

UNHCR Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families

Docket No. DHS-2021-0051

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Table of Contents

I.	INTRODUCTION	1
II.	EXECUTIVE SUMMARY: KEY ISSUES & RECOMMENDATIONS	3
III.	GUIDANCE ON APPROPRIATE PROCEDURES THAT PROMOTE FAMILY UNITY	5
	A. ENSURING THAT SEPARATION OF CHILDREN FROM PARENTS AND OTHER CARETAKERS IS A MEASURE OF LAST RESORT	6
	B. DOCUMENTING PROCESSES THAT IMPLICATE FAMILY SEPARATION	7
	C. UTILIZING CHILD ADVOCATES TO PROMOTE BEST INTERESTS	8
	D. PLACING CHILD PROTECTION EXPERTS AT THE BORDER	9
	E. IMPLEMENTING INTEGRATED RECEPTION MODELS	9
IV.	CHALLENGES TO FAMILY UNITY IN THE U.S. ASYLUM FRAMEWORK	10
	A. BORDER POLICIES THAT JEOPARDIZE FAMILY UNITY	10
	B. SEPARATION OF CHILDREN FROM NON-PARENTAL ADULTS	12
	C. CRIMINAL PROSECUTION OF ASYLUM SEEKERS WHO ENTER THE UNITED STATES IRREGULARLY	14
	D. DETENTION OF ASYLUM SEEKERS, INCLUDING ADULTS AND FAMILIES	14
	E. FLAWED AGE DETERMINATION PROCEDURES	16
V.	CONCLUSION	17

I. INTRODUCTION

The Office of the United Nations High Commissioner for Refugees (UNHCR) submits the comments below on the request for input by the U.S. Department of Homeland Security, “Identifying Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families.” These comments focus on issues which are of particular interest to UNHCR and may have a significant impact on the rights of and protection for persons of concern to UNHCR, including asylum-seeking and refugee families and children.

UNHCR offers this submission consistent with its supervisory responsibility as set forth under its Statute¹ and reiterated in the 1967 United Nations Protocol Relating to the Status of Refugees (“1967 Protocol”)² and the 1951 United Nations Convention Relating to the Status of Refugees (“1951 Convention”).³ The

¹ G.A. Res. 428(v), Statute of the Office of the U.N. High Comm’r for Refugees (Dec. 14, 1950) [hereinafter UNHCR Statute].

² Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, art. II(1) [hereinafter 1967 Protocol] (“The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.”).

³ Convention Relating to the Status of Refugees, July 28, 1951, 1577 U.N.T.S. 137, art. 35(1) [hereinafter 1951 Convention] (“The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”).

United States is a signatory and State party to the 1967 Protocol and therefore is bound to comply with the obligations deriving from the 1967 Protocol, as well as, by incorporation, articles 2 – 34 of the 1951 Convention. Furthermore, as a State party, the United States has agreed to cooperate with UNHCR to facilitate the Office’s duty of supervising the application of the provisions of the Protocol and, as incorporated therein, the 1951 Convention.⁴

One of the means by which UNHCR exercises its supervisory responsibility is by providing to States party its guidance and interpretations of the 1951 Convention, the 1967 Protocol, and other international refugee instruments, particularly as relevant to laws and policies being considered by the country in question. UNHCR’s guidance on such matters is informed by its seven decades of experience assisting refugees and supervising the treaty-based system and standards of international refugee protection.

UNHCR’s office in Washington, D.C. has long been concerned with asylum-seeking families and children in the United States and at its borders and has an established, collaborative relationship with the U.S. Department for Homeland Security (DHS), U.S. Department of Health and Human Service (HHS) Office of Refugee Resettlement (ORR), and other U.S. agencies that address issues related to ensuring the protection of asylum seekers and refugees arriving to the United States, including families and children. UNHCR has long acknowledged that the United States is facing significant challenges associated with ongoing arrivals of asylum seekers amongst mixed movements in the sub-region. In this context, we recognize that the U.S. asylum system is under strain and in need of reform to ensure that it upholds international legal standards and advances essential rights of refugees and asylum seekers, among other goals.

Children’s rights are safeguarded in international law and are at the heart of UNHCR’s protection mandate.⁵ Especially considering that children face unique protection risks, addressing their specific needs is a key priority for UNHCR.⁶ **The right to family life and family unity is enshrined in international human rights, humanitarian, and refugee law**, and it applies to all individuals, including asylum seekers and refugees, and throughout displacement, including at admission, in reception, in detention, where expulsion is threatened, and other stages.⁷ International law recognizes the family as the natural, fundamental group of society, and it ascribes to family units a right to protection by States.⁸ Children have special protections relating to their right to remain with their families, and “the best interests of the child is an overarching human rights principle that must be respected in all matters including those relating to

⁴ “The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions.” 1967 Protocol, art. II.

⁵ U.N. High Comm’r for Refugees, *A Framework for the Protection of Children*, 7 (2006), available at <https://www.unhcr.org/50f6cf0b9.pdf>.

⁶ U.N. High Comm’r for Refugees, *A Framework for the Protection of Children*, at 7.

⁷ Frances Nicholson (Independent Consultant to the Division of International Protection, U.N. High Comm’r for Refugees), *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, 1, PPLA/2018/01 (Jan. 2018), available at <https://www.unhcr.org/5a8c40ba1.pdf>; see also Expert Roundtable Organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, *Summary Conclusions: Family Unity*, 8-9 (Nov. 2001), in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 604-08* (Feller et al., eds., Cambridge University Press 2003), available at <http://www.unhcr.org/419dbfaf4.pdf>.

⁸ G.A. Res. 217(III) A, Universal Declaration of Human Rights, U.N. Doc. A/810, art. 16(3) (Dec. 1948); U.N. G.A., International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 23(1) (Dec. 19, 1966) [*hereinafter ICCPR*]; U.N. G.A., International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, art. 10(1) (Dec. 16, 1966); see also U.N. G.A., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, A/RES/45/158, art. 44 (Dec. 18, 1990) [*hereinafter CMW*]; U.N. G.A., Convention on the Rights of the Child, art. 3 (Nov. 20, 1989) [*hereinafter CRC*]; U.N. G.A., Convention on the Rights of Persons with Disabilities, A/RES/61/106, Annex I (Dec. 13, 2006); U.N. Human Rights Committee, General Comment No. 19 on Article 23, adopted at 39th Session (July 27, 1990); K. Jastram & K. Newland, *Family Unity and Refugee Protection*, in *REFUGEE PROTECTION AND INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 555-603* (Feller et al., eds., Cambridge University Press 2003) available at <http://www.refworld.org/docid/3be01b964.html>. Related rights, such as the right not to be subject to arbitrary or unlawful interference with family (among other matters), are also protected in several of those instruments. See ICCPR, art. 17(1); CRC, art. 16; CMW, art. 14.

the child’s right to family life.”⁹ Accordingly, it is essential that these rights and principles guide the development and implementation of asylum law, policy, and practice where children and families are affected.¹⁰

UNHCR has a strong interest in ensuring that U.S. asylum law, policy, and procedure aligns with the international treaty obligations that the United States helped to create and respectfully offers its guidance on these obligations. Furthermore, enhancing protection for children of concern will contribute to a better future for them, their families, and host communities.¹¹

II. EXECUTIVE SUMMARY: KEY ISSUES & RECOMMENDATIONS

UNHCR observes that a diverse set of existing U.S. asylum laws, policies, and procedures have significant implications for family unity of asylum-seeking parents and children arriving in the United States. Over the past five years alone, thousands of families have become separated, and many more stand at risk of future separation. Such laws, policies, and procedures—many of which stand at variance with applicable international legal standards and principles—range from those controlling access at the U.S.-Mexico border, to those governing detention practices in the United States, and to some concerning age assessments performed on youth, among others. UNHCR welcomes this opportunity to provide feedback on those laws, policies, and procedures it views as posing a significant risk to family unity and to offer recommendations regarding more protective, rights-oriented approaches to receiving and processing asylum seekers.

UNHCR understands that this request for input is informed and inspired by relatively recent, deeply troubling policies that led to significant family separations.¹² In particular, the U.S. government’s “zero tolerance” policy, piloted in 2017 and adopted in 2018, under which authorities criminally prosecuted irregular entrants without any exception for asylum seekers or individuals with minor children, proved especially damaging. While not a family separation policy on its face, the government implemented the “zero tolerance” policy knowing it would lead to family separation, and in fact thousands of children were forcibly separated from their parents.¹³ Although the U.S. government halted the policy in June 2018 after widespread public criticism, it reportedly separated additional children from their parents following the end of “zero tolerance”, purportedly in some cases due to allegations against parents unrelated to child safety.¹⁴ In all, the government separated more than 5,400 children from their parents under policies that

⁹ Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, at 5-6; see also CRC, arts. 7-10, 18, 22; ICCPR, art. 24 (addressing the protection of the rights of the child, as such or as a member of a family). International instruments, in particular the Convention on the Rights of the Child, outlines corresponding obligations of States to uphold these rights of children. See J.M. POBJOY, *THE CHILD IN INTERNATIONAL REFUGEE LAW* 19-22, 27-32 (Cambridge University Press 2017).

¹⁰ See Nicholson, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, at 6; Comm. on the Prot. of the Rights of All Migrant Workers and Members of Their Families and Comm. on the Rights of the Child, 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, CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017).

¹¹ U.N. High Comm’r for Refugees, *A Framework for the Protection of Children*, at 7.

¹² See DEP’T OF HOMELAND SEC., *Family Reunification Task Force*, <https://www.dhs.gov/family-reunification-task-force>; Identifying Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families, 86 Fed. Reg. 70512 (proposed Dec. 10, 2021).

¹³ See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE DEPARTMENT OF JUSTICE’S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES, i., 21-028 (Jan. 2021), available at https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf.

¹⁴ CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY 17 (Feb. 2, 2021), available at <https://sgp.fas.org/crs/homesecc/R45266.pdf>; see also The Trump Administration’s Child Separation Policy: Substantiated Allegations of Mistreatment: Hearing Before the H. Comm. on Oversight and Reform, 116th Cong. 32 (2019), available at

contravene fundamental principles and standards of international law, as well as basic human rights.¹⁵ While some have been reunified, as many as 1,500 children may remain separated from their parents, and some might never be reunified.¹⁶

Where asylum-seeking families do experience forcible separation, the consequences can be profoundly severe and potentially permanent. Removing children from their parents without justification is one of the gravest violations that can be perpetrated against children.¹⁷ Accordingly, UNHCR urges the U.S. government to reconsider, amend, or terminate its practices that fail to protect—and in certain cases actively threaten—family unity. Where there are efforts underway to address ongoing separation, such as the Interagency Task Force on the Reunification of Families’ reunification program, UNHCR urges the U.S. government to pursue reunification to the fullest extent such that any family separated based on justifications that fall short of the strict standards under international law has the opportunity to reunify. In the analysis that follows, UNHCR proposes a series of recommendations to advance and uphold the rights of refugee and asylum-seeking families and children, including the right to family unity. More specifically, UNHCR recommends that the U.S. government:

Create or amend policies and procedures to advance children’s best interests and protect family unity by:

- Ensuring that separation of children from their parents or other caretakers is an exceptional measure of last resort that is taken only when appropriate—that is, when the child is at risk of severe harm or there is an ongoing custody dispute leaving the child at risk—by developing guidance to govern decisions regarding separation that incorporate key safeguards to guarantee that the child’s best interests are paramount, incorporating child protection experts in procedures affecting children, creating a tracking mechanism that follows all members of families that are separated and facilitates their reunification once separation is no longer warranted, and otherwise instituting other safeguards to ensure transparency and accountability in the process.
- In coordination with child protection experts, stakeholders, and other government agencies, utilizing integrated reception centers that serve newly arrived asylum seekers and which enhance the integrity of the asylum process, uphold due process protections, and promote family unity.
- Establishing a system to perform expedited reunifications of children arriving with non-parental, adult family members, consistent with child welfare best practices and informed by the process recently implemented for Afghan unaccompanied children and their family members.

<https://www.govinfo.gov/content/pkg/CHRG-116hrg37315/html/CHRG-116hrg37315.htm> (“Since the court had an injunction last summer, last June, ordering the stop to separations of parents and children, more than 700 family units have been separated. Many of these family units are being separated based on only allegations and arrests that may have nothing to do with child safety.”); CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION’S “ZERO TOLERANCE” IMMIGRATION ENFORCEMENT POLICY, at 13 (“On February 7, 2019, a representative from HHS’s OIG testified before Congress that DHS was continuing to separate children from their parents . . . The testimony noted that while DHS routinely separates families if parents have a criminal history, DHS has not provided HHS with sufficient information to facilitate appropriate placement within the ORR shelter system.”).

¹⁵ Jacob Soboroff, *More Than 2,100 Children Separated at Border ‘Have Not Yet Been Reunified,’ Biden Task Force Says*, NBC NEWS, June 8, 2021, <https://www.nbcnews.com/politics/immigration/more-2-100-children-separated-border-have-not-yet-been-n1269918>

¹⁶ Sharyn Alfonsi, *Families Separated by Trump Administration at the Border Still Waiting for Reunification*, CBS NEWS, Oct. 10, 2021, <https://www.cbsnews.com/news/migrant-children-family-separation-border-60-minutes-2021-10-10/>.

¹⁷ U.N. High Comm’r for Refugees, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, 4.3.4 (2021) [*hereinafter* UNHCR BIP Guidelines].

- Amending age determination procedures used to identify youth arriving in the U.S. to align with international principles and standards.

Terminate policies and procedures that contravene international law and threaten family unity by:

- Ending border policies that jeopardize the safety and wellbeing of migrant and asylum-seeking families and children, including the Migrant Protection Protocols and Title 42 expulsions.
- Ceasing the prosecution of asylum seekers who enter the United States irregularly—a practice that is itself at variance with international law—and instead ensuring their full and immediate access to the asylum system, thereby minimizing the separation of children from their parents when not rooted in the child’s best interests.
- Eliminating reliance on the detention of asylum seekers and reducing detention of this population to the greatest extent possible.

Further observations, comments, and recommendations are detailed, below.

III. GUIDANCE ON APPROPRIATE PROCEDURES THAT PROMOTE FAMILY UNITY

Drawing on its decades of global expertise, UNHCR offers the following guidance on policies and procedures that promote family unity. **Under the international legal framework, the best interests of the child must be a primary consideration in any action affecting children,**¹⁸ and, in light of the potential gravity of their consequences, policies and procedures that impact children, particularly those with implications for family unity, must incorporate **strict procedural safeguards.**¹⁹

Procedural safeguards commensurate with the impact a decision to separate could have on the child and their future development should ensure that the best interests principle is respected, uphold children’s rights, and guarantee that the decision-making framework accounts for their immediate and long-term wellbeing.²⁰ Key safeguards include:

- Allowing children to express their own views and utilizing a child-friendly approach in all aspects of processes impacting children, among others.²¹
- Involving staff with relevant child protection expertise and experience working with children and adolescents.²²
- Ensuring that children who have been separated from a parent or are otherwise not in the in care of a parent or legal guardian have access to an attorney and guardian to represent their rights and best interests.²³

¹⁸ See generally UNHCR BIP Guidelines, ch. 2.

¹⁹ UNHCR BIP Guidelines, ch. 2.3.

²⁰ UNHCR BIP Guidelines, ch. 2.3.

²¹ UNHCR BIP Guidelines, ch. 2.3.

²² UNHCR BIP Guidelines, ch. 2.3.

²³ UNHCR BIP Guidelines, ch. 2.3.

- Implementing mechanisms in any process implicating family unity to document the decision-making process—including evidence relied upon, the decision rationale, and substantive review, the notification to parents and children of the decision made, and the process in place for parents or children to challenge the decision—and permitting review of decisions where there may be a change in circumstances or new facts, evidence, or other considerations that could affect the initial decision.²⁴
- Prioritizing decisions regarding children such that they are completed in the shortest time possible, while still respecting the child’s need for adequate time to gain trust and without compromising other procedural aspects.²⁵

The below sections address essential principles and standards that may guide the development and implementation of policies and procedures which advance family unity and propose how the U.S. government might apply these in practice.

A. Ensuring that Separation of Children from Parents and Other Caretakers is a Measure of Last Resort

International law provides that children generally shall not be separated from their parents or other caretakers against their will, except if necessary for the best interests of the child.²⁶ Given the gravity of the impact of separation, even if only temporary, it should be treated as a measure of last resort,²⁷ and other reasonable efforts must be made first to attempt to address the situation.²⁸ This principle also may apply to children cared for by other people who are not their biological parents or legal guardians.²⁹

UNHCR recognizes that decisions concerning the separation of children from their parents, or other caretakers, falls within the jurisdiction of State authorities.³⁰ It is critical that such decisions reside exclusively with competent authorities subject to judicial review³¹ and where that is not possible (e.g., because those particular authorities are not able or willing), decisions on separation should be exceptional and provisional—that is, the decision should provide the child with a safe care arrangement and have no impact on parental rights or responsibilities.³² While UNHCR does not have the legal competence to make custody decisions, its guidelines governing procedures to evaluate children’s best interests may help inform the limited circumstances in which separation might be appropriate in a border reception context.

- First, the “[s]eparation of a child from their parents should be considered only where there are reasonable grounds to believe that the child is, or is likely to be, exposed to severe abuse or neglect by the parents [or caregiver], such as serious physical or mental harm or sexual exploitation and abuse.”³³ In the event that officials qualified to deal with such situations

²⁴ UNHCR BIP Guidelines, ch. 2.3.

²⁵ UNHCR BIP Guidelines, ch. 2.3.

²⁶ CRC, art. 9; *see also* UNHCR BIP Guidelines, ch. 4.3.

²⁷ UNHCR BIP Guidelines, ch. 4.3.

²⁸ UNHCR BIP Guidelines, ch. 4.3.3.

²⁹ UNHCR BIP Guidelines, ch. 4.3.

³⁰ UNHCR BIP Guidelines, ch. 4.3; *see also* CRC, art. 9 (providing that decision-making on the separation of a child from their parents against their will is limited to “competent authorities subject to judicial review”).

³¹ CRC, art. 9; *see also* UNHCR BIP Guidelines, ch. 4.3.1.

³² UNHCR BIP Guidelines ch. 4.3.

³³ UNHCR BIP Guidelines, chs. 4.3.2, 4.3.4. UNHCR’s BIP Guidelines detail what may constitute serious physical harm or emotional injury or sexual abuse or exploitation. *Id.* ch. 4.3.4. Relevant factors to consider in assessing risk include frequency and patterns of past incidents, trends of violence, possibilities for effective addressing and monitoring, and persistence of the root causes of the abuse or neglect. *Id.*

determines that there does exist an imminent risk to a child, and reasonable efforts were undertaken but not successful at addressing the concern, separation may be justified.³⁴

- Second, separation may be considered where there is an ongoing custody dispute that leaves the child at risk, either from one or both of his or her parents or because parents are unable to agree what is in the child’s best interests, resulting in harm to the child.³⁵ This type of situation might raise concern because unresolved custody issues may cause the child distress and negatively affect their emotional well-being, or, in some cases, “violence may be perpetrated against the child by one or both parents or the parents may try to use or involve the child in their conflict.”³⁶ Further, such disputes can delay durable solutions for children.³⁷

While DHS similarly lacks the authority to make formal custody decisions, its enforcement actions can result in long-term, even permanent, separation of children and parents, including in situations distinct from those outlined above in which separation may be considered appropriate. This was evidenced by the U.S. government’s prior “zero tolerance” policy initiated in 2017 and the families who have remained separated for the more than four years since then. Accordingly, DHS has the responsibility to incorporate adequate safeguards into its immigration enforcement programs to mitigate the risk of short-term and long-term family separation.

The following subsections on documentation, child advocates, child protection experts, and integrated reception models address the record-keeping, staffing, and conditions necessary to facilitate reasoned decision making in a border context in a manner that protects family unity. More broadly, it is essential that the policies DHS seeks to enforce align with international standards and respect the rights of asylum seekers, including the right to family unity (see Section IV). Among the range of legitimate policies that the U.S. government may employ to manage arrivals at the border, there is opportunity to take approaches that preserve family unity.

B. Documenting Processes that Implicate Family Separation

As underscored in the preceding subsection, separation of children from their parents or other caretakers should be a rare measure reserved only for circumstances where a child is at imminent risk of harm and other reasonable efforts will not adequately address the situation. In any case where separation may be implicated, authorities should produce written, reasoned decisions that capture essential information and that justify and explain the outcome.³⁸ This supports a more transparent, objective process.³⁹ In particular, the decision should detail the factual circumstances of the child, the views of the child and those close to the child, and the subsequent analysis of the best interests of the child—more specifically, the elements

³⁴ UNHCR BIP Guidelines, ch. 4.3.3.

³⁵ UNHCR BIP Guidelines, ch. 4.3.5.

³⁶ UNHCR BIP Guidelines, ch. 4.3.5.

³⁷ UNHCR BIP Guidelines, ch. 4.3.5.

³⁸ UNHCR BIP Guidelines, ch. 2.3; *see also* Comm. on the Rights of the Children, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para. 1), CRC/C/GC/14, ¶¶ 87, 97 (May 29, 2013) (“States must put in place formal processes, with strict procedural safeguards, designed to assess and determine the child’s best interests for decisions affecting the child, including mechanisms for evaluating the results.”).

³⁹ *See* CRC, General Comment No. 14, ¶ 87 (providing that “States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children”). In addition, written, reasoned decisions facilitate their review or revision. “Mechanisms should be made known to the child and be accessible to him or her directly or by his or her legal representative, if it is considered that the procedural safeguards had not been respected, the facts are wrong, the best-interests assessment had not been adequately carried out or that competing considerations had been given too much weight.” CRC, General Comment No. 14, ¶ 98.

and factors considered, as well as the weight accorded to each factor and the rationale behind such allocation.⁴⁰ With respect to establishing facts, well-trained professionals should be responsible for eliciting all information necessary for a best interests evaluation,⁴¹ and information and data gathered must be verified and analyzed before use.⁴² “If the decision is not in line with the views of the child, the reasons need to be clearly explained and documented.”⁴³ Not only does this documentation advance reasoned decision-making, it ensures that there exists a robust record to support expeditious reunification, when appropriate, and, in the interim, to facilitate regular, direct contact between children and their parents.⁴⁴

C. Utilizing Child Advocates to Promote Best Interests

Unaccompanied or separated children may benefit from having an advocate or guardian who can accompany them during any best interest decision-making processes, as well as advance children’s best interests and general well-being throughout the asylum procedure.⁴⁵ Family reunification is normally considered to be in the best interests of the child in the case of unaccompanied or separated children, and UNHCR has recognized the value of child advocates in evaluating those prospects.⁴⁶ While the precise role and manner of appointment of a child advocate varies across countries, they may include professionals or individuals from a diversity of backgrounds with relevant knowledge or experience, such as staff of registered child welfare non-governmental organizations, and can assist in gathering facts from all stakeholders and identifying the wishes of children, parents, and other close family members.⁴⁷ Authorities should always consult child advocates when collecting information in this type of case, and where authorities appointed the child advocate to represent a child during judicial proceedings, they typically should ask the child advocate to attend planning and decision-making processes, such as removal proceedings.⁴⁸ In turn, child advocates can apply best interests principles to make recommendations in accordance with domestic child welfare law and international law and guidance.⁴⁹ UNHCR observes the value and successes of the Young Center’s child advocate program, through which ORR appoints child advocates to advance the best interests of individual children, and encourages the U.S. government to

⁴⁰ UNHCR BIP Guidelines, ch. 2.3. While there is no single form that such records should take, UNHCR has developed sample forms that may serve as a guide or be informative. See U.N. HIGH COMM’R FOR REFUGEES, BIP TOOLBOX - FORMS, <https://www.unhcr.org/handbooks/biptoolbox/forms.html> (last visited Jan. 24, 2022).

⁴¹ CRC, General Comment No. 14, ¶ 92. The Committee on the Rights of the Child has advised, “This could involve interviewing persons close to the child, other people who are in contact with the child on a daily basis, [and] witnesses to certain incidents, among others.” *Id.*

⁴² CRC, General Comment No. 14, ¶ 92.

⁴³ UNHCR BIP Guidelines, ch. 2.3.

⁴⁴ See CRC, art. 9(3) (“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”); UNHCR BIP Guidelines, ch. 4.3 (quoting CRC art. 9(3)).

⁴⁵ UNHCR BIP Guidelines, chs. 2.3, 3.8, 3.8.3; see also U.N. General Assembly, Guidelines for the Alternative Care of Children, A/RES/64/142, ¶ 145 (Feb. 24, 2010), available at <https://www.refworld.org/docid/4c3acd162.html> (“As soon as an unaccompanied child is identified, States are strongly encouraged to appoint a guardian or, where necessary, representation by an organization responsible for his/her care and well-being to accompany the child throughout the status determination and decision-making process.”). “Children who are in parental care may also be given the opportunity to be accompanied by an independent representative outside of the family, should they so choose.” UNHCR BIP Guidelines, ch. 2.3.

⁴⁶ UNHCR BIP Guidelines, chs. 3.8, 3.8.3.

⁴⁷ UNHCR BIP Guidelines, ch. 3.8.3; Young Center, U.N. High Comm’r for Refugees & Kids in Need of Defense, Representing Children from Central America: Leveraging International Law to Strengthen Gang Based Asylum Claims (Feb. 2017), available at <https://www.unhcr.org/uk/589a3ecb4.pdf>.

⁴⁸ UNHCR BIP Guidelines, ch. 3.8.3.

⁴⁹ The Young Center for Immigrant Children’s Rights, U.N. High Comm’r for Refugees & Kids in Need of Defense, Representing Children from Central America: Leveraging International Law to Strengthen Gang Based Asylum Claims (Feb. 2017), available at <https://www.unhcr.org/uk/589a3ecb4.pdf>.

support the expansion of this model, including earlier in a child’s reception processing at the border, such that it can reach and serve a greater number of children.⁵⁰

D. Placing Child Protection Experts at the Border

As emphasized above, the best interests principle shall be a primary consideration in all decisions affecting children, including those related to protection procedures.⁵¹ Under the international child protection framework, involving staff with relevant child protection expertise and experience working with children and adolescents is an essential procedural safeguard. UNHCR guidance elaborates, “When determining the best interests of the child, the involvement of a multidisciplinary team of professionals across the social service workforce (e.g., child protection, refugee protection, social work, psychologist, etc.) provides additional guarantees that the recommendations [in any best interests procedure] are based on the consideration of a wide range of aspects relevant to the case and that they are objective.”⁵² These principles and safeguards are of increased importance in contexts like border processing, where the focus may be on objectives like immigration enforcement and where there could be less space to properly evaluate and make decisions based on best interests.

While UNHCR recognizes that advancing children’s best interests is often a challenge, including in U.S. policy and practice,⁵³ there are several measures that the United States could adopt to better prioritize children’s best interests in the border management context. One involves organizing and engaging multi-sectorial child protection teams as part of an integrated reception model (see following section). Such teams comprised of experts from the Office of Refugee Resettlement (ORR), the Department of Homeland Security (DHS), and non-governmental organizations could more effectively identify, assess, and address issues related to child welfare and protection. Pending a larger restructuring of the reception framework, U.S. authorities might embed child protection experts at border and reception facilities. It could be useful, for example, to have child welfare experts from outside of DHS, such as those within ORR, co-located at Customs and Border Protection (CBP) facilities that initially process families arriving at or apprehended near the border.

E. Implementing Integrated Reception Models

UNHCR observes that inadequate infrastructure and highly segmented agency processing have limited U.S. border authorities’ ability to provide safe, orderly, and humane processing of large-scale arrivals of migrants and asylum seekers at its southwestern land border. As the arrival of asylum seekers fleeing persecution and violence, many of them children and families, has increased over the last decade, these deficiencies have resulted in overcrowding in U.S. border custody. Primary policy responses have been to limit access to territory through a range of measures, such as queue management (“metering”) at the ports of entry and more deterrence-focused measures like the Migrant Protection Protocols (MPP). Not only have these policies increased the vulnerability of asylum seekers at the border, but they also have led to other negative outcomes, including family separations, while failing to address the underlying infrastructure and process gaps.

⁵⁰ See THE YOUNG CENTER FOR IMMIGRANT CHILDREN’S RIGHTS, CHILD ADVOCATE PROGRAM, <https://www.theyoungcenter.org/child-advocate-program> (last visited Jan. 24, 2022).

⁵¹ CRC, art. 3; *see also* UNHCR BIP Guidelines, ch. 1.3.1.

⁵² UNHCR BIP Guidelines ch. 2.3.

⁵³ *See, e.g.*, THE YOUNG CENTER FOR IMMIGRANT CHILDREN’S RIGHTS, REIMAGINING CHILDREN’S IMMIGRATION PROCEEDINGS: A ROADMAP FOR AN ENTIRELY NEW SYSTEM CENTERED AROUND CHILDREN 48-49 (Oct. 2020), https://static1.squarespace.com/static/597ab5f3bebafb0a625aaf45/t/5f9acdc38fc5b520e882eb1/1603980749320/Reimagining+Children’s+Immigration+Proceedings_Young+Center+for+Immigrant+Children%27s+Rights.pdf.

Under international law, States have the sovereign power to regulate the entry of non-nationals to their territory. However, they may not do so in a way that infringes the right to seek asylum or results in refoulement. Investments in border processing and an adequate reception system upon arrival are crucial to ensure access to protection.⁵⁴ To address current challenges the United States faces at its southern border, UNHCR’s experience suggests that integrated reception models, which bring together a range of actors and processes under one roof, achieve greater efficiency in processing while guaranteeing the integrity of the asylum process, increasing due process protections, and promoting the unity of families arriving at borders. Such “integrated” models coordinate actions among border authorities, protection authorities (including asylum authorities and child protection authorities), intergovernmental organizations, local government actors, humanitarian responders, and civil society actors, among others, under a shared responsibility model of specialized roles and service delivery. In addition to creating efficiencies, integrated models also help to achieve the proper balance between enforcement and protection safeguards as compatible objectives.

Within the United States context, an integrated reception model could facilitate co-location of the various government agencies with roles to play respective to children and families and unaccompanied children, supported by NGO child welfare professionals as needed. With child protection professionals embedded within the process flow, children’s best interests can better be assessed and safeguarded, and risks of family separation mitigated. With attention paid to meeting children’s and families’ immediate humanitarian needs while undergoing immigration processing, conditions in integrated reception centers are more conducive than current CBP facilities to determining familial relationships and assessing if there are any urgent risks to the child’s safety and wellbeing. Integrated reception centers also have the flexibility to allow for extended family members to remain together.

IV. CHALLENGES TO FAMILY UNITY IN THE U.S. ASYLUM FRAMEWORK

There exist a range of U.S. asylum laws, policies, and procedures that have significant implications for the unity of asylum-seeking families arriving in the United States. Some of these, such as the U.S. government’s prior “zero tolerance” policy, were enacted with the express intent to separate asylum-seeking parents and children as a means to deter families from coming to the United States. Others, such as the re-instated Migrant Protection Protocols and expulsions under Title 42, lead to family separations as a result of the dire circumstances and conditions to which asylum seekers are subjected under those policies. Further, practices around prosecuting irregular entrants, detention of asylum seekers, and flawed age determination procedures for youth pose serious challenges to maintaining family unity. This section offers an overview of the laws, policies, and procedures most concerning to UNHCR with respect to their threat to family unity, and it includes recommendations as to how the U.S. government might address these most effectively.

A. Border Policies That Jeopardize Family Unity

a. Migrant Protection Protocols (MPP)

UNHCR is deeply concerned about the implications of MPP, which the U.S. government attempted to terminate in mid-2021 but recently re-instated pursuant to a federal court order. UNHCR has underscored

⁵⁴ Reception refers to the measures adopted by a host country to meet the immediate needs of new arrivals. These measures are provided to all persons, regardless of status, in order to ensure their welfare until their referral to appropriate processes and procedures. U.N. High Comm’r for Refugees, *The 10-Point Plan in Action* (2016 Update), available at <https://www.refworld.org/10pointplaninaction2016update.html>.

that MPP contravenes international standards, including because it does not uphold the fundamental principle of non-refoulement, which applies fully in the transfer of asylum seekers to third countries, and fails to ensure that asylum seekers are guaranteed safety and accorded adequate treatment in Mexico, among other reasons,⁵⁵ and it has recognized reports that asylum seekers reportedly have suffered murder, kidnapping, rape, and other violent attacks and threats upon return to Mexico.⁵⁶

Returning asylum-seeking families to Mexico under MPP leads to family separations. It is UNHCR's understanding that in some cases families have had no choice but to separate, with children fleeing unaccompanied to the United States due to risks of harm that they face in Mexico. In others, UNHCR has heard accounts of families separated at the border, with U.S. authorities sending parents or legal guardians back to Mexico while permitting their children to enter the United States—in some cases based on allegations of false documentation establishing family relationship or legal guardianship and in which parents and legal guardians had extremely limited recourse due in large part to the circumstances they faced under MPP⁵⁷—or allowing one parent to remain in the United States and placing the other in MPP, “even when the family is travelling together and ask[s] to be kept together.”⁵⁸ Some children travel with adult relatives who are not their parents or legal guardians—including grandparents, aunts, uncles, and older siblings—and immigration authorities routinely separated them as well.⁵⁹

UNHCR recommends that the U.S. government halt implementation of MPP, which violates the U.S.'s treaty-based non-refoulement obligations,⁶⁰ and refrain from instituting any similar transfer arrangement in the future unless it complies with applicable international standards, to mitigate the risk of harm to asylum seekers and reduce forcible separation of families.⁶¹ Further, UNHCR urges the government to undertake pro-active efforts to facilitate the reunification of any families, parents, or children who became separated as a result of MPP.

b. Title 42

UNHCR is concerned that the application of Title 42 restrictions on asylum seekers' access to territory compels some families to separate prior to crossing the U.S.-Mexico border so that children can seek

⁵⁵ Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, *Wolf v. Innovation Law Lab* at 16-18, No. 19-1212 (2021).

⁵⁶ Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, *Wolf v. Innovation Law Lab* at 17; see also Human Rights First, *Any Version of “Remain in Mexico” Policy Would Be Unlawful, Inhumane, and Deadly* (Sept. 2021), <https://www.humanrightsfirst.org/sites/default/files/MPPUnlawfulInhumaneandDeadly.pdf>.

⁵⁷ UNHCR, *U.S. Asylum and Border Policies Explained* (Nov. 9, 2021), <https://www.unrefugees.org/news/u-s-asylum-and-border-policies-explained/>; see also HUMAN RIGHTS WATCH, *LIKE I'M DROWNING – CHILDREN AND FAMILIES SENT TO HARM BY THE US ‘REMAIN IN MEXICO’ PROGRAM 22-24* (Jan. 6, 2021), available at <https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program>; Letter from Women's Refugee Commission to Cameron Quinn, Officer for Civil Rights and Civil Liberties, Dep't of Homeland Sec. and Joseph Cuffari, Inspector General, Dep't of Homeland Sec., pp. 5-9 (Aug. 16, 2019), <https://docs.house.gov/meetings/JU/JU01/20190906/109889/HHRG-116-JU01-20190906-SD008.pdf>; The Young Center for Immigrant Children's Rights, *The “Migrant Protection Protocols” are Harming Children and Must End* (Nov. 2019), <https://www.theyoungcenter.org/stories/2019/12/12/the-migrant-protection-protocols-are-harming-children-and-must-end>.

⁵⁸ HUMAN RIGHTS WATCH, *LIKE I'M DROWNING*, at 23. See Complaint for Declaratory and Injunctive Relief at ¶¶ 64-75, *Constanza Lemus v. Wolf*, 1:20-cv-10009 (D. Mass. 2020).

⁵⁹ HUMAN RIGHTS WATCH, *LIKE I'M DROWNING*, at 23.

⁶⁰ UNHCR observes that, in August 2021, a federal district court ordered the Biden administration to re-implement MPP, a decision upheld in December 2021 by the Fifth Circuit. See *Texas v. Biden*, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021), *aff'd* 20 F.4th 928 (5th Cir. Dec. 13, 2021). Nevertheless, UNHCR notes that MPP—in its past and current iterations—violates international law, and it is concerned about the safety and due process risks to asylum seekers. Press Statement, Matthew Reynolds, UNHCR Representative for the United States and the Caribbean, UNHCR Comment on Reinstatement of U.S. Policy that Endangers Asylum Seekers (Dec. 2, 2021), available at <https://www.unhcr.org/en-us/news/press/2021/12/61a8eeef4/unhcr-comment-reinstatement-policy-endangers-asylum-seekers.html>. Thus, UNHCR urges the government to take any and all actions required to end the program as quickly as possible.

⁶¹ See Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, *Wolf v. Innovation Law Lab* at 12-14.

protection, resulting in children arriving in the United States alone without a parent. Under Title 42, individuals do not have an opportunity to have their protection needs assessed, and consequently, they are returned to a place where they may face risks to their lives and freedom. UNHCR has repeatedly expressed concern over this possibility, as well as that of chain refoulement—that is, the successive pushbacks by countries—of those subject to Title 42 back to their countries of origin,⁶² and it has underscored that the policy is at variance with international law.⁶³ Advocates have documented significant levels of serious harm and violence experienced by families, adults, and children expelled from the United States under this authority.⁶⁴

UNHCR understands that, in light of this context, thousands of families have become separated or considered they had no choice but to separate, due to the dire circumstances they encounter upon expulsion across the border.⁶⁵ Where families have self-separated, many of the children have arrived alone in the United States, where the government is responsible for providing services to meet their heightened needs as unaccompanied children. This trend has occurred at a time when the system has already experienced severe strain, and it results in a precarious situation for children who experience the trauma of separation and are less likely to have immediate prospects for family reunification in the United States.

UNHCR recommends that the U.S. government immediately halt application of Title 42 and refrain from implementing any similar policy in the future. Instead, it should grant asylum-seeking families access to the United States, where they may remain together as they pursue their claims for protection. In UNHCR's experience, it is significantly easier to provide appropriate care for children in family units than for unaccompanied children. As UNHCR has previously advanced, preserving access to asylum procedures and protecting public health are compatible. U.S. authorities should bring its policy at the U.S.-Mexico border in line with UNHCR's global COVID-19 guidance, specifically by integrating any necessary public health measures (e.g., health screenings, testing, quarantine, and / or isolation) into border processing to resume regular reception of asylum-seeking families. Such modification, in addition to restoring the right to seek asylum and reducing the risk of refoulement, would eliminate perverse incentives for children to leave the protection of their family for a chance to seek safety and receive protection alone in the United States.

B. Separation of Children from Non-Parental Adults

UNHCR observes that unaccompanied children who arrive in the United States with non-parental adult caretakers—such as grandparents, aunts, uncles, and adult siblings, among others—are separated from them, designated as “unaccompanied,” and placed into the custody of ORR. Once children are under the

⁶² Press Statement, Matthew Reynolds, UNHCR Representative for the United States and the Caribbean, UNHCR Concerned Over U.S. Expulsion Flights Under Covid-19 Asylum Restrictions (Aug. 11, 2021), *available at* <https://www.unhcr.org/en-us/news/press/2021/8/6113dfc14/unhcr-concerned-expulsion-flights-under-covid-19-asylum-restrictions.html>.

⁶³ Brief of Amicus Curiae United Nations High Commissioner for Refugees in Support of Plaintiffs-Appellees and Affirmance at 2-3, *Huisha-Huisha v. Mayorkas*, No. 21-5200 (D.C. Cir. Nov. 19, 2021), *available at* <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&docid=61a4a2ac4&skip=0&type=AMICUS&coi=USA&querysi=Huisha&searchin=fulltext&sort=date>; *see also* U.N. High Comm'r for Refugees, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the Covid-19 Response* (Mar. 16, 2020), *available at* <https://www.refworld.org/docid/5e7132834.html>.

⁶⁴ HUMAN RIGHTS FIRST, “ILLEGAL AND INHUMANE”: BIDEN ADMINISTRATION CONTINUES EMBRACE OF TRUMP TITLE 42 POLICY AS ATTACKS ON PEOPLE SEEKING REFUGE MOUNT 3-5 (Oct. 2021), <https://www.humanrightsfirst.org/sites/default/files/IllegalandInhumane.pdf>.

⁶⁵ *See* Nicole Sganga & Camilo Montoya-Galvez, *Over 2,100 Children crossed Border Alone After Being Expelled With Families to Mexico*, CBS NEWS, May 7, 2021, <https://www.cbsnews.com/news/migrant-children-left-families-asylum-border/> (“Since President Biden took office, Border Patrol agents have encountered more than 2,100 unaccompanied migrant children who are believed to have left their families voluntarily in order to seek asylum in the U.S.” after previously being expelled under Title 42 when they tried to cross with their families); HUMAN RIGHTS FIRST, “ILLEGAL AND INHUMANE,” at 24 (concluding that policies including Title 42 have led to family separations).

care of ORR, the agency begins to identify sponsors with whom they can be reunified, potentially including the same adult family member with whom the child arrived. Recent estimates suggest that as many as 10 to 17 percent of children in ORR custody had been separated from relatives with whom they traveled to the United States,⁶⁶ and the separation of children from these non-parental, trusted caregivers can have enduring traumatic impacts.

In addition, these separations, unnecessary where adequate safeguards are in place,⁶⁷ create greater strains on CBP, which must transfer this group of children to ORR, and on ORR, which holds them in custody until they can be released to a sponsor. This issue became especially acute during early 2021, when unaccompanied children arrived in the United States in unprecedented numbers, spurring ORR to stand up emergency intake sites and influx facilities due to insufficient capacity at its regular shelters. Child welfare experts have underscored that “congregate care can cause severe harm, especially for young children,”⁶⁸ and the emergency intake sites—some of which have held several thousand children at a time—present a wide range of challenges that make it difficult to ensure children’s safety and wellbeing.

Under international law, children generally should not be separated from their parents against their will, except if necessary for the best interests of the child.⁶⁹ Given the gravity of the impact of separation, even if only temporary, “[s]eparation of children from parents against their will should be a last resort and should never be done if other less intrusive measures can protect the child.”⁷⁰ This principle also may apply to children cared for by other people who are not their biological parents or legal guardians.⁷¹ In other words, the term “family” should be interpreted broadly—and in a way that accounts for cultural norms—and “can, depending on the context, include extended family members or other people in the community with whom the child is living”—and in whose care the child, for instance, arrives at the border.⁷² For children arriving with a non-parental caretaker, the relationship between them must be assessed on a case-by-case basis.⁷³

UNHCR recommends that the U.S. government develop and implement a system through which it can perform expedited reunifications of unaccompanied children with a non-parental adult family member with whom they present at a port of entry or are apprehended after crossing irregularly. This framework—particularly if situated with adequate safeguards within an integrated reception model—would better ensure children’s rights to health, safety, and family unity. More specifically, using existing expertise and parameters, HHS might evaluate children’s accompanying family members as sponsors for the child while they are in CBP custody and then release them together, thereby preventing traumatic separations, enhancing the efficiency of processing relatively simple cases, and preserving CBP and ORR resources for other categories of children.⁷⁴ Throughout this process, children will maintain the “unaccompanied” designation and legal protections afforded to children without a parent or legal guardian.

⁶⁶ Kristina Cooke & Mica Rosenberg, *Where Is My Aunt? Kids Separated from Relatives at the Border Strain U.S. Shelters*, REUTERS, Mar. 30, 2021, <https://www.reuters.com/article/us-usa-immigration-separations/where-is-my-aunt-kids-separated-from-relatives-at-the-border-strain-u-s-shelters-idUSKBN2BM149>.

⁶⁷ See *supra* Section III.A (describing the only circumstances under which it is appropriate to separate children from parents or other caregivers).

⁶⁸ Megan Finno-Velasquez, Kristina Lovato & Rachel Prandini, *the US Must Adopt Child Welfare Strategies for Unaccompanied Minors*, THE HILL, June 30, 2021, <https://thehill.com/opinion/immigration/560981-the-us-must-adopt-child-welfare-strategies-for-unaccompanied-minors?rl=1>

⁶⁹ CRC, art. 9; see also UNHCR BIP Guidelines, ch. 4.3.

⁷⁰ UNHCR BIP Guidelines, ch. 4.3.

⁷¹ UNHCR BIP Guidelines, ch. 4.3.

⁷² CRC, art. 8; see also UNHCR BIP Guidelines, ch. 4.3.1.

⁷³ UNHCR BIP Guidelines, ch. 4.3.1.

⁷⁴ See *supra* Section III.A (describing the only circumstances under which it is appropriate to separate children from parents or other caregivers). For additional details regarding how such processing may be implemented, see The Young Center for Immigrant Children’s Rights, *Prioritizing Unaccompanied Children’s Safety at the Border*, May 27, 2021, <https://www.theyoungcenter.org/stories/2021/5/27/prioritizing-unaccompanied-childrens-safety-at-the-border>.

UNHCR is encouraged by the process that the government created to accommodate the expeditious reunification of Afghan unaccompanied children with non-parental, adult family members with whom they arrived,⁷⁵ and it urges the government to conduct an evaluation of it and consider expanding and adapting that model to the U.S.-Mexico border context.

C. Criminal Prosecution of Asylum Seekers Who Enter the United States Irregularly

UNHCR remains concerned that, under U.S. law, asylum seekers who enter the United States irregularly may be criminally prosecuted, a practice that not only contravenes the Refugee Convention but has led to large numbers of family separations, such as the thousands that occurred pursuant to the “zero tolerance” policy described above. The Convention “recognizes that the seeking of asylum can require refugees to breach immigration rules” and stipulates that refugees should not suffer penalties, or discrimination, for this reason.⁷⁶ Article 31(1) of the 1951 Convention prohibits states from imposing penalties on asylum seekers on account of irregular entry provided that they have come directly, presented themselves to the authorities without delay, and show good cause for their irregular entry or presence.⁷⁷ Even where Article 31(1) does not apply,⁷⁸ any penalties imposed must not undermine the right to seek asylum and may only be administrative, not criminal, in character, and impermissible penalties include restrictions on economic or social rights, such as the right to family unity. The traumatic, unnecessary separations on this basis—executed under wide-reaching policies like zero tolerance, in isolated cases, or otherwise—have violated the families’ basic human rights, resulting in severe psychological distress, and, in some cases, that distress continues long after reunifications.⁷⁹

UNHCR recommends that the U.S. government refrain from prosecuting asylum seekers who enter the United States irregularly, in compliance with the Convention and its fundamental principle of non-penalization and to avoid the separation of children from their parents. Instead, UNHCR urges U.S. authorities to process asylum seeking families into the United States, without imposing penalties in the event of irregular entry, such that they may remain together as they pursue their claims for international protection.

D. Detention of Asylum Seekers, Including Adults and Families

UNHCR is concerned about the impact of U.S. detention policy and practice on many asylum-seeking families and children, as well as the long-standing discrepancies between the U.S. approach to detention of asylum seekers and the clear limitations on the use of detention under international law. UNHCR observes that asylum-seeking families who arrive at or are apprehended near the U.S. border may face separation due to U.S. policy and practice that appears to favor detention. Some families, for example,

⁷⁵ See U.S. DEP’T OF HEALTH AND HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT, FIELD GUIDANCE NO. 19 (updated version Nov. 9, 2021); Kristina Cooke & Mica Rosenberg, *‘When Are My Parents Coming?’ - 1,300 Afghan Children Evacuated to U.S. in Limbo*, REUTERS, Nov. 10, 2021, <https://www.reuters.com/world/when-are-my-parents-coming-1300-afghan-children-evacuated-us-limbo-2021-11-10/> (“More than 1,000 of the unaccompanied children from Afghanistan have been released, the bulk with relatives they were originally traveling with . . . according to the HHS. . . [A]uthorities made an exception to the rule in policy guidance issued on Sept. 4 that said Afghan children could be released to adults with proven ‘bona fide’ relationships who had been screened by U.S. officials.”).

⁷⁶ 1951 Convention, Introductory Note.

⁷⁷ 1951 Convention, art. 31(1).

⁷⁸ See 1951 Convention, art. 31(1) (providing that Article 31(1) does not apply where the individual did not come directly, present themselves to the authorities without delay, or show good cause for their irregular entry or presence).

⁷⁹ Kathryn Hampton et al., *The Psychological Effects of Forced Family Separation on Asylum-Seeking Children and Parents at the US-Mexico Border: a Qualitative Analysis of Medico-Legal Documents*, PLOS ONE 16(11): e0259576e02, 2021, available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0259576>.

may be comprised of both parents and their children, and UNHCR understands that, in such cases, one parent (perhaps a father) may have been separated from his partner and children to be detained, while the other parent (perhaps a mother) and children are placed in family detention or paroled into the United States. Similarly, sometimes arriving families are comprised of parent(s) and a mix of adult and minor children, and adult children may be separated for detention apart from their parents and minor siblings. These, and other, family separations may cause unnecessary distress, and they have the potential to generate protection challenges, including refoulement.⁸⁰

Bearing in mind that seeking asylum is a lawful act, detention of asylum seekers should be treated as a measure of last resort, and instead alternatives, which may advance family unity and offer a variety of other benefits—both to asylum seekers and the U.S. government—should be utilized.⁸¹ Under international standards, when detention is used, it must not be arbitrary, meaning that detention must be determined to be necessary in the individual’s case, reasonable in all the circumstances, proportionate to a legitimate purpose, and prescribed by law.⁸² Further, UNHCR Detention Guidelines recognize children’s right to family unity and the right not to be separated from their parents against their will, and the guidelines underscore that “[o]verall an ethic of care—and not enforcement—needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration.”⁸³

Accordingly, detention of asylum-seeking children, and families with children, should be avoided. Detention is never in the best interests of a child, and children should not be detained for immigration related purposes, irrespective of their legal or migratory status or that of their parents.⁸⁴ The detention of asylum-seeking families for the purposes of maintaining family unity does not constitute a sufficient reason to detain, especially when there are effective alternatives available. Stated differently, asylum-seeking families must not face the false choice of remaining together but detained or separating so that, for example, children might be released while their parents are detained.⁸⁵ Thus, authorities should consider all appropriate care arrangements in the case of children accompanying their parents, “not least because of the well-documented deleterious effects of detention on children’s well-being, including on their physical and mental development,” and due to the trauma induced by separation from parents or other family members.⁸⁶

⁸⁰ Regarding possible protection challenges, for example, one family member may have significant information relevant to the family’s asylum claim, and if that individual is separated from their family members, the others may not be able to convey complete information to, say, the asylum officer conducting a fear screening, which may result in a negative fear determination and disparate fear findings for the separated family members. Relatedly, separating members of a family unit who then have to navigate their processes and protection claims independently of each other generates inefficiencies and risks erroneous outcomes in asylum procedures.

⁸¹ U.N. High Comm’r for Refugees, *Detention Guidelines*, ¶ 2 (2012), <https://www.refworld.org/pdfid/503489533b8.pdf> [*hereinafter* UNHCR Detention Guidelines].

⁸² UNHCR Detention Guidelines, ¶¶ 18, 52.

⁸³ UNHCR Detention Guidelines, ¶ 51.

⁸⁴ U.N. High Comm’r for Refugees, *UNHCR’s Position Regarding the Detention of Refugee and Migrant Children in the Migration Context*, at 1 (Jan. 2017), available at <https://www.unhcr.org/en-us/58a458eb4>; see also Comm. on the Prot. of the Rights of All Migrant Workers and Members of Their Families and Comm. on the Rights of the Child, 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, CMW/C/GC/4-CRC/C/GC/22 (Nov. 16, 2017) (“Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents’ migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.”).

⁸⁵ In addition, authorities cannot, for instance, force asylum-seeking families to choose between remaining together in detention or abandoning their claim for protection as part of the terms for their release, which would presumptively signify that the family would be subject to removal.

⁸⁶ UNHCR Detention Guidelines, ¶ 53.

UNHCR recommends that the U.S. government eliminate its reliance on detention of asylum seekers—adults, families, and children—and reduce detention of this population to the greatest extent possible by amending its detention framework to comply with international legal standards. UNHCR encourages U.S. authorities to create a system that operates more generally under a presumption of family unity—specifically one that contemplates allowing *both* parents and *all* children (minor and adult) to be processed together since, for example, even separation from one parent while remaining with the other can be traumatic to a child— and utilizes alternatives to detention to maximize the ability of families to remain together while they seek protection, such as the previously highly successful family case management program.⁸⁷ For related recommendations, see *supra* section on integrated reception models.

E. Flawed Age Determination Procedures

Youth arriving at the U.S. border are subject to age determination procedures. For youth traveling with family members, the results may control whether they remain together or face separation.⁸⁸ UNHCR observes that where the age of an individual is in question, U.S. anti-trafficking law calls for procedures that rely on multiple forms of evidence.⁸⁹ Officials are to evaluate each case based upon “the totality of all available evidence,” and in cases where “no conclusive information is available,” officials rely on medical assessments involving dental and skeletal maturity assessments.⁹⁰ These methods have been widely criticized for being “arbitrary and inaccurate, with a significant margin of error, because they are generally based on reference materials that do not take into account ethnicity, nutritional status, disease, and developmental history, considerations which are especially relevant for individuals coming from conflict and/or resource-constrained environments.”⁹¹ Consequently, families may be separated due to the erroneous application of these assessments.⁹²

While UNHCR recognizes that States may need to utilize age assessments as a means of identification, under international standards, the procedure must follow key principles and requires several essential safeguards. Any determination must be conducted in a safe, child-, gender-, and culturally sensitive manner.⁹³ Such procedures should be conducted only in cases where a child’s age is in doubt, and they must be part of a comprehensive evaluation that accounts for both the physical appearance and

⁸⁷ See, e.g., Human Rights First, *FACT CHECK: Asylum Seekers Regularly Attend Immigration Court Hearings*, 3 (Jan. 2019), https://www.humanrightsfirst.org/sites/default/files/FACT_CHECK_Court_Appearance_Rates.pdf.

⁸⁸ See, e.g., HUMAN RIGHTS WATCH, *LIKE I’M DROWNING*, at 22-23 (describing a case in which Border Patrol reportedly apprehended a 17-year-old traveling with his mother and siblings and separated the child from his family because they took the position that his birth certificate was false).

⁸⁹ U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, JUVENILE AND FAMILY RESIDENTIAL MANAGEMENT UNIT: FIELD OFFICE JUVENILE COORDINATOR HANDBOOK, 3.1.2 (Sept. 1, 2017) [*hereinafter* JFRMU handbook]; DEP’T OF HEALTH AND HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT, CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED, Section 1 (July 14, 2021), *available at* <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-1>.

⁹⁰ JFRMU handbook, 3.1.2.

⁹¹ Ranit Mishori, *The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children’s Rights*, 6 *Children* (7) 85, 1 (2019), *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6678520/>.

⁹² For example, inadequate age assessments could lead to the arbitrary detention of children wrongly identified as adults, as well as the housing of children alongside adults. See UNHCR Detention Guidelines, ¶ 56.

⁹³ U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/09/08, ¶ 75 (Dec. 22, 2009) [*hereinafter* GIP no. 8]. In the case of unaccompanied and separated children, any age assessments should not be carried out immediately upon their arrival in border areas or on the territory “since time is crucial in building trust and allows for proper recollection and sharing of information about the child’s own story which is useful in establishing his or her age.” U.N. High Comm’r for Refugees, *UNHCR Observations on the Use of Age Assessments in the Identification of Separated or Unaccompanied Children Seeking Asylum: Case No. CIK-1938/2014 – Lithuanian Supreme Court*, ¶ 9(xi) (June 1, 2015), *available at* <https://www.refworld.org/pdfid/55759d2d4.pdf>.

psychological maturity of the individual.⁹⁴ Where scientific procedures like dental and skeletal assessments are used to determine age, margins of error should be allowed,⁹⁵ and anatomical data sets relevant to particular geographic regions or ethnic groups must be considered.⁹⁶ This is because no method can determine age definitively, and thus, in cases involving uncertainty, individuals should be considered children.⁹⁷ Further, because age is not calculated the same way universally or given the same degree of importance in different places, caution must be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age.⁹⁸ Youth who receive an adverse age assessment outcome should have the opportunity to challenge it and be provided with legal assistance to help guide them through that process.⁹⁹

UNHCR recommends that the U.S. government amend its policies and procedures governing age determinations of youth such that they align with international standards, which will help mitigate family separations resulting from inaccurate results, among other benefits. This means that age assessments should rely on multi-disciplinary evaluations and that, in disputed cases, individuals are treated as children until established otherwise. Other safeguards would include, for example, appointing a qualified independent guardian to be appointed to advise any child subject to an age assessment before it is conducted.

V. CONCLUSION

UNHCR recognizes the current and complex challenges associated with large-scale arrivals of asylum seekers, including families and children, amidst mixed movements within the sub-region and the corresponding strains on U.S. border management and the asylum system. UNHCR offers its continued support to the U.S. authorities to overcome these issues and ensure consistency with international law and principles, including those related to the best interests of the child and the right to family life and unity.

UNHCR recognizes that a diverse set of existing U.S. asylum laws, policies, and procedures have significant implications for family unity of asylum-seeking parents and children arriving in the United States and that those have led to the separation of thousands of families in just the past few years alone. In an effort to minimize the future risk of separation for asylum-seeking families that come to the United States in search of refuge, UNHCR sees significant openings for the Government to pursue alternative approaches to border management and processing such that children can remain with their parents, caretakers, and other family members upon arrival and as they pursue their claims for protection.

⁹⁴ GIP no. 8, ¶ 75; U.N. High Comm'r for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, ch. 5.11 (Feb. 1997), available at <https://www.unhcr.org/3d4f91cf4.pdf>; see also Exec. Comm. of the High Comm'r's Programme, Conclusion on Children at Risk No. 107 (LVII), ¶ (g)(ix) (Oct. 5, 2007); U.N. High Comm'r for Refugees, *UNHCR Observations on the Use of Age Assessments in the Identification of Separated or Unaccompanied Children Seeking Asylum*, ¶¶ 9(i-ii) (June 1, 2015), available at <https://www.refworld.org/pdfid/55759d2d4.pdf>.

⁹⁵ U.N. High Comm'r for Refugees, *UNHCR Observations on the Use of Age Assessments in the Identification of Separated or Unaccompanied Children Seeking Asylum: Case No. CIK-1938/2014 – Lithuanian Supreme Court*, ¶¶ 9(i-ii).

⁹⁶ European Asylum Support Office, EASO Practical Guide on Age Assessment, 22, 57-58, 76 (2018), available at <https://euaa.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf>; see also Andreas Olze et al., *Forensic Age Estimation in Living Subjects: the Ethnic Factor in Wisdom Tooth Mineralization*, 118 INT'L J. LEGAL MED. 170 (2004); Andreas Olze et al., *Comparative Study on the Effect of Ethnicity on Wisdom Tooth Eruption*, 121 INT'L J. LEGAL MED. 445 (2007).

⁹⁷ GIP no. 8 ¶ 75. Most experts agree that age assessments are not a *determination* of chronological age but rather an *estimation*. U.N. High Comm'r for Refugees, *UNHCR Observations on the Use of Age Assessments in the Identification of Separated or Unaccompanied Children Seeking Asylum: Case No. CIK-1938/2014 – Lithuanian Supreme Court*, ¶¶ 9(i-ii).

⁹⁸ GIP no. 8 ¶ 75.

⁹⁹ UNHCR, UNICEF & IRC, *Discussion Paper on a Possible Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children*, at 6; see also GIP no. 8 ¶ 75.

UNHCR further acknowledges the Government’s long-standing commitment to refugees and asylum seekers, and it welcomes the many opportunities that the Government has taken over the years to consult with UNHCR on the implementation of the 1967 Protocol. In line with UNHCR’s supervisory and advisory role, our Office remains available to engage with the U.S. government in robust consultation so that we might provide technical support and examples of good practices for upholding and advancing family unity in the reception and processing of asylum seekers.