



Submission by the Office of the United Nations High Commissioner for Refugees in the case of 2021KuHap78282 before the Seoul Administrative Court

Introduction

1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR” or “the Office”)¹ in relation to case 2021KuHap78782, before the Seoul Administrative Court of the Republic of Korea (“Korea”).
2. As the subsidiary organ entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions,² UNHCR has a direct interest in this matter. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”³ This supervisory responsibility is reiterated in Article 35(1)⁴ of the 1951 Convention relating to the Status of Refugees (“1951 Convention”)⁵ and Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).⁶
3. UNHCR’s supervisory responsibility is exercised, among other ways, by the issuance of interpretive guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention and the 1967 Protocol. Such guidelines include the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (“UNHCR Handbook”),⁷ which is complemented by a number of *Guidelines on International Protection*.⁸

¹ These submissions do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law: UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V): <https://www.refworld.org/docid/3ae6b3628.html>.

³ *Ibid.*, para 8(a).

⁴ According to Article 35(1) of the 1951 Convention, States undertake to co-operate with UNHCR and “shall facilitate [UNHCR’s] duty of supervising the application of the provisions of the Convention”.

⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137: <http://www.unhcr.org/3b66c2aa10.pdf>. The full text of the UNHCR’s unofficial Korean translation of the 1951 Convention and the 1967 Protocol can be found at the UNHCR Korea website.

⁶ *Ibid.*

⁷ UNHCR Handbook, April 2019: www.refworld.org/docid/5cb474b27.html. The UNHCR Handbook and Guidelines on International Protection are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

⁸ *Ibid.*

4. Korean courts have found that the guidance within the UNHCR Handbook “must be respected in interpretation and application of the Convention”, considering the obligation of Contracting States under Article 35 of the 1951 Convention, as well as its preamble, which notes that UNHCR is charged with the task of supervising the implementation of the 1951 Convention.⁹ The UNHCR Handbook has been found by many other judicial authorities, including the Supreme Courts of Canada, the United Kingdom, and the United States respectively to be a “highly relevant authority”,¹⁰ a “highly persuasive authority”,¹¹ providing “significant guidance”,¹² and “should be accorded considerable weight, in the light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention”.¹³ UNHCR’s Handbook and Guidelines have also been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 *Vienna Convention on the Law of Treaties*, in reflecting “subsequent practice in the application of the treaty”.¹⁴

5. UNHCR regularly provides information to decision-makers and courts of law concerning the proper interpretation and application of the provisions of the 1951 Convention and has a history of third-party interventions in many national and regional jurisdictions. The Office is often approached directly by courts or other interested parties to obtain UNHCR’s expertise¹⁵ on particular legal issues.

6. The appellant is a national of Uganda who was recognized as a refugee in Korea on 11 April 2014. The appellant was issued a detention order by the Ministry of Justice on 16 June 2021 and subsequently with a deportation order on 5 July 2021, after he served a 16-month sentence for crimes of violence, inflicting bodily injury on another, and indecent act by compulsion. The appellant had previously been sentenced to six months of imprisonment with a two year suspended sentence for the crime of insult, and eight months of imprisonment for the crime of attempted larceny. The Ministry of Justice has argued in its submission to the court, *inter alia*, that the multiple and severe nature of the appellant’s crimes brings them within the scope of Article 32 (expulsion on grounds of public order) and Article 33(2) of the 1951 Convention (removal of refugees convicted by a final judgment of a particularly serious crime and constituting a danger to the community of Korea).

⁹ See, for example, *2019Nu47119* (Seoul High Court, 27 Sep 2019); *2014Nu52093* (Seoul High Court, 28 Jan 2015); *2013KuHap13617* (Seoul Administrative Court, 10 Oct 2013).

¹⁰ *Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, www.refworld.org/cases.CAN_SC.3ae6b68b4.html at paras. 46 and 119; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do> at pp. 713-714.

¹¹ *R v. Secretary of State for the Home Department, Ex parte Adan*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, www.refworld.org/cases.GBR_HL.3ae6b73b0.html.

¹² *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, www.refworld.org/cases.USSCT.3ae6b68d10.html.

¹³ *Al-Sirri (FC) v Secretary of State for the Home Department*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, www.refworld.org/cases.UK_SC.50b89fd62.html at para. 36. Similarly, the Handbook has been found “particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice”. *R v. Secretary of State for the Home Department, Ex parte Robinson*, United Kingdom: Court of Appeal (England and Wales), 11 July 1997, www.refworld.org/cases.GBR_CA_CIV.3ae6b72c0.html at para. 11.

¹⁴ *Pushpanathan v Canada (M.C.I.)*, [1998] 1 SCR 982, para. 54; *R v. Secretary of State for the Home Department, Ex parte Adan and Others*, note 11 above, para. 71.

¹⁵ *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, United Kingdom: Supreme Court, 19 February 2014, www.refworld.org/cases.UK_SC.5304d1354.html, para. 72.

7. UNHCR submits this *amicus curiae* to provide neutral and expert information on the interpretation of relevant international refugee law concepts in order to assist the Seoul Administrative Court in its deliberations. In this submission, UNHCR presents its interpretation of the provisions in international refugee law which, under certain limited circumstances, permit the expulsion of refugees on grounds of “national security” or “public order” (Article 32 of the 1951 Convention) or the application of exceptions to the principle of non-refoulement if a refugee is determined to pose a danger to the security of the host country or, having been convicted by a final judgment of a “particularly serious crime”, a danger to its community (Article 33(2) of the 1951 Convention). UNHCR will only address issues of legal principle arising from these points and will not address or comment on the particular facts of the claim or positions taken by the parties.
8. A person is a refugee within the meaning of the 1951 Convention as soon as they fulfil the criteria contained in the refugee definition and is entitled to the rights and benefits set out in the 1951 Convention (Articles 3 to 34). This includes, most importantly, protection against expulsion and other forms of forcible removal except in the circumstances exhaustively defined in Articles 32 and 33(2) of the 1951 Convention. Under Art 32, refugees who are lawfully in the territory of a state party to the 1951 Convention may not be expelled save on grounds of national security or public order. As an exception to the principle of *non-refoulement* provided for under Article 33(1) of the 1951 Convention, the expulsion or any other form of removal of a refugee to any country where they would be at risk of persecution or of onward transfer to such a risk may exceptionally be permitted only in the circumstances explicitly provided for in Art 33(2). The application of either provision requires a determination offering at a minimum the procedural safeguards specifically provided for in Art 32(2) and (3).
9. Both provisions are exceptions to general protection principles. Due to the severe consequences and possibly irreparable harm done to the person, they must be interpreted and applied restrictively.¹⁶ Moreover, a decision to expel a refugee must be based on an individualized determination, reached in a procedure which observes due process of law and offers the procedural safeguards elaborated below. Articles 32 and 33(2) govern expulsion or removal of refugees, and do not deprive the person concerned of their refugee status.

Expulsion to a country other than the country of persecution

10. Article 32 of the 1951 Convention provides:

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

¹⁶ It is a general principle of law that exceptions to international human rights treaties must be interpreted restrictively: ECtHR, *Klass v. Germany*, at para. 42 (1978); ECtHR, *Winterwerp v Netherlands*, at para. 37 (1979). See also, UNHCR, *Note on Expulsion of Refugees* (EC/SCP/3), 24 August 1977, at para. 4: <https://www.refworld.org/docid/3ae68cbf14.html>; and Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires Analyzed with a Commentary* by Dr. Paul Weis, at 342 (Cambridge University Press, 1995).

2. *The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.*

3. *The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.*

Material scope of Article 32

11. Article 32 of the 1951 Convention applies to any measure which obliges the refugee to leave the territory of a Contracting State including, for example, removal based on an expulsion order, but also a residence ban which means that the person concerned is obliged to leave the territory of the host State.¹⁷ The decision to impose such a measure would need to be taken by a judicial or an administrative authority.¹⁸
12. Article 32 does not, however, permit the expulsion of a refugee to the country of origin or, in the case of a stateless person, the country of former habitual residence, or any other country where the individual concerned would be at risk of persecution, or from where he or she risks being sent on to a threat of persecution. UNHCR emphasizes that Article 32 is not an exception to the principle of *non-refoulement*; it does not permit expulsion of a refugee to his/her country of origin, or any other country where the individual concerned would be at risk of persecution, or from where he or she risks being sent on to a threat of persecution. In other words, removal of a refugee to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion is permitted only in the exceptional circumstances specified in Article 33(2) of the 1951 Convention.¹⁹

Personal scope of Article 32

13. The protection against expulsion under Article 32 of the 1951 Convention applies to refugees who are lawfully in the territory of the host State, that is, those whose presence in the country is lawful under applicable national legislation, even if they are authorized to remain only on a temporary basis.²⁰ In UNHCR's view, the scope of Article 32 should also be extended to asylum-seekers without stable immigration status, including those without visas, but who have been admitted into national RSD procedures and may

¹⁷ *Ibid.*, at p. 322

¹⁸ *Ibid.*, As noted by Paul Weis, a leading refugee law scholar who was a delegate for the International Refugee Organization during the drafting of the 1951 Convention, the decision to expel may not be made simply by a police officer.

¹⁹ See paragraphs 29-39.

²⁰ Taking into consideration the objective and purpose of the Convention, the term "lawful in" should be interpreted in a liberal and flexible manner, as to include a presence which is "known and not prohibited." UNHCR, "Lawfully Staying" – A Note of Interpretation, 3 May 1988, paras. 21, 23 and 24, <https://www.refworld.org/docid/42ad93304.html>

therefore be considered as “authorized” to be present in the territory of the country of asylum.²¹

Grounds for expulsion under Article 32

14. Under Article 32 of the 1951 Convention, the expulsion of a refugee is prohibited save for reasons of national security or public order.

(i) For a threat to “national security” to justify expulsion, similar considerations apply as in the context of the “security of the country” exception to the principle of *non-refoulement* under Article 33(2). As elaborated below (in paragraph 31), this would require acts of a serious nature threatening, directly or indirectly, the government, integrity, independence or external peace of the country of asylum.²² Vague possibilities in the future cannot qualify as threats against national security under the Article 32.²³

(ii) The concept of “public order” should likewise be subject to a narrow interpretation and limited to cases of commission of serious crimes or conduct. It does not include broader causes which may be applicable to aliens in general, such as, for example, indigence, illness or disability.²⁴ Expulsion may be justified for reasons of public order if a refugee has committed or been convicted of certain serious crimes where such crimes are considered to be violations of public order in the country concerned.²⁵ Yet the concept of public order as used in Article 32 of the Refugee Convention does not automatically justify the expulsion of any refugee who has committed or been convicted for a crime, however serious. A separate finding is required to the effect that the continued presence of the offender is prejudicial to the maintenance of public order.²⁶ On the other hand, the public order ground under Article 32 is not limited to criminal conduct; other serious concerns may also form the basis of a decision to expel, albeit only in very grave cases.²⁷

Application of expulsion under Article 32

²¹ See J. Hathaway, *The Rights of Refugees under International Law*, 2nd ed., Cambridge University Press, Cambridge (2021), at pp. 196-212.

²² Atle Grahl-Madsen, *Commentary to Article 32, Commentary on the 1951 Refugee Convention (Articles 2-11, 13-37)*, published by UNHCR, Geneva 1997: <http://www.unhcr.org/refworld/docid/4785ee9d2.html> at p. 121; Ulrike Davy, Article 32, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (ed. A. Zimmermann), pp.1309-1310.

²³ U. Davy, *ibid.*

²⁴ P. Weis, note 16 above, at p. 332.

²⁵ Many crimes or offences will not be serious enough to warrant such a measure. The drafters of the 1951 Convention were concerned that only crimes which affect the internal peace and stability of States should be seen as serious enough to warrant the expulsion of a refugee under what was to become Article 32 of the 1951 Convention. See J. Hathaway, note 21 above, pp. 844-856.

²⁶ A. Grahl-Madsen, note 22 above, at p. 124, where it is recalled that “[t]aking into consideration that refugees as a rule had nowhere to go, once they were expelled, it was obviously the intention of the drafters that expulsion should only be resorted to in those extreme cases where the continued presence of the refugee would to some extent upset the very equilibrium of society.” and p. 129, where the maintenance of public order is described as “the preservation of peace and tranquility in the society at large”.

²⁷ *Ibid.*, at pp. 121-124.

15. UNHCR underlines that Article 32 of the 1951 Convention also contains procedural guarantees, without prejudice to other rights and principles of due process provided by international and domestic laws. The reference to “due process of law” in Article 32(2) does not preclude either judicial or administrative procedures, as long as they are prescribed by law and abide by basic standards of fairness and justice, both procedurally and substantively. “Due process of law” generally entails that such a decision must be made in accordance with the law and the procedural guarantees associated with basic standards of fairness, in particular equality before courts and tribunals and the right to a fair hearing.²⁸ In the context of refugee protection, this term has also a fundamentally substantial dimension which means that the expulsion decision “must be based on law, that it may not be unreasonable, arbitrary or capricious and must have a real and substantive relation to its object”.²⁹
16. Article 32(2) provides refugees with the following specific guarantees: the right to submit evidence to clear themselves, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority. Pursuant to Article 32(2) of the 1951 Convention, the host State may be exempted from observing the specific requirements of procedural fairness listed in that provision only if this is required due to compelling reasons of national security.
17. Article 32(3) requires the host State to allow a refugee whom it intends to expel reasonable time within which to seek legal admission to another country. This specific procedural safeguard also reflects the requirement that the expulsion of a refugee is considered a measure of last resort, only applicable if other measures, such as prosecution or imprisonment in the country of refuge, are unavailable or insufficient to address the security risks. Article 32(3) also provides that the host state may apply internal measures which are deemed necessary for expulsion of a refugee. While such measures may include detention, such detention must be exceptionally resorted to where it was determined that it is necessary in an individual case and otherwise meets international standards. It must be reasonable in all circumstances, proportionate to a legitimate purpose, non-discriminatory, and subject to judicial oversight.³⁰ Indefinite detention is *ipso facto* arbitrary as a matter of international human rights law,³¹ and if it is found that deportation of a detainee is impossible or impracticable, the detainee should be released immediately.³²

²⁸ See UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32: <https://www.refworld.org/docid/478b2b2f2.html>, in particular, para. 62.

²⁹ P. Weis, note 16 above, at p. 332.

³⁰ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012: <https://www.refworld.org/docid/503489533b8.html>, para. 30.

³¹ *Ibid.*, para. 44.

³² See, for example, ECtHR, *M.S. v. Belgium*, Application NO. 50012/08, 31 January 2012, where the Court found that detention ordered solely for reasons of national security when deportation is impossible is in violation of the Article 5.1 of the European Convention on Human Rights which guarantees the fundamental right to liberty and security of person. These fundamental rights are also guaranteed in Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). In its General Comment No. 8 (1982) on Article 9, the Human Rights Committee (HRC) made it clear that Article 9(1) “is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as ... immigration control etc.” HRC, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982, No. 8, para. 1, <http://www.refworld.org/docid/4538840110.html>.

18. In light of the overriding human rights purpose of the 1951 Convention, as well as the extremely serious consequences of expulsion for a refugee, the circumstances in which expulsion might be appropriate in the context of “national security” or “public order” under Article 32(1) of the 1951 Convention must be interpreted restrictively. Due consideration should be given to the general situation of a refugee that differentiates him/her from other persons, including the below:³³
1. Refugees do not have a home country to which they can return and therefore their expulsion may have particularly severe consequences;
 2. Refugees are uprooted individuals in an alien and unfamiliar environment, and consequently may encounter challenges of adaptation and integration;
 3. The expulsion of refugees may result in great hardship for any close family members residing with them, further justifying a restrictive interpretation of the circumstances in which expulsion might be appropriate; and
 4. The expulsion of a refugee can be regarded as an "additional" punishment to which a national of the country committing the same offence would not be liable. This is particularly true in case of detention prior to expulsion of a refugee. Such detention may be much more prolonged than for other persons who are returning to their country of nationality,³⁴ giving rise to concerns of human rights violations.

Principle of non-refoulement under international refugee law and human rights law

19. The principle of *non-refoulement* – the obligation of States not to expel or return a refugee to territories where his or her life or freedom would be threatened – is the cornerstone of international refugee law³⁵ and constitutes a fundamental principle from which no derogation is permitted.³⁶ It is most prominently expressed in Article 33(1) of the 1951 Convention which provides that:

“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.”³⁷

Material scope of Article 33(1)

³³ UNHCR, *Note on Expulsion of Refugees*, note 16 above, para. 5.

³⁴ *Ibid.*

³⁵ See Elihu Lauterpacht and Daniel Bethlehem, “*The Scope and Content of the principle of non-refoulement: Opinion*”, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), pp. 87–177. 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, <https://www.refworld.org/docid/45f17a1a4.html> and UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, <https://www.refworld.org/docid/438c6d972.html>.

³⁶ Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. See also, UNHCR, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSPP/2001/09, para. 4, <https://www.refworld.org/docid/3d60f5557.html>.

³⁷ While Article 33(2) of the 1951 Convention foresees exceptions to the principle of *non-refoulement*, other international human rights law and most regional refugee instruments set forth an absolute prohibition of *refoulement*, without exceptions of any sort, as elaborated in paragraphs 26-28.

20. The prohibition of return to a danger of persecution under international refugee law is applicable to expulsion as well as any other form of forcible removal, including deportation, extradition, informal transfer or renditions. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return “in any manner whatsoever”. The prohibition of *refoulement* under this provision precludes the expulsion or return of a refugee to their country of origin or, in the case of a refugee who is stateless, the country of former habitual residence; or to any place where they would be at risk of persecution on account of one or more 1951 Convention grounds; or to any place from where they risk being sent to such a risk.³⁸
21. Under Article 33(1), States have a duty to ensure, prior to implementing any removal measure to the country of origin or any third country, that the person whom it intends to remove from its territory or jurisdiction is not at risk of persecution, serious human rights violations or other serious harm. States have a duty to inquire into the reasons an individual seeks protection including, where relevant, prior to the execution of a removal order.³⁹
22. The principle of *non-refoulement* also applies to measures which amount to rejection or non-admittance at the frontier. The travaux préparatoires show that the drafters of the 1951 Convention intended the *non-refoulement* provision to provide for protection against forcible removal to a risk of persecution, including through rejection at the border.⁴⁰ As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.⁴¹

Personal scope of Article 33

23. Under international refugee law, the principle of *non-refoulement* applies to any person who is a refugee under the 1951 Convention,⁴² that is, anyone who meets the inclusion criteria of Article 1A(2)⁴³ and does not come within the scope of one of its exclusion

³⁸ See UNHCR, *Note on Non-Refoulement*, note 35 above, para. 4. See also P. Weis, note 16 above, at pages 341-343, quoted in E. Lauterpacht and D. Bethlehem, note 35 above, at paragraph 124.

³⁹ ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para. 359, <http://www.refworld.org/docid/4d39bc7f2.html>. See also, *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and UNHCR (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras 56 and 64, www.refworld.org/docid/515010a52.html.

⁴⁰ See E. Lauterpacht and D. Bethlehem, note 35 above, at paras. 76-86.

⁴¹ The 1951 Convention and the 1967 Protocol do not set out procedures for the determination of refugee status as such. Yet it is generally recognised that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention outside the context of mass influx situations. See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, paras. 4–5. See also Executive Committee, Conclusions No. 81 (XLVIII) 1997, para. (h); No. 82 (XLVIII) 1997, para. (d)(iii); No. 85 (XLIX) 1998, para. (q); No. 99 (LV), 2004, para. (l). See also, P. Weis, note 16 above, p. 342.

⁴² Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term “refugee” shall apply to any person who “owing to a 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 [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it”.

⁴³ The declaratory nature of recognition of refugee status extends the scope of *non-refoulement* to all refugees, including those who have not formally been recognized as such but given other status or without statuses, and to asylum-seekers whose status has not yet been determined. See, UNHCR Handbook, note 7 above, para. 28. See also, *G v G*, [2021] UKSC 9, (19 March 2021): <http://www.bailii.org/uk/cases/UKSC/2021/9.html> at para 81, in which the Supreme Court of the United Kingdom stated: ‘Under the 1951 Geneva Convention recognition that an individual is a refugee is a declaratory act. The obligation not to refoule an

provisions.⁴⁴ Article 33 applies irrespective of whether or not the refugee is lawfully in the country. It provides protection not only in respect of return to the country of origin but also with regard to forcible removal to any other country where a person has reason to fear persecution related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to his or her country of origin.⁴⁵

Exceptions to the principle of non-refoulement

24. While Article 33 is non-derogable by virtue of Article 42(1) of the 1951 Convention, as no reservations are permitted, Article 33(2) nevertheless provides for exceptions to the principle of *non-refoulement* in the specific circumstances enumerated in Article 33(2). The exceptions to the *non-refoulement* provision are to be interpreted restrictively in light of the serious situation to which a refugee is returned as elaborated below.

The principle of non-refoulement of refugees under customary international law

25. Taken together, under international refugee law as well as international jurisprudence and regional refugee⁴⁶ and human rights instruments,⁴⁷ the principle of *non-refoulement* of refugees constitutes an essential binding and non-derogable component of international refugee protection. In addition to its enshrinement in these instruments, the principle of *non-refoulement* has also found expression in the constitutions and/or national legislation of a number of states,⁴⁸ as well as supported by state practice,⁴⁹ In UNHCR's view, it has attained the status of customary international law.⁵⁰ The fundamental and non-derogable

individual arises by virtue of the fact that their circumstances meet the definition of "refugee", not by reason of the recognition by a Contracting State that the definition is met.'

⁴⁴ These are: the first paragraph of Article 1D (which applies to persons who are receiving protection or assistance from a UN agency other than UNHCR), Article 1E (which applies to those recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality), and Article 1F (which applies to those for whom there are serious reasons for considering that they have committed certain serious crimes or acts).

⁴⁵ UNHCR, *Note on Non-Refoulement*, note 35 above, para. 4. See also E. Lauterpacht and D. Bethlehem, note 35 above, at paragraph 124.

⁴⁶ See Article III(3) of the *Bangkok Principles* concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966, which states that: "No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory." Similarly, the principle of non-refoulement is set out in Article II (3) of the Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* and in the *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*.

⁴⁷ In the Americas, the principle of *non-refoulement* is enshrined in Article 22(8) of the *American Convention on Human Rights*. It provides that: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions." The European Court of Human Rights has held that *non-refoulement* is an inherent obligation under Article 3 of the *European Convention on Human Rights*. See, for example, *Chahal v. The United Kingdom*, 70/1995/576/662, ECtHR, 15 November 1996, <https://www.refworld.org/cases/ECHR.3ae6b69920.html>; *T.I. v. The United Kingdom*, Appl. No. 43844/98, ECtHR, 7 March 2000, <https://www.refworld.org/cases/ECHR.3ae6b6dfe.html>.

⁴⁸ *Note on the Principle of Non-Refoulement*, note 35 above, para. 11.

⁴⁹ *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, note 35 above.

⁵⁰ See UNHCR, *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 in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994: <http://www.unhcr.org/refworld/docid/437b6db64.html>; UNHCR, *Note on the Principle of Non-Refoulement* note 35 above; *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, note 35 above, pages 7-8. See also UNHCR, 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, HCR/MMSP/2001/09, 16 January 2002, at preamble para. 4:

character of the principle of *non-refoulement* has also been reaffirmed by UNHCR's Executive Committee ("ExCom")⁵¹ in numerous ExCom Conclusions.⁵²

The principle of non-refoulement under international human rights law

26. Even where it is determined that an individual is subject to exceptions to *non-refoulement* under the 1951 Convention – expressly provided in Article 33(2) and elaborated below – it is important to note that *non-refoulement* obligations may arise from international human rights law. International human rights law complements international refugee law.⁵³
27. A number of international human rights treaties provide for the absolute prohibition against *refoulement*, regardless of a person's nationality or legal status (including one's recognized refugee status). Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") explicitly prohibits the return of a person to another state where there are substantial grounds for believing the person would be at risk of being subjected to torture. Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee also encompasses the obligation not to extradite, deport, expel or otherwise remove a person from a State's territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the ICCPR, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁵⁴ The prohibition of torture and arbitrary deprivation of life, which inherently includes the prohibition of *refoulement* to risk thereof, is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens*.⁵⁵

<http://www.unhcr.org/refworld/docid/3d60f557.html>; Zaoui v. Attorney General, (No 2) [2005] 1 NZLR 690, 30 September 2004 (New Zealand Court of Appeal), paras. 34 and 136: <http://www.unhcr.org/refworld/docid/49997af11a.html>. See also E. Lauterpacht and D. Bethlehem, note 35 above, at paras 193-219. In the view of the Inter-American Court of Human Rights, the principle of *non-refoulement* should be observed as a norm of *jus cogens*. See *Advisory Opinion OC-21/14*, para. 211. See also Conclusion III(5): Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984: <http://www.refworld.org/docid/3ae6b36ec.html>.

⁵¹ ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of persons in need of international protection. At present, 107 States are Members of the Executive Committee, including the Republic of Korea which joined in 2000: www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html.

⁵² See ExCom Conclusions No. 25(b); No. 29(c); No. 50(g); No. 52(5); No. 55(d); No. 62(a)(iii); No. 65(c); No. 68(f); No. 71 (g); No. 74(g); No. 77(a); No. 81(h); No. 82(d)(i); No. 85(q); No. 91(a); No. 94(c)(i); No. 99(1); No. 103(m); and No. 108(a).

⁵³ Article 5, 1951 Convention.

⁵⁴ HRC, General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant (2004), UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, para. 12. It should be noted that the HRC lists violation of Articles 6 and 7 of the ICCPR as non-exhaustive examples of violation of rights that would trigger non-refoulement obligations. Similarly, in its General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin, U.N. Doc. CRC/GC/2005/6, 1 September 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[...] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment and right not to be arbitrarily deprived of liberty] of the Convention." (para. 27).

⁵⁵ See, for example, HRC, General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8

28. Therefore, when states are bound by the duty of *non-refoulement* beyond the 1951 Convention, removal pursuant to Article 33(2) of the 1951 Convention may not be implemented,⁵⁶ regardless of considerations of any public interest favouring removal.

Exceptions to non-refoulement provided under the Article 33(2) of the 1951 Convention

29. Article 33(2) of the 1951 Convention provides for the exceptional loss of protection against *refoulement* in circumstances expressly enumerated therein. Article 33(2) stipulates that:

The benefit of [Article 33(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 [or she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

30. Article 33(2) of the 1951 Convention exhaustively enumerates the circumstances in which the application of an exception to the obligation of *non-refoulement* may be permissible: (1) where there are “reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is”, or (2) where the refugee, “having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

“Security of the country” exception

31. For the “danger to the security of the country” exception to apply, there must be an individualized finding that the refugee poses a current or future danger to the national security of the host country.⁵⁷ The danger envisaged must be very serious, rather than of a lesser order.⁵⁸ Generally, the “danger to security of the country” exception may be invoked in cases of acts of a serious nature, which endanger directly or indirectly the constitution, territorial integrity, independence or external peace of the host country.⁵⁹ The burden is on the state authorities to provide reliable and credible evidence on whether there exist “reasonable grounds” for regarding a refugee as a present or future danger to the security of the country.

“Danger to the community” exception

⁵⁶ See, for example, Supreme Court of Canada, *Suresh v. Canada* [2002] 1 SCR 3; Human Rights Committee, *Ahani v. Canada*, UNHRC Comm. No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, 29 Mar 2004; *UNHCR intervention before the Supreme Court of Canada in the case of Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of Canada (Respondents)*, 8 March 2001, <https://www.refworld.org/docid/3e71bbe24.html>.

⁵⁷ *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, note 35 above; *UNHCR Note on Diplomatic Assurance and International Refugee Protection*, August 2006, <https://www.refworld.org/docid/44dc81164.html> at para 12.

⁵⁸ See A. Grahl-Madsen, note 22 above, at para. 8.

⁵⁹ *Ibid.*, pp 233-236; UNHCR intervention before the Supreme Court of Canada in the case of Suresh, note 56 above, at pp. 16-17. Also see Walter Kälin, who notes that the exception covers such conduct as “attempts to overthrow the government of the host State through violence or otherwise illegal means, activities against another State which may result in reprisals against the host State, acts of terror and espionage.” Walter Kälin, *Das Prinzip des Non-refoulement*, Europäische Hochschulschriften Bd./Vol. 298, at 131 (Bern, Frankfurt am Main: Peter Lang, 1982) (unofficial translation from the German original).

32. For the “danger to the community” exception to apply, not only must the refugee in question have been convicted of a crime of a very serious nature, but it must also be established that the refugee, in light of the crime and conviction, constitutes a very serious present or future danger to the community of the host country.
33. Although Article 33(2) does not specifically list the crimes of “particularly serious” nature, UNHCR notes that the term “crime” is doubly qualified by the terms “particularly” and “serious”, thereby emphasizing the high degree of gravity required for the crime to meet the exception.⁶⁰ The severity of crimes should be judged based on international standards, not simply by its categorization of the Contracting State or the nature of the penalty.⁶¹ Rather, the application of the term “particularly serious crime” in the context of an exception to *non-refoulement* must be based on a thorough examination of all factors related to crime. These factors include, at a minimum, the nature of the act, the actual harm inflicted, the intention of the perpetrator and the circumstances of the crime, the nature of penalty imposed, and whether most jurisdictions would consider it a particularly serious crime.⁶²
34. UNHCR submits that even if the crime committed is ordinarily considered to be of a grave nature, other extenuating relevant factors and circumstances, including the extent of actual harm, intention or mental state⁶³ of the perpetrator, circumstances surrounding and leading to the crime must be considered in a comprehensive manner, before determining whether the crime is a “particularly serious crime”.
35. The fact that a person has been convicted, in a final judgment, of a particularly serious crime does not of itself entail that they also meet the “danger to the community” requirement. Instead, the host State must demonstrate that the person who has committed a “particularly serious” crime, additionally poses a current and future danger to the community. Whether a person constitutes a “danger to the community” must be established in each individual case and will depend on the nature and circumstances of the particular crime and other relevant factors.⁶⁴
36. UNHCR emphasizes that the “danger to the community” exception pursuant to Article 33(2) is concerned with the risks associated with the refugee’s continued presence in the community in which he or she has taken refuge; as such, the decisive factor for determining whether the exception should apply is the future danger posed to the

⁶⁰ E. Lauterpacht and D. Bethlehem, note 35 above, at para. 186. See also, *UNHCR Intervention before the United States Court of Appeals for the Ninth Circuit in the case of Delgado v. Holder; Attorney General*, 16 October 2020, <https://www.refworld.org/docid/4cbdb45d2.html>, at p. 15.

⁶¹ UNHCR, *Criminal Justice and Immigration Bill Briefing for the House of Commons at Second Reading*, July 2007, <https://www.unhcr.org/uk/576d237f7.pdf> at pp.3-4.

⁶² *UNHCR Intervention before the US Court of Appeals for the Ninth Circuit in the case of Delgado* note 60 above, at p.17.

⁶³ See, for example, *Betkoshabeh v. Minister for Immigration and Multicultural Affairs*, (1998) 157 ALR 95, at para. 102, that found that the authorities in considering the ‘particular serious’ nature of the crimes “should have considered the extent to which the psychological illness reduced the moral culpability of the appellant.”

⁶⁴ See *UNHCR Intervention before the Supreme Court of the United States in the case of Ahmed Ali v. Deborah Achim, Michael Chertoff, Secretary of the Department of Homeland Security, and Michael Mukasey, Attorney General*, November 2007: <https://www.refworld.org/docid/47503a952.html>, at pp. 18-22.

community by the refugee rather than the seriousness or categorization of the crime that the refugee has committed. The conviction for a particularly serious crime is a threshold requirement for application of this exception; however, the key inquiry is whether the individual poses a present and future threat to the community of refuge.⁶⁵

Application of Article 33(2)

37. The removal of a refugee in application of one of the exceptions provided for in Article 33(2) of the 1951 Convention is lawful only if it is necessary and proportionate. This means that the host State must demonstrate that (1) there must be a rational connection between the removal of the refugee and the elimination of the danger resulting from their presence for the security or community of the host country; (2) *refoulement* must be the last possible resort for eliminating the danger to the security or community of the host country (i.e. if less serious measures, including, for example, expulsion to a third country where there is no risk of persecution would be sufficient to remove the threat posed by the refugee to the security or the community of the host country, *refoulement* cannot be justified under Article 33(2)); and (3) such danger must outweigh risks of *refoulement*, taking into account the degree of persecution feared – if the individual is likely to face severe persecution, the danger then must be very serious to justify the return.⁶⁶
38. The application of the exceptions to the principle of *non-refoulement* should be subject to strict procedural guarantees. At a minimum, these should be the same as the procedural safeguards required for expulsion of refugees lawfully in the territory under Article 32 of the 1951 Convention.⁶⁷
39. The provisions of Article 33(2) of the 1951 Convention do not affect the host State's non-refoulement obligations under international human rights law, which permit no exceptions. Thus, the host State would be barred from removing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture or other serious human rights violations.⁶⁸

Conclusion

40. In summary, UNHCR submits that:

- The principle of *non-refoulement* constitutes an essential binding and non-derogable component of international refugee law. Under international refugee law, the responsibility of a State to protect a refugee from *refoulement* is engaged whenever expulsion or other forms of removal would expose that person to a risk of being subject to persecution in their

⁶⁵ *Ibid.*, at pp. 18-19.

⁶⁶ UNHCR, *Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees*, 6 January 2006, <https://www.refworld.org/docid/43de2da94.html> at pp. 7-8.

⁶⁷ *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, note 57 above; E. Lauterpacht and D. Bethlehem, note 35 above, at para. 159. See also paras 16-17 above.

⁶⁸ See above at paras 26-28.

country of origin or habitual residence, or any other country where they may face such a risk.

- Pursuant to Article 32 of the 1951 Convention, a refugee who is lawfully in the territory of the host State may not be expelled except on grounds of “national security” or “public order”, albeit not to a country where they would face a risk of persecution. The grounds for expulsion under this provision should be interpreted restrictively.
- International refugee law permits exceptions to the principle of *non-refoulement* only in the circumstances exhaustively enumerated in Article 33(2) of the 1951 Convention.
 - In order for the “danger to the security of the country” exception to apply under Article 33(2) of the 1951 Convention, there must be an individualized finding that the refugee poses a current or future danger of a very serious degree to the national security of the host country.
 - As for the “danger to the community” exception to be triggered, it should be determined whether a “particularly serious” crime was committed, through an examination of all factors related to the crime, as well as consideration of the high degree of gravity of the crime. In case the crime committed is determined to be “particularly serious”, it must be assessed whether the individual continues to constitute a present or future danger to the community.
- The principle of proportionality must be observed in any expulsion or removal of a refugee in application of Article 32 or Article 33(2), taking into due consideration the exceptional nature of such measures.
- The application of Article 33(2) is without prejudice to the host State’s *non-refoulement* obligations under international human rights law which provide for an absolute prohibition against *refoulement*, notably where expulsion or other forms of removal would expose the person concerned to a risk of torture or arbitrary deprivation of life.

UNHCR
14 March 2022