Submission by the Office of the United Nations High Commissioner for Refugees in the case of 2020HunGa1 and 2020HunBa119 before the Constitutional Court of the Republic of Korea

Introduction

1 These observations are submitted by the Office of the United Nations High Commissioner for Refugees ("UNHCR")[1] in relation to cases 2020HunGa1 and 2020HunBa119, before the Constitutional Court of the Republic of Korea, which are seeking constitutional review of articles 46.1 (deportation orders) and 63.1 (detention orders) of the *Immigration Act.*[2]

2 UNHCR has a direct interest in this matter, 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 to the problem of refugees.[3] 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[.]"[4] This supervisory responsibility is reiterated in Article 35(1)[5] of the 1951 Convention relating to the Status of Refugees ("1951 Convention")[6] and Article II of the 1967 Protocol relating to the Status of Refugees ("1967 Protocol").[7]

3 UNHCR's supervisory responsibility is exercised in part 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 and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ("UNHCR Handbook"),[8] which was subsequently complemented by a number of *Guidelines on International Protection.*[9]

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[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] Immigration Act No. 15492, Mar. 20, 2018, https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=48439.

[3] 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.

[4] *Ibid*., para 8(a).

[5] 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".

[6] 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.

[7] *Ibid.*

[8] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ("Handbook")*, April 2019, HCR/1P/4/ENG/REV, https://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.

[9] See, in particular, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status Refugees.*

4 The UNHCR Handbook has been found by 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 provides information on a regular basis to decision-makers and courts of law concerning the proper interpretation and application of the provisions within 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 *"unique and unrivalled expertise"*[15] on particular legal issues. UNHCR has been granted intervener status in numerous jurisdictions all over the world, including the European Court of Human Rights and the Court of Justice of the European Union, the US Supreme Court, the Supreme Court of Norway, the Supreme Court of the United Kingdom (as well as the former House of Lords), the German Federal Constitutional Court and the Supreme Court of Canada among others.

6 This submission is provided pursuant to Article 29 of the *Refugee Act* (2013) which provides that the "Minister of Justice shall cooperate when UNHCR makes requests…on the matters in the following sub-paragraphs: … [c]ompliance with and implementation of the Refugee Convention and Protocol". It further provides that "[a]t the request of UNHCR, the Minister of Justice shall cooperate with UNHCR so that UNHCR may carry out the work stated in the following sub-paragraphs […] [s]ubmit opinions on determinations of refugee status or appeals".[16]

7 This submission was prepared with deference to Article 6 of the Constitution of the Republic of Korea which provides that the "[t]reaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect

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[10] *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, paras. 46 and 119, http://www.refworld.org/cases,CAN_SC,3ae6b68b4.html; *Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993,* pp. 713-714, www.refworld.org/cases,CAN_SC,3ae6b673c.html.

[11] *R v. Secretary of State for the Home Department, Ex parte Adan,* United Kingdom: House of Lords (Judicial Committee), 19 December 2000, http://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, http://www.refworld.org/cases,USSCT,3ae6b68d10.html.

[13] *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, para. 36, http://www.refworld.org/cases,UK_SC,50b89fd62.html. 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*, Case No: FC3 96/7394/D, United Kingdom: Court of Appeal (England and Wales), 11 July 1997, para. 11, http://www.refworld.org/cases,GBR_CA_CIV,3ae6b72c0.html.

[14] *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 para. 54; *R v. Secretary of State for the Home Department, Ex parte Adan and Others*, United Kingdom: Court of Appeal (England and Wales), 23 July 1999, para. 71, http://www.refworld.org/cases,GBR_CA_CIV,3ae6b6ad14.html.

[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, para.72, http://www.refworld.org/cases,UK_SC,5304d1354.html.

[16] Republic of Korea: Law No 11298 of 2012, Refugee Act, http://www.refworld.org/docid/4fd5cd5a2.html.

as the domestic laws of the Republic of Korea". It further provides that "[t]he status of aliens shall be guaranteed as prescribed by international law and treaties"[17].

8 The claimant is a young asylum-seeker from the Arab Republic of Egypt who came to Korea on 21 July 2018 at the age of 17 as an unaccompanied child on a 30-day B-2 visa. He eventually exceeded the allowed period of sojourn and was apprehended and detained in the Suwon Immigration Office on 17 Oct 2018. He was issued both deportation and detention orders the following day, on 18 Oct 2018, and transferred to Hwaseong Immigration Detention Center and was detained there for a month. With the help of a local non-governmental organization, his application for asylum was then registered by the authorities while in Hwaseong Immigration Detention Center and it is still pending. The NGO also assisted in obtaining his temporary release on account of his being a child. The claimant has since reached the age of majority which places him at risk of prolonged detention with limited possibility for temporary release.

9 The decision to extend a detention order is in principle reviewed every three months by the Ministry of Justice (MoJ), (the same authority that issued the original detention and deportation orders), this is largely an administrative formality. Moreover, there is no maximum limit to immigration detention set by law and it remains in force until a court cancels the detention order or one is granted refugee or humanitarian status and allowed to stay. Furthermore, anyone who is detained under the *Immigration Act* is excluded from seeking habeas corpus relief as stated in Article 2 of the *Habeas Corpus Act*.

10 Against this background, UNHCR submits this *amicus curiae* in order to assist the Constitutional Court of the Republic of Korea in its deliberations. In this submission, UNHCR addresses the fundamental principles of non-refoulement and the right to seek asylum. UNHCR then provides its interpretation of the relevant principles of international refugee and human rights law on the arbitrary detention of asylum-seekers and highlights substantive safeguards. It further underlines that the principles related to the detention of asylum-seekers apply *a fortiori* to children. 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.

General principles for the protection of asylum-seekers

11 Article 14(1) of the *Universal Declaration of Human Rights* provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."[18] The 1951 Convention and its 1967 Protocol, as well as other international and regional human rights treaties and instruments give meaning to this right by defining those to whom international protection is to be conferred and by elaborating on refugees' rights and protections.

12 Among these rights and protections are the right to seek asylum, protection against penalties for illegal entry where the applicable conditions are fulfilled, and the principle of *non-refoulement*, which help to ensure the protection of those fleeing persecution and are essential

[17] Constitution of the Republic of Korea, wholly Amended by Constitution No. 10, Oct. 29, 1987, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1&lang=ENG.
[18] UNGA, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), www.refworld.org/docid/3ae6b3712c.html.

to the full enjoyment of the other rights guaranteed by the 1951 Convention and 1967 Protocol. These protections are designed to account for the reality that the "position of asylum-seekers may . . . differ fundamentally from that of ordinary migrants."[19]

Non-refoulement

13 The principle of *non-refoulement*, that is, the obligation of States not to expel or return a person to territories where his or her life or freedom would be threatened, is the cornerstone of international refugee law,[20] most prominently expressed in Article 33 of the 1951 Convention which provides that:[21]

> *"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."*[22]

14 The principle of *non-refoulement* constitutes an essential binding and non-derogable component of international refugee protection[23] which has been restated in international[24] and regional refugee[25] and human rights instruments.[26] 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.[27] It is a norm of customary

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[19] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (Guidelines on Detention), 2012, Guideline 1, para. 11, https://www.refworld.org/docid/503489533b8.html.

[20] 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, http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=45f17a1a4 and UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, http://www.unhcr.org/refworld/docid/438c6d972.html.

[21] 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.

[22] 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.

[23] 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/MMSP/2001/09, para. 4, http://www.unhcr.org/refworld/docid/3d60f5557.html.

[24] An explicit *non-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.

[25] 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 ("OAU Convention")*, and in the *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, https://www.refworld.org/docid/3ae6b36ec.html.

[26] 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" 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*.

[27] UNHCR, *Note on Non-Refoulement*, 23 August 1977, EC/SCP/2, para. 11, https://www.refworld.org/docid/3ae68ccd10.html.

international law[28] and is consequently binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol.[29] The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by UNHCR's Executive Committee (ExCom)[30] in numerous ExCom Conclusions.[31]

15 Under the obligations 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.[32] States have a duty to inquire into the reasons an individual seeks protection including, where relevant, prior to the execution of a removal order.[33] Even in cases where an applicant applies for refugee status after receiving a deportation order, the State is obliged to determine the risk of refoulement prior to carrying out deportation. "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."[34]

16 Lastly, given that 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, 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*

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[28] See 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. 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, para. 211, https://www.refworld.org/cases,IACRTHR,54129c854.html and *Advisory Opinion OC-25/18*, 30 May 2018, para. 181, https://www.refworld.org/cases,IACRTHR,5c87ec454.html.

[29] *Ibid, Advisory Opinion OC-21/14,* para. 211.

[30] 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, 106 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.

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

[32] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of A.S.N and T.K.M v The Netherlands* before the European Court of Human Rights, 20 March 2018, 68377/17, https://www.refworld.org/docid/5b9283cc4.html. See also UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of D.A. and others v. Poland before the European Court of Human Rights,* 5 February 2018, 51246/17, https://www.refworld.org/docid/5a9d6e414.html.

[33] 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 United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56 and 64, http://www.refworld.org/docid/515010a52.html; UNHCR, *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, http://www.refworld.org/docid/510a74ce2.html.

[34] The 1951 Convention and the 1967 Protocol do not set out procedures for the determination of refugee status as such, however, 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 ExCom Conclusions No. 81, para. (h); No. 82, para. (d)(iii); No. 85, para. (q); No. 99, para. (l). See also, P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, Cambridge (1995), p. 342.

applies not only to recognized refugees, but also to those whose status has not yet been determined.[35]

Freedom of movement under the 1951 Convention

17 Article 31(2)[36] of the 1951 Convention protects a refugee's right to freedom of movement and allows for restrictions only when necessary. This requires an individualized assessment of the restrictions' purpose as well as a proportionality assessment to evaluate whether less restrictive measures are available to meet that purpose.[37]

Detention of asylum-seekers

18 Legal systems built on the rule of law recognize as essential components the right to liberty and security of persons and freedom of movement as fundamental rights,[38] which apply to all persons regardless of their immigration status. [39] While the right to liberty of person is not absolute,[40] there are well-accepted limits and substantive safeguards in international law against unlawful as well as arbitrary detention.[41] The applicable international standards regarding the detention of asylum-seekers are detailed in depth in UNHCR's *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Guidelines on Detention).[42] The particular standards and criteria guarding against 'unlawfulness' and 'arbitrariness' of detention are highlighted below for the Constitutional Court's consideration.

19 **Detention must be in accordance with and authorised by law.** [43] Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are

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[35] UNHCR Handbook, para. 28. See also, ExCom Conclusions, No. 6, para. (c); No. 79, 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, https://www.refworld.org/docid/5a2ead6b4.html.

[36] Article 31(2) states: *The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*

[37] UNHCR, *Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention*, 15 March 2017, Roundtable, para. 24, https://www.refworld.org/docid/5b18f6740.html.

[38] See, ExCom Conclusion No. 44, para. (b). See also, in particular, ExCom Conclusion, Nos. 55, para (g); 85, paras. (cc), (dd) and (ee); and 89, third paragraph, http://www.unhcr.org/3d4ab3ff2.html. Fundamental rights to liberty and security of persons and freedom of movement are enshrined in major international and regional human rights instruments: see, for example, Articles 3 and 9, UDHR; Article 9, ICCPR; Articles 1 and 25, ADRDM; Article 6, ACHPR; Article 7, ACHR; Article 5, ECHR; Article 6, CFREU. Also see, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own. See also, Article 12, African Charter on Human and Peoples' Rights, 1981 (ACHPR); Article 22, American Convention on Human Rights, 1969 (ACHR); Article 2, Convention for the Protection of Human Rights and Fundamental Freedoms (as amended), 1950 (ECHR); Article 2, Protocol No. 4 to the ECHR, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto, 1963; Article 45, CFREU.

[39] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para. 1, http://www.unhcr.org/refworld/docid/453883fa8.html; HRC, *CCPR General Comment No. 15: The Position of Aliens under the Covenant*, 11 April 1986, para. 2, https://www.refworld.org/docid/45139acfc.html.

[40] Article 9 of the ICCPR may be derogated from in a public emergency subject to being "strictly required by the exigencies of the situation" and "provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination …" (Article 4, ICCPR). Also, *A v. Australia*, CCPR/C/59/D/560/1993, HRC, 3 April 1997, para. 9.3, http://www.unhcr.org/refworld/docid/3ae6b71a0.html, which found no basis to suggest that detention of asylum-seekers was prohibited as a matter of customary international law.

[41] Guidelines on Detention, para. 18.

[42] UNHCR, Guidelines on Detention; See also ExCom Conclusions: No. 44; No. 55; No. 85; and No. 89.

[43] UNHCR, Guidelines on Detention, p. 14.

established by law."[44] At the same time, although national legislation is the primary consideration for determining the lawfulness of detention, it is "not always the decisive element in assessing the justification of deprivation of liberty."[45] Detention of an asylum-seeker can only be resorted to for a legitimate purpose under international law even if the detention abides by national law.[46]

20 In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order, public health or national security.[47] Article 9 of the 1951 Convention acknowledges the right of the States to take 'provisional measures', 'in time of war or other grave and exceptional circumstances', in the case of a particular person but this is qualified by the next phrase, 'pending a determination by the Contracting States that that person is in fact a refugee and that the continuance of such measure is necessary….in the interest of national security.'[48]

21 Therefore, it is exceptionally permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection, provided that they could not be obtained in the absence of detention.[49] This exception to the general principle – that detention of asylum-seekers is a measure of last resort – cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time. [50] Article 31 still applies in circumstances of irregular entry, and after this permissible initial period of detention, States may only impose restrictions on movement which are necessary and applied only until the individual's status is regularized or he or she obtains permission to enter another country.

22 Conversely, the following purposes are not considered to be legitimate: detention as a penalty for illegal entry, as a deterrent to seeking asylum, and on grounds of expulsion.[51] Irregular entry and stay do not constitute crimes per se against persons, property or national security.[52] Criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention. As a general rule, it is unlawful to detain asylum-seekers in on-going asylum proceedings on grounds of expulsion as they are not available for removal until a final decision on their claim has been made. [53]

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[44] *Ibid*., para. 15. See also HRC, General Comment No. 35, specifically clarifying that Article 9 of the ICCPR applies to refugees and asylum-seekers, https://www.refworld.org/docid/553e0f984.html.
[45] *Ibid*., para. 15. See also *Lokpo et Touré v. Hungary*, Application no. 10816/10, ECtHR, 20 September 2011, https://www.refworld.org/cases,ECHR,4e8ac6652.html
[46] UNHCR, *UNHCR intervention before the United States Court of Appeals for the Ninth Circuit in the case of Flores v. Lynch, Attorney General*, 23 February 2016, https://www.refworld.org/docid/57447b784.html
[47] UNHCR, Guidelines on Detention, Guideline 4.1 p. 16, para. 21. See paras. 22-30 which describe the three legitimate purposes. See also *UNHCR intervention before the US Court of Appeals for the Ninth Circuit in Flores v. Lynch, supra* note 46.
[48] G.S. Goodwin-Gill, "*Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*", 2001, https://www.unhcr.org/3bcfdf164.pdf.
[49] UNHCR, Guidelines on Detention, Guideline 4.1, p.18, para. 28. UNHCR ExCom No. 44, above note 38, para. (b).
[50] *Ibid*., p.18, para. 28.
[51] UNHCR, Guidelines on Detention, 4.1.4, p.19-20, paras. 31-33.
[52] See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 24.
[53] UNHCR, Guidelines on Detention, Guideline 4.1, p.20, para. 33.

Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected.[54]

23 Any decision to detain an asylum-seeker **must be based on an assessment of the individual's particular circumstances**.[55] To guard against arbitrariness, it must be determined that detention is **necessary**, **reasonable**, and **proportionate to a legitimate purpose** for each individual case.[56] **Necessity** is determined "in light of the purpose of the detention," and must be within what "is strictly necessary to achieve the pursued purpose in the individual case."[57] **Reasonableness** is arrived by the "assessment of any special needs or considerations in the individual's case."[58] The "general principle of **proportionality** requires that a balance be struck [in each case] between the importance of respecting the rights to liberty and security of the person and freedom of movement, and the public policy objectives of limiting or denying these rights."[59]

24 Both necessity and proportionality are subject to the "least restrictive means" test which means that failure to consider whether less coercive or intrusive measures, such as alternatives to detention and non-custodial solutions for children,[60] could also render detention arbitrary.[61]

25 **Detention laws must conform to the principle of legal certainty**.[62] This requires, *inter alia*, that the law and its legal consequences be foreseeable and predictable. Explicitly identifying the grounds for detention in national legislation would meet the requirement of legal certainty.[63] However, insufficient guarantees in law to protection against arbitrary detention such as no limits on the maximum period of detention or no access to an effective remedy to contest it, could also call into question the legal validity of any detention.[64]

26 **Indefinite detention is arbitrary and maximum limits on detention should be established in law.**[65] Temporarily suspending detention does not negate this requirement. The test of proportionality applies to both the initial order of detention as well as any extensions

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[54] *Ibid*., p. 20, para. 33. See *Lokpo and Touré v. Hungary*, above note 45; *R.U. v. Greece*, (2011), ECtHR, App. No. 2237/08, para. 94, http://www.unhcr.org/refworld/docid/4f2aafc42.html. See also, *S.D. v. Greece*, (2009), ECtHR, App. No. 53541/07, para. 62, http://www.unhcr.org/refworld/docid/4a37735f2.html. The ECtHR has held that detention for the purposes of expulsion can only occur after an asylum claim has been finally determined. See also, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Alaa Al-Tayyar Abdelhakim v. Hungary*, 30 March 2012, App. No. 13058/11, http://www.unhcr.org/refworld/docid/4f75d5212.html; and *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Said v. Hungary*, 30 March 2012, App. No. 13457/11, http://www.unhcr.org/refworld/docid/4f75d5e72.html.

[55] *Ibid*., Guideline 4, p. 15.

[56] *Ibid*., Guideline 4.2, p. 21.

[57] *Ibid*., Guideline 4.2, p.21, para. 34.

[58] *Ibid*.

[59] *Ibid*.

[60] See Guidelines on Detention, Annex A, Alternatives to detention.

[61] *Ibid*., Guideline 4, p. 15, para. 18 and Guideline 4,3, p. 22-24.

[62] *Ibid*., Guideline 3, p.14, para. 16.

[63] *Ibid*. See also *Recommendation of the UN Working Group on Arbitrary Detention (WGAD), Report to the Fifty–sixth session of the Commission on Human Rights*, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5, https://www.refworld.org/docid/3b00f25a6.html.

[64] *Ibid*., para. 17.

[65] *Ibid*., Guideline 6, p.26.

thereafter, and the length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary.[66]

27 **The decision to detain or to extend detention must be subject to minimum procedural safeguards.**[67] Asylum-seekers are entitled to the following minimum procedural guarantees:

27.1 Asylum-seekers need to be **informed at the time of arrest or detention of the reasons for their detention**,[68] and their rights in connection with the order, including review procedures, in a language and in terms which they understand.[69] They must also be **informed of their right to legal counsel**.[70]

27.2 Asylum-seekers must be brought promptly before a judicial or other independent authority to have the detention decision reviewed. The **reviewing body must be independent of the initial detaining authority**, and possess the power to order release or to vary any conditions of release.[71] Following the initial review of detention, regular **periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place**, which the asylum-seeker and his/her representative would have the right to attend.[72]

27.3 Irrespective of the aforementioned reviews, either personally or through a representative, **the right to challenge the lawfulness of detention before a court of law at any time needs to be respected**.[73] The burden of proof to establish the lawfulness of the detention justifies its application according to the principles of necessity, reasonableness and proportionality, and establish that other, less intrusive means of achieving the same objectives have been considered in the individual case is with the authorities.[74]

27.4 **Persons in detention must be given access to asylum procedures** and provided accurate legal information about the asylum process and their rights. Access to legal and linguistic assistance should be made available. [75]

Particular considerations on the detention of children seeking protection

28 International law principles related to the detention of asylum-seekers apply *a fortiori* to children. Furthermore, child asylum-seekers have particular rights specific to them as children that prompt specific and heightened State responsibilities under international law.

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[66] *Ibid*., Guideline 6, p.26, para. 44.
[67] *Ibid*., Guideline 7, p. 27.
[68] Article 9 (2), ICCPR; Article 7 (4), ACHR; Article 5 (2) ECHR; and Article 6, ACHPR.
[69] See further WGAD Report, *supra* note 63.
[70] UNHCR, Guidelines on Detention, Guideline 7, p. 27, para. 47(ii).
[71] *Ibid*., para. 47(iii). See also *A. v. Australia*, supra note 40, and *C. v. Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, https://www.refworld.org/cases,HRC,3f588ef00.html.
[72] *Ibid*., Guideline 7, p. 27, para. 47(iv).
[73] *Ibid*., Guideline 7, p. 28, para. 47(v).
[74] *Ibid*.
[75] *Ibid*., Guideline 7, p. 28, para. 47(vi).

29 The United Nations Convention on the Rights of the Child (hereinafter "CRC")[76] of 20 November 1989, ratified by the Republic of Korea on 20 November 1991, provides that the **best interests of the child** shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22).[77]

30 The principles regarding the protection of children set by the CRC apply throughout all stages of displacement. The UN Committee on the Rights of the Child writes that "State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory. Therefore, the enjoyment of rights stipulated in the Convention […] is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness."[78]

31 UNHCR's position is that children should not be detained and detention is never in the best interests of the child.[79] The well-documented deleterious effects that detention has on children's well-being, including on their physical and mental development, has long raised the question of whether any detention of children can ever be appropriate in practice, even as a measure of last resort.[80] Even under the most well-meaning circumstances such as 'protective custody' arrangement of unaccompanied refugee and asylum-seeking children 'for their own protection' are known to have had harmful impact.[81]

32 In the 2015 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, it was noted that "[t]he detention of children, including pretrial and

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[76] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, https://www.refworld.org/docid/3ae6b38f0.html.

[77] UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, has noted that: "States should make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and other administrative considerations." 5 March 2015, A/HRC/28/68, https://www.refworld.org/docid/550824454.html.

[78] UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 12, https://www.refworld.org/docid/42dd174b4.html.

[79] See UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context ('UNHCR January 2017 Position Paper')*, January 2017, https://www.refworld.org/docid/5885c2434.html; see also UN Human Rights, OHCHR, '*Children and families should never be in immigration detention*', which states: 'Let us be clear: immigration detention is never in the best interests of the child.', http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21026&LangID=E#sthash.fwKB9lJR.dpuf.

[80] UNHCR, Guidelines on Detention, Guideline 9.2, p. 35, para. 53. See also *UNHCR January 2017 Position Paper*, p. 2, as it states: "recent studies have indicated that detention of children can undermine their psychological and physical well-being and compromise their cognitive development. Furthermore, children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bedwetting. There is indeed strong evidence that detention has a profound and negative impact on children's health and development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families. The risk of exposure to others forms of harm, including sexual and gender-based violence, are also significant in many detention contexts." See further, Jong-chul Kim, *Report on Migrant Children in Immigration Detention: Eradication of immigration detention of children and alternatives to detention*, 2016, http://w4refugee.org/board/bbs/download.php?bo_table=2_manual&wr_id=44&no=1&page=7.

[81] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece (Complaint No. 173/2018) before the European Committee of Social Rights*, 9 August 2019, https://www.refworld.org/docid/5d9745494.html. For more on the negative effects of detention on children, see Alice Farmer, *The impact of immigration detention on children*, https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/detention/farmer.pdf and PICUM, *Child Immigration Detention in the EU*, March 2019, https://picum.org/wp-content/uploads/2019/06/Child-Immigration-Detention-in-the-EU-ENG.pdf.

post-trial incarceration as well as institutionalisation and administrative immigration detention, is inextricably linked – in fact if not in law – with the ill-treatment of children, owing to the particularly vulnerable situation in which they have been placed that exposes them to numerous types of risk" and that "the particular vulnerability of children imposes a heightened obligation of due diligence on States to take additional measures to ensure their human rights to life, health, dignity and physical and mental integrity".[82]

33 In some jurisdictions, children between 15 and 18 years "tend to be provided much lower levels of protection", and are "sometimes considered as adults or left with an ambiguous migration status until they reach 18 years of age".[83] However, the definition of the child under the CRC provides rights and protection until the age of 18. In the UN CRC-CMW Joint General Comment, States are urged "to ensure that equal standards of protection are provided to every child, including those above the age of 15 years and regardless of their migration status".[84]

Conclusion

34 In summary, UNHCR submits that:

- UNHCR recognizes that States face an "array of contemporary challenges to national asylum systems" and that each State may rightfully "control the entry and stay of non-nationals on their territory," but such control is nevertheless "subject to refugee and human rights standards."[85]
- 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.
- Protection against *refoulement* in this context includes asylum-seekers whose refugee status has yet to be determined. Consequently, States have a duty to inquire into the reasons based on which an individual seeks protection prior to the execution of a removal order.
- The right to seek asylum and the right to liberty and security of person and freedom of movement provided in international refugee and human rights law mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.[86]

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[82] UN Human Rights Council, *supra* note 77, para. 70.
[83] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 3, https://www.refworld.org/docid/5a12942a2b.html.
[84] *Ibid.*
[85] UNHCR, Guidelines on Detention, p. 6.
[86] *Ibid.*, p. 13.

- Exceptional detention of asylum-seekers can only be applied where it has been determined that it is necessary in an individual case and otherwise meets international standards. There are substantive safeguards against unlawful and arbitrary detention under international law such as, *inter alia*, detention must be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose.

- There must be a maximum time limit established in law for periods of detention, and the decision to detain or extend detention must be subject to minimum procedural safeguards as is necessary in the individual case. Failure to consider less coercive or intrusive means could also render detention arbitrary.

- International law principles related to the detention of asylum-seekers apply *a fortiori* to children. Detention is never in the best interests of the child, which must be a primary consideration in any decision affecting them.[87]

- Alternatives to detention including appropriate care arrangements remain the best measure, as liberty and freedom of movement of children should always be the preferred solution.[88] States have a duty of individual assessment, preceding any removal measure, in accordance with the principle of *non-refoulement* and best interest of the child.

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[87] CRC General Comment No. 6 (2005), supra note 78, para. 63.
[88] UNHCR, *Alternatives to detention*, 3 June 2015, paras. 16-19: https://www.refworld.org/docid/58638ecf4.html.