UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

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15 April 2002

BY FACSIMILE [redacted] & FIRST CLASS MAIL

[redacted]

Re: Request for Advisory Opinion on Detention of Asylum Seekers

Dear [redacted]

I am writing in response to your request for an advisory opinion from the Office of the United Nations High Commissioner for Refugees ("UNHCR") on certain aspects of the current practice of detention of asylum seekers by the Immigration and Naturalization Service ("INS"). Specifically, you requested that UNHCR address the following issues: 1) whether international standards permit a State to use detention of asylum seekers as a means of deterring future refugee flows or as a response to their manner of entry, and 2) whether a policy of detaining asylum seekers of a particular nationality while releasing asylum seekers of other nationalities violates international standards.

UNHCR has been formally mandated by the United Nations General Assembly to ensure international protection to refugees and other persons of concern and to assist governments in identifying and implementing durable solutions on their behalf.[1] The detention issues presented affect the treatment of asylum seekers in the United States and their access to the US asylum process and, therefore, relate directly to UNHCR's mandate.

[1] The General Assembly established the Office of UNHCR as of 1 January 1951. *See* Statute of the Office of the United Nations High Commissioner for Refugees, U.N.G.A. Res. 428(V), 14 Dec. 1950; Executive Committee Conclusion No. 46 (1987) (reiterating UNHCR's leading role in refugee protection, including detention issues).

The United States is a State party to the 1967 Protocol relating to the Status of Refugees (the "1967 Protocol").[2] As such, the United States is bound by the 1967 Protocol and the substantive provisions of the 1951 Convention relating to the Status of Refugees ("1951 Convention").[3] The United States has agreed to uphold international refugee protection standards and to cooperate with UNHCR in the exercise of its functions and its duty of supervising the application of the provisions of the 1951 Convention and its 1967 Protocol.[4]

UNHCR's governing body is the Executive Committee of the High Commissioner's Programme. The Executive Committee is comprised of 57 members, including the United States. In the exercise of its terms of reference, the Committee adopts Conclusions on International Protection addressing particular aspects of international protection. While the Conclusions are not formally binding, they represent elements relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight.

UNHCR appreciates the opportunity to comment on the questions you have raised. The detention of asylum seekers and access to the asylum process are issues of significant concern to UNHCR. In this regard, we present below international refugee law standards relating to the detention of asylum seekers, the use of detention as a deterrent, as well as the use of detention based on national origin.

I. *Asylum Seekers Should Not be Detained*

Detention of asylum seekers is inherently undesirable as it can have a significant impact on their ability to access the asylum process and can be a traumatizing experience. Detention may make it more difficult for asylum seekers and refugees to secure legal counsel, communicate with family members and access legal materials and interpreters to assist in preparing their claims. These obstacles particularly affect vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Many asylum seekers may have endured torture or trauma in their home countries and detention could easily cause further mental suffering.

Under international refugee law, asylum seekers should not be detained except when it is absolutely necessary. Article 31(1) of the 1951 Convention provides:

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[2] The 1967 Protocol relating to the Status of Refugees, *adopted* 31 Jan. 1967, *entered into force* 4 Oct. 1967, 606 U.N.T.S. 267 (1967). The United States acceded to the Protocol in 1968.

[3] The 1951 Convention relating to the Status of Refugees, *adopted* 28 July 1951, *entered into force* 22 Apr. 1954, 189 U.N.T.S. 137 (1951). Article I(1) of the 1967 Protocol incorporates by reference Articles 2 through 34 of the 1951 Convention.

[4] 1967 Protocol, Article II.

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

As Contracting States (including the United States) and UNHCR's Executive Committee have long recognized, it is likely that refugees may need to resort to illegal means to flee from persecution, which should not result in them being subject to penalties by the country of asylum.[5] Further to Article 31 of the 1951 Convention, UNHCR's Executive Committee has concluded that asylum seekers who have been admitted to a country for a refugee status determination must "not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful."[6] Article 31(2) also provides, *inter alia*, that States shall not apply restrictions to the movements of refugees "other than those which are necessary." Thus, international standards preclude the detention of asylum seekers due to their unlawful entry into the country.

In view of the hardship of detention and its inherent undesirability, the Executive Committee has identified only four instances when detention may be "necessary," as follows:[7]

(i) to verify identity;

(ii) to determine the elements on which the claim for refugee status or asylum is based;

(iii) to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or

(iv) to protect national security or public order.[8]

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[5] Executive Committee Conclusion No. 58(XL) (1989) ("[C]ircumstances may compel a refugee or asylum seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered."); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992) ("*Handbook*"), ¶ 196 ("In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently without personal documents."); UNHCR, "Detention of Asylum Seekers and Refugees: the Framework, the Problem and Recommended Practice," a Conference Room Paper for the Standing Committee, EC/49/SC/CRP.13, 4 June 1999 ("UNHCR Note on Detention"), ¶ 15 ("[T]he very circumstances which prompt the flight may compel an asylum-seeker to leave without documents or to have recourse to fraudulent documentation when leaving a country where his/her safety or freedom is endangered.").

[6] UNHCR Executive Committee Conclusion No. 22, (II)(B)(2)(a)(1981).

[7] UNHCR Executive Committee Conclusion No. 44 (1986). *See also, UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (10 February 1999) ("*UNHCR's Detention Guidelines*"), ¶ 1, 3 (stating that as a general rule, asylum seekers should not be detained.).

[8] *Id*.

The Executive Committee has reiterated, in subsequent Conclusions, the need to resort to the detention of asylum seekers only in exceptional circumstances, as well as the need to prevent arbitrary detention.[9]

UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers ("*UNHCR's Detention Guidelines*") provide additional guidance regarding the application of these limited exceptions. The exception regarding verifying identity should be used only in cases in which identity may be undetermined or in dispute. In determining the elements of the claim, States should detain asylum seekers only for purposes of undertaking a preliminary interview and not for the entire time it may take to make a determination on the merits.[10]

In cases in which asylum seekers arrive with false or no documents, detention is justified only when there is an intention to mislead or a refusal to cooperate with the authorities. Asylum seekers who arrive without documentation, because they are unable to obtain any in their country of origin, should not be detained solely for that reason. The final exception should be used only if there is evidence that an individual asylum seeker has criminal antecedents and/or affiliations and is likely to pose a risk to public order or national security.[11]

If it is determined that one of the limited exceptions applies to a particular case, detention should be used only for a minimal period of time.[12] Alternatives to detention, such as reporting obligations or guarantor requirements, should be used *first*, unless it is determined that they would not be effective for that individual.[13]

II. ***Detention Used as a Deterrent is Contrary to International Standards and Would Amount to Arbitrary Detention***

Pursuant to Article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and to enjoy asylum. This is a fundamental human right.[14] The right to seek asylum has been repeatedly acknowledged in various international fora, including through Conclusions of UNHCR's Executive Committee and resolutions of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, and the General Assembly.[15]

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[9] *See* Executive Committee Conclusions Nos. 46(f) (1987); 47(e) (1987); 50 (i) (1989), 55(g) (1989), 65(c), (j) (1991); 71(f) (1993); 85(cc), (dd), (ee) (1998); and 89 (2000).
[10] *UNHCR's Detention Guidelines*, Guideline 3.
[11] *Id.*
[12] *Id.*
[13] *Id*. (emphasis in original).
[14] Universal Declaration of Human Rights, U.N.G.A. Res. 217A(III), *adopted* 10 Dec. 1948 ("UDHR"), Article 14 ("Everyone has the right to seek and to enjoy in other countries asylum from persecution."); UN Declaration on Territorial Asylum, U.N.G.A. Res. 2312(xxii), *adopted* 14 Dec. 1967, Preamble and Article 1; Vienna Declaration and Programme of Action, World Conference on Human Rights, A/Conf. 157/23, *adopted* on 25 June 1993, Article 23; Charter of Fundamental Rights of the European Union 2000/C 364/01, Article 18.
[15] *See*, *e.g.*, Executive Committee Conclusion No. 82(XLVIII) (1997); Committee for Human Rights Resolution (Human Rights and Mass Exodus), E/CN.4/RES/1998/49; Sub-Commission on the Promotion

The right to seek asylum is predicated on the ability to leave one's country, or to remain outside it, in order to avoid the risk of persecution. A State's practice of deterring further arrivals of asylum seekers through the use of detention frustrates the ability of individuals to escape harm and seek safety elsewhere. UNHCR has repeatedly stated that asylum seekers should not be detained for purposes of deterrence.[16] The detention of asylum seekers in furtherance of a policy to deter future arrivals does not fall within any of the exceptional grounds for detention and is contrary to the principles underlying the international refugee protection regime.[17] As discussed above, while in some limited instances, detention may be justified for national security or public order reasons, detention for the purpose of discouraging further arrivals cannot be justified.[18]

Moreover, the right to liberty is a fundamental human right set out in universal human rights instruments. The Universal Declaration of Human Rights[19] and the International Covenant on Civil and Political Rights ("ICCPR")[20] specify that no one should be arbitrarily deprived of his or her liberty. According to the Human Rights Committee ("HRC"), the term "arbitrary" is to be given a broad application which is not to be equated with "against the law."[21] In a landmark decision concerning a Cambodian asylum-seeker in Australia, the HRC determined that:

> … detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors

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and Protection of Human Rights (Freedom of Movement and Population Transfer), E/CN.4/SUB.2/Res/1997/29; and U.N.G.A. Res. A/RES/51/75, 12 Feb. 1997.

[16] *UNHCR's Detention Guidelines*, Guideline 3 ("Detention of asylum-seekers…as part of a policy to deter future asylum-seekers, … is contrary to the norms of refugee law"); UNHCR Executive Committee, Note on International Protection (A/AC.96/643), 9 Aug. 1984, ¶ 29 (while detention may be justified both with regard to individual asylum seekers or a large-scale influx, this is not the case where asylum seekers are detained with the sole object of discouraging further arrivals). S*ee also*, Global Consultations on International Protection, Geneva Expert Round Table, 8-9 November 2001, Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised, ¶ 11(c) ("Refugees and asylum seekers should not be detained … for purposes of deterrence.").

[17] UNHCR Executive Committee, Note on International Protection (A/AC.96/643), 9 Aug. 1984, ¶ 29 (while detention may be justified both with regard to individual asylum seekers or a large-scale influx, this is not the case where asylum seekers are detained with the sole object of discouraging further arrivals); *UNHCR's Detention Guidelines*, Guideline 3 ("Detention of asylum-seekers . . . applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, . . . , is contrary to the norms of refugee law.").

[18] *Id*.

[19] UDHR, Article 9 ("No one shall be subjected to arbitrary arrest, detention or exile.").

[20] International Covenant on Civil and Political Rights, *adopted* 19 Dec. 1966, *entered into force* 23 Mar. 1976, U.N.G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966) ("ICCPR"), Article 9 ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.") The United States ratified the ICCPR on 8 June 1992.

[21] In addition, the United Nations Working Group on Arbitrary Detention issued a set of ten principles which bring together the main criteria for determining whether or not the deprivation of liberty of asylum-seekers and immigrants may be arbitrary. "Report of the Working Group on Arbitrary Detention," E/CN.4/2000/4, 28 Dec. 1999.

> particular to the individual such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal…[22]

UNHCR has also provided guidance on when the detention of asylum seekers becomes arbitrary:

> Detention of asylum-seekers may be considered to be arbitrary if: it is not in accordance with the law; if the law itself allows for arbitrary practices, or is enforced in an arbitrary way; when it is random or capricious or not accompanied by fair and efficient procedures for its review . . . if it is disproportionate, or indefinite . . . For detention not to be arbitrary it should be prescribed by a law that is sufficiently accessible and precise, and it should not include elements of inappropriateness or injustice.[23]

UNHCR has further articulated that detention of asylum seekers and refugees is arbitrary when:

> … they are detained for insufficient reasons, without an adequate analysis of their individual circumstances, without a meaningful opportunity to have their cases reviewed by an independent body, in the absence of an adequate legal framework, or for disproportionate or indefinite periods.[24]

In accordance with international human rights law, as well as international refugee protection standards, a relationship is required between the use of detention and the ends to be achieved. Therefore, in each case, there must be an individualized analysis of the need to detain a particular individual.[25] As UNHCR has noted, States should not detain an entire group of asylum seekers on the formal basis that they are likely to abscond prior to a determination of their asylum claims.[26] Even if the State's national law allows for detention when an individual is likely to abscond, "international standards dictate that there must be some substantive basis for such a conclusion in the individual case."[27] There should be a compelling need to detain that is based on the personal history of each individual asylum seeker.[28] Therefore, when detention is used as a deterrent to other asylum seekers, such detention is arbitrary, as deterrence is an inappropriate goal and insufficient reason for detention.

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[22] *See A. v. Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, 30 Apr. 1997.
[23] UNHCR Note on Detention, ¶ 25.
[24] *Id*.
[25] UNHCR Note on Detention, ¶ 14 ("International standards dictate that there must be some substantive basis" in each individual case for a conclusion that an individual will not appear for his or her hearings.).
[26] *Id*.
[27] *Id*.
[28] *Id*. at ¶ 26.

III. ***The Detention of Asylum Seekers based on their National Origin is Discriminatory and Constitutes Arbitrary Detention***

Under Article 2(1) of the ICCPR, State Parties must ensure to all within their territories the rights recognized in the ICCPR "without distinction of any kind, such as race, colour, . . . national or social origin . . ." This includes the aforementioned Article 9 of the ICCPR, that is, the right to liberty. Subjecting individuals to detention based on their national origin is also contrary to Article 3 of the 1951 Convention, which obligates Contracting States to apply the provisions of the Convention to refugees "without discrimination as to race, religion or country of origin." [29]

The detention of asylum seekers based on their national origin is therefore discriminatory and would constitute arbitrary detention.

IV. ***Conclusion***

The practice or policy of using detention as a means of deterring asylum seekers from seeking protection in any given country or to penalize asylum seekers for their unlawful entry is contrary to the norms and principles of international refugee law. Detention is arbitrary when asylum seekers of a particular national origin are subject to more restrictive criteria for release from detention than those of other nationalities. Detention is also arbitrary if the decision to detain lacks an individualized analysis of the reasons for detention.

We hope this opinion provides helpful guidance to the US court considering these issues.

Sincerely,

[redacted]
Regional Representative

[29] *See also*, 1966 International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, *entered into force* 3 Jan. 1976, U.N.G.A. Res. 2200A (XXI) (1966), Article 2(2); International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, *entered into force* 4 Jan. 1969, U.N.G.A. Res. 2106 (XX) (1965); Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, *entered into force* 3 Sept. 1981, U.N.G.A. Res. 34/180; and Convention on the Rights of the Child, *adopted* 20 Nov. 1989, *entered into force* 20 Sept. 1990, U.N.G.A. Res. 44/25, U.N. Doc. CRC/C/97 (1989), Article 2.