

DETENTION OF ASYLUM-SEEKERS AND REFUGEES:
THE FRAMEWORK, THE PROBLEM AND
RECOMMENDED PRACTICE

I. PURPOSE OF THE CONFERENCE ROOM PAPER

1. The detention of asylum-seekers has received considerable attention over recent years. Large numbers of individuals falling within the mandate of the Office are presently subject to detention or similar restrictive measures in different parts of the world. In view of the provisions of Article 31 of the 1951 Convention relating to the Status of Refugees and the fact that the majority of asylum-seekers have not committed crimes -- and indeed they are not suspected of having done so -- their detention raises significant concern, both in relation to the fundamental right to liberty, and because of the standards and quality of treatment to which they are subjected.

2. Against a background of regular resort to detention of asylum-seekers, this note is submitted both to draw attention to the increasing institutionalization of the practice and to inform more detailed discussion by the Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices. It is hoped that the Standing Committee will again take a strong stand on the issue, in particular on the aspect of arbitrariness. A series of proposals are put forward for consideration by the Standing Committee in conclusion of this note.

II. THE FRAMEWORK

A. UNHCR concern

3. Detention has been a recurring protection problem for the Office. It is regularly brought to the attention of the Executive Committee, and has been the subject of specific focus on at least four occasions. In 1986, the Note to the Sub-Committee of the Whole on International Protection (EC/SCP/44) expressed concern that the use of detention was increasing, despite Executive Committee recommendations discouraging recourse to detention in 1980 and 1983. This same concern was raised in the High Commissioner's reports to the United Nations General Assembly in 1984 (A/39/12), 1985 (A/40/12) and 1986 (A/42/12). These reports chronicled a failure on the part of States to make the necessary distinction between asylum-seekers on the one hand, and illegal migrants on the other, thereby exposing the former to such control measures as automatic detention for indeterminate periods. Concern with regard to detention has been repeatedly expressed by the Executive Committee in its General Conclusions on International Protection, including in 1987 (A/AC.96/702, para. 204), 1989 (A/AC.96/737, para. 22), 1992 (A/AC.96/804 para. 21) and 1993 (A/AC.96/821, para. 19). In the early 1990s, the Office studied the European detention legislation and practice and in 1995 published an analysis of findings in Volume 1, Number 4 of the European Series. Similar monitoring of the detention practices in Asia, Africa and the Americas, as well as in Europe, has been undertaken during 1999. Results of this monitoring suggest no amelioration of the problem.

4. In its 1986 Conclusion on Detention of Refugees and Asylum-Seekers (A/AC.96/688, para. 128), the Executive Committee stated clearly that detention of asylum-seekers and refugees should normally be avoided; if found to be necessary, it may be resorted to only on grounds prescribed by law and only for specific and limited purposes. This Conclusion also identified the need for national legislation and administrative practice to distinguish between refugees/asylum-seekers and other aliens, noting that detention of these persons should be subject to judicial or administrative review. The importance of

humane conditions of detention and the need to ensure that refugees and asylum-seekers are not accommodated with persons detained as common criminals, were also highlighted.

5. At its forty-ninth session in 1998 the Executive Committee again returned to the detention issue. In its Conclusion on International Protection (A/AC.96/911m, para. 21 (dd) and (ee)), the Executive Committee stated that it:

“Deplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention;

“Notes with concern that asylum-seekers detained only because of their illegal entry or presence are often held together with persons detained as common criminals, and reiterates that this is undesirable and must be avoided whenever possible, and that asylum-seekers shall not be located in areas where their physical safety is in danger.”

B. International standards

6. The right to liberty is a fundamental human right set out in universal and regional human rights instruments. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights “Pact of San Jose”, and the Cairo Declaration on Human Rights in Islam all specify, in more or less similar terms, that no one should be arbitrarily deprived of his or her liberty. This includes, of course, both refugees and asylum-seekers.

7. Refugees and asylum-seekers are in a different situation than other aliens by virtue of the fact that they may be forced by their circumstances to enter a country illegally in order to escape persecution. Hence Article 31 of the 1951 Convention relating to the Status of Refugees prohibits the punishment of refugees for illegal entry under certain circumstances, which would of course be justified for others. The Executive Committee's 1986 Conclusion on Detention of Refugees and Asylum-Seekers sets out the limited accepted bases on which the detention of refugees or asylum-seekers may be justified, namely: to verify identity; to determine the elements of the claim; to deal with cases where refugees 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 to protect national security or public order.

8. Detention of asylum-seekers is also on the agenda of human rights bodies. Within the United Nations system, the Commission on Human Rights established a Working Group on Arbitrary Detention in 1991 to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards. In 1997, the Working Group was asked to devote its attention to detained immigrants and asylum-seekers and has since conducted visits to various States to investigate their situation. The Human Rights Committee, the United Nations treaty monitoring body for the International Covenant on Civil and Political Rights, has also addressed this problem in observations regarding implementation of the Covenant by certain countries and in the resolution of individual complaints brought before it. In a broader context, the Human Rights Committee has published General Comments on the interpretation of various provisions of the Covenant, several of which touch on the issue of detention of aliens, including asylum-seekers.

9. Regional human rights institutions, particularly those in Europe, have for their part also expressed concern about detention of asylum-seekers. The European Court of Human Rights (and in the past the Commission) have addressed the issue in a number of decisions which variously declare detention which is arbitrary as unlawful, and unacceptable conditions of detention, for example in an airport international transit zone, as inconsistent with the European Convention on Human Rights and Fundamental Freedoms. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (established under the Convention of the same name) has also looked at detention of refugees and particularly of asylum-seekers. During its monitoring missions to States, Committee

members regularly request to visit places where asylum-seekers are held and have frequently commented, sometimes in strong terms, on the conditions there.

10. Following from these fundamental principles, 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. It may also be arbitrary if it is disproportionate, or indefinite. Recent developments in human rights law suggest that detention in accordance with the law requires a legal regime governing detention, as opposed to a mere executive decision to detain. 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.

11. In addition, all those who are detained have a right to be treated in conformity with internationally accepted norms and standards. Among these are those established in the United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, and the United Nations Standard Minimum Rules for the Treatment of Prisoners. These rules represent a consensus among States on how the basic principles should be respected. Asylum-seekers have a right, as all other individuals, to be treated in accordance with these standards.

C. UNHCR guidelines

12. In 1995, in order to provide guidance to States on the limits to detention, the Office produced a set of Guidelines on Detention of Asylum-Seekers. The Guidelines brought together important international law principles relating to detention with existing UNHCR doctrine. They set out minimum standards for what might be considered acceptable state practice. These Guidelines have recently been revised to reflect developments in human rights law, particularly as regards arbitrary detention. They also seek to offer greater clarity regarding the circumstances in which restrictions may be warranted and the alternatives which could be considered.

13. The revised Guidelines reiterate the principle that detention of asylum-seekers should be an exception, not the rule. The exceptional situations remain the same as those set out in the 1986 Conclusion on Detention of Refugees and Asylum-Seekers (see paragraph 7 above). The revision elaborates further on the grounds for detention, provides additional guidance on the identity and documentation issue and proposes a number of alternatives to the use of detention for asylum-seekers. Options suggested in the Guidelines include the use of reporting and residency requirements, release on bail, sureties (which could be provided by family members, churches, non-governmental organizations or other community members) and allowing asylum-seekers to live in open centres where their presence can be monitored. The Guidelines encourage all States actively to work towards incorporating alternatives to detention into their overall policy.

III. RECOMMENDED PRACTICE

A. Arbitrary detention

14. In many States the decision to detain is taken on the basis of sometimes very wide discretionary powers, often not prescribed by law. Moreover, even when the grounds upon which such orders are made are established in law, these are far too frequently applied in an arbitrary manner. For instance, a large number of asylum-seekers are detained on the formal basis that it is likely that they will abscond prior to completion of the status determination procedures, the fear being that they will not present themselves for removal in the event of a negative asylum decision. While applicable national law may make provisions for detention in all such cases, international standards dictate that there must be some substantive basis for such a conclusion in the individual case.

15. Many jurisdictions make detention of asylum-seekers mandatory where the person does not have identity documents, or uses false documents. States must, however, recognize that the 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 physical safety or freedom is endangered. Where such compelling circumstances exist, the use of such documentation

would be justified. Where there is a willingness on the part of the asylum-seeker to cooperate with the verification of identity process and asylum-seekers have not destroyed their documents with the sole purpose of misleading the authorities, detention in order to verify identity should not routinely be judged necessary, in the absence of other factors.

16. The requirement that detention be subjected to either an administrative or judicial review is an essential safeguard against arbitrary detention. In many States, review mechanisms either of an administrative or judicial nature do exist. The degree to which asylum-seekers can effectively challenge the lawfulness of their detention, however, varies significantly. In many States, asylum-seekers are expected to initiate the review process themselves, by applying for bail or parole, which often poses difficulties given their unfamiliarity with the legal process and, in many cases, their inability to speak the language. These difficulties are even more acute when assistance in the form of legal aid is not available. In order to ensure that the rights of asylum-seekers are respected in this regard, there should be prompt, mandatory and periodic review of all detention orders before an independent and impartial body.

17. UNHCR shares the opinion of the Working Group on Arbitrary Detention that in States where such challenges are by way of bail hearings "asylum-seekers may have no effective opportunity to challenge the reasons for the detention, as the focus would be on establishing the reliability of the surety and its relationship to the applicant as opposed to the reasons for the detention."

B. Conditions of detention

18. In addition to its preoccupation with the legal dimensions of the problem, the Office has become particularly concerned about the conditions in which many asylum-seekers are detained. Contrary to recommendations consistently made by the Executive Committee, large numbers of asylum-seekers in detention continue to be accommodated with prisoners on remand or convicted criminals, which may pose a direct threat to their physical integrity. The majority of asylum-seekers in detention are not there by virtue of having committed a crime, but due to a breach of administrative procedures. In accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, administrative detainees should be held separately from criminal detainees.

19. The living conditions of detained asylum-seekers is a serious concern in many countries where detention is practised. Serious overcrowding, failure to provide separate quarters for women and men, living spaces which lack appropriate furniture and sanitary and other facilities, such as proper bathing or washing areas or outdoor space for recreational purposes, are commonly reported deficiencies. In one European country where asylum-seekers are routinely detained in community living quarters, the Ombudsperson investigated the conditions in several of the centres during 1998 and reported a number of violations, even of the country's Constitution, due to appallingly poor living conditions for both the detained asylum-seekers and their guards.

20. The problem of wholly inadequate living conditions bordering on, and in some cases arguably amounting to, inhuman and degrading treatment is also common in a number of countries where asylum-seekers are detained for lengthy periods in international transit zones of airports, facilities which ordinarily are not designed for such use. These areas commonly lack privacy, any appropriate sleeping or bathing area, do not allow for separation of males from females and have, at best, restricted access to telephones or other means of contacting UNHCR or other interlocutors. De facto detention in such areas, especially for those who are undocumented or of undetermined nationality, frequently lasts for many months, and in some cases, for years.

C. Detention of children

21. Minor asylum-seekers are regularly detained or threatened with detention because of their own, or their parents', illegal entry into the country. Such detention can pose grave risks to their well-being, their education and their psychological development. A serious difficulty, however, for UNHCR in dealing with this problem is the absence of data, or lack of transparency, on the part of some States regarding the number of children detained, the length of their detention, or the specific reasons for their detention.

22. UNHCR welcomes recent measures taken by some States to bring their policies in line with internationally accepted principles, as for example in certain jurisdictions whereby the release of an adult member of the family is permitted in order to keep minor children out of detention. States are encouraged to ensure that minor asylum-seekers are accorded the full scope of legal rights available to adults. The appointment of a legal guardian or adviser will greatly facilitate this task. States are also encouraged to explore appropriate alternatives to detention in conjunction with child welfare agencies. At a minimum, minors should be detained separately from adults, unless these are their relatives, and they should never be placed with common criminals.

D. Detention of refugees

23. While the larger problem, in terms of both numbers and frequency, relates to detention of asylum-seekers, there are also significant problems in some parts of the world with respect to detention of refugees. Refugees have obligations to the country in which they live and may, like all other persons, be detained if there are legitimate reasons for their arrest and detention, such as criminal charges against them.

24. However, UNHCR has to deal all too frequently with cases in which refugees recognized by UNHCR under its mandate, but not so recognized by the country in which they have sought sanctuary, are detained solely on account of illegal presence in the country. While not in all cases arbitrary, such detention is nevertheless unwarranted in UNHCR's view and the Office works to find solutions for these individuals which will result in their release. Often the detaining State stipulates that release is conditional on immediate departure from the country, which in effect means that resettlement to a country where refugee status will be recognized becomes the only solution.

IV. CONCLUSIONS

25. Arbitrary detention of asylum-seekers and refugees occurs 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. Observation suggests that this occurs more and more frequently all over the world and UNHCR abhors this growing practice, which seriously undermines the already-threatened right to seek and enjoy in other countries asylum from persecution.

26. The following proposals are put forward for consideration by the Standing Committee as representing a minimum set of recommended practices to address the problem of arbitrary detention of asylum-seekers.

(a) Governments should ensure that detention of asylum-seekers is resorted to only for reasons recognized as legitimate, consistent with international standards and only when other measures will not suffice; detention should be for the shortest possible period;

(b) The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum-seeker;

(c) If detained, asylum-seekers should be provided in writing, in a language they understand, with the reasons for detention, together with a written explanation of their rights and how to exercise them;

(d) Each decision to detain should be reviewed periodically as to its necessity and its compliance with relevant legal standards by a court or similar competent independent and impartial body. Where legal aid is available, asylum-seekers should have access to it;

(e) Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention;

(f) Detained asylum-seekers should be held in conditions appropriate to their status and not with persons charged with or convicted of criminal offences (unless so charged or convicted themselves);

(g) Detained asylum-seekers should be given adequate access to UNHCR, their legal representatives and their relatives;

(h) Time-frames governing the duration of detention of asylum-seekers should not be unreasonable and should be prescribed by law;

(i) Unaccompanied minors should never be detained on account of illegal entry or presence;

(j) UNHCR, legal representatives and, where appropriate, specialized non-governmental organizations should have access to all places of detention, including transit zones at international ports and airports;

(k) All custodial staff should receive training related to the special situation and needs of asylum-seekers;

(l) National authorities should cooperate in the provision of relevant information on asylum policy, practice and statistics; and

(m) Refugees recognized under UNHCR's mandate for whom UNHCR is actively seeking long-term solutions should not, in the ordinary course, be detained pending implementation of the solutions.