OPINION No. 34/1999 (UNITED STATES OF AMERICA)

Communication addressed to the Government on 4 May 1998

Concerning Israel Sacerio Pérez

The State is a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);

(ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source but did not receive its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.

5. Israel Sacerio Pérez, aged 51, a Cuban refugee, arrived in the United States in 1964. He was convicted of drug possession in 1991 and sentenced to 37 months' imprisonment, which he served at the Rochester Federal Penitentiary, Rochester, Minnesota, starting on 16 August 1991. On 29 April 1994, he was transferred to the Orleans Parish Prison, Federal Division, in New Orleans, Louisiana, where he is still detained, almost five years after having served his full sentence.

6. In its response dated 15 October 1998, the Government justified both on facts and in law the continued detention of Israel Sacerio Pérez. The Government first explained the applicable legal regime.

7. In order to determine what law to apply where a challenge to immigration detention has been presented, recent amendments to the Immigration and Nationality Act (INA) must be considered. In any particular case, the relevant facts in determining what statutes and regulations govern detention are the date the alien's immigration proceedings commenced, whether the alien is under a final order of exclusion, deportation, or removal, and whether the alien has been convicted of a serious criminal offence enumerated in the statute.

8. Before passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law No. 104-208 (30 September 1996), courts held that the Attorney-General had statutory authority to detain inadmissible aliens subject to final orders of exclusion, citing the Attorney-General's express authority to detain inadmissible aliens pending a hearing before an immigration judge, her obligation to deport such aliens immediately unless she determines that immediate deportation is impracticable or improper, and her discretionary authority to grant (and revoke) immigration parole. These rules still apply to aliens whose exclusion proceedings commenced prior to 1 April 1997 (8 CFR sections 235.3 (e) and 241.20).

9. The Attorney-General was directed to detain excluded aliens convicted of aggravated felony crimes by former INA section 236 (e), 8 USC section 1226 (e) (1994), in addition to the Immigration Act of 1990, Public Law No. 101-649 (29 November 1990). The courts construed former section 236 (e) as a limit on the release or immigration parole of excludable aliens (rather than a limit on the authority to detain such aliens). Pre-IIRIRA section 236 (e) still applies to aliens in proceedings initiated before 1 April 1997.

10. The Immigration and Nationality Act addresses the detention and release of illegal aliens both pending removal proceedings and pending actual removal from the United States. It should be emphasized that United States law has always contemplated that any alien denied admission to the United States or ordered deported from the country will be promptly returned to his/her own country or to a third country willing to accept him/her. Current law contemplates that such removal will occur within 90 days of a final order requiring an alien to leave the United States. Further, while the statute is more restrictive regarding the detention and release of aliens in immigration proceedings who have been convicted of certain enumerated crimes, the restrictions are clearly aimed at individuals convicted of serious or repeated offences, among whom the incidence of further criminal activity and flight to avoid deportation has been well documented.

11. The Government argues that the case inquired into by the Working Group involves a criminal alien who cannot be promptly repatriated because his own Government has failed to issue travel documents or otherwise honour its obligation under international law to accept the return of its nationals. Because of recent amendments to the immigration statute, different provisions of law may apply depending on the effective dates of the legislation and when proceedings commenced in an individual alien's case. While many of the recent changes reflect the heightened concern of the United States Congress with criminal aliens who commit further crimes and fail to comply with immigration orders, the statute uniformly reflects a careful balancing of the interests of the United States and the need to protect its lawful inhabitants from

potentially dangerous aliens against the humanitarian concerns that necessarily arise when such an alien is illegally present in the United States but is unreturnable because the designated country of deportation will not accept him. The statute thus provides for release at the discretion of the Attorney-General under terms that impose minimal demands on aliens who wish to live and work in the community while awaiting deportation - that they not endanger other persons or property, and that they not abscond to avoid further proceedings or eventual enforcement of their immigration orders.

12. The statutory and regulatory guidance regarding the detention and release of criminal alien offenders who remain in the United States although ordered deported is presently provided by the transition period custody rules (TPCR) in section 303 (b) (3) (b) of IIRIRA, if their administrative immigration proceedings commenced before 1 April 1997.

13. The custody and release of aliens who were denied admission or ordered excluded from the United States in proceedings that commenced before 1 April 1997 continue to be governed by the statutory scheme in place prior to that date. If the Attorney-General determines that immediate exclusion is not practicable or proper, such aliens may be paroled from custody (8 USC sections 1227 (a), 1182 section 2 (d) (5) (a) (1994, supp. 1997)).

14. Immigration parole is discretionary and authorized on a "case-by-case basis for urgent humanitarian reasons or significant public benefit" (8 USC section 1182 section (d) (5) (a) (supp. 1997)). An Immigration and Naturalization Service (INS) district director thus may parole an excluded alien whose continued detention is not in the public interest (8 CFR section 212.5 (a) (5)).

15. Criminal aliens denied admission or found deportable in removal proceedings commenced after 1 April 1997 may be conditionally released at the end of the 90-day removal period unless the Attorney-General determines that the alien is a risk to the community or unlikely to comply with the order of removal (8 USC section 1231 (a) (supp. 1997)). Consideration is given to such factors as the alien's criminal history, rehabilitation or recidivism, and relatives or other equities in the United States (8 CFR section 241.4 (1998)). Inadmissible aliens under final orders of removal may apply to the district director for parole; deportable aliens under final orders of removal may also appeal the district director's custody determination or seek amelioration of the conditions under which release has been approved before the Board of Immigration Appeals (see, generally, 8 CFR section 236 (1998)).

16. In short, for criminal aliens who cannot be promptly removed from the United States, IIRIRA section 303, amended INA section 241 (a) (6) and the Attorney-General's statutory parole authority eliminate the possibility of indefinite detention without discretionary review pending efforts to return an alien to his own country.

17. The Government accordingly contends that international law is not violated by the detention of dangerous criminal aliens unlawfully present in the United States; that the applicable statutes, administrative regulations and judicial precedent reflect a thorough weighing of the interests of the United States and those of the individuals subject to removal proceedings.

18. In the light of the above the Government dealt with the case of Israel Sacerio Pérez. According to the Government, Israel Sacerio Pérez is a non-Mariel Cuban subject to a final order of deportation issued on 26 May 1994. He is not on the repatriation list of individuals (restricted to persons who came via Mariel) whose return the Government of Cuba is willing to accept. He stands convicted of multiple offences, including three aggravated felony offences for possession with intent to distribute illegal drugs. Detention of deportable criminal aliens whose deportation proceedings commenced prior to 1 April 1997 is currently governed by the transition period custody rules (TPCR). The Government contends that since Mr. Sacerio Pérez cannot be returned to his country of origin (as the Government will not accept his return), the Attorney-General has, in the exercise of her discretionary authority under the TPCR, considered that if released from custody he would pose a threat to the community.

19. In the case of Israel Sacerio Pérez, even though the final order of deportation was issued on 26 May 1994, the Government does not give any details of the alleged multiple offences of which Mr. Sacerio Pérez was convicted, including possession with intent to distribute illegal drugs. Implied in the statement of Government is that no distribution of drugs took place. That Mr. Sacerio Pérez is a non-Mariel Cuban whose return his Government will not accept cannot justify his being indefinitely detained. Five years of detention after completion of sentence, without even a temporary parole, is much too long. That individuals who have been convicted for offences and have served their sentence fully, may continue to be a threat to the community when released applies to citizens as well as aliens liable to deportation and cannot be the legal basis for continued prolonged detention; such reasoning would render the continued deprivation of liberty arbitrary.

20. The Working Group is of the opinion that the detention of Israel Sacerio Pérez is arbitrary, for the reasons adduced above, and is in violation of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights. Such prolonged detention without reasonable cause would fall within category III of the categories of cases submitted for the Group's examination.

21. Accordingly, the Working Group requests the Government to take the necessary measures to remedy the situation of the above-named individual so as to bring it into conformity with the provisions of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights.

Adopted on 1 December 1999