

THE UNHCR PERSPECTIVE ON DETENTION

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I INTRODUCTION

I have been asked to speak to you today about the UNHCR's perspective on detention. The detention of asylum seekers is not a new issue, nor a new concern for the UNHCR. Large numbers of individuals falling within the mandate of the UNHCR continue to be subject to detention or other restrictive measures in various parts of the world and the UNHCR is concerned at the increasing institutionalisation of detention.

I would like to begin with an overview of the UNHCR's policy on detention, outlining the general principle underpinning our policy as well as the specific instances in which the detention of asylum seekers may be justified. I would then like to turn to some key areas of interest and, at times, controversy, and clarify the UNHCR's interpretation of these key concepts and issues. Finally, in light of the UNHCR's concerns with detention practices, it is important to highlight some alternatives to detention and examples of recommended practice.

II OVERVIEW OF UNHCR POLICY

A The General Principle

The UNHCR position is that the detention of asylum seekers and refugees is inherently undesirable and should normally be avoided. This position is based firmly in respect of each individual's fundamental right to liberty and to be free from arbitrary detention, as enshrined in a range of human rights instruments, such as the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights (ICCPR). These instruments of course apply equally to refugees and asylum seekers.

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In addition, refugees and asylum seekers are in a different situation to 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 refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Contracting States can also not apply restrictions of movement on refugees other than those that are necessary, and that restrictions shall only be applied until such time as their status is regularised or they obtain admission into another country.

UNHCR's Executive Committee, consisting of states, in a number of annual conclusions has expressed its serious and deep concern that large numbers of refugees and asylum seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum and called upon States to intensify their efforts to protect refugees from these practices.

UNHCR is not alone in emphasising these principles of international law. The importance of freedom from arbitrary detention as a fundamental human right is underlined by the work of various other bodies in the international system. The agenda of the UN Commission on Human Rights' Working Group on Arbitrary Detention includes the situation of detained immigrants and asylum seekers. Since 1997, the Working Group has been visiting States to investigate this situation. Similarly, the Human Rights Committee has published General Comments and Individual Communications on various provisions of the ICCPR, several of which touch on the issue of the detention of aliens, including asylum seekers.

UNHCR has sought to bring together many of these international law principles and Executive Committee Conclusions in its Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, which were last updated in 1999. The Guidelines set out minimum standards for the treatment of detained asylum seekers and recommend a number of detention alternatives that could be considered. Most importantly, they reiterate that the detention of asylum seekers should ordinarily be avoided. The Guidelines emphasise that although States have a right to control persons entering their territory, for detention to be lawful, and not arbitrary, it must be not only in accordance with national law and subject to due process safeguards, but also consistent with Article 31 and international law.

Subsequent discussions at UNHCR's Global Consultations have reaffirmed the principles set out in the Guidelines. Participants acknowledged that they provide important guidance for States and that national law and practice should take full account of international obligations. Detention should never be applied unlawfully or arbitrarily, but only where it has been determined to be necessary in light of the circumstances of the case and on the basis of criteria established by law in line with international standards.

What, then, are those circumstances in which a resort to detention may be justified?

B Exceptions to the General Principle

In light of the strong general presumption against detention, it is evident that fairly exceptional circumstances are needed to justify detention. In assessing whether detention of asylum seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non-discriminatory manner for a minimal period. The Executive Committee in its Conclusion No 44 (1986) has outlined the limited and specific grounds on which detention measures can be considered. These grounds have also been reaffirmed in UNHCR's Guidelines on Detentions and in its Global Consultations discussions. They are:

- (1) To verify identity,
- (2) To determine the elements of an asylum seekers' claim,
- (3) To deal with cases where refugees have destroyed their travel or identity documents or have used fraudulent documents to mislead authorities in the country of asylum, or
- (4) To protect national security or public order (eg risk of absconding).

It should be emphasised that detaining authorities must identify a compelling need to detain a particular individual on one of these grounds, based on the personal history of that individual asylum-seeker. Initial periods of administrative detention for the purposes of identifying refugees and asylum seekers and establishing the elements of their claim should be minimised. Furthermore, detention prolonged beyond the initial period must be clearly justified for reasons of national security or public order, and be subject to administrative or judicial review.

UNHCR is particularly keen to stress that detention should not be used as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention for these purposes is contrary to article 31 of the Refugee Convention as well as relevant international human rights law, such as the 1966 International Covenant on Civil and Political Rights (article 9) and the Convention on the Rights of the Child (article 37).

Since September 11, 2001 and particularly in light of more recent terrorist activities, it is appropriate to say a few words about detaining asylum seekers on national security grounds. Detention can be justifiably deemed necessary if there are good reasons for suspecting links with terrorists in an individual case. But it must be stressed that the circumstances of an individual case must provide the grounds for detaining an asylum seeker. The automatic detention of asylum seekers, or their selective detention on the ground of their national, ethnic, racial or religious origin is not supported by UNHCR. Such measures could be seen as an arbitrary and even discriminatory response to recent events that would conflict with international legal norms.

To summarise UNHCR's position, when detention is permitted by a State, it should only be exceptionally applied for one of the specific and limited purposes where there is evidence that detention alternatives may not be suitable in an individual case. If judged necessary it should only be imposed in a non-discriminatory manner for a minimal period, be subject to prompt and periodic review, and allow for exceptions for vulnerable groups. It should also be in humane conditions.

III UNHCR INTERPRETATION OF KEY CONCEPTS AND ISSUES

A number of key concepts and issues relating to detention have created debate amongst relevant actors. I would like to take the time now to briefly clarify the UNHCR's interpretation of some of these concepts. Firstly, two points about the specific wording of article 31 of the 1951 Convention. I will then emphasise a few points about the UNHCR's Guidelines on Detention.

A Interpretation of Article 31

Two phrases have generated discussion about the scope of article 31: the reference to asylum seekers 'coming directly' and when restrictions on movement are 'necessary'.

1 Coming directly

UNHCR considers that the phrase 'coming directly' is not limited to situations in which a person enters the country of asylum literally directly from their country of origin. It also covers persons who transit briefly through an intermediate country without having applied for, or received, asylum there, or who are unable to find effective protection in a country of first asylum or other countries that they flee.

It is not possible or desirable to set out blanket circumstances in which asylum seekers will have not 'come directly' from their country of origin or unsafe third country. For example, the application of strict time limits to determine what period of transit in a third country may exclude an asylum seeker from the protection of article 31 is unhelpful. Instead, UNHCR affirms that each case must be assessed on its own merits. Equally, it is necessary to consider in each case whether an asylum seeker has genuinely available and effective protection in a third country. It is necessary to reiterate that refugees will frequently have justifiable reasons for illegal entry or irregular movement, as has been acknowledged by the UNHCR Executive Committee at various points, including in its Conclusions Nos 15, 22, 44 and 58, and may have good cause for not applying in a third country.

2 Necessary

A second phrase in article 31(2) that needs clarification is when restrictions on the movement of asylum seekers and refugees are considered 'necessary'. ExCom Conclusion No 44 outlines that authorities need to show that it is 'necessary' to detain an individual under the specific and limited grounds on which detention can be justified. Determining whether detention is necessary on one of these grounds is not a matter merely of sovereign discretion, rather authorities must also consider whether it is reasonable to detain and whether detention is proportional to the objectives it aims to achieve.

A decision that it is 'necessary' to detain a particular asylum seeker must also be made based on the circumstances and personal history of that particular individual. This is an area of particular concern for UNHCR. For example, many asylum seekers are detained on the general assumption that asylum seekers are likely to abscond before their status determination is completed or will not present themselves for removal if a negative asylum decision is received. Although national laws may make provisions for the automatic detention of asylum seekers on this basis, international standards require that there is some substantive basis

for such a conclusion in the individual case. In other words, national authorities must actively consider and assess each case to determine whether detention is 'necessary' and such a decision should be subject to administrative or judicial review.

Equally, the mandatory detention of asylum seekers who do not have identity documents or who use false documents is concerning. It is important to recognise that the circumstances that may prompt an individual to flee their home country, may also force an asylum seeker to leave without documents or to have recourse to false documentation. In these compelling circumstances, and where an asylum seeker is willing to cooperate with identity verification processes, or has not purposefully destroyed documents to mislead authorities, detention cannot be considered necessary to verify identity, in the absence of other factors.

B UNHCR Guidelines on Detention

I would like to emphasise three points about UNHCR's Guidelines on Detention. First, to say a few words about the scope of the Guidelines, then about the need for review of detention orders, and finally raise particular concerns about the detention of children and vulnerable groups.

1 Scope of the Guidelines

The Guidelines apply to all asylum seekers who are being considered for, or who are in, detention and detention like situations. For these purposes, UNHCR considers that detention is: 'confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed or where the only opportunity to leave this limited area is to leave the territory'. It is important the States equally recognise that the minimum standards set out in the Guidelines, particularly regarding the conditions of detention, apply across all situations in which an asylum seekers' freedom of movement is substantially curtailed.

2 The need for administrative or judicial review of detention

UNHCR's Guidelines, consistent with article 9 of the ICCPR and a number of Executive Committee Conclusions, affirm that asylum seekers should have the right to challenge the legality and necessity of their detention, in accordance with the rule of law and principles of due process. The requirement that detention must be subject to review mechanisms is an essential safeguard against arbitrary detention.

In addition, although many states have review mechanisms of either a judicial or administrative nature, the degree to which asylum seekers can effectively access these procedures varies significantly. Unfamiliarity with legal processes and language difficulties both pose problems. These problems are made more acute when legal assistance is not available. To overcome these difficulties, UNHCR believes that there needs to be a prompt, and periodic judicial or administrative review of all detention orders before an independent and impartial body.

3 Detention of children and vulnerable groups

A strong theme that runs through the UNHCR Guidelines on Detention concerns the highly negative impact of detention on the psychological well being of those detained, particularly in relation to children and vulnerable persons including torture and trauma victims, unaccompanied elderly person and persons with a mental or physical disability.

The Guidelines stress that alternatives to detention should be actively considered prior to any decision to detain. If none of the alternatives can be applied and States do detain children, this should, in accordance with article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time in accordance with the exceptions outlined above. In addition, a qualified medical practitioner should certify that detention will not adversely affect their health and well being. Regular follow up and support by a skilled professional, as well as access to services, hospitalisation, medication and counselling should be available, if needed.

In relation to children, and drawing upon more general principles of human rights law, as enshrined in the Convention on the Rights of the Child, UNHCR is particularly concerned about the fact that minor asylum seekers are regularly detained or threatened with detention on account of their own, or their parents', illegal entry into the country. UNHCR welcomes measures taken by some States to bring their policies in line with international standards, and explore appropriate alternatives to detention. Wherever possible, unaccompanied minors should be released into alternative care arrangements with family members already residing in the country of asylum or competent child welfare authorities. Alternatives also need to be pursued for children accompanying their parents. Children and their primary care-givers should not be detained unless this is the only means of maintaining family unity. Where detention is used as a measure of last resort, special living arrangements must be made for children and their families.

IV ALTERNATIVES TO DETENTION AND RECOMMENDED PRACTICE

Having voiced UNHCR's strong view that the detention of asylum seekers is inherently undesirable, I would like to take this opportunity to mention some alternatives to detention. I have mentioned the need to particularly explore alternatives to detention for children and vulnerable groups, but my comments will be directed more generally at detention alternatives for all asylum seekers.

UNHCR's Guidelines on Detention identify a number of non-exhaustive options that allow authorities to monitor the whereabouts of asylum seekers, while ensuring that asylum seekers' liberty and basic freedom of movement are not unreasonably curtailed.

A Monitoring requirements

One option is to permit asylum seekers to live outside of detention situations provided they comply with ongoing monitoring requirements (eg Netherlands, Norway, United Kingdom). Such requirements may be that the asylum seeker periodically reports to officials during status determination procedures or reside at a particular address or within a particular region until their status has been determined, or they obtain prior approval to change locations. These requirements could be tailored to the circumstances of a particular asylum seeker and to meet the concerns of authorities.

B Provision of a Guarantor

A second alternative would be to require that an asylum seeker provide a guarantor who would be responsible for ensuring their attendance at appointments and hearings. If the asylum seeker absconds or fails to attend, a monetary penalty would be levied against the guarantor. It should be noted that asylum seekers with limited links to persons in the country of asylum may have difficulty in identifying a guarantor who is willing to support them.

C Release on Bail or Bond

This alternative is similar to the first two proposals, but would allow already detained asylum seekers to be released on a combination of monitoring conditions or financial guarantees (eg Canada's Toronto Bail Program, also trialed with a 90% success rate in the United Kingdom with a group who had been considered at a high risk of absconding). While allowing a high degree of flexibility, the amount of bail must not be set so high as to be prohibitive.

D Open centres

An additional option is to establish open centres (for example, pilot centres in the United Kingdom). Although asylum seekers would be required to reside at a specific collective accommodation centre, they would be allowed to obtain permission to leave the centre and return at stipulated times.

