



Submission by the Office of the United Nations High Commissioner for Refugees in the case of 2020KuDan17245 before the Seoul Administrative Court

Introduction

1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR”)¹ in relation to case 2020KuDan17245, 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*

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 its [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>.

⁶ *Ibid.*

Refugees (“UNHCR Handbook”),⁷ which was subsequently complemented by a number of *Guidelines on International Protection*.⁸

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 of 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.

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 See in particular, UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention* (“GIP No. 10 - Military Service”), 12 November 2014, www.refworld.org/docid/529ee33b4.html, and UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention* (“GIP No. 12 - Conflict and Violence”), 2 December 2016, www.refworld.org/docid/583595ff4.html.

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 10 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.

6. The appellant is a national of Yemen whose refugee claim is based on a risk of forced recruitment, and other forms of mistreatment by both the Houthi armed forces and the government forces in the context of ongoing armed conflict and violence in Yemen. The appellant's refugee status application was rejected by the Ministry of Justice on 23 October 2019, on the grounds that (1) alleged fear of persecution in the context of civil war and forced recruitment arises from extraordinary circumstances of civil war and does not constitute one or more of the 1951 Convention grounds; and (2) the appellant had not expressed his political or religious opinions or conducted activities in regards thereto against specific political or religious organizations in Yemen.
7. UNHCR submits this *amicus curiae* to provide neutral and expert information on the interpretation of the international refugee law concepts in order to assist the Seoul Administrative Court in its deliberations. In this submission, UNHCR presents its assessment of the protection needs of persons fleeing armed conflict and violence in Yemen, together with up-to-date country of origin information on the situation. It further provides its interpretation of individual and group-based risks in situations of armed conflict and violence, as well as forced recruitment by non-State armed groups, desertion therefrom and risk of imputed political opinion arising from the above actions. UNHCR also addresses the principle of *non-refoulement*. 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.

Assessment of the international protection needs of persons fleeing armed conflict and violence in Yemen

8. UNHCR acknowledges the difficulties decision-makers encounter in determining whether harm inflicted in situations of armed conflict and violence amounts to persecution, and whether it is linked to a Convention reason. In view of the ongoing armed conflict in Yemen, weak rule of law and the serious and widespread violations of international humanitarian law ("IHL") and violations as well as the abuse of human rights law committed by all parties to the conflict, UNHCR characterizes the flight of civilians from the country as a refugee movement, with many continuing to be in need of international protection. UNHCR's position on Returns to Yemen, published in April 2015, remains valid.¹⁶ All persons from Yemen meeting the criteria for refugee status under the 1951 Convention should receive international protection. For those who do not, the suspension of forcible returns of nationals to Yemen should serve as a minimum standard.¹⁷
9. Further and updated country of origin information on the situation in Yemen can be found in the annex to this submission.

¹⁶ UNHCR Position on Returns to Yemen, April 2015, www.refworld.org/docid/5523fdf84.html, in particular paras 8 and 9.

¹⁷ *Ibid.*

Persecution in situations of armed conflict and violence

10. In accordance with the ordinary meaning to be given to the terms in their context and in light of the object and purpose of the 1951 Convention, Article 1A (2)¹⁸ applies to persons fleeing situations of armed conflict and violence. The 1951 Convention makes no distinction between refugees fleeing in peacetime or wartime. The analysis required under Article 1A (2) focuses on a well-founded fear of being persecuted for one or more of the Convention grounds.¹⁹
11. In situations of armed conflict and violence, an applicant may be at risk of being singled out or targeted for persecution. Equally, in such situations, entire groups or populations may be at risk of persecution, leaving each member of the group at risk.²⁰ The fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim,²¹ nor is the size of the group relevant. The test is whether an individual's fear of being persecuted is well-founded. At times, the impact of a situation of armed conflict and violence on an entire community, or on civilians more generally, *strengthens* rather than weakens the well-founded nature of the fear of being persecuted of a particular individual.²²
12. In situations of armed conflict and violence, whole communities may be affected by, and be at risk from, aerial bombardments, the use of cluster munitions, barrel bombs or chemical weapons, artillery or sniper fire, improvised explosive devices, landmines, car bombs or suicide bombers, or siege tactics, for example. The systematic denial of food and medical supplies, the cutting of water supplies and electricity, the destruction of property or the militarization or closure of hospitals and schools may also constitute serious human rights or IHL violations that affect whole communities.²³ Exposure to such actions can

¹⁸ Article 1A(2) defines a refugee as a person: "owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is 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." The same definition is set out in Article 2 (1) of the Refugee Act of the Republic of Korea: Law No 14408 of 2016, Refugee Act, enacted in 2012 and most recently amended in 2016.

¹⁹ UNHCR, *GIP No. 12 - Conflict and Violence*, para. 10.

²⁰ *Ibid.*, para. 17.

²¹ UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001: www.refworld.org/docid/3b20a3914.html, para. 20.

²² UNHCR, *GIP No. 12 - Conflict and Violence*, para. 17. According to the European Court of Human Rights: "in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion"; *F.G. v Sweden*, Application No. 43611/11, European Court of Human Rights, 23 March 2016: www.refworld.org/docid/56fd485a4.html, para. 126.

²³ Relevant criteria to assess the intensity of a conflict were formulated in *AM & AM (Armed Conflict: Risk Categories) Somalia v. Secretary of State for the Home Department*, [2008] UKAIT 00091, United Kingdom: Immigration Tribunal/Immigration Appellate Authority, 27 January 2009, www.refworld.org/docid/4934f7542.html and repeated by the European Court of Human Rights in *Sufi and Elmi v. United Kingdom*, 28 June 2011, www.refworld.org/docid/4e09d29d2.html, para. 241 and *L.M. and Others v. Russia*, 15 October 2015, www.refworld.org/docid/561f770f4.html, para. 121.

amount to persecution within the meaning of Article 1A (2) of the 1951 Convention, either independently or cumulatively.²⁴

13. The UNHCR Handbook also confirms this in stating that in addition to the personal experiences of the applicant, it is important to take into account the experiences of others similarly situated. “What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded.”²⁵
14. The logic of denying refugee status to those affected by an armed conflict which itself engages or is driven by a Convention ground can lead to absurd situations.²⁶ To illustrate why such an approach is flawed, leading refugee law scholars have cited the example of a situation of armed conflict and violence which becomes genocidal, and where, according to the logic above, no persons would be eligible for refugee status.²⁷ In UNHCR’s view, the fact that the violence prevailing in a country is generalized and widespread is often erroneously used against finding a nexus between a well-founded fear and a 1951 Convention ground.

Forced recruitment by non-State armed groups, desertion therefrom, and imputed political opinion

15. In a situation of armed conflict and violence, persecution may emanate from State or non-State actors, and from one or more sides involved in the situation of armed conflict and violence.²⁸ Refugee status can be warranted in the case of persons at risk of harm from actors on one or both sides of conflict and violence.²⁹ In the particular context of non-international armed conflict, special consideration would need to be given to the applicant’s profile, and whether he or she was recruited into and/or participated in activities of a non-State armed group considered to be in opposition to the government, and any likely reprisals from the government. It would often be unreasonable to expect former non-State recruits to relocate into government-controlled territory in a situation of an ongoing conflict,³⁰ especially if the conflict has religious or ethnic dimensions.³¹
16. In countries undergoing civil war or generalized violence, threat of forced recruitment by coercion or by force often emanates from non-State armed groups³² who are not lawfully

²⁴ UNHCR, *GIP No. 12 - Conflict and Violence*, para. 18.

²⁵ UNHCR Handbook, para. 43.

²⁶ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (3rd ed. 2007), p. 128.

²⁷ *Ibid.*

²⁸ UNHCR Handbook, para. 65; *GIP No. 12 - Conflict and Violence*, para. 28; *GIP No. 10 - Military service*, para. 52.

²⁹ *Ibid.*, *GIP No. 12 - Conflict and Violence*, para. 28.

³⁰ See paragraph 11 above, and the country of origin information regarding the situation in Yemen contained in the annex.

³¹ UNHCR, *GIP No. 10 - Military Service*, para. 61.

³² UNHCR, *GIP No. 10 - Military Service*, para. 42.

entitled to recruit.³³ A person seeking international protection due to fear of forced recruitment in this context will be eligible for refugee status, provided the other elements of the refugee definition are established.³⁴ It is foremost necessary to review whether and the extent to which the State is unable and/or unwilling to provide protection against such recruitment.³⁵

17. In assessing the State's ability and/or willingness to provide protection against forced recruitment by non-State armed groups, it is necessary to examine the specific context of the country of origin, including, *inter alia*, whether the State exercises effective control over the area where the non-State armed groups conduct forced recruitment, and whether effective methods of redress are available through the State structure.³⁶
18. In some circumstances, a State may be prevented from extending protection to affected populations, for example in cases where it has lost control over its territory and population or where such control is fluid or uncertain.³⁷ In such cases, it would be inappropriate to equate the exercise of a certain administrative authority and control over territory by international organisations or non-State actors with national protection provided by a State.³⁸
19. Without effective protection from the State, well-founded fear of persecution arising from forced recruitment by non-State armed groups and desertion therefrom may be established, if such fear is related to one or more of the grounds specified in the refugee definition in Article 1A(2) of the 1951 Convention. Of particular importance in this *amicus* submission, where the appellant was denied refugee status based on various grounds including the lack of specific expression of political opinion or political activities, is the imputed political opinion arising from the context of forced recruitment and desertion therefrom.
20. Under the Convention ground of political opinion, it must be shown that the applicant has a well-founded fear of being persecuted for holding certain political opinions, or because the holding of such opinions has been attributed to him or her.³⁹ The refugee definition does not require applicants to describe their beliefs or conduct as political for them to be considered political opinions for purposes of protection provided by the 1951 Convention.

³³ UNHCR, *GIP No. 10 - Military Service*, paras 7 and 35. See also, paragraph 11 above, and the country of origin information regarding the situation in Yemen contained in the annex.

³⁴ UNHCR, *GIP No. 10 - Military Service*, para. 35.

³⁵ UNHCR, *GIP No. 10 - Military Service*, paras 35 and 43; UNHCR, *GIP No. 12 - Conflict and Violence*, para. 30.

³⁶ UNHCR, *GIP No. 10 - Military Service*, paras. 44-45.

³⁷ UNHCR, *GIP No. 10 - Military Service*, para. 30. See also, paragraph 9 above, and the country of origin information regarding the situation in Yemen contained in the annex.

³⁸ UNHCR, *GIP No. 12 - Conflict and Violence*, para. 41.

³⁹ UNHCR Handbook, para. 28. 'Political opinions' also includes political neutrality or not having a political opinion. See *RT (Zimbabwe) and others v Secretary of State for the Home Department*, where the UK Supreme Court found that the right to not hold a political opinion is equally important. "I can see no basis in principle for treating the right to hold and not to hold political beliefs differently. Article 10 of the ECHR provides that everyone has the right to freedom of expression and that this right 'shall include freedom to hold opinions.' That must include the freedom not to hold opinions." [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012: www.refworld.org/cases,UK_SC,500fdacb2.html, para 36.

In UNHCR's view, the concept of political opinion should be understood in a broad sense, to incorporate "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged".⁴⁰

21. The concept of imputed political opinion has been analysed and accepted by a number of the highest and appellate courts in various jurisdictions. The Supreme Court of Canada, in *Canada (Attorney General) v. Ward*, held that the political opinion at issue need not have been expressed outright; it can be perceived or imputed. Furthermore, imputed political opinion need not necessarily conform to the claimant's true beliefs; what is relevant is the perception of the persecutor. The Court, finding that persecution from imputed political opinion may include cases "where the State is not an accomplice to the persecution but is simply unable to protect the claimant,"⁴¹ accepted the plaintiff's well-founded fear of persecution arising from his association and later disassociation with a domestic paramilitary group.
22. The Supreme Court of the United Kingdom has also addressed the issue and found: "the principle is not in doubt that an individual may be at risk of persecution on the grounds of imputed opinion".⁴² The United Kingdom Upper Tribunal in *MSM (Somalia) v. Secretary of State for the Home Department* cited the words of Article 10(1) (e) of the Qualification Directive, stating that "The concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant" and concluded that "[t]hese words embrace the twin concepts of actual and imputed political opinion. Both are protected."⁴³
23. In situations of armed conflict and generalized violence, expressing objections or taking a neutral or indifferent stance to the strategies, tactics or conduct of parties or refusing to join, support, financially contribute to, take sides or otherwise conform to the norms and customs of the parties involved in the situation may – in the eyes of the persecutor – be considered critical of the political goals of the persecutor.⁴⁴ It may furthermore be seen as deviating from religious or societal norms or practices. As such, such actions or lack thereof might indicate or create the perception in the eyes of the persecutor that the person holds a different political opinion, religious (or non) belief, or affiliation with or belonging to an ethnic or social group.⁴⁵ In such a case, the perception of the persecutor is sufficient to satisfy the causal link between the fear of persecution and the Convention ground of

⁴⁰ UNHCR, *GIP No. 1- Gender*, para. 32, UNHCR, *GIP No. 10 – Military service*, para. 52; UNHCR, *GIP No. 12 - Conflict and Violence*, para. 38.

⁴¹ *Canada (Attorney General) v. Ward*, note 9 above, at pages 746-747.

⁴² *RT (Zimbabwe) and others v Secretary of State for the Home Department*, note 60 above, para. 36.

⁴³ *MSM (journalists; political opinion; risk) Somalia v. Secretary of State for the Home Department*, [2015] UKUT 00413 (IAC), United Kingdom: Upper Tribunal, 30 July 2015, www.refworld.org/cases/GBR_UTIAC_55ba10194.html, para. 33.

⁴⁴ UNHCR, *GIP No. 12 – Conflict and Violence*, para. 37.

⁴⁵ *Ibid.*

political opinion (or one or more of the other grounds). Where the persecutor is a non-State armed actor, the causal link is established either where the persecutor harms the applicant for a Convention-related reason, *or* the State does not protect him or her for a Convention-related reason.⁴⁶

24. Therefore, asylum cases involving forced recruitment and desertion therefrom may be decided on the basis that there is a ‘nexus’ or causal link between the well-founded fear of being persecuted and the political opinion ground in the 1951 Convention. Depending on the facts, actions related to forced recruitment may be viewed through the prism of actual or imputed political opinion. In relation to the latter, the persecutors may interpret the individual’s refusal to participate in a conflict as a manifestation of political disagreement with their policies or an expression of support to their opposition. In this context, the act of desertion⁴⁷ may in itself be, or be perceived to be, an expression of political views.⁴⁸

Principle of non-refoulement

25. A person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the refugee definition. As such, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition but is recognized because he or she is a refugee. It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to asylum-seekers whose status has not yet been determined.⁴⁹ As was recently stated by the Supreme Court of the United Kingdom:

Under the 1951 Geneva Convention recognition that an individual is a refugee is a declaratory act. The obligation not to refoule an 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. For this reason a refugee is protected from refoulement from the moment they enter the territory of a Contracting State whilst the State considers whether they should be granted refugee status.⁵⁰

⁴⁶ UNHCR, *GIP No. 10 – Military service*, para. 48. See also, UNHCR, Guidelines on International Protection No.2: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002, www.unhcr.org/refworld/docid/3d36f23f4.html, para. 23.

⁴⁷ Desertion involves abandoning one’s duty or post without permission or resisting the call up for military duties. Depending on national laws even someone of draft age who has completed his or her national service and has been demobilized but is still subject to national service, may be regarded as a deserter under certain circumstances. Desertion can occur in relation to the police force, gendarmerie or equivalent security services, and is also the term used to apply to deserters from non-State armed groups. Desertion may be for reasons of conscience or for other reasons. UNHCR, *GIP No. 10 – Military Service*, para. 3.

⁴⁸ UNHCR, *GIP No. 10 – Military Service*, para. 52.

⁴⁹ UNHCR Handbook, para. 28. See also, ExCom Conclusion, No. 6 (XXVIII) - 1977, para. (c); ExCom Conclusion, No. 79 (XLVII) - 1996, paras. (i)(j); UNHCR, Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114), October 2017, www.refworld.org/docid/5a2ead6b4.html. On the status and involvement of Korea in ExCom, see note 87 *infra*.

⁵⁰ *G v G*, [2021] UKSC 9, United Kingdom: Supreme Court, 19 March 2021: www.bailii.org/uk/cases/UKSC/2021/9.html, para. 81.

26. UNHCR underlines that the responsibility of a State to protect a person from *refoulement* is engaged wherever its conduct exposes that person to a risk of being subjected to persecution or ill-treatment in another country, in particular if the person has expressed a fear of such, or the individual circumstances or characteristics of the person or group to which she belongs indicates a risk of which the State ought to be aware.⁵¹
27. The principle of *non-refoulement*, namely the obligation of States not to expel or return a person, in any manner whatsoever, to territories where his or her life or freedom would be threatened is the cornerstone of international refugee law,⁵² is most prominently expressed in Article 33 of the 1951 Convention which provides that:⁵³
- “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.”*⁵⁴
28. The principle of *non-refoulement* constitutes an essential binding and non-derogable component of international refugee protection⁵⁵ which has been restated in international and regional refugee⁵⁶ and human rights⁵⁷ instruments. In addition to its enshrinement in

⁵¹ See UNHCR's oral intervention before the European Court of Human Rights in the case of *Hirsi and Others v. Italy*, p. 4: <https://www.refworld.org/pdfid/4e0356d42.pdf> and in the case of *N.D. and N.T. v. Spain*, p. 6: <http://www.refworld.org/docid/5bb3873b4.html>.

⁵² 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, (2003) at 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: www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4 and UNHCR, *Note on the Principle of Non-Refoulement*, November 1997: www.unhcr.org/refworld/docid/438c6d972.html.

⁵³ Unlike some provisions of the 1951 Convention, Article 33 is not dependent on the lawful residence of a refugee in the territory of a Contracting State.

⁵⁴ While Article 33 (2) of the 1951 Convention foresees exceptions to the principle of *non-refoulement*, international human rights law and most regional refugee instruments set forth an absolute prohibition, without exceptions of any sort.

⁵⁵ 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.

⁵⁶ 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*, 22 November 1984: www.refworld.org/docid/3ae6b36ec.html.

⁵⁷ An explicit *refoulement* provision is contained in Article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which stipulates that no State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. 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. See Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 and General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. 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

these instruments, the principle of *non-refoulement* has also found expression in the constitutions and/or national legislation of a number of States. It is a norm of customary international law⁵⁸ and is consequently binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol.⁵⁹ The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed in numerous Conclusions of UNHCR's Executive Committee.⁶⁰

29. The prohibition of *refoulement* is applicable to any form of removal, including deportation, expulsion, extradition, informal transfer or 'renditions', as well as non-admission at the border. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (*refoulement*) 'in any manner whatsoever'.⁶¹ This wording should be understood as indicating that a wide range of State conduct, the categories of which do not fall into a closed list, may engage *non-refoulement* obligations.
30. Under the obligations forming part of *non-refoulement*, 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.⁶² States have a duty to inquire into the reasons an individual seeks protection including, where relevant, prior to the execution of a removal order.⁶³ "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

to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions" whereas 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.

⁵⁸ UNHCR, *Note on Non-Refoulement*, 23 August 1977, www.refworld.org/docid/3ae68ccd10.html, para. 11. See also Conclusion III(5): *Cartagena Declaration on Refugees*, note 78 above. This principle has also been confirmed by the Inter-American Court of Human Rights in *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, 19 August 2014, www.refworld.org/cases,IACRTHR,54129c854.html, para. 211 and *Advisory Opinion OC-25/18*, 30 May 2018, www.refworld.org/cases,IACRTHR,5c87ec454.html, para. 181.

⁵⁹ *Ibid*, *Advisory Opinion OC-21/14*, para. 211.

⁶⁰ The Executive Committee of the High Commissioner's Programme ("UNHCR's Executive Committee" or "ExCom") is an intergovernmental body currently comprised of 107 Member States of the United Nations and the Holy See. The Republic of Korea is an active member of ExCom. Chief among its duties, the ExCom advises UNHCR in the exercise of its protection mandate. See ExCom Conclusions No. 25 (XXXIII) 1982, (b); No. 29 (XXXIV) 1983, para. (c); No. 50 (XXXIX) 1988, para. (g); No. 52 (XXXIX) 1988, para. (5); No. 55 (XL) 1989, para. (d); No. 62 (XLI) 1990, para. (a) (iii); No. 65 (XLII) 1991, para. (c); No. 68 (XLIII) 1992, para. (f); No. 71 (XLIV) 1993, para. (g); No. 74 (XLV) 1994, para. (g); No. 77 (XLVI) 1995, para. (a); No. 81 (XLVIII) 1997, para. (h); No. 82 (XLVIII) 1997, para. (d)(i); No. 85 (XLIX) 1998, para. (q); No. 91 (LII) 2001, para. (a); No. 94 (LIII) 2002, para. (c)(i); No. 99 (LV) 2004, para. (1); No. 103 (LVI) 2005, para. (m); and No. 108 (LIX) 2008, para. (a).

⁶¹ 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, www.refworld.org/docid/45f17a1a4.html, para. 7.

⁶² UNHCR, *Submission by UNHCR in the case of A.S.N and T.K.M v The Netherlands* before the ECtHR, 20 March 2018, 68377/17: www.refworld.org/docid/5b9283cc4.html. See also UNHCR, *Submission by UNHCR in the case of D.A. and others v. Poland* before the ECtHR, 5 February 2018, 51246/17, www.refworld.org/docid/5a9d6e414.html.

⁶³ 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; UNHCR, *Intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, paras. 74 and 75, www.refworld.org/docid/510a74ce2.html.

grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.”⁶⁴

31. UNHCR maintains that the criteria for refugee status in the 1951 Convention need to be interpreted through a full and inclusive approach, so that individuals or groups of persons who meet these criteria are duly recognized and protected.⁶⁵ Only after an asylum-seeker is found not to meet the refugee criteria in the 1951 Convention, or of broader refugee criteria elaborated in regional refugee instruments, should consideration be given to other – complementary - forms of international protection, including humanitarian or subsidiary protection status, which may also be derived from *non-refoulement* obligations in accordance with international or regional human rights law.⁶⁶
32. To ensure this step-by-step approach is correctly followed, UNHCR recommends the establishment of a single comprehensive procedure, before a central expert authority, which first assesses whether an asylum-seeker qualifies for 1951 Convention refugee status and, if not, then assesses the need for other complementary forms of protection.⁶⁷ Such a procedure should also meet all the requirements of fairness, including the right to appeal with suspensive effect, and access to UNHCR.⁶⁸
33. In the context of complementary forms of protection, it is also important to note that such protection without essential procedural safeguards may eventually lead to repatriation of the applicant, thereby resulting in violations of the principle of *non-refoulement*.⁶⁹

Conclusion

34. In summary, UNHCR submits that:

- The fact that the violence prevailing in a country is generalized and widespread does not preclude a link between a well-founded fear and a 1951 Convention ground. On the

⁶⁴ 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, *The Refugee Convention: The Travaux Préparatoires Analysed with a Commentary*, CUP, Cambridge (1995), p. 342.

⁶⁵ UNHCR, Providing International Protection Including Through Complementary Forms of Protection, 2 June 2005, EC/55/SC/CRP.16, paras. 6 and 26: www.refworld.org/docid/47fdfb49d.html.

⁶⁶ Such as the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS, Vol. 1465: www.refworld.org/docid/3ae6b3a94.html, p. 85; *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, Vol. 999, p. 171: www.refworld.org/docid/3ae6b3aa0.html; *European Convention for the Protection of Human Rights and Fundamental Freedoms*: 4 November 1950, <http://www.refworld.org/docid/3ae6b3b04.html>.

⁶⁷ See UNHCR, Global Consultations on International Protection/Third Track: Complementary Forms of Protection Complementary Forms of Protection, para. 9, 4 September 2001, EC/GC/01/18: www.refworld.org/docid/3bfa84345.html. See also, ExCom Conclusion No. 8, note 70 above.

⁶⁸ UNHCR, *GIP No. 1- Gender*, para. 32; UNHCR, *GIP No. 12: Conflict and Violence*, paras 8 and 87; ExCom Conclusions No. 87 (L) 1999, para. (f); No. 89 (LI) 2000. See also, UNHCR, Providing International Protection Including Through Complementary Forms of Protection, 2 June 2005, EC/55/SC/CRP.16, para. 27: www.refworld.org/docid/47fdfb49d.html.

⁶⁹ Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, June 2005, PPLA/2005/02, www.refworld.org/docid/435e198d4.html.

contrary, UNHCR guidance indicates that people fleeing such violence in situations of armed conflict will in many circumstances fall within the definition of a refugee.

- The criteria for refugee status need to be interpreted in a full and inclusive manner so that individuals who fulfil the criteria are duly recognized and protected under the 1951 Convention and 1967 Protocol, rather than being granted complementary protection.
- Asylum cases involving forced recruitment and desertion therefrom may be decided on the basis that there is a nexus between a well-founded fear of being persecuted and the political opinion ground in the 1951 Convention. Depending on the facts, forced recruitment and desertion therefrom may amount to actual or imputed political opinion. In relation to the latter, the various actors to the conflict may interpret the individual's refusal to participate in a conflict as a manifestation of political disagreement with its policies. The act of desertion may in itself be, or be perceived to be, an expression of political opinion.
- Persons who deserted Houthi military groups in Yemen, to which they had been forcibly recruited, are likely to be in need of international refugee protection due to a well-founded fear of persecution by State or non-State actors, on the basis of their political opinion or imputed political opinion and/or other relevant grounds, depending on the individual circumstances of the case, taking into context the prolonged armed conflict and humanitarian crisis in Yemen.
- The principle of *non-refoulement* constitutes an essential binding and non-derogable component of international refugee law and international human rights law. UNHCR underlines that the responsibility of a State to protect a person from *refoulement* is engaged wherever its conduct exposes that person to a risk of being subject to persecution or ill-treatment in another country.

UNHCR
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