IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL APPEAL NOS. 18, 19 & 20 OF 2011
(ON APPEAL FROM CACV 132, 134 & 136 OF 2008)

BETWEEN

C	*Appellant / Applicant (FACV 18/2011)*
KMF	*Appellant / Applicant (FACV 19/2011)*
BF	*Appellant / Applicant (FACV 20/2011)*

and

DIRECTOR OF IMMIGRATION	*1st Respondent / 1st Respondent*
SECRETARY FOR SECURITY	*2nd Respondent / 2nd Respondent*

and

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES	*Intervener*

INTERVENER'S CASE

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A. Introduction

1. The present case raises important questions of law of great relevance to UNHCR's mandate. UNHCR is grateful to the Court for admitting UNHCR to be heard.

2. UNHCR is a global humanitarian non-political organisation. Being a subsidiary organ of the United Nations General Assembly ("UNGA") UNHCR has been entrusted by the UNGA with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.'

3. Paragraph Sea) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees.' As such UNHCR has a responsibility and unique expertise to present its views to this Court. UNHCR's views are informed by more than 60 years of experience supervising international refugee law. UNHCR

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1 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees,* 14 December 1950, AIRES/428(V), (the "Statute").

2 According to Article 8(a) of the *1950 Statute of the Office of the United Nations High Commissioner for Refugees,* 'The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application* and proposing amendments thereto;' [emphasis added].

provides international protection and direct assistance to refugees throughout the world and has staffin some 120 countries.'

4. UNHCR has a long history of acting as *amicus curiae* (and/or as an intervener) in proceedings before national and international courts, providing submissions on issues connected with its mandate. Consistent with its non-political character, UNHCR does not consider that it has any legal or other interest in the outcome of this case insofar as it concerns the legal relations between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Appellant / Applicants (hereinafter, the **"Applicants").** It will therefore advance submissions only on questions that connect with its mandate, as stipulated in its letter to the Court dated 30 October 2012, and will not address (for example) the facts of the individual cases or the legality of any action taken by the Government.

Al. Legal Issues in the Case

5. The issues ansmg in the appeal and upon which UNHCR IS making submissions may be framed in the following way:

5.1. whether - at a minimum - the principle of *non-refoulement* of refugees is a norm of customary international law; and

5.2. if the norm exists, whether there is a duty on States, under the customary international law norm of *non-refoulement,* to independently inquire into whether the person is a refugee and is to

3 In the Asia-Pacific region UNHCR works together with virtually every Government to address the problems of refugees. In this region, UNHCR has 64 offices and 4 regional offices spread across 23 countries.

be protected from *refoulement,* which duty IS not delegable to UNHCR.

B. Nature and Scope of the Principle of *Non-Refoulement* of Refugees

6. The principle of *non-refoulement* is the cornerstone of international refugee protection. It protects refugees against removal, in any manner whatsoever, to a country where their life or freedom would be threatened.

7. The principle of *non-refoulement* of refugees is encapsulated in Art 33(1) of the 1951 Convention relating to the Status of Refugees **("1951** Convention")", which provides that:

> *"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*

8. A "refugee" IS defined in Art 1(A)(2) of the 1951 Convention, as subsequently amended by the 1967 Protocol relating to the Status of Refugees **("1967** Protocol")", Art 1(2), as follows:

> *"A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:*
>
> > *(2) Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is*

4189 UNTS 137, entry into force 22 Apri11954.

5606 UNTS 267, entry into force 4 October 1967. The limitation in the 1951 Convention to persecution arising from events occurring in Europe or such other areas as individual States parties might voluntarily declare (see Art I(B)) was removed by the 1967 Protocol Art 1(3).

unable or, owing to such fear, is *unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events,* is *unable or, owing to such fear,* is *unwilling to return to it."*

9. Given the declaratory nature of refugee status, the principle of *non-refoulement* applies to any person who meets the refugee definition, irrespective of whether the person concerned has been formally recognized as a refugee, and thus, it includes asylum-seekers whose status has not yet been formally decided, either by a State or UNHCR. A person does not become a refugee because of recognition, but is recognised because s/he is a refugee." This has been reiterated by the Executive Committee of the High Commissioner's Programme **("Executive** Committee")."

10. It will be noted that the definition of a "refugee" in Art 1A(2) of the 1951 Convention does not dovetail precisely the terminology of the *non-refoulement* principle as framed in Art 33(1) of the 1951 Convention. In international practice, however, no distinction is recognised. Further, nothing in the *travaux preparatoires* indicates that a distinction was intended; while the object and purpose of the 1951 Convention and of Article 33(1) in particular, as well as the internal coherence of the Convention, dictate such an interpretation. In fact, threats to life or freedom – the language of Art 33(1) - have been used as the minimum meaning of

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6 UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the* 1951 *Convention and the* 1967 *Protocol Relating to the Status of Refugees,* December 2011, para. 28, *HCR/IP/4/ENG/REV. 3.*

7 UNHCR Executive Committee, *Conclusion No.* 15 *(XXX)* - 1979 *on Refugees without an asylum country,* at paras. (b) and (c); See also 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,* 26 January 2007, above footnote 2, para.6; and UNHCR Executive Committee, *Conclusion No. 6 (XXVII)* - 1977 *on Non-refoulement,* at paragraph (c).

acts of persecution in Article IA(2) of the 1951 Convention," See: UNHCR, *Commentary of the Refugee Convention* 1951 *(Articles* 2-11, 13-37), October 1997, at paragraph (4) of the commentary to Art 33[9]; and see Prof. Guy Goodwin-Gill's treatise *The Refugee in International Law,* 3rd Ed., (OUP, 2007, Oxford) at p. 234; Lauterpacht and Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion', in: Feller, Turk and Nicholson (eds), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection,* (CUP and UNHCR, 2003, Cambridge) at p. 123 ("Lauterpacht and Bethlehem 2003") [10]; Wouters, *International Legal Standards for the Protection from Refoulement,* (Intersentia, 2009) at p. 57.

11. In R **v Secretary of State for the Home Department, ex p. Sivakumaran** [1988] 1 AC 958, 1001, Lord Goffheld:

> *"It is, I consider, plain, as indeed was reinforced in argument by* [counsel for the High Commissioner] *with reference to the travaux preparatoires. that the non-refoulement provision in art* 33 *was intended to apply to all persons determined to be refugees under art* 1 *of the Convention."*

12. The principle of *non-refoulement* thus applies, presumptively, to persons claiming refugee status **but** whose claims have not been determined.[11] The rationale for this is obvious: a State cannot in good faith *(pacta sunt*

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[8] UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the* 1951 *Convention and the* 1967 *Protocol Relating to the Status of Refugees,* December 2011, para. 51, *HCRI1P/4IENG/REV. 3.*

[9] UNHCR, *Commentary of the Refugee Convention* 1951 *(Articles* 2-11,13-37), October 1997.

[10] Cambridge University Press, *The Scope and Content of the Principle of Non-Refoulement: Opinion,* June 2003.

[11] UNHCR Note on International Protection, UN doc. *AJAC.96/694,* 3 August 1987, at para. 23.

sevanda, Art 26 of the Vienna Convention on the Law of Treaties[12]) discharge the international obligation of *non-refoulement* without first taking steps to ascertain whether a person being deported meets the definition of a refugee. This has been repeatedly affirmed by the Executive Committee[13] and also by resolutions of the UNGA.[14]

13. Art 33(1) is subject to certain exceptions. By virtue of the 1951 Convention, Art 33(2):

> *"2. The benefit of* [Art 31(1)] *may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*

14. The scope of Article 33(1) is also limited by the 'exclusion' clauses contained in Articles 1D, IE and IF of the 1951 Convention.

15. The principle of *non-refoulement of* refugees overlaps - but is not co-extensive – with other related protections in international law. Various international human rights instruments and (in some cases) customary international law prohibit *inter alia* expulsion to a risk of:

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12 1155 UNTS 331, entry into force 27 January 1980.

13 Executive Committee Conclusion No.6 (1977) at para. (c), No. 14 (1979) at para. (c), No. 15 (1979) at paras. (b) and (c), No. 53 (1988) at para. 1, No. 81 (1997) at para. (h), No. 82 (1997) at para. (d)(iii), and No. 85 (1988) at para. (q).

14 UNG Res. 52/103, 12 December 1997 (UN Doc. A/RES/52/103): "5. *Reaffirms that everyone is entitled to the right to seek and enjoy in other countries asylum from persecution, and, as asylum is an indispensable instrument for the international protection of refugees, calls on all States to refrain from taking measures that jeopardize the institution of asylum, in particular by returning or expelling refugees or asylum-seekers contrary to international human rights and to humanitarian and refugee law",* (emphasis added).

15.1. torture;

15.2. cruel, inhuman or degrading treatment or punishment; and

15.3. arbitrary deprivation of life.

See: Art 3 of United Nations Convention against Torture or Other Cruel Inhuman or Degrading Treatment or Punishment **("Torture** Convention'Y'; Arts 6 and 7 of the International Covenant on Civil and Political Rights ("ICCPR,,)16 and Arts 2 and 3 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR,,).17

16. This Court has recognised that *refoulement* to a real risk of either of the first two categories (torture or cruel, inhuman or degrading treatment or punishment) is contrary to Hong Kong statute law: **Ubamaka Edward Wilson v Secretary for Security and Anor.,** unreported, FACV 15/2011, 21 December 2012; **Secretary for Security v Prabakar** (2004) 7 HKCFAR 197. It is palpably clear from the judgment in **Ubamaka** (although not part of the *ratio)* that *refoulement* to a real risk of arbitrary deprivation of life is also unlawful.

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15 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46,1465 UNTS 85,10 December 1984.

16 Intemationai Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/63 16 (1966), 999 UNTS 171, Mar. 23, 1976. Human Rights Committee, General Comment No. 20 (1992), at para. 9; and Human Rights Committee, General Comment No. 31 (2004), at para. 12.

17 Convention for the Protection of Human Rights and Fundamental Freedoms, Europ.T.S. No.5; 213 UNTS 221, Nov. 4, 1950. See for example, Soering v The United Kingdom (1989) II EHRR 439; Chahal v United Kingdom (1996) 23 EHRR 413; and more recently M.S.S. v Belgium and Greece, Application no. 30696/09, ECtHR, 21 January 2011; and Hirsi Jamaa aud Others v Italy. Application no. 27765/09 ECtHR, 23 February 2012.

17. The principle *ofnon-rejoulement* developed under international refugee and human rights law stems from a single unified value: States must not exercise their right to remove, in any manner whatsoever, people from their territory and/or jurisdiction, where they face a threat to their lives or freedoms.

18. In assessing the submissions on customary international law it is pertinent to note that:

18.1. UNHCR's submission *infra* is that the principle of *non-rejoulement* of refugees, as expressed by Art 33(1) of the 1951 Convention is - at a minimum - a norm of customary international law;

18.2. The submissions that follow on customary international law encompass only refugee status as defined within the 1951 Conventionl1967 Protocol, and are not intended to convey, but are without prejudice to, any wider meaning. All references in this document to *'non-refoulement'* are, unless the context should otherwise require, to *non-refoulement* of refugees (and, as per para. 9 above, also to asylum-seekers).

C. The Formation of Customary International Law

19. Amongst the sources of international law authoritatively listed[18] in Art 38(1) Statute of the International Court of Justice, Art 38(1)(c) refers to:

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18 Although literally listing the sources of law to be applied *by the Court,* Art 3S(I) is nevertheless accepted to represent the state of public international law generally: see Crawford, *Brownlie's Principles of Public International Law* (Sth Ed.), Oxford University Press, 200S, Oxford, pp. 21-23 (hereinafter "Brownlie's Principles, S" Ed.").

"international custom, as evidence of a general practice accepted as law"

20. *Per* the International Court of Justice (ICI) in North Sea Continental Shelf (Federal Republic of German v Denmark, Federal Republic of German v Netherlands) [1969] ICI Rep 3, 44 at § 77 ("North Sea Continental Shelf'):

> *"the acts concerned [must] amount to a settled practice, [and] they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".*

21. Customary international law is the result of constant and uniform usage accepted as law. See, Asylum Case (Columbia v Peru) [1950] ICI Rep 266, pp. 276-277. International custom is binding on all states subject to persistent objection. It is derived from State practice accompanied by *opinio juris sive necessitatis ("opinio juris")* (US Restatement (Third) Foreign Relations Law, §102).[19] It is this element of *opinio juris* that differentiates acts of comity from customary international law.

Cl. *State Practice*

22. State practice may be constituted in myriad forms including *(inter alia):*

22.1. verbal or physical acts of States, including diplomatic correspondence, policy statements: North Sea Continental Shelf § 73; Reservations to the Convention on Genocide (Advisory Opinion) [1951] ICI Rep 15, 25 ("Genocide Case"); Case

[19] Restatement of the Law, Third, Foreign Relations Law of the United States (1987), The American Law Institute.

Concerning the Right of Passage Over Indian Territory (Merits) (Portugal v India) [1960] lCJ Rep 6, pp. 40 and 43;

22.2. widespread participation in a treaty regime or series of them (which can itself be sufficient), a pattern of treaties in the same or similar form, recitals in international instruments, comments at drafting conventions or on International Law Commission drafts: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion [1971] ICJ Rep 16, 47 (the "Namibia case"); North Sea Continental Shelf §§ 70-71; *Brownlie's Principles*, 8th Ed., p. 24;

22.3. the practice of international organisations: Genocide Case p. 25; resolutions (Case Concerning Military and .Paramilitary Activities in and against (Nicaragua v United States of America), Merits [1986] ICJ Rep 14 ("Nicaragua v USA"), pp. 100-103 (§§ 189-194);

22.4. UNGA resolutions: Genocide Case Nicaragua v USA pp. 100-103; Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, pp. 254-255 (§§ 68-70);

22.5. judgments of courts oflaw (Article 38(I)(d) of the ICJ Statute: Case of the S.S. "Lotus" (France v Turkey), PCl.l Ser. A, No. 10 (1927), p. 28); and domestic law Fisheries Case (United Kingdom v Norway) [1951] ICJ 16, p. 131 (the "Fisheries Case"); North Sea Continental Shelf;

22.6. diplomatic acts and instructions and other public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states: US Restatement (Third) Foreign Relations Law *Brownlie's Principles,* 8th Ed., p. 24).

23. As to the quality and degree of uniformity required, the practice in question should be "settled" but complete uniformity is not required: Fisheries Jurisdiction (United Kingdom v Iceland) [1974] ICJ Rep 3, at pp.23-26; North Sea Continental Shelf at pA2 (§§ 74 and 77-78); and *Brownlie's Principles* 8th Ed., p.24. There is no need for "absolutely rigorous conformity with the rule" and it is not to be expected that in the practice of States the application of the rules in question should have been perfect: see Nicaragua v USA where the Court held (p. 96) as follows:

> *"186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."*

24. See also R (European Roma Rights Centre) v Prague Immigration Officer [2005] 2 AC 1,35.

25. The passage of a *"short period of time... [need) not necessarily be a bar to the formation of a new rule of customary international law"* **(North Sea Continental Shelf** p. 43, § 74). Even without the passage of any considerable period of time, a very widespread, and representative participation might suffice in itself, provided it included specially affected states, to transform a treaty provision into customary international law.

C2. Opinio Juris

26. State practice alone - even if sufficiently uniform – does not amount to customary international law absent a sense of legal obligation to carry out the practice - that is, *opinio juris sive necessitatis* (or *"opinio juris")*. Hence the ICJ has said that the settled practice *"must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."* **(North Sea Continental Shelf,** § 72). The Court continued (at § 77):

> *"...in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of opinion juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."*

27. And *per* the US Restatement (Third) Foreign Relations Law: *"For a practice of states to become a rule of customary international law it must appear that the states follow the practice form a sense of legal obligation; a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law".* According to Lord Bingham in **R (European Roma Rights Centre) v Prague Immigration Officer** [2005] 2 AC **1,22-23** this *"accurately and succinctly"* summarizes the relevant law.

D. The Principle of *Non-refoulement* of Refugees as Customary International Law

28. UNHCR submits that there is sufficiently uniform State practice coupled with *opinio juris* to conclude that there is a norm of customary international law prohibiting *refoulement* of refugees. No State claims that *refoulement* of refugees is permissible under international law. See: Professor Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3fd Ed.) Oxford University Press (Oxford) (2007), p. 228.

DI. State Practice

29. UNHCR is uniquely placed to comment on the State practice surrounding the international treatment of refugees, including the principle of *non-refoulement.* As explained by UNHCR in a 1994 submission invited by the German Constitutional Court:[20]

> *"4. In the exercise of his supervisory function under paragraph* 8 *of the Statute of his Office, combined with Article* 35 *of the 1951 United Nations Refugee Convention and Article II of the 1967 Refugee*

[20] "The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany", filed in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93.

Protocol, the United Nations High Commissioner for Refugees has frequently been called upon to draw the attention of governments to the need to respect the principle of non-refoulement or to protest to governments in those cases in which the principle of non-refoulement has been disregarded. This action by the High Commissioner has related both to refugees within a State's territory and also to refugees seeking asylum at a State's frontiers. It has enabled the High Commissioner closely to follow the practice of Governments in regard to the application of the principle of non-refoulement and to contribute to the development of this principle into a rule of international customary law.

5. In many cases, the State in question was a party to the 1951 *United Nations Refugee Convention or to the* 1967 *United Nations Refugee Protocol. In these cases the High Commissioner could, of course, base his action on a treaty obligation assumed by the Government concerned. There have, however, also been numerous cases in which the High Commissioner has been required to make representations to States which were parties neither to the Convention nor to the Protocol, and it* is *here that the Office has necessarily had to rely on the principle of non-refoulement irrespective of any treaty obligation. In response to such representations by the High Commissioner, the Governments approached have almost invariably reacted in a manner indicating that they accept the principle of non-refoulement as a guide for their action. They indeed have in numerous instances sought to explain a case of actual or intended refoulement by providing additional clarifications and/or by claiming that the person in question was not to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle. "*

30. There are presently 145 States parties to the 1951 Convention and 146 to the 1967 Protocol - that is three quarters of the Member States of the United Nations are party to one or both treaties – making them two of the most-subscribed human rights treaties. As noted above at § 22.2, it is uncontroversial that the contents of a treaty may crystallise into customary international law: see e.g. **Nicaragua v USA,** p. 93 (§§ 174-179); **US Restatement (Third) Foreign Relations Law** (1986), §§102(2) and (3).

31. Some scholars — as stated by Kalin, Caroni and Heim in Zimmerman'! at p. 1343 — have argued that for a conventional rule to become customary international law a widespread and representative participation in the convention especially of States whose interests were specifically affected can suffice.

32. In 2002, State Parties to the 1951 Convention and/or 1967 Protocol adopted a Declaration:

> *"acknowledging the continued relevance and resilience of this international regime of rights and principles, including at its core the principle ofnon-refoulement, whose applicability* is *embedded in customary tntemauonai law".*[22]

33. The *non-refoulement* principle is the cornerstone of international refugee protection. The fundamental nature of the principle of *non-refoulement* of refugees is confirmed by the fact that the 1951 Convention and 1967 Protocol expressly prohibit any reservation against Art 33: see Art 42(1) of the 1951 Convention and Art VII(2) of the 1967 Protocol. This is important evidence in favour of a customary rule: **North Sea Continental Shelf,** pp. 38-39 (at § 63). Moreover, the rule is non-derogable, i.e. no derogation or exemption of the principle of *non-refoulement* is permitted in times of armed conflict or national emergency threatening the life of a nation. See also Executive Committee Conclusion No. 79 (1996), at para. (i) and

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21 Andreas Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford Commentaries on International Law), Oxford University Press Inc. (New York) (20 II).

22 UN High Commissioner for Refugees, *Declaration of States Parties to the* 1951 *Convention and or Its* 1967 *Protocol relating to the Status of Refugees,* 16 January 2002, HCRlMMSP/2001/09. The Declaration was welcomed unanimously in UNGA Res. 57/187 (A/RES/57/187, 15 December 2001).

UNGA Resolution 52/132 (1998) recalling that the principle of *non-refoulement* is not subject to derogation.

34. It would be quite wrong to draw the inference that the remaining one quarter of Member States of the United Nations who are not States Parties to the 1951 Convention and/or 1967 Protocol do not accept merely by the fact of not being a State Party to the Convention and/or Protocol, the principle of *non-refoulement.*

35. UNHCR has closely followed the practice of Governments in relation to the application of the principle *of non-refoulement,* both by States Parties to the 1951 Convention and/or 1967 Protocol and by States which have not ratified either instrument. In UNHCR's experiences, Governments of States Parties and those not party to the Convention or Protocol have overwhelmingly confirmed to UNHCR that they recognise and accept the principle of *non-refoulement* as binding." This is demonstrated, *inter alia,* in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended *refoulement,* thus implicitly confirming their acceptance of the principle.

36. The acceptance by non-States Parties to the 1951 Convention and 1967 Protocol of the principle of *non-refoulement* of refugees powerfully supports the existence of a customary rule.

37. The practice of the Executive Committee is highly instructive as evidence of State practice and *opinio juris.*

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23 UNCHR confirmed this to be the case in its submission to the Federal Constitutional Court of the Federal Republic of Germany, filed in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93. See § 6.

38. The Executive Committee, comprised of 87 Member States, including many non-States Parties to the 1951 Convention and 1967 Protocol, represents all continents and regions. Asia is well represented: China, India, Japan, Pakistan, the Philippines, the Republic of Korea, and Thailand are all members of the Executive Committee.

39. As regards international protection, the role of the Executive Committee is to advise UNHCR at its request. In this context, the Executive Committee adopts conclusions on international protection on the basis of consensus, thus setting standards, *inter alia*, in the area of forced displacement.[24] The Executive Committee has frequently confirmed the customary nature of the principle of *non-refoulement* of refugees. The following Executive Committee Conclusions demonstrate that the principle has been accepted as representing customary international law since at least the late 1970s including by non-States Parties to the 1951 Convention and 1967 Protocol:

39.1. Conclusion No.6 (XXVIII) 1977, which declared as follows:

> *"The Executive Committee, (a) Recalling that the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States; (b) Expressed deep concern at the information given by the High Commissioner that, while the principle of non-refoulement is in practice widely observed, this principle has in certain cases been disregarded; (c) Reaffirms the fundamental importance of the observance of the principle of non-refoulement-both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of*

[24] See UNHCR, *A Thematic Compilation of Executive Committee Conclusions, 6th edition, June 2011,* June 2011, where the pronouncements by the Executive Committee in relation to the various components of UNHCR's practice can be found.

whether or not they have been formally recognized as refugees" (emphasis added);

39.2. Conclusion No. 19 (XXXI) 1980, at (a);

39.3. Conclusion No. 25 (XXXIII) 1983, at (b):

"Reaffirmed the importance of the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a peremptory rule of international law" (both China and the UK sat on the Executive Committee that agreed this Conclusion);

39.4. Conclusion No. 44 (XXXVI) 1986, at (i);

39.5. Conclusion No. 50 (XXXIX) 1988, at (g);

39.6. Conclusion No. 79 (XLVII) 1996, at (i)-(j);

39.7. Conclusion No. 81 (XLVII) 1997, at (h)-(i);

39.8. Conclusion No. 82 (XLVIII) 1997, at (b) and (h)-(i);

39.9. Conclusion No. 85 (XLIX) 1998, at (f) and (n); and

39.10. Conclusion No. 103 (LVI) 2005 at (d) and (j).

40. It must be re-emphasised that the Executive Committee, in consistently affirming the customary status of the principle of *non-refoulement* of refugees, has enjoyed widespread geographical representation from all regions.

41. UNHCR has also repeatedly reaffirmed - at a minimum - the customary status of the principle of *non-refoulement* of refugees, e.g. in its annual Note on International Protection, which provides an annual report on State practice:

41.1. "Note on International Protection" (submitted by the High Commissioner) (1987) UN doc. A/AC.96/694 para 21. *"The peremptory character of the principle of non-refoulement remains generally recognized, and most States have continued to abide by the rule, even when faced with a variety of difficulties, including massive numbers of arrivals and fragile political relations with countries of origin."*

41.2. "Note on International Protection" (submitted by the High Commissioner) (1985) UN doc. A/AC.96/660 para. 17: *"The fundamental principle of non-refoulement has found expression in a number of universal and regional international instruments as well as in the national legislation of a number of countries and has come to be characterized as a peremptory norm of international law. Since the thirty-fifth session of the Executive Committee, the principle received strong endorsement at the regional level at the Colloquium on International Protection of Refugees in Central America, Panama and Mexico, which met in Cartagena, Colombia in November 1984. The Colloquium adopted the "Cartagena Declaration on Refugees" in which the participating States unanimously concluded, inter alia, that the principle of non-refoulement is an overriding legal principle having a normative character independent of international instruments. "*

41.3. "Note on International Protection" (submitted by the High Commissioner) (1984) UN doc. A/AC.96/643 para. 15: *"The repeated reaffirmation by States of the jitndamental character of this principle and the need for its scrupulous observance has served to enhance its stature which, as recognized by the Executive Committee at its thirty-third session, is progressively acquiring the character of a peremptory norm of international law."*

41.4. "Note on International Protection" (Submitted by the High Commissioner) (1982) UN doc. A/AC.96/609/Rev.l para. 5: *"...with regard to the principle of non-refoulement, which, as a result of constant reaffirmation by States over a number of years, has increasingly come to be regarded as a peremptory norm of international law from which no derogation is permitted. "*

41.5. "Note on International Protection" (Submitted by the High Commissioner) (2001) UN doc. A/AC.96/951 at para. 16: *"a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established non-refoulement as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. They duty not to refoule is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined"*

41.6. "Note on International Protection" (Submitted by the High Commissioner) (2012), UN doc. AlAC.96/1110: *"The principle of non-refoulement, which prohibits returning anyone to a territory where they face threats to their life or freedom,* is *central to the 1951 Convention relating to the Status of Refugees and a norm of customary international law. UNHCR continued to work for its universal observance."*

42. The Convention on the Rights of the Child ("CRC"), [25] which boasts 193 States parties, expressly recognises the rights of child refugees: Art 22. This is particularly relevant because it involves recognition of the right of asylum in respect of children, by *every single State* which is not party to the Convention and Protocol.

43. It is noted that in 2003 the PRC removed a reservation to the CRC concerning Hong Kong relating to *inter alia* the status of child refugees present within the HKSAR: see below at §§ 86-87.

D2. Opinio Juris

44. The replication and recognition of the principle of *non-refoulement* of refugees in other international/regional instruments is also evidence of its status as a norm of customary international law:

[25] 1577 UNTS 3,2 September 1990.

44.1. Convention relating to the International Status of Refugees of 28th October 1933[26] *(per* Art 3: *"Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures such as expulsions or non-admission at the frontier (refoulement), refugees who have been authorized to reside there legally, unless the said measures are dictated by reasons of national security or public order.*");

44.2. Provisional Arrangement concerning the status of refugees coming from Germany of 4 July 1936 (Article 4)27;

44.3. Convention concerning the status of refugees coming from Germany of 10 February 1938 (Article 5)28;

44.4. Article 22 (8) of the American Convention on Human Rights;29

44.5. Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967[30];

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26 League of Nations, *Convention Relating to the International Status of Refugees,* 28 October 1933, League of Nations, Treaty Series Vol. CLlX No. 3663.

27 League of Nations, *Provisional Arrangement concerning the Status of Refugees Coming From Germany,* 4 July 1936, League of Nations Treaty Series Vol. CLXXI, No. 3952, page 77.

28 League of Nations, *Convention concerning the Status of Refugees Coming From Germany,* 10 February 1938, League of Nations Treaty Series, Vol. CXCn, No. 4461, page 59.

29 Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica,* 22 November 1969.

30 Council of Europe, *Resolution* 14 *(J*967) *Asylum to Persons in Danger of Persecution,* 29 June 1967,14 (1967).

44.6. Cartagena Declaration on Refugees, Nov. 22, 1984, OAS/Ser.LN/II.66, Section III, para. 5 (declaring *non-refoulement* to *bejus cogens*)[31]; and

44.7. Article III (3) of the Principles concernmg the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966, restated by its successor, the Asian-African Legal Consultative Organization in 2001.[32]

44.8. Article 1I(3) of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa.'" and

44.9. Article 18 and 19(2) of the Charter of Fundamental Rights of the European Union.[34]

45. As Sir Elihu Lauterpacht CBE QC LLD[35] and Sir Daniel Bethlehem KCMG QC[36] indicate in their comprehensive survey of the State practice

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31 *Cartagena Declaration on Refugees, Colloquium on the International Protection ofRefugees in Central America, Mexico and Panama,* 22 *November 1984.*

32 Asian-African Legal Consultative Committee, *Bangkok Principles on the Status and Treatment ofRefugees* (31 December 1966); Asian-African Legal Consultative Organization, 1966 *Bangkok Principles on Status and Treatment ofRefugees* (Declaration adopted by the Asian-African Legal Consultative Organization, 40th sess, New Delhi, 24 June 2001).

33 Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"),* 10 September 1969, 1001 UNTS 45.

34 European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union (20071C 303101),* 14 December 2007, C 303/1.

35 Sir Elihu is the founder of the Lauterpacht Centre for International Law, University of Cambridge, and has acted as Agent and Counsel in a number of1CJ cases.

36 Sir Daniel was formerly the Principal Legal Advisor to the Commonwealth and Foreign Office (2006 to 20II).

and *opinio juris* in this area, to the replication and recognition of the principle of *non-refoulement* of refugees in other international instruments may be added the explicit and implicit incorporation of the principle of *non-refoulement* in the internal legal order and specific legislation of States. They calculated that some 125 States have incorporated the principle of *non-refoulement* in one way or another into their domestic law, which can be taken as an indication of *opinio juris."*

46. The practice of the UNGA is also an important source of the development of international customary law.

47. The UNGA has repeatedly underlined the importance of full respect for the principle of *non-refoulement,* called upon States to respect the principle, and endorsed the principle of *non-refoulement* of refugees as a custom: (UNGA Resolutions: 32/67 (1977); 33/26 (1978); 34/60 (1979); 35/41 (1980); 36/125 (1981); 37/195 (1982); 38/121 (1983); 39/140 (1984); 40/118 (1985); 41/124 (1986); 42/109 (1985); 43/117 (1988); 44/137 (1989); 46/106 (1991); 47/105 (1992); 48/116 (1993); 49/169 (1994); 50/152 (1995); 51/75 (1996); 52/103 (1997); 52/132 (1999); 53/125 (1998); 54/146 (1999); 55/74 (2000); 56/137 (2001); 57/187 (2001); 58/151 (2003); 59/170 (2004); 60/129 (2005); 61/137 (2006); 62/124 (2007); 63/148 (2008); 63/127 (2009); 65/194 (2010)).38

48. By Res. 217 A (III) of 1948, the UNGA unanimously adopted the Universal Declaration of Human Rights ("UDHR"), of which Art 14(1) provides:

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37 *Lauterpacht and Bethlehem 2003:* p. 148 (para. 213). See also Kalin, Caroni and Heim in *Zimmerman (ed) 2011:* p. 1344, at 29.

38 For a thematic overview of relevant UNGA and ECOSOC Resolutions see: UNHCR, *Thematic Compilation of General Assembly & Economic and Social Council Resolutions,* September 2011.

(I) *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*[39]

49. The principle of *non-refoulement* was again unanimously endorsed by the UNGA in its *Declaration on Territorial Asylum,* Res. 2312 (XXII) of 1967, which provides (in Art 3):

> I. *No person referred to in article* I, *paragraph* I, *shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.*[40]

50. In UNGA Res. 57/187 (A/RES/57/l87, adopted unanimously on 18 December 2001) the General Assembly welcomed, at § 3, the adoption of the *Declaration of States Parties to the* 1951 *Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12-13 December 2001,* which acknowledged *inter alia: "...the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, whose applicability is embedded in customary international law"* (emphasis added). See para. 32 above. Further, the Resolution *"underlines in particular the importance of full respect for the principle of non-refoulement, and recognizes that a number of States not parties to the international refugee instruments have shown a generous approach to hosting refugees"* (at para. 4).

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39 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

40 Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

D3. Judicial Decisions

51. Judicial decisions are both a source of law, as per Art 38(1)(d) of the ICJ Statute, as well as evidence of State practice. See para. 22.5 above.

52. The International Criminal Court has declared the principle of *non-refoulement* to be a norm of customary international law. In **Situation en RepubIigue Democratigue du Congo: Le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui,** ICC-0l/04-0l/07, International Criminal Court (ICC), 9 June 2011, at paras. 67 and 68, the International Criminal Court, in the context of witnesses applying for asylum in the Netherlands, the Court referred *inter alia* to the 1948 UDHR, the 1951 Convention and the 1967 Protocol:

> *"68. The "non-refoulement" principle is considered to be a norm of customary international law and is an integral part of international human rights protection. All individuals are entitled to enjoy its application by a State"*

53. Lord Bingham in **R (European Roma Rights) v Prague Immigration Officer** [2005] 2 AC 1,37-38 held, at 26, that:

> *"26. There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claims to have a well-founded fear."*

54. This holding was *obiter;* the House of Lords held the *non-refoulement* rule, even if custom, could not avail the appellants since the principle did not extend to the facts of that case - i.e, as they had not yet left their country of

origin. UNHCR submits that, as to the customary status of the rule, Lord Bingham's *dicta* is correct.

55. See also **Nada v Switzerland,** ECtHR, Grand Chamber (Application no. 10593/08) 12 September 2012, at § 47; and the concurring opinion of Judge Pinto De Albuquerque in **Hirsi Jamaa and Others v Italy,** ECtHR (Application no. 27765/09), 23 February 2012.

D4. The Writings of Highly Qualified Publicists

56. A survey of the academic and expert literature on the subject demonstrates that the predominant view, by far, is that the principle of *non-refoulement* of refugees is a norm of customary international law.

57. In Goodwin-Gill and McAdam's authoritative treatise on refugee law, *The Refugee in International Law*, 3rd Ed., (OUP, 2007, Oxford), the learned authors undertook a comprehensive survey of international practice confirming that the rule is indeed custom: pp. 228, 248 and 354.

58. Lauterpacht and Bethlehem likewise conclude in their study, at p.163 (at § 253(a)) that the absolute prohibition on *refoulement* is a rule of customary international law. The Lauterpacht and Bethlehem opinion was cited with approval by Lord Bingham in **R (European Roma Rights) v Prague Immigration Officer** [2005] 2 AC 1,37-38.

59. The International Law Association" referred in its Resolution 6/2002 to: *"the fundamental obligation of states not to return (refouler) a refugee in any manner whatsoever to a country in which his or her life or freedom may be threatened"* and declared:

> *"1. Everyone seeking international protection as a refugee outside his or her country of origin and in accordance with the relevant international instruments should have access to a fair and effective procedure for the determination of his or her claim. ...*
>
> *5. No one who seeks asylum at the border or in the territory of a state shall be rejected at the frontier, or expelled or returned in any manner whatsoever to any country in which he or she may' be tortured or subjected to inhuman, cruel or degrading treatment or punishment, or in which his or her life or freedom may be endangered. "*

60. The Council of the International Institute of Humanitarian Law[42] stated in the *San Remo Declaration on the Principle of Non-refoulement* (2001) that: *"The Principle of Non-Refoulement of Refugees incorporated in Article* 33 *of the Convention relating to the Status of Refugees of* 28 *July 1951* is *an integral part of Customary International Law".* It continued in its Explanatory Note that:

> *"Currently, 141 States are contracting Parties either to the Convention relating to the Status of Refugees of 1951 or to the Protocol Relating to the Status of Refugees of 1967, or both. All these States are, of course, bound by the principle of non-refoulement of refugees as incorporated in Article* 33 *(1) of the Convention, subject to the exceptions spelt out in Article* 33 (2) *as well as Article 1 (F). However, the principle of non-refoulement of refugees can now be deemed as* ***an***

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41 The ILA is an international non-governmental expert body founded in 1873 and has as its mission: *"the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.* "

42 The IIHL is an international non-governmental organisation, founded in 1970, composed of international law experts.

integral part of customary international law. Consequently, non-contracting Parties to the Convention and/or the Protocol are equally bound by the principle of non-refoulement of refugees: not because of any treaty obligation, but because this is general international law.

The principle of non-refoulement of refugees can be regarded as embodied in customary international law on the basis of the general practice of States supported by a strong opinio juris. The telling point is that, in the last half-century, no State has expelled or returned a refugee to the frontiers of a country where his life or freedom would be in danger - on account of his race, religion, nationality, membership of a particular social group or political opinion - using the argument that refoulement is permissible under contemporary international law. Whenever refoulement occurred, it did so on the grounds that the person concerned was not a refugee (as the term is properly defined) or that a legitimate exception applied. As the International Court of Justice pointed out in a different context, in the 1986 *Nicaragua Judgement, the application of a particular rule in the practice of States need not be perfect for customary international law to emerge: if a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, this confirms rather than weakens the rule as customary international law."* (emphasis in bold added)

61. An American Society of Intemational Law publication (eds. Louis B. Sohn[43] and Thomas Buergenthal?") entitled: "The Movement of Persons Across Borders" in 23 Stud. Transnat'l Legal Pol'y 123 (1992) further lends support to the view that the non-refoulement principle is custom.

62. Kalin, Caroni and Heim have also outlined why the principle of non-refoulement of refugees is a norm of customary international law. See Zimmerman (ed), *"The* 1951 *Convention Relating to the Status of Refugees*

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43 Former advisor to the US State Department and US representative on the Law of the Sea Convention.

44 Former Judge of the International Court of Justice, 2000-2010; Lobingier Professor of Comparative Law and Jurisprudence at The George Washington University School of Law.

and its 1967 *Protocol: A Commentary",* (Oxford: OUP, 2011), pp. 1343-1346.

63. A great number of scholars agree. The weight of their opinion, particularly amongst leading scholars in the field, undoubtedly supports the view that the principle of *non-refoulement* of refugees is at least customary international law:

63.1. Jean Allain, *"The Jus Cogens Nature of Non-Refoulement"* 13 International J. Ref. L 533, 538 (2001) – finding norm prohibiting refoulement part of CIL and binding on all States;

63.2. Prof. Roda Mushkat, *"One Country Two International Personalities: The Case of Hong Kong",* (HKUP, 1997, Hong Kong), p. 86;

63.3. International Helsinki Federation for Human Rights, *Anti-terrorism Measures, Security and Human Rights. Developments in Europe, Central Asia and North America in the Aftermath of September 11,* April 2003, p.169;

63.4. Maryellen Fullerton, *"Failing the Test: Germany leads Europe in Dismantling Refugee Protection"* (2001) 36 *Texas International Law Journal* 231; and

63.5. James A Rice, *"Hong Kong's Policies Relating to Asylum-Seekers: Torture and the Principle of Non-refoulement"* (2011) 28 UCLA Pacific Basin Law Journal 148 (commenting on the Judgment of

Hartmann J below in this case, concluding that the norm is custom and has attained the status of *jus cogens:* pp.163-168).

64. There are very few opposing views, see, e.g.: James C. Hathaway, *"The Rights of Refugees under International Law"* (CUP, 2005, New York), pp. 36, 363-365, who takes the view that not even genocide, torture or slavery are customary international law based on 'non-conforming' State practice. He advances a similar view in respect of *non-refoulement* under international refugee law.

65. However, as Kalin, Caroni and Heim put forward - in response to Hathaway's opposing views:

> *"the existence of customary law does not depend on the absence of any violation. Rather, as stated by the ICJ, it suffices 'that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule' [ICJ, Nicaragua v. United States of America, p.* 98 *(para. 186)]"45*

66. It is a fact that, regrettably, instances of *refoulement* of refugees or asylum seekers do occur from time-to-time. This fact does not, however, refute the existence of the norm of customary international law or demonstrate a non-acceptance of the norm as an obligation. There are several reasons why this is so.

67. First, acts of *refoulement* are virtually always condemned by States, including collective condemnation through the UNGA, the Executive

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45 *Zimmerman (ed) 2011.*

Committee, and/or by UNHCR. This reaction reinforces the existence of the rule.

68. Secondly, the response of the State engaging in the act of *refoulement* is highly relevant. In such cases States invariably deny that the person concerned was a refugee or invoke an exception to the norm. Although such conduct undermines the protection of refugees, the denials and invoking of exceptions that follow support the existence of the norm of *non-refoulement* as custom. See **Nicaragua v USA** at p. 96 (§ 186). See also para. 35 above.

69. Thirdly, there is a certain circularity to the argument that a norm of customary international law cannot exist in the face of acts contravening it. An act may be done because there is no rule prohibiting it, or the State concerned may simply have decided to breach the rule. It is manifest that States will, on occasion, act contrary to established international obligations - both customary and conventional. Even the best-established rules of *jus cogens,* such as the prohibition against genocide, the use of force or torture, are contravened from time-to-time, sometimes in a widespread or systematic fashion. Such actions do not destroy or detract from the obligatory - and legal – character of these prohibitions. In testing whether a given norm of customary international law exists it is necessary to go further than merely observing the existence of acts contrary to the norm contended for; it is necessary to analyse such acts in their proper context, namely: (1) the nature and scale of such acts, and by how many States; (2) whether the acts have really been done in a spirit that implies the non-existence of an obligation; and (3) how other States and relevant bodies have responded.

D5. UNHCR's Position

70. **In** accordance with its supervisory responsibility UNHCR has also repeatedly reaffirmed the customary status of the principle of *non-refoulement* of refugees, e.g.:

70.1. UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement,* November 1997;

70.2. UN High Commissioner for Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection,* August 2006; and

70.3. UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the* 1951 *Convention relating to the Status of Refugees and its 1967 Protocol,* 26 January 2007, paras. 14-16.

D6. Conclusion on CIL

71. For the above reasons, UNHCR respectfully submits that the principle of *non-refoulement* of refugees – at a minimum – has crystallised into a norm of customary international law.

E. Refugee Status Determination and the Duty of Independent Inquiry

72. Under both conventional and customary international law responsibility for complying with the principle of *non-refoulement* lies exclusively with States.

73. In this regard UNGA Res. 2312 (XXII)[46] is apposite: "3. *It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."* See also, Executive Committee Conclusion No. 81 (1997), at para. (d) in which the Committee *"emphasizes that refugee protection is primarily the responsibility of States, and that UNHCR's mandated role in this regard cannot substitute for effective action, political will, and full cooperation on the part of States".*

74. For removal, in any manner whatsoever, of an individual to be lawful, States need to examine whether such removal would result in a breach of the their *non-refoulement* obligations.[47] To satisfy this obligation, an independent inquiry as to whether the person is a refugee entitled to the benefits of *non-refoulement* protection would ordinarily be required.[48] Accordingly it is only reasonable that a State, in order not to violate the principle of *non-refoulement,* must be in a position to make such a determination in respect of any person claiming international protection from *refoulement* before taking any step to remove them from its territory *(cf.* R Case § 59).[49]

75. This proposition is well supported by authority, including extensive State

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[46] Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

[47] 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,* 26 January 2007, para.8.

[48] See *Lauterpacht and Bethlehem 2003,* p. 118; and K. Wouters, *International Legal Standards for the Protection from Refoulement,* Intersentia, Antwerp (2009), p. 164-165.

[49] See the following UNHCR Executive Committee Conclusions: *Conclusion No. 30 (XXXIV),* 1983, para. (e) (i); *Conclusion No.* 65 *(XLII),* 1991, para. (0); *Conclusion No.* 71 *(XLVI), 1993,* para. (i); *Conclusion No.* 74 *(XLV),* 1994, para. (i); *Conclusion No.* 81 *(XLVIII),* 1997, para. (h); *Conclusion No.* 82 *(XLVIII),* 1997, para. (d) (iii); *Conclusion No. 103 (LVI), 2005,* para. (r). See also *Lauterpacht and Bethlehem 2003,* pages 116-119.

practice and *opinio juris:* 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*, 26 January 2007, para. 8; UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, paras. 5; Executive Committee, Conclusion No. 81 (XLVIII) *"General"* (1997), para. (h); Conclusion No. 82 (XLVIII), *"Safeguarding Asylum"* (1997), para. (d)(iii); Conclusion No. 85 (XLIX), *"International Protection"* (1998), para. (q); Conclusion No. 99 (LV), *"General Conclusion on International Protection"* (2004), para. (l); See the following UNHCR Executive Committee Conclusions: *Conclusion No. 30 (XXXIV),* 1983, para. (e) (i); *Conclusion No.* 65 *(XLII),* 1991, para. (0); *Conclusion No.* 71 *(XLVI), 1993*, para. (i); *Conclusion No.* 74 *(XLV),* 1994, para. (i); *Conclusion No. 81 (XLVIII),* 1997, para. (h); *Conclusion No. 103 (LVI), 2005*, para. (r); *Lauterpacht and Bethlehem 2003*, pp. 118-119.

76. Refugee status determination procedures are generally guided by responsibilities derived from international and regional refugee and human rights instruments, as well as by national judicial and administrative legal standards.i" This would normally involve an administrative decision which is subject to review.

77. The Executive Committee has recommended that refugee status determination procedures must be accessible, fair and efficient in accordance with a number of procedural safeguards (See e.g. Executive Committee Conclusion No.8 (1977), at para. (e)).

[50] See Asylum Procedures (Fair and Efficient Asylum Procedures), Global Consultations on International Refugee Protection, Second Meeting, EC/GC/01/12, 31 May 2001, paras. 41-43

78. UNHCR does not make immigration decisions and cannot discharge the obligation of *non-refoulement* on behalf of a State. It does not do so or purport to do so. UNHCR has no power under its mandate, under international law generally, or under the domestic law of any country, to expel or deport any person from or to any territory.

79. In Hong Kong, UNHCR carries out refugee status determinations. However it is crucial to understand the basis upon which this is done and the nature and purpose of this activity.

80. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees." One aspect of UNHCR's international protection mandate is to make representations to Governments on behalf of refugees and other persons of concern to the Office, in order that their rights are respected. In accordance with this mandate and in order to protect and assist refugees, UNHCR is obliged to determine and declare whether individuals or groups are of concern to the Office. In some contexts, this may require that UNHCR formally determines whether or not a specific individual(s) or a wider group, are refugees, even where a Government may have carried out a similar or different determination, or no determination at all. UNHCR's mandate in this regard is neither restricted by international obligations assumed by a particular State, nor by the existence of national refugee status determination procedures.

81. In the absence of a refugee status determination mechanism in Hong Kong, the purpose of UNHCR carrying out refugee status determination is to

51 UNHCR Statute, para. 1.

assist refugees and asylum-seekers present in the Territory to assess their international protection needs. This is the reason UNHCR has performed and continues to perform refugee status determinations in Hong Kong based on its independent mandate to provide international protection to refugees and to find solutions through, *inter alia,* resettlement to third countries.

82. UNHCR acts pursuant to its independent mandate entrusted to it by the UNGA. It thus does not exercise delegated authority from the HKSAR, whether *de facto* or *de jure.*

83. Further, the status determinations carried out by UNHCR are not *per se* intended to have domestic legal consequences under Hong Kong law. Such determinations lack the essential characteristics of decisions with domestic legal effect. This is evident from *(inter alia)* the fact that UNHCR, as a subsidiary organ of the United Nations, enjoys immunity from all forms of legal process (including judicial review) in the performance of its official functions: International Organisations and Diplomatic Privileges Ordinance, Cap. 190, and Articles 10 and 11 of Cap. 190H. Also, 1946 Convention on the Privileges and Immunities of the United Nations, Art II, section 2.

84. That said, in countries and territories in which UNHCR does carry out refugee status determination, including in Hong Kong, the Office expects that the relevant (immigration) authorities will take its determinations into account in making immigration-related decisions, particularly in respect of removal or deportation. In particular, where UNHCR has determined a person is a refugee pursuant to Art 1A(2) of the 1951 Convention, it would expect that this decision be given considerable weight before the

Government concerned takes steps to remove him or her, unless in any particular case the decision maker concludes that there are cogent reasons not to do so on the facts of that individual case: MM (Iran) v. Secretary of State for the Home Department [2010] EWCA Civ 1457 (CA) [23]-[28].

85. No agreement between the HKSAR and UNHCR involves UNHCR acting for or on behalf of the Government of the Region in respect of any of its international obligations, nor in respect of making deportation decisions. UNHCR believes that immigration decisions are solely a matter for the State immigration authorities, subject to the scrutiny of the Courts of the Region.

86. Further, it is noted that the United Kingdom and the People's Republic of China had placed and maintained, respectively, a declaration against the CRC reserving for *inter alia* the Hong Kong legislation governing the detention of children seeking refugee status, the determination of their status and their entry into, stay in and departure from the HKSAR. However on 10 April 2003 the Central People's Government notified the Secretary General of the United Nations *(qua* depository of multilateral treaties[52]) that it had decided to withdraw this reservation. The UNTS Database records that:

> *"In regard to the above-mentioned declaration, by a notification recieved* (sic) *on 10 April 2003, the Government of the People's Republic of China informed the Secretary-General that it had decided to withdraw its declaration relating to article* 22 *of the Convention. The declaration reads as follows:*
>
> > *'The Government of the [PRC}, on behalf of the [HKSAR}, seeks to apply the Convention to the fullest extent to children seeking*

[52] By art 102 of the UN Charter every treaty and international agreement must be registered with the secretariat of the UN.

> *asylum in the [HKSAR] except in so far as conditions and resources make full implementation impracticable. In particular, in relation to article 22 of the Convention the Government of the [PRC] reserves the right to continue to apply legislation in the [HKSAR] governing the detention of children seeking refugee status, the determination of their status and their entry into, stay in and departure from the [HKSAR]'."*
>
> (emphasis added)

87. In other words from at least 2003 onwards the international law duty upon Hong Kong to *(inter alia)* determine the status of child refugees was expressly extended to the Region.

88. Given the specific situation of the HKSAR, UNHCR appreciates the generous hospitality and current policy of the Government of the Region to allow refugees recognised by UNHCR to remain in its territory until a permanent solution is found. Likewise, UNHCR recognises that the Government of HKSAR has established national procedures to adjudicate claims for protection under the Convention against Torture. In order to properly respect the principle of *non-refoulement* of refugees as a norm of customary international law, the creation of a unified system, whereby eligibility for protection under both international refugee law and human rights law are considered in the same proceedings would be an appropriate response.i" Given the commonality of the claims at issue, a unified system would allow for a fair and efficient processing of claims.

F. Conclusion

89. In summary, UNHCR respectfully submits that:

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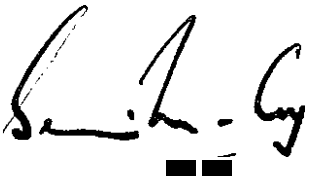
53 UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures),* 31 May *2001, EC/GCIO* 1/12, para. 48.

89.1. the principle of *non-refoulement* IS a norm of customary intemationallaw;

89.2. as such, there is a duty on States to independently inquire into whether the person is a refugee protected from *refoulement;* and

89.3. in carrying out refugee status determination in Hong Kong, UNHCR exercises its independent mandate which is not delegated.

Dated this 31st Day ofJanuary 2013



GERARD McCOY SC

TIMOTHY PARKER

Counsel for the Intervener*

BAKER & McKENZIE

Solicitors for the Intervener*

*All Counsel and Solicitors for UNHCR act on an entirely complimentary basis.