is inconsistent with international norms and the broader human rights of liberty and security of the person, dignity, and freedom of movement as well as UNHCR’s guidelines. UNHCR’s extensive experience further counsels that it is ineffective and counterproductive for a State to prioritize deterrence or other security objectives over the humanitarian objective of protecting refugees and asylum-seekers.

## ARGUMENT

### I. THE UNITED STATES IS BOUND BY THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES.

The *1951 Convention* and the *1967 Protocol* are the key international instruments governing the protection of refugees and address who is a refugee, his or her rights and responsibilities, and the legal obligations of States. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to “refugees” as defined in Article 1A(2) of the *1951 Convention*. *1967 Protocol*, Art. 1, ¶¶ 1–2. The *1967 Protocol* universalizes the refugee definition in Article 1 of the *1951 Convention*, removing the geographical and temporal limitations. *Id.*, ¶¶ 2–3. The core of both the *1951 Convention* and *1967 Protocol* is the obligation on States to provide effective protection to refugees and to safeguard the principle of *non-refoulement*, which is the obligation not to return an individual to any country where he or she faces persecution or a real risk of serious harm. To protect individuals against *refoulement*, States should ensure all asylum-seekers have access to fair and efficient asylum

procedures, an objective undermined by detention practices. UNHCR ExCom, *General Conclusion on Int’l Protection*, Oct. 8, 1993, No. 71 (XLIV) – 1993 (Reiterating “the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection”); UNHCR ExCom, *Detention of Refugees and Asylum-Seekers*, Oct. 13, 1986, No. 44 (XXXVII) – 1986. In 1968, the United States acceded to the *1967 Protocol*,<sup>8</sup> thereby binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*.

Congress enacted the Refugee Act of 1980, 94 Stat. 102, expressly to “bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees,” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citing H.R. Rep. No. 96-608 at 9 (1979)). As the Supreme Court has recognized, “one of Congress’ primary purposes’ in passing the Refugee Act was to implement the principles agreed to in the 1967 [Protocol] . . . .” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *Cardoza-Fonseca*, 480 U.S. at 436–37). The Refugee Act thus serves to bring the United States into compliance with its international obligations under the *1967 Protocol*, and through this Protocol the *1951 Convention*. The Refugee

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<sup>8</sup> H.R. Conf. Rep. No. 96–781, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 160; H.R. Rep. No. 96-608, at 9 (1979); S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968).

Act should be interpreted and implemented in a manner consistent with those instruments.

Over the 60 years of its existence, UNHCR has issued considerable guidance to clarify States' obligations under the *1951 Convention* and the *1967 Protocol*, and to assist with their meaningful implementation. One such source of guidance is the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992; reissued Dec. 2011) ("*Handbook*").<sup>9</sup> The *Handbook* is internationally recognized as an important source of interpretation of international refugee law. The Supreme Court has determined that, although the *Handbook* is not legally binding on U.S. officials, it nevertheless provides "significant guidance" in construing the *1967 Protocol* and in giving content to the obligations established therein. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also Matter of S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996).

At the request of States and to accompany its work in developing the *Handbook*, in 1999, UNHCR issued the *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, which were superseded in 2012 by the *2012 Detention Guidelines*.<sup>10</sup> Among other things, the *2012 Detention Guidelines* reflect the current state of international law and are intended to offer guidance to:

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<sup>9</sup> <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>>.

<sup>10</sup> *See* notes 6–7, *supra*.

- (a) Governments in their elaboration and implementation of asylum and migration policies which involve an element of detention; and
- (b) Decision-makers, including judges, in making assessments about the necessity of detention in individual cases.

*2012 Detention Guidelines*, ¶ 1. The *2012 Detention Guidelines* represent UNHCR policy and are intended as advice to governments and other bodies making decisions on detaining individuals.

## **II. INTERNATIONAL HUMAN RIGHTS AND REFUGEE LAW PROHIBIT THE DETENTION OF CHILDREN, EXCEPT AS A MEASURE OF LAST RESORT**

### **A. International Law Prohibits the Arbitrary Detention of Refugees and Asylum-Seekers**

As the *2012 Detention Guidelines* make clear, a basic tenet of international human rights law is that “[t]he rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement.” ¶ 1; *see also* Int’l Covenant on Civ. and Pol. Rts. (“ICCPR”), Art. 9, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (“No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”);<sup>11</sup> Universal Declaration of Hum. Rts., Art. 9, Dec. 10, 1948, GA res. 217A(III) (“No one shall be subjected to arbitrary arrest, detention or exile”);<sup>12</sup> Convention on the Rts. of the Child

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<sup>11</sup> <<http://tinyurl.com/ICCPR1966>>.

<sup>12</sup> <<http://tinyurl.com/UDHR1948>>.

“CRC”), Art. 37(b), Nov. 20, 1989, 1577 U.N.T.S. 3 (“No child shall be deprived of his or her liberty unlawfully or arbitrarily”).<sup>13</sup>

The U.N. Human Rights Committee, the international body charged with interpreting the ICCPR, issued its 35<sup>th</sup> General Comment in 2014, specifically clarifying that Article 9 of the ICCPR applies to refugees and asylum-seekers. U.N. Hum. Rts. Comm., *General Comment No. 35*, Art. 9 (Liberty and Security of Person), ¶ 3 (Dec. 16, 2014).<sup>14</sup> The United States, as party to the ICCPR, is obliged to bring its law and practice in line with this guidance.<sup>15</sup> In recent years, numerous other pre-eminent global bodies have weighed in confirming the applicability of these fundamental tenets of international law in the

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<sup>13</sup> <<http://tinyurl.com/CRC1989>>. The United States has signed (but not fully ratified) the CRC. See U.N. Treaty Ratification Status, Convention on the Rts. of the Child, <<http://tinyurl.com/CRCStatus>> (showing United States signature on Feb. 16, 1995). As a signatory, the United States is bound not to “defeat” the CRC’s “object and purpose.” Vienna Convention on the Law of Treaties, Art. 18, 1155 U.N.T.S. 331, <<http://tinyurl.com/ViennaConvention>>. Moreover, the CRC is the world’s most ratified human rights treaty (ratified by all but one country), and its provisions are therefore considered customary international law. See, e.g., Inter-American Ct. of Hum. Rts., *Judicial Condition and Hum. Rts. of the Child*, Advisory Opinion OC-17/2002 (Aug. 28, 2002) (“The large number of ratifications shows a broad international consensus (*opinio iuris comunis*) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter.”).

<sup>14</sup> <<http://www.refworld.org/docid/553e0f984.html>>.

<sup>15</sup> *Treaty Actions*, 3 U.S. State Dep’t Dispatch 45 (Nov. 9, 1992) (noting ICCPR was signed by President on June 1, 1992, deposited on June 8, 1992, and entered into force for United States on September 8, 1992).



context of immigration detention. *See, e.g.*, U.N. Hum. Rts. Council, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015); U.N. Comm. on the Rts. of the Child, *Rep. of the 2012 Day of General Discussion on the Rts. of All Children in the Context of Int’l Migration* (“U.N. Comm. on the Rts. of the Child Rep.”) (2013);<sup>16</sup> U.N. General Assembly, *Rep. of the Special Rapporteur on the Hum. Rts. of Migrants*, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012) (“*Rep. of the Special Rapporteur*”);<sup>17</sup> Inter-American Ct. of Hum. Rts., *Advisory Opinion OC-21/14, “Rts. and Guarantees of Children in the Context of Migration and/or in Need of Int’l Protection”*, OC-21/1419 (Aug. 2014); Council of Europe, Comm’r for Hum. Rts., *Positions on the Rts. of Minor Migrants in an Irregular Situation*, Position Paper (June 25, 2010).

In line with these clear and unequivocal articulations of international law, the *2012 Detention Guidelines* emphasize that the fundamental rights to liberty and security of person and freedom of movement “apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.” ¶¶ 12–14 (footnotes omitted); *see also 1951 Convention*, Art. 26 (binding a State to “accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”).

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<sup>16</sup> <<http://tinyurl.com/CommRCReport>>.

<sup>17</sup> <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=502e0bb62>>.

An individual's status as a refugee, asylum-seeker, or stateless person is not, by itself, a legitimate reason justifying the use of detention. *2012 Detention Guidelines*, ¶ 32; *see also A Thematic Compilation of Executive Comm. Conclusions* (7th ed. June 2014), No. 106, LVII, Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons (2006) (calling for "States not to detain stateless persons on the sole basis of their being stateless and to treat them in accordance with international human rights law").<sup>18</sup> This is because "seeking asylum is not an unlawful act." *2012 Detention Guidelines*, ¶ 2.<sup>19</sup> Consequently, "any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review" and "detention of asylum-seekers should normally be avoided and be a measure of last resort." *Id.*

UNHCR understands that States face an "array of contemporary challenges to national asylum systems" and that each State may rightfully "control the entry and stay of non-nationals on their territory," but such control is nevertheless "subject to refugee and human rights standards." *Id.*, ¶ 1. "Detention can only be applied where

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<sup>18</sup> <<http://www.unhcr.org/53b26db69.html>>.

<sup>19</sup> Every person has the right to seek and enjoy in other countries asylum from persecution. *See Universal Declaration of Hum. Rts.*, Art. 14; *Org. of American States, American Convention on Hum. Rts.*, Art. 22 (7) (Nov. 22, 1969); *Inter-American Comm'n on Hum. Rts.*, *American Declaration of the Rts. and Duties of Man*, Art. 27 (May 2, 1948); *see also 1951 Convention*, Art. 31 (providing that asylum-seekers shall not be penalized for their illegal entry).

it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case.” *Id.*, ¶ 2.

At the threshold, “[a]ny detention or deprivation of liberty must be in accordance with and authorised by national law” and “[d]etention laws must conform to the principle of legal certainty.” *Id.*, ¶¶ 15–17. But even if the detention of asylum-seekers abides by national law, under international law it still “can only be resorted to for a legitimate purpose.” *Id.*, ¶ 21. As the *2012 Detention Guidelines* make clear, “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.” *Id.*; *see also id.*, ¶¶ 22–30 (describing legitimate purposes). In addition, any use of detention must be limited to only the period of time necessary to fulfill the designated purpose and be subject to minimum procedural safeguards and judicial oversight. *Id.*, ¶¶ 44–47.

Even if the detention of an asylum-seeker is based on a purpose recognized as legitimate under international law, a State must still assess the “necessity, reasonableness, and proportionality” of “each individual case.” *Id.*, ¶ 34; *see also* U.N. Comm’n on Hum. Rts., *Rep. of the Working Group on Arbitrary Detention*, Deliberation No. 9, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012). Necessity is determined “in light of the purpose of the detention,” and State authorities cannot act beyond what “is strictly necessary to achieve the pursued purpose in the individual case.” *2012 Detention Guidelines*, ¶ 34. Reasonableness “requir[es] an assessment of any special needs or considerations in the individual’s case.” *Id.* The “general principle of 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. *Id.*

### **B. International Law Principles Related to Detention of Asylum-Seekers Apply *A Fortiori* to Children**

In addition to limiting the detention of asylum-seekers as a general matter, the *2012 Detention Guidelines* highlight that the special circumstances and needs of particular asylum-seekers, such as children and their caregivers, must be taken into account. ¶¶ 49–65. Children, in particular, should “not be detained at all.” *Id.*, ¶ 51.<sup>20</sup> Because of “the extreme vulnerability of a child,” a State must consider the “best interests of the child” when taking any action affecting a child and utilize “an ethic of care—and not enforcement— . . . to govern interactions with asylum-seeking children.” *Id.*, ¶¶ 51–52; *see also* U.N. Comm. on the Rts. of the Child, *General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ¶ 63 (Sept. 1, 2005) (“An ethic of care – and not detention – needs

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<sup>20</sup> The *2012 Detention Guidelines* incorporate international legal obligations from the Convention on the Rights of the Child. *See* ¶ 51. As discussed *supra* at note 13, the United States, as signatory to the CRC, is bound not to undermine the CRC’s object or purpose, and the CRC’s near-universal ratification has caused it to be considered customary international law.

to govern all interactions with asylum-seeking children, with the best interests of the child a primary consideration.”).<sup>21</sup>

The *2012 Guidelines* and their discussion of child detention were developed following a series of consultations in which the United States government was heavily involved. UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, ¶ 7 (2011) (“[A]ll actions taken in respect of children [must be] in the best interests of the child, and ensure every child’s right to development, family unity, education, information, and the opportunity to express their views and to be heard”); UNHCR, *Global Roundtable on Reception and Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons*, ¶¶ 25–34 (2015) (“The principle of the best interests of the child was underlined throughout the discussions.”);<sup>22</sup> UNHCR, *Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons*, ¶ 15 (2012) (“The best interests of the child should be the cornerstone of all asylum proceedings for minors and remain the primary consideration”).

Basic principles of international human rights law and the exceptional vulnerability of children are the foundation of UNHCR’s position on this issue. Article 37 of the CRC states: “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law

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<sup>21</sup> <<http://tinyurl.com/CommRCGC6>>.

<sup>22</sup> <<http://www.refworld.org/docid/4e315b882.html>>.

and shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>23</sup> The United States, as signatory to the CRC, is bound not to “defeat the object and purpose” of the treaty.<sup>24</sup> The U.N. Committee on the Rights of the Child, the body charged with interpreting the CRC, clarified in 2013 that States should “expeditiously and completely cease the detention of children on the basis of their immigration status,” arguing that detention solely because of immigration status is never in the child’s best interest. *U.N. Comm. on the Rts. of the Child Rep.*, ¶ 78.

This precept is well-grounded because detaining children has “well-documented deleterious effects . . . on children’s well-being, including on their physical and mental development.” *2012 Detention Guidelines*, ¶ 53. Such effects include mental health problems such as “[a]nxiety, depression, and post-traumatic stress disorder,” and “self-harm and suicidal ideation.” Katy Robjant, Rita Hassan & Cornelius Katona, *Mental Health Implications of Detaining Asylum Seekers: Systemic Review*, 194 *Brit. J. of Psychiatry* 306 (Mar. 2009) (“*Implications of Detaining Asylum Seekers*”) (reviewing ten studies on “impact of immigration detention on the mental health of children”).<sup>25</sup>

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<sup>23</sup> See note 13, *supra*.

<sup>24</sup> See note 13, *supra*.

<sup>25</sup> <<http://tinyurl.com/RobjantArticle>>; see also Janet Cleveland, Cécile Rousseau & Rachel Kronick, Brief for submission to the House of Commons Comm. on Bill C-4, *The Preventing Hum. Smugglers from Abusing Canada's Immigration System Act*, Bill C-4: The Impact of Detention and Temporary Status on Asylum Seekers’ Mental Health (2012), <<http://tinyurl.com/BillC-4Comment>>.

Child asylum-seekers who are detained also face constant physical dangers, such as “assaults, sexual assaults and self-harm.” Australian Hum. Rts. Comm’n, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014).<sup>26</sup> Further, “[t]ime in detention [is] positively associated with severity of distress,” and “longitudinal results have shown that the negative impact of detention persists.” *Implications of Detaining Asylum Seekers* at 1. To avoid unnecessary harm to children, States are encouraged “to ensure that the detention of children be used only as a measure of last resort and for the shortest appropriate period of time.” *2012 Detention Guidelines*, ¶ 51; CRC, Art. 37.

Instead of being detained, unaccompanied or separated children “should be released into the care of family members who already have residency within the asylum country,” or if that is not possible, the State should use “alternative care arrangements, such as foster placement or residential homes” managed by “competent child care authorities” to “ensur[e] that the child receives appropriate supervision.” *2012 Detention Guidelines*, ¶ 54; *see also id.*, ¶ 51 (noting child “deprived of his or her family environment . . . shall be entitled to special protection and assistance provided by the State”).

### **C. Accompanied Children Should Be Neither Detained Nor Separated From Their Care-Givers**

As discussed above, children (whether accompanied or unaccompanied) should not be detained. Indeed, UNHCR specifically asserts that “[c]hildren seeking asylum should not be kept in detention

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<sup>26</sup> <<http://tinyurl.com/AHRCReport>>.

and that this is particularly important in the case of unaccompanied children.” UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, ¶¶ 7.6–7 (1997). The U.N. Committee on the Rights of the Child recommends that States grant the same rights to all children, “whether accompanied or unaccompanied,” because there is “broad consensus” that international norms dictate that “no migrant child should be detained, whatever the circumstances.” *U.N. Comm. on the Rts. of the Child Rep.*, ¶¶ 10, 58.

The harmful effects to asylum-seeking children that spring from detention (as discussed above) are not cured simply by detaining a child with his or her family; rather, these detrimental effects exist whenever a child is detained. *See, e.g., Popov v. France*, (2012) ECtHR, App. No. 39472/07 (“[The Court] is of the view that the best interests of the child cannot be limited to simply maintaining family unity. Rather, the authorities must put in place all of the measures necessary to limit as much as possible the detention of families with children and to preserve their right to a family life effectively”); *Kanagaratnam v. Belgium*, (2011) ECtHR, App. No. 15297/09 (“[T]he Court is of the view that by placing the children in a closed facility, the Belgian authorities subjected them to feelings of anxiety and inferiority and knowingly took the risk of comprising their development”). Thus, international human rights law dictates that no child—accompanied or not—be detained except as a measure of last resort and for the shortest time period possible.

Additionally, children are entitled to the fundamental right of “family unity” and “the right not to be separated from their parents against their will.” *2012 Detention Guidelines*, ¶ 51. As recognized by the U.N. Conference of Plenipotentiaries that adopted the *1951*



*Convention*, the “unity of the family” is an “essential right of the refugee.” Final Act of the 1951 U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation B (July 1951).<sup>27</sup> This principle is enshrined in Article 16 of the Universal Declaration of Human Rights, which states that the “family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” and articulated in treaties binding on the United States, such as Article 23 of the ICCPR.

Because family unity is a fundamental right and because children, in principle, should “not be detained at all,” detention of accompanied children and their caregivers must be used only as a measure of last resort and for the minimum appropriate time period. *2012 Detention Guidelines*, ¶¶ 51–53; see also UNHCR, *Refugee Children Guidelines on Protection and Care*, 37 (1993).<sup>28</sup> “Strong efforts must be made to have [asylum-seeking children] released from detention and placed in other accommodation,” and, even if detention is temporarily warranted, “[f]amilies must be kept together at all times, which includes their stay in detention as well as being released together.” *Id.*

As the High Commissioner of Refugees publicly stated, “[c]hildren who arrive in another country in search of international protection are extremely vulnerable and have specific needs. We should treat them first and foremost as children, not as illegal aliens.” UNHCR Press Release, *U.N. Refugee Agency Calls on States to End*

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<sup>27</sup> <<http://www.unhcr.org/40a8a7394.html>>.

<sup>28</sup> <<http://www.unhcr.org/3b84c6c67.html>>.

*Immigration Detention of Children on the 25th Anniversary of the Convention on the Rights of the Child* (Nov. 20, 2014).<sup>29</sup> That is true, he indicated, “[e]ven if they are detained together with their families.” *Id.*

For these reasons, the *2012 Detention Guidelines* indicate that “[a]ll appropriate alternative care arrangements should be considered in the case of children accompanying their parents, not least because of the . . . deleterious effects on children’s well-being.” *2012 Detention Guidelines*, ¶ 53. “The detention of children with their parents or primary caregivers needs to balance, *inter alia*, the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children, and the best interests of the child.” *Id.*

### **III. DETERRENCE IS NOT A VALID JUSTIFICATION FOR DETENTION UNDER INTERNATIONAL HUMAN RIGHTS LAW**

International human rights and refugee law condemns using detention as a tool to deter future asylum-seekers or to prioritize security concerns over treating asylum-seekers humanely and compassionately.<sup>30</sup>

*First*, detention policies aimed at deterrence “are generally unlawful . . . as they are not based on an individual assessment as to the necessity to detain.” *Id.* ¶ 3. Article 31 of the *1951 Convention* obligates member States to “not impose penalties, on account of [refugees’] illegal

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<sup>29</sup> <<http://www.unhcr.org/546de88d9.html>>.

<sup>30</sup> Instead of detention, UNHCR recommends that States consider alternatives and provides a framework by which States may evaluate potential alternatives. *2012 Detention Guidelines*, ¶¶ 35–42.

entry or presence . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” These principles generally disfavor using detention simply as a method by which to deter future asylum-seekers. *See, e.g.*, HCJ 7385/13, HCJ 8425/13 *Eitan v. Israel* (2014) (Isr.) (“We considered the relative benefit in the law [detaining asylum-seekers] opposite to the continuing deprivation of the right of liberty, and we found that it is not in a proportionate and proper degree.” (unofficial translation by UNHCR));<sup>31</sup> HCJ 7146/12 *Adam v. Knesset* (2013) (Isr.) (finding deterrence rationale inappropriate because individual was treated not as an end, but rather as a means, which improperly limited his dignity as a person).<sup>32</sup>

Accordingly, in *R.I.L-R v. Johnson*, the District Court of the District of Columbia flatly rejected the United States Government’s 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.” 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015). The court held that such an argument was “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. Furthermore, the court found that even if deterrence was a legitimate purpose (which it is not), “a general-deterrence rationale seems less applicable where . . . neither

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<sup>31</sup> <<http://refworld.org/docid/54e605334.html>>.

<sup>32</sup> <<http://tinyurl.com/AdamDecision>>.

those being detained nor those being deterred are certain wrongdoers, but rather individuals who may have legitimate claims to asylum in this country.” *Id.*

**Second**, as a practical matter, “there is no evidence that detention has any deterrent effect on irregular migration.” *2012 Detention Guidelines*, ¶ 3. This lack of evidence has been noted both by American courts and practitioners. In *Johnson*, the court found that the U.S. Government had “presented little empirical evidence . . . that the[] detention policy even achieves its only desired effect—i.e., that it actually deters potential immigrants.” 80 F. Supp. 3d at 189. And both a recent UNHCR Legal and Protection Policy Research Series paper and a Report of the Special Rapporteur on the Human Rights of Migrants similarly found that, “[t]here is no empirical evidence that the prospect of being detained deters irregular migration, or discourages persons from seeking asylum.” Alice Edwards, *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 1, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1 (Apr. 2011),<sup>33</sup> *Rep. of the Special Rapporteur*, ¶ 2.

**Third**, policies that prioritize a State’s security concerns by permitting or encouraging detention of asylum-seekers are not only unlawful and ineffective, they are counterproductive. Detention of asylum-seekers worsens an already precarious humanitarian crisis by

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<sup>33</sup> <<http://www.unhcr.org/refworld/docid/4dc935fd2.html>>.

driving asylum-seekers into the hands of smugglers and human traffickers. As stated by UNHCR:

In our dialogue with Governments [in regard to protecting refugees], security concerns often seem to trump humanitarian and protection considerations, but they are not mutually exclusive. We have seen time and again how giving primacy to a security focus at the expense of protection has failed to bring about the desired results, often at great expense to taxpayers. Push-backs, building walls, increasing detention, and further restricting access, combined with few legal avenues to safety, will never be the answer. The impact is simply the diversion of refugee movements along other routes and the aggravation of already precarious situations in regions embroiled in conflict. Worse still, these measures compel more people who have nothing left to lose to risk dangerous journeys in the hope of finding eventual safety and stability. This creates an environment in which smuggling and trafficking can thrive.

UNHCR, 66th Sess. of the Exec. Comm. of the High Comm'r's Programme Agenda (Oct. 8, 2015).<sup>34</sup>

## CONCLUSION

For all the foregoing reasons, UNHCR respectfully urges this Court to construe the Agreement in accordance with the United States' binding obligations under the *1951 Convention* and *1967 Protocol*.

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<sup>34</sup> <<http://www.unhcr.org/56150fb66.html>>.

Respectfully submitted,

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IN SUPPORT OF APPELLEES

FEBRUARY 23, 2016

## **CERTIFICATION OF COMPLIANCE**

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(A) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Expanded BT 14-point font.

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s/ Ana C. Reyes

ANA C. REYES

DATED: FEBRUARY 23, 2016

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 23, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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ANA C. REYES

DATED: FEBRUARY 23, 2016