



April 27, 2021

Senator Kyrsten Sinema, Chair
Homeland Security & Governmental Affairs Subcommittee on Government Operations and
Border Management

Senator James Lankford, Ranking Member
Homeland Security & Governmental Affairs Subcommittee on Government Operations and
Border Management

**Re: Amnesty International USA Statement for Hearing: The Non-Governmental
Organization Perspective on the Southwest Border**

Dear Chairperson Sinema, Ranking Member Lankford, and Members of the Subcommittee:

On behalf of Amnesty International USA and our members and supporters in the United States, we submit this statement for the record on the treatment of asylum-seekers and immigrants at the U.S. southern border.¹

The Biden administration has inherited a chaotic, punitive system that does not prioritize the well-being of people seeking safety in the United States. However, no matter the situation or who is heading the administration, the government must uphold its human rights obligations. As the Biden administration rightfully welcomes children seeking safety at the U.S. southern border, we call on the government to stop the misuse of Title 42 and ensure the human rights of all people seeking safety. The government must not resort to the use of detention as a default measure, and instead respect the right to seek asylum and freedom from arbitrary detention.

¹ Amnesty International is an independent, Nobel Peace Prize-winning, global human rights movement of more than ten million people. Amnesty International USA is the movement's U.S.-based section.

Stop the Misuse of Title 42

In March 2020, the previous administration began misusing Title 42 of U.S. Code Section 265 to effectively shut down access to the asylum system. Disregarding the objections of its own experts, the Centers for Disease Control and Prevention (“CDC”) issued an [order](#) under Title 42, allegedly as a public health measure responding to COVID-19, which the U.S. Department of Homeland Security (“DHS”) has since used to close U.S. borders to people seeking safety. The government must immediately halt this unlawful use of Title 42.

The unlawful use of Title 42 has resulted in the summary expulsion of over 500,000 immigrants and asylum-seekers.² Title 42 has particularly affected Black immigrants and asylum-seekers, who have been summarily returned to the countries they fled because the Mexican government is largely only receiving immigrants and asylum-seekers from the northern countries of Central America who are expelled under Title 42.³ Over the course of Black History Month in February 2021 and then in March 2021, the Biden administration expelled over 1,200 Haitians to danger in Haiti, including children, infants, and families.⁴

All of this was entirely preventable, endangered lives, and is in violation of the U.S.’s obligations under international and domestic law to uphold the right to seek asylum and not forcibly return individuals to a place where they would face persecution – the principle of *non-refoulement*.

The right to seek asylum is enshrined in both international and domestic law. Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the latter of which the United States has signed and incorporated into domestic law through the 1980 Refugee Act, governments must uphold the right to seek asylum.⁵ The U.S. government has codified in domestic law the right to seek asylum both at and between ports of entry along the U.S. border.⁶ The United States government is under an obligation not to return individuals to a situation in which they would be at risk of torture or other serious human rights abuses: the principle of non-

² U.S. Department of Homeland Security, Customs and Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (April 7, 2021), available at www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics.

³ www.dhs.gov/news/2021/03/16/statement-homeland-security-secretary-alejandra-n-mayorkas-regarding-situation.

⁴ Haitian Bridge Alliance, The UndocuBlack Network, and The Quixote Center, *The Invisible Wall: Title 42 and its Impact on Haitian Migrants* (March 2020), available at www.quixote.org/wp-content/uploads/2021/03/The-Invisible-Wall.pdf.

⁵ 1980 Refugee Act, available at www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf.

⁶ 8 U.S.C. §§ 1158, 1225.

refoulement.⁷ This includes not only their countries of origin, but any other place where they would face risk of serious harm.⁸

The U.S.'s public health laws should not be used to evade U.S. obligations under human rights and refugee law. The UN High Commissioner for Refugees (“UNHCR”) has made clear that blanket measures restricting access to asylum on health grounds, without safeguards to protect against *refoulement*, is discriminatory, does not meet international standards for protection, and cannot be justified.⁹ As President Biden assumed office, UNHCR yet again reminded governments: “The right to seek asylum is a fundamental human right. The COVID-19 pandemic provides no exception.”¹⁰ Yet, the Biden administration continues to use Title 42 to expel people seeing safety under the pretext of public health, violating their right to seek asylum and protection against *refoulement* – bedrock principles of refugee protection.

Furthermore, the use of Title 42 does not advance the public health justifications on which it is purportedly based. The use of Title 42 contradicts [public health experts](#), who have clearly assessed and confirmed that there is no public health rationale for denying people their right to claim asylum at the U.S. border.¹¹ Despite experts at the Centers for Disease Control and Prevention (CDC) determining there was no public health rationale to close the border, the order invoking the use of Title 42 was still issued over their objections.¹²

Simply put: there is no public health rationale to treat immigrants and asylum-seekers differently, but it is causing irreparable harm to them. Public health experts have published a series of recommendations on how to restart the asylum process safely by using common-sense measures.¹³

⁷ *Convention Relating to the Status of Refugees*, Art. 33 [Refugee Convention]; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), Art. 3, G.A. Res. 39/46.

⁸ UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, at para. 7.

⁹ UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response* (March 16, 2020), available at www.refworld.org/docid/5e7132834.html.

¹⁰ UNHCR, *UNHCR warns asylum under attack at Europe's borders, urges end to pushbacks and violence against refugees* (January 28, 2021), available at www.unhcr.org/en-us/news/press/2021/1/601121344/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-violence.html.

¹¹ See www.publichealth.columbia.edu/research/program-forced-migration-and-health/letter-acting-hhs-secretary-cochran-and-cdc-director-walensky.

¹² See www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19/; <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>.

¹³ See www.publichealth.columbia.edu/public-health-now/news/public-health-experts-issue-recommendations-protect-public-health-and-lives-asylum-seekers.

The exemption of unaccompanied children from Title 42 is welcome and was long overdue, as it conflicts with the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”) and human rights obligations.¹⁴ However, the welcoming of children at the border, while the U.S. continues to expel families with children as well as adults, demonstrates that the use of Title 42 is arbitrary and serves as a cruel and unlawful form of border management. This selective use of Title 42 also creates family separation and endangers children, when parents expelled under Title 42 and placed in a desperate situation, allow their children to travel to the U.S. alone to ask for protection.¹⁵

UNHCR has warned that “[m]easures restricting access to asylum must not be allowed to become entrenched under the guise of public health.”¹⁶ We urge the government to heed that warning and stop the misuse of Title 42 and the practice of summarily expelling immigrants and people seeking safety.

Detention Is Not the Solution

People seeking safety need protection and humane treatment, not detention and deportation. Subjecting asylum-seekers to blanket detention measures undermines the United States’ obligations under domestic and international laws. As the number of people in Immigration and Customs Enforcement (“ICE”) detention continues to rise, now at more than 15,000 people, and proposals are considered for expedited processing and detention in Customs and Border Protection (“CBP”), we urge the government not to fall back on the default solution of arbitrary, mass detention.

Detaining people solely on account of their immigration constitutes arbitrary detention, a violation of international law. Both refugee and international human rights law require the U.S. government to respect and ensure personal liberty and security as all individuals’ default

¹⁴ William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) § 235(c)(2); 8 U.S.C. §1232(c)(2), Pub. L. No. 110–457, 122 Stat. 5044 (2008).

¹⁵ www.humanrightsfirst.org/sites/default/files/FailuretoProtect.4.20.21.pdf.

¹⁶ UNHCR, *Inclusion key to protecting refugees and their hosts amid COVID-19 pandemic* (November 4, 2020), available at www.unhcr.org/news/press/2020/11/5fa2f16b4/inclusion-key-protecting-refugees-hosts-amid-covid-19-pandemic.html.

condition.¹⁷ Arbitrary detention is prohibited.¹⁸ Immigrants and asylum-seekers, as anyone else, must benefit from a legal presumption of liberty and not be subjected to arbitrary detention.

The U.S. government has an obligation to ensure that the human rights of immigrants and asylum-seekers are respected, protected, and fulfilled. Detention should be the exception and can only be permitted in very narrow circumstances.¹⁹ It must be justified in each individual case, subject to judicial review, necessary and proportionate to a legitimate purpose, and non-discriminatory.²⁰ When detention occurs, it must be the least restrictive as possible for the shortest period of time. In order to show that detention is necessary and proportionate, a government must demonstrate that alternatives to detention would not be effective before resorting to detention.²¹ The blanket use of detention for border enforcement constitutes arbitrary detention and is unlawful – it is not based on an individualized assessment of its necessity and proportionality and is used as a default measure instead of an exception.²²

The blanket use of detention for border enforcement also jeopardizes lives with the threat of *refoulement*. Mass detention undermines the U.S.'s obligation to provide a fair opportunity to seek asylum, given the well documented issues with meaningful access to legal counsel for people in detention.²³ Without a meaningful opportunity to ask of protection, people seeking

¹⁷ *Universal Declaration of Human Rights*, Arts. 9, 14 [UDHR]; *International Covenant on Civil and Political Rights*, Art. 9(1) [ICCPR]; UN Human Rights Committee (HRC), *General Comment 35: Article 9 (Right to Liberty and Security of Persons)* [HRC General Comment 35]; General Assembly (GA), *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/173, Principle 2 [GA Body of Principles]; UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility*, UN Doc A/HRC/35/25 (April 28, 2017) at para 58 [Special Rapporteur on Migrants 2017]; Refugee Convention, Art. 31.

¹⁸ UDHR, Arts. 9, 14; ICCPR, Arts 2, 9(1); Refugee Convention, Art. 31; *Convention on the Protection of the Rights of Migrant Workers and Members of their Families*, Art. 16 [Migrant Worker Convention]; UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30 on Discrimination against Non-Citizens*; HRC General Comment 35; UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guidelines 1, 2, 3 [UNHCR Detention Guidelines]; Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants* (February 7, 2018) at para 8 [WGAD 2018].

¹⁹ See, e.g., UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility*, UN Doc A/HRC/35/25 (April 28, 2017) at para 62.

²⁰ See Refugee Convention, Art. 31(2); HRC General Comment 35 at para 12; UNHCR Detention Guidelines, Guideline 4.2, para 34; *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, I(A)(10) [Siracusa Principles]; Special Rapporteur on Migrants 2017 at para 58.

²¹ UNHCR Detention Guidelines, Guideline 4.2, para 34; see also Siracusa Principles I(A)(11).

²² UNHCR Detention Guidelines, Guideline 4.1.4 at para. 32; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Bahamas* (April 28, 2004) CERD/C/64/CO/1 at para 17; WGAD 2018 at para 19; Special Rapporteur on Migrants 2017 at para 58.

²³ For the right to legal assistance, see ICCPR, Art. 14(3); UN Human Rights Committee, *General Comment No. 13, Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*; UNHCR Detention Guidelines, Guideline 7; GA Body of Principles, Principles 17, 18; see, e.g., Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration

safety could be returned to the very danger they fled, in violation of the U.S.'s obligation of non-*refoulement*.

The use of arbitrary detention for border enforcement further undermines the right to seek asylum because it seeks to deter people from seeking safety in the United States. Refugee and international law establish the right to seek asylum without penalty regardless of how a person enters a country, and the right to liberty and security, free from arbitrary detention.²⁴ The Refugee Convention recognizes the humanity behind flight: people fleeing violence and persecution often have little choice about how they cross borders in their search for safety and compassion demands they not be penalized for the matter of entry. In fact, as noted above, U.S. law permits people to apply for asylum regardless of how they enter – whether at or between ports of entry. The blanket use of detention to deter people from crossing a border to ask for asylum is not only wholly inconsistent with refugee protection and human rights standards, it is also at odds with U.S. law guaranteeing the right to seek asylum regardless of how they entered the country.

The detention of families violates the U.S.'s obligations toward the treatment of immigrant children. The detention of immigrant children, whether accompanied or unaccompanied, is prohibited in international law as it is not in their best interests.²⁵ Additionally, detaining children because of their parents' immigration status will never be in their best interests, nor will separating them from their parents.²⁶ Children should not be detained, and families should be released as a unit.²⁷ The detention of families must end altogether.

Council (September 2016), available at www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf;

Kyle Kim, "Immigrants held in remote ICE facilities struggle to find legal aid before they're deported," *Los Angeles Times* (September 28, 2017), available at www.latimes.com/projects/la-na-access-to-counsel-deportation/.

²⁴ Refugee Convention, Art. 31(2); ICCPR, Arts 2, 9(1); Special Rapporteur on Migrants, 2017 at para 58; *Report of the Working Group on Arbitrary Detention on its visit to the United States of America* (July 17, 2017), UN Doc. A/HRC/36/37/Add.2, at paras. 26-28, 32.

²⁵ See WGAD 2018 at para 11; Special Rapporteur on Migrants 2017 at para 61; UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context* (January 2017); UN Special Rapporteur on torture, *Thematic Report on Torture and Ill-Treatment of Children Deprived of their Liberty* (March 5, 2015) UN Doc. A/HRC/28/68 at para. 80; UN Committee on the Rights of the Child, *General Comment No. 22 and General Comment No. 6*, UN Doc. CRC/GC/2006/6 at para. 18.

²⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* (November 16, 2017) CMW/C/GC/4-CRC/C/GC/23.

²⁷ WGAD 2018 at para. 40.

The government should prioritize humane and respectful reception for asylum-seekers at the southern border, recognizing their right to seek protection and upholding their humanity and dignity. The government should expand community-based programs as alternatives to detention so that asylum-seekers and immigrants are allowed to live in the community, supported by sponsors, community-based services, and case management programs. These are proven, compassionate alternatives that are humane, support dignity, and facilitate compliance with complicated immigration proceedings. These reforms will move the U.S. toward compliance with its human rights obligations, drastically reduce the number of people detained by ICE, and save hundreds of millions of dollars.

Conclusion and Recommendations

The approach to the border should be straight forward: the government must uphold the rights of immigrants and people seeking safety, without discrimination to their status, country of origin, or other characteristics, and implement a fair and humane system that ensures the fair and timely processing of asylum-seekers and immigrants without the default use of detention.

The desire to implement processes to regulate border entry can be achieved based on protecting public health and respecting human rights. The U.S. has the capacity, and must marshal the political will, to act.

The alternative is unacceptable and unlawful: adults and families with children expelled under Title 42, the blanket use of detention, lives jeopardized as people are subject to *refoulement*. People seeking safety can and must be welcomed. It is the U.S.'s legal and moral obligation, and it is their human right to ask for safety.

Amnesty International USA recommends:

End the misuse of Title 42

- Urge the Administration to immediately stop expelling individuals and families under Title 42
- Urge the Administration to withdraw the CDC order and rescind the accompanying Health and Human Services (“HHS”) final rule
- Withhold appropriations used to carry out expulsions under Title 42

End arbitrary, mass detention

- Co-sponsor and support the passage of the Dignity for Detained Immigrants Act (S. 1186) and the forthcoming Freedom for Families Act sponsored by Senator Merkley

- Uphold the presumption of liberty and reject the blanket use of detention; only after consideration of non-punitive and non-invasive alternatives to detention can detention be considered, in narrow and limited circumstances. If a person is detained, it must be for the shortest period of time in the least restrictive setting.
- Support NGO-run community-based case management programs and nonprofit service providers and local communities – at the border and in the interior – that are welcoming and assisting people seeking safety
- Urge the Administration to end family detention and do not fund family detention
- Cut funding for ICE and CBP's overall budgets by at least 50 percent, including specifically 50 percent cuts in funding for ICE officers and Border Patrol agents
- Reduce the ICE Custody Operations account by at least 75%, including through prohibition of the use of funds for the detention of families, and ensuring that ICE cannot use funds to detain people without access to an individualized consideration of release. Instead invest funding in programs that move away from detention and surveillance and prioritize un-mandated, community-based care outside of DHS
- Do not fund border wall/barrier construction; rescind or redirect unobligated border wall funding from previous appropriations Acts, including from cancelled contracts; and sharply restrict "virtual" wall and mass-surveillance technologies. Instead, provide reparations for border communities and resources to restore areas that have been negatively impacted by wall construction
- Restrict DHS authority to transfer and reprogram funding to ICE's Enforcement and Removal Operations account

Ensure oversight and accountability

- Hold oversight hearings on violations of U.S. refugee and human rights law and treaty obligations, including on Title 42
- Conduct official visits to ICE and CBP facilities and other locations detaining families, children, and individuals, such as hotels and any "reception" sites, to assess conditions and violations of domestic and international obligations

Uphold Access to Asylum

- Ensure a fair and meaningful opportunity to ask for safety, and reject any form of expedited processing of claims for asylum and other protection
- Establish a right to counsel for people in immigration proceedings and ensure people are guaranteed legal counsel in all immigration court proceedings

We call on Congress to urge the Biden administration to take critically needed steps to uphold its rights obligations, and for elected officials to support legislative action to welcome people seeking safety with humanity, compassion, and care and by upholding their human rights. We urge Congress to approach this issue with the urgency, accountability, and transparency it deserves.

For more information, please contact Denise Bell at 917/583-8584 and dbell@aiusa.org.

Sincerely,



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