

United Nations High Commissioner for Refugees

Recommendations regarding Proposed Revisions to the Immigration Control Act Republic of Korea

I. Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) was created over fifty years ago by the United Nations General Assembly, charged with the tasks of ensuring the international protection of, and seeking durable solutions for, refugees.¹ UNHCR must do this in collaboration with Governments, who have the primary responsibility, and the authority, to protect refugees. Specifically, UNHCR is mandated to supervise the application by States of international conventions for the protection of refugees.² Likewise, when States sign on to the *1951 Convention relating to the Status of Refugees* and/or the *1967 Protocol relating to the Status of Refugees*, they take on the obligation to cooperate with the Office of the UNHCR in the exercise of its functions, and in particular States are obliged to facilitate the UNHCR's duty to supervise the application of the provisions of the Convention.³ Consistent with these two complementary provisions of international law, the UNHCR Representation in Seoul, Republic of Korea offers the following technical advice and recommendations, based on international law and principles governing the protection of refugees with respect to those aspects of the revisions to Korean immigration law which affect asylum-seekers and refugees.

UNHCR acknowledges the potential of the Republic of Korea to contribute significantly to the protection of refugees and the crucial, precedent-setting role its legislation and refugee protection practice may have for the entire region. Accordingly, the Office welcomes what it understands to be the objective of the Government of the Republic of Korea in revising the Immigration Control Act; that is, to codify in domestic legislation the obligations the State has taken on by acceding to the two above-referenced international refugee protection instruments. The following recommendations are thus offered, based on UNHCR's years of experience in advising Governments on refugee protection issues, to assist the Government of the Republic of Korea in striving for the highest standards of refugee protection.

II. General Comments

Based on its experience, UNHCR recommends that refugee protection matters should be regulated in a law separate and distinct from the immigration enforcement law. This is so because the essential objectives of these two types of legislation are different. Refugee protection laws aim to ensure that the positive obligation on States to protect the human rights of refugees and other persons in need of international protection can be ascertained and adequately met, while immigration enforcement laws are generally aimed at keeping borders strong and countries safe, specifically by controlling access to the territory. Refugees, who are by definition foreigners, must be given access, while the goal of immigration control laws is generally to keep foreigners out. Furthermore, enforcement activities are often essentially adversarial and interrogative; refugee determination and protection activities are,

or should be, collaborative and non-adversarial.⁴ While UNHCR appreciates that at present there is not an intention to legislate refugee status determination and protection issues in a free-standing law separate from the immigration legislation, the Office nevertheless suggests that this course of action be seriously considered.

The Republic of Korea has not entered any significant reservations to any of the substantive refugee protection provisions of the *1951 Convention relating to the Status of Refugees*.⁵ By virtue of the fact that the Constitution of the Republic of Korea accords to international treaties such as the *1951 Convention* the force of domestic law⁶, the essential, and particularly the non-derogable⁷, provisions of the Convention already form part of the domestic law. For better implementation and clarity for Government officials carrying out refugee protection activities, including refugee status determination, these provisions should also be spelled out in the relevant law. Of particular importance in this regard are three provisions that UNHCR considers to be key: Article 1 of the *Convention*, spelling out the criteria for refugee status; Article 33 (1) of the *Convention*, guaranteeing protection from *refoulement* (return to a territory where the life or freedom of the individual would be threatened for a Convention reason); and Article 35 of the *Convention*, specifying the need to cooperate in certain ways with UNHCR. These provisions are of great importance in successfully implementing international refugee law. Other Articles should also be included, particularly those related to the rights to be accorded to recognized refugees, so that they can easily access their rights to work authorization, education, documentation and other such rights. Set out below are more specific and detailed recommendations.

With respect particularly to UNHCR's recommendations regarding the procedural aspects of the law, these are informed specifically by the relevant international legal norms, best practices in established asylum countries and the relevant conclusions of the UNHCR's governing body, the Executive Committee of the High Commissioner's Programme (Excom), of which the Republic of Korea is a member. The standards indicated in Excom Conclusion No. 8 (XXVIII) – 1977 on "Determination of Refugee Status" are particularly recommended for the positive changes that the Ministry of Justice wants to integrate in this legislation to put in place a fair, transparent and efficient refugee status determination process that respects international standards.

III. Specific Recommendations from UNHCR's Perspective

For ease of reference, UNHCR has organized its comments in the order in which the relevant sections appear in the latest revision of the Immigration Control and Refugee Protection Act. However, as UNHCR has a number of recommendations for the inclusion of elements that do not yet exist in the law, these are listed at the end of our document. There is also a brief summary of UNHCR's recommendations, in the order in which UNHCR would logically suggest they should appear, appended.

A. Comments on Existing Proposed Revisions:

1. Objectives of Law: Section 1

With a view to the appropriate future interpretation of the refugee-related aspects of the law, UNHCR recommends that this section refer to international human rights and refugee law. This could be accomplished easily by adding after "fair and appropriate control of immigration and sojourn of foreigners, and administration of refugee affairs" the following words: " in line with the international obligations of the Republic of Korea under international human rights and refugee law."

2. Definition of "Refugee": Section 2-2

UNHCR recommends that the language in Article 1 A (2) of the *1951 Convention relating to the Status of Refugees*, as modified by the removal of the temporal and geographic limitations by the *1967 Protocol*, be set out in the definition section in 2-2. Likewise, since the revision foresees also using the cessation and exclusion provisions, the wording of Article 1 C, D, E and F should also be included in this definition section. Adoption of this internationally agreed language not only promotes consistency in both use and interpretation, it also helps to ensure there are no gaps in refugee protection which would promote undesirable secondary movements by refugees and asylum-seekers. UNHCR is aware that an earlier draft of the revisions did contain some of this language and urges that it be reinstated and expanded.

3. Definition of "Protection": Section 2-10

UNHCR recommends that the term "protection" not be used to refer to what appears to be, in fact, detention. The term "protection", when used in relation to asylum and refugee matters, has a very specific international law meaning that does not accord with the proposed language, which refers to detaining persons in jail-like facilities. "Protection" in the context of international refugee law refers to the protection of the human rights of refugees and others, including the right not to be returned to a situation of danger. In UNHCR's view, it is preferable to use the internationally accepted and understood terminology.⁸

4. Permission for Temporary Landing of Refugees: Section 16 – 2

The current Immigration Control Act provides for special reception measures for persons seeking asylum whilst on board vessels. UNHCR notes these measures and refers to Excom Conclusion No. 53 (XXXIX) – where the following guidelines are given:

- "(1) Like other asylum seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.
- (2) Without prejudice to any responsibilities of the flag State, stowaway asylum-seekers should, whenever possible, be allowed to disembark at the first port of call and given the opportunity of having their refugee status determined by the authorities, provided that this does not necessarily imply durable solution in the country of the port of disembarkation.
- (3) Normally UNHCR would be requested to assist in finding a durable solution for those found to be refugees, based on all relevant aspects of the case".

UNHCR therefore recommends that Article 16 (2) be amended to include the following re-affirmations: that such asylum-seekers are protected against forcible return to a country where they may face persecution because of one of the reasons indicated in the *1951 Refugee Convention*; that they will be allowed to land and follow the normal refugee status determination procedure; and that, if necessary, UNHCR may be consulted to assist in seeking an appropriate durable solution if those concerned are found to be in need of international protection⁹.

In light of the above comments, UNHCR recommends that the section be strengthened by amending the latter part of the section, after "a temporary landing permit for the asylum-seeker" as follows: "for **initially** no more than 90 days **shall** be granted with the approval of the Minister of Justice, where necessary in consultation with the Minister of Foreign Affairs and Trade." The newly added section regarding the MOFAT could then be deleted.

5. Persons to be Deported: Section 46

UNHCR welcomes the specification that those who are recognized as refugees shall not be subjected to forced departure. This provision is consistent with Article 33(1) of the *1951 Convention*.

6. Country to be Repatriated and Non-Refoulement: Section 56

UNHCR is disappointed that the language of Article 33 of the *Refugee Convention* is not duplicated in this section, as had been the case in an earlier draft (subsection (4) in the draft of August 2005). For both the guarantee of non-return in the majority of cases and the exception in cases of danger to the security of the Republic or to the community, the carefully constructed language of Article 33 has been used and interpreted in many asylum countries over the life of the Convention. The use of this accepted language would enhance the clarity of the law and, by virtue of the jurisprudence and understandings which have evolved over the years regarding this formulation, provide valuable guidance to those who must interpret the principle in the Korean context.¹⁰

UNHCR further recommends that the prohibition on return should also be applied on behalf of two other groups, in addition to recognized refugees; these are i) asylum-seekers for the duration of their processing, and ii) those allowed to stay on humanitarian grounds.¹¹ Since the principle of *non-refoulement* is now generally accepted to be part of customary international law, this status should be reflected in the Korean law as well.¹²

Considering the fact that the Immigration Control and Refugee Protection Act strives to address all legal aspects governing migration management and control in one piece of legislation, it is strongly recommended to consider the introduction of a single procedure which, in addition to refugee protection concerns, would also consider in one procedure, conducted by the same competent authority, the applicability of *non-refoulement* obligations deriving from international human rights law, particularly those found in Article 3 of the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* as well

as in Articles 6 and 7 of the *International Covenant on Civil and Political Rights* as interpreted by the Human Rights Committee.¹³

Non-refoulement obligations are an important tool for ensuring complementary forms of protection, and for this reason UNHCR regrets that in the latest version of the draft revisions made available to it on 12 July, the provision implementing the prohibition on *refoulement* found in Article 3 of the *Convention against Torture* (formerly set out in Section 56(3) of the 3 July draft) has been removed. This complementary provision of international human rights law can be important for the protection of asylum-seekers, refugees and particularly of others who may be in need of international protection but who fall outside the purview of the refugee instruments.

7. Detention of Asylum-seekers: Sections 60-68

UNHCR welcomes the fact that there is no specific reference in the draft revisions to the detention of asylum-seekers *per se*. This is in line with the international legal position that the detention of asylum-seekers is inherently undesirable.¹⁴ While appreciating that there is not a practice of mandatory or routine detention of asylum-seekers in the Republic of Korea, UNHCR is nevertheless aware that in some cases asylum-seekers are detained. The Office therefore recommends that any exceptional detention of asylum-seekers and refugees be required in the legislation to be done in accordance with the provisions of Executive Committee Conclusion No. 44 and UNHCR's detention guidelines, both of which are based on accepted international legal principles and best practices in asylum countries. In particular, UNHCR notes that asylum-seeking children should never be detained and that in the case of detention of asylum-seekers who are women or who may be otherwise vulnerable, special arrangements may need to be made on account of their particular needs. For example, women need to be accommodated separately from men, and the unaccompanied elderly and survivors of torture and trauma may have particular physical or psychological health issues which will need to be regularly addressed.¹⁵ UNHCR therefore recommends that this section be amended accordingly.

8. Cessation of and Exclusion from Refugee Status: Section 76 - 2

The draft law now contains references to the provisions of the 1951 Convention addressing cessation of and exclusion from refugee status. UNHCR agrees with the inclusion of these important constituent elements of the refugee definition, as failure to exclude those undeserving of protection can undermine the institution of asylum. However, as with the inclusion criteria, UNHCR recommends that the draft law should duplicate the wording regarding cessation and exclusion found in the relevant parts of Article 1 of the *1951 Convention*. Furthermore, in UNHCR's view it is essential that the law refer to the exclusion and cessation criteria in the same section of the law where the inclusion criteria of the Convention are listed. Currently the inclusion portions of the refugee definition are found in Section 2-2, whereas the exclusion and cessation portions are found in Section 76-2. Whichever part of the law is chosen as the repository of the definition, it should include all the criteria in that one section.

UNHCR notes, as well, that exclusion and cessation need not be considered in every case; it is only in those cases which raise issues of exclusion or cessation that analysis of these elements of the definition should be undertaken. UNHCR further cautions that no additional criterion for cessation and exclusion can be indicated. This is so because Article 1 is a key *Convention* Article from which no derogation or reservation is allowed.¹⁶ Furthermore, given the serious negative impact an erroneous decision to cease or exclude from refugee status may have, UNHCR emphasizes that these provisions must be restrictively interpreted, and that there must be clear procedural safeguards in place when exclusion and cessation are being considered.

UNHCR and the Executive Committee have developed guidance for States to use when considering either cessation or exclusion¹⁷. Key points which UNHCR recommends should be included regarding cessation are the following:

- Cessation is not normally considered in the course of an initial refugee status determination; it rather arises after refugee status has been granted, and either circumstances in the country of origin change significantly or the individual undertakes some action which throws doubt on the continued need for international protection;
- Cessation should never result in the individual concerned being put into an uncertain status;¹⁸
- Cessation based on change of circumstances must only occur when the change can be shown to be fundamental, stable and durable;
- Cessation on the basis of changed circumstances should not be applied to refugees who can invoke "compelling reasons" arising out of past persecution for not wishing to return to, or to avail themselves of the protection of, their country of origin;
- Cessation based on the actions of the individual (e.g. re-availing oneself of the protection of the country of origin or re-establishing oneself in the country of origin) should only be applied where the act was truly voluntary on the part of the refugee and it results in him or her being able to access effective and durable national protection.

Key points which UNHCR recommends should be included regarding exclusion are as follows:

- Exclusion elements should be considered in the regular refugee status determination procedure, if raised in the individual case, and should be interpreted restrictively;
- The exceptional nature of Article 1 F of the *1951 Convention* suggests that inclusion should generally be considered before exclusion, but there is no rigid formula;¹⁹
- The standard of proof for exclusion elements of the definition, "serious reasons for considering" that the person has engaged in excludable behaviour, requires clear and credible proof;
- In order to be correctly excluded, it must be shown that the individual was personally responsible for the excludable act;

- Secret evidence or evidence taken *in camera* should not be used to exclude from refugee status; the asylum-seeker must have the opportunity to challenge the evidence to be relied on.

9. Cancellation of Refugee Status: Section 76 - 3

The 1951 Refugee Convention and 1967 Protocol do not specifically address the issue of cancellation of refugee status. UNHCR accepts, however, that when refugee status has been recognized on the basis of fraud, false statements or other misconduct, domestic law dealing with the cancellation of flawed administrative decisions may correctly be applied to vitiate the flawed decision.²⁰ However, because of the effect a decision canceling refugee status may have on a person still in need of international protection, caution must be exercised, and as with exclusion and cessation, proper procedural safeguards must be in place to protect the individual and ensure that the process of considering cancellation provides a fair opportunity for the individual to put forward his or her side of the issue²¹.

10. Dismissal of Refugee Application: Section 76 - 4

UNHCR notes that the draft law provides three grounds for the dismissal of a refugee status application. Whilst UNHCR understands the necessity to manage efficiently the procedures for refugee status determination, and encourages the use of time frames and other such mechanisms to do so, UNHCR nevertheless notes that there may on occasion be circumstances beyond the control of an asylum-seeker that may prevent him or her from responding to the Ministry. UNHCR therefore recommends that flexibility be incorporated in this section of the law on behalf of asylum-seekers who, for good reasons, may not be in a position to respond in a timely fashion to requests from the Ministry of Justice.

11. Refugee Status Determination and Appeals: Sections 76 – 5/6

General Comments:

UNHCR welcomes the Government's objective of improving the procedures for refugee status determination and, in line with the provisions of Executive Committee Conclusions dealing with fair, transparent and efficient refugee status determination procedures, would recommend that the following general points be included in the draft law:

- The RSD officer who conducted the first instance interview should not be the officer re-interviewing a rejected asylum-seeker who has decided to lodge an appeal;
- The RSD decision maker (or body of decision-makers) at the appeal level should be different from the person who decided the claim in the first instance;
- Interviewers and officers analysing the claims of asylum-seekers should be competent in the skills needed to carry out their tasks, and well trained in refugee law.

UNHCR Participation

UNHCR remarks that the draft law does not indicate any role for UNHCR to participate in or observe the refugee status determination procedure. UNHCR has over 50 years of expertise in determining refugee status and interpreting Article 1

of the *1951 Convention relating to the Status of Refugees*, and has developed a body of policy and law that can be helpful to States undertaking refugee status determination. Executive Committee Conclusion No. 8 (XXVIII) – 1977 on “Determination of Refugee Status” recommended that States parties to the 1951 Refugee Convention “... give favourable consideration to UNHCR participation in such procedures in appropriate form.”²²

In line with this recommendation, a number of States parties to the 1951 Refugee Convention involve UNHCR in the refugee status determination process. For example, in Austria, Belgium, France, Germany, New Zealand and the United Kingdom, UNHCR participates in different capacities in the procedure for determining refugee status. Some of the various modes of UNHCR involvement include:

- Open access to the file of the asylum seeker;
- The possibility to provide advice to the decision-making body;
- The possibility to attend as an observer during the deliberations of the decision-making body.

While UNHCR is unlikely to have the capacity to participate fully on a regular basis in all aspects of refugee status determination in the Republic of Korea, it is recommended that the draft law provide for the possibility for UNHCR:

- to review RSD files and provide advice to the decision-makers;
- to attend asylum interviews with the consent of the asylum-seeker, and
- to attend as an observer during the deliberations of the Refugee Recognition Review Committee.

Such UNHCR involvement, especially in developmental years, is likely to contribute positively to the building of a more transparent and effective refugee protection system in Republic of Korea. Direct involvement as outlined above may be complemented by other measures ranging from organization of legal counseling networks, coverage of costs of legal representation in specific – for example, precedent-setting – cases, advice to lawyers and briefs to the courts.

Time Limitations

UNHCR recalls that, while States may indicate deadlines for the submission of asylum claims, these should be in line with Executive Committee Conclusion No. 15 (XXX) 1979, which stipulates that

“While asylum seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfillment of other formal requirements, should not lead to an asylum request being excluded from consideration”.

UNHCR therefore welcomes the deletion in the draft law of the provision stating that an asylum seeker should apply within one year after his date of arrival in Republic of Korea. Likewise, UNHCR appreciates the extension from 7 to 14 days of the deadline for rejected asylum seekers at the first instance level to lodge an appeal. However, as previously indicated, UNHCR would recommend a further extension of the deadline to 30 days and the inclusion of a provision stating that

the appeal period may be extended for an applicant who has reasonable cause for not lodging an appeal within the stated time frame.

12. Issuance of Convention Travel Document: Section 76 - 7

UNHCR welcomes the extension of the period of validity of the Convention Travel Document from one to two years. This reflects the best practice under Article 28 of the *Convention* and provides a more stable time period for the refugee. UNHCR acknowledges the progress made by the introduction of the possibility to extend the validity of the travel document for a one-year period, while noting that this amendment nevertheless falls short of bringing the provision fully in line with international standards. The limitation that a Convention Travel Document can only be extended once is inconsistent with the Republic of Korea's obligations under Article 28 of the *1951 Convention* and may lead to most undesirable situations of refugees in orbit. The provisions of the Schedule to the *1951 Convention*, in particular those relating to the transfer of responsibility for refugees, are a sufficient tool to discontinue the obligations of the Republic of Korea to prolong Convention Travel Documents in cases in which a refugee recognized by the country has lawfully taken up residence in the territory of another contracting State.

UNHCR strongly recommends to lift the limitation of a single renewal currently found in the draft, and further recommends that the reasons for denial of issuance of a travel document found in subsection (1) of 76 - 7 be reworded to reflect more closely the exceptions foreseen in article 28. That is, the reasons for non-issuance of a Convention Travel Document should be limited to cases where there are "compelling reasons of national security or public order."²³

13. Complementary Forms of Protection: Section 76 – 9

UNHCR welcomes the inclusion of a provision for granting a complementary form of protection, on a humanitarian basis, to those in need of international protection who do not fulfill the criteria for refugee status as set out in the *1951 Convention/1967 Protocol*. For greater clarity and to accord with the generally recognized international language used for this sort of protection, UNHCR recommends the adoption of the language used by the Executive Committee of the High Commissioner's Programme on this type of protection, as set out in the Conclusion on the matter, Conclusion No. 103 (LVI) – 2005.²⁴

In the above-referenced note it is explained that, though States may grant humanitarian status at their discretion to any foreigner for any reason, including compassionate reasons unrelated to refugee issues²⁵, this type of humanitarian status should be distinguished from complementary forms of protection provided to persons who have refugee-like reasons for not being able to return home, but who do not meet the strict definition in the *1951 Convention/1967 Protocol*. It is there noted, as well, that when complementary protection is provided to such persons, the beneficiaries should be provided with a definitive status carrying the highest degree of stability and certainty which ensures the human rights and fundamental freedoms of such persons without discrimination, taking into account the relevant international instruments and giving due regard to the best interests of the child

and family unity principles.²⁶ Thus UNHCR recommends that the law clearly state the status the beneficiaries of complementary forms of protection will enjoy as a result of the decision to grant them this protection, and that it be of sufficient duration, and carrying a sufficient number of rights (e.g. to work authorization, access to education, protection from *refoulement*, etc.) to provide them a sense of stability.

14. Support of Refugees and Others: Section 76 – 9

UNHCR welcomes the potential found in this section for the Government to provide support to asylum-seekers, refugees and persons who have been granted complementary forms of protection who may be in need of it. Also welcome is the addition of access to Korean language training, which is a necessary skill for asylum-seekers and refugees to live and integrate in Korea. UNHCR particularly appreciates the addition in the current draft of asylum-seekers to the list of possible beneficiaries of such assistance. Asylum-seekers may be more likely than refugees to require assistance for basic needs, while refugees are more likely to require help in order to integrate into Korean society.

However, UNHCR is disappointed that the provision in a previous draft for intergovernmental cooperation with respect to the provision of support to persons of concern has been removed. This represented, in UNHCR's view, a progressive and important provision which could have served to enhance the ability of relevant government departments and offices to cooperate to ensure that the basic needs of asylum-seekers and refugees are provided for. Such a provision is even more important, given the fact that even if established, a support facility is unlikely to have the capacity to house or provide support to all asylum-seekers and refugees. In that sense, a mechanism for cooperation to ensure the meeting of the needs of refugees is even more important, in UNHCR's view, than the establishment of a specific facility. UNHCR therefore recommends that the provision relating to intergovernmental cooperation be reinstated.

15. Treatment of Refugees and Others: Section 76 - 10²⁷

UNHCR notes that the currently proposed formulation for the treatment of refugees, while ostensibly fulfilling the requirements of the *Convention* and *Protocol*, in fact may not do so. This is because it says only that "efforts should be made" to ensure the legal status and treatment of refugees, whereas the *Convention* requires, by mandatory language ("shall"), that certain rights must be accorded to refugees. According to the *Convention*, these rights may be offered at different levels, sometimes depending on the right involved, sometimes depending on the beneficiary's legal status. In addition to that, and perhaps more important, UNHCR notes that international human rights law has advanced quite considerably since the adoption of the *1951 Convention* and that the state may well have obligations with respect to all those present in the territory, by virtue of general human rights law, which go beyond the terms of the *Convention*. One such example would be the absolute prohibition on *refoulement* found in Article 3 of the *Convention Against Torture and Other Cruel, Unusual or Degrading Treatment or Punishment*, which, in a case where it could be shown that a refugee would be subject to prohibited

treatment if returned, would effectively mean that the exception to the principle of *non-refoulement* found in Article 33(2) would be overridden by the newer treaty.

UNHCR welcomes the intention in the draft to allow the issuance of work permits to asylum-seekers and those holding complementary forms of protection. UNHCR is concerned, however, with the restriction contained in the current draft, which limits the availability of such work permits to those who are deemed to be in need of employment for the survival of themselves and their families. Aside from the fact that in UNHCR's experience, given the lack of support structures, virtually every asylum-seeker in Korea needs employment to sustain him or herself, the element of discretion introduced by this provision could lead to discrimination as between individuals and groups of asylum-seekers and those under complementary forms of protection. UNHCR's own policy on this issue is clear: asylum-seekers must be given sufficient assistance to ensure the meeting of their basic needs, or must be allowed to work in order to sustain themselves and their families.²⁸ In the context of an individual asylum system such as is developing in Korea, the option of providing work authorization to asylum-seekers so that they can legally sustain themselves throughout the asylum procedure appears to be the most logical and convenient way of ensuring that the basic needs of those concerned can be met. This is so also for those under complementary forms of protection.²⁹

16. Minors Unaccompanied by Adults: Section 76 – 12

UNHCR strongly urges that in the case of minors who are seeking asylum, the mandatory appointment of a guardian should be required by the legislation as soon as the child is identified as unaccompanied or separated from family members. While minors of a certain age may be in a position to have a say in the disposition of their claims, all minors require a legal guardian throughout and after their asylum process. The guardian should have the necessary expertise and professional qualification to ensure that the interests of the child are safeguarded and the needs of the child are met.³⁰

While welcoming the fact that the draft provides that minors are to be given priority in using the support facility recommended in Section 76 – 9, UNHCR notes that it may not always be in the best interests of the child to be accommodated in such an institution if a more suitable arrangement, for example foster care, can be made available. In this sense, UNHCR recommends that the section be amended to reflect that decisions regarding the accommodation and care of the child shall be taken in accordance with the best interests of the child.³¹

17. Guarantee of Family Reunification: Section 76 – 13

The right to family unity in international human rights law is considered to be of a fundamental nature.³² At the same time, the unity of the refugee family is constantly threatened, given the frequency with which refugee families become separated during flight and the fact that refugee families cannot reunite in their own country. Taken together with the prime importance of family unity for the stability and integration of refugees,³³ these factors all lead UNHCR to recommend that the provision allowing the entrance and stay of family members of refugees be strengthened. Given its importance, the right to family unity should be mandatory

except in so far as the members of the family may be inadmissible for serious exclusionary reasons.³⁴ The present draft is merely permissive – the Minister “may” allow the spouse or children under the age of 20 to enter or remain. UNHCR would prefer to see a stronger provision, making reunification mandatory unless there are serious reasons related to exclusion from refugee status or threats to the security of the country.

UNHCR also recommends that family members of a refugee should be provided the same status as the refugee.³⁵ And for greater stability and certainty, best state practice ensures by law that family members of refugees can maintain their status, or easily obtain another residence status, should the refugee die or cease to be a family member. UNHCR notes that such a provision was entered in an earlier draft (August 2005) and recommends that it be reinstated.

18. Cooperation for the advancement and administration of entry and exit control: Section 81 -2

While appreciating the reference in this section to cooperation with UNHCR, UNHCR recommends that the language adopted in this regard be more in line with the language of Article 35 of the *1951 Convention*. This section requires the cooperation of states with UNHCR in the exercise of its functions, in particular as regards supervision of the application of the *Convention* and the provision of statistical and other data. The current draft does not necessarily reflect the nature of this cooperation, but rather speaks of administration of entry and exit control, which is not a matter of UNHCR’s competence.³⁶ UNHCR recommends that at the least, the section be amended to refer, in addition to immigration control, also to matters of refugee protection, in order to make UNHCR’s collaboration relevant.

UNHCR is grateful that at the present time and in the absence of such a provision, the Government is already engaging in significant collaboration with UNHCR. UNHCR recommends, however, that for greater clarity and certainty, the requirements of Article 35 should be specifically codified.

B. Recommendations relating to Issues of Concern to UNHCR not yet covered in the draft revisions

1. Access to Asylum Procedures at Ports of Entry

The current draft is silent regarding access to refugee status determination procedures for asylum seekers arriving through the airports. UNHCR recommends that, in conformity with Executive Committee Conclusions No. 8, as well as a series of subsequent Conclusions addressing procedural issues, it should be specified in the law that immigration officers at the airport are given clear instructions for dealing with persons seeking asylum upon arrival at the airport. In particular, the immigration officers should be directed to ensure admission of the asylum seeker, inform him/her about the refugee status determination procedure in Republic of Korea and report the arrival of the applicant to the responsible officer in charge of refugee status determination.

2. Reception and Registration of Asylum-seekers

UNHCR recommends that the revision of the law also provide for the adequate reception and registration of asylum-seekers. "Reception" in this context entails the treatment of asylum-seekers on arrival and until their claims to refugee status are finally determined. Reception includes, but is not limited to, registration and the issuance of a document to certify the asylum-seeking status of the individual. Reception encompasses also the treatment afforded to asylum-seekers vis-à-vis their ability to access health care, shelter, clothing, food, safe water and other basic necessities of life, including the possibility legally to undertake employment in the asylum country. In other words, the ability of asylum-seekers to have their basic human rights respected in dignity. UNHCR is mindful that there is a high degree of flexibility allowed in the adoption of appropriate reception arrangements, given the differences in environment in different countries around the world. UNHCR also appreciates that the possibility to establish a refugee support facility envisioned in Section 76 -11 is an attempt to address these issues. Given the need for flexibility over time as well as the difficulty of setting out in detail in legislation the reception conditions, UNHCR recommends that the law set out also the basic elements of importance with respect to reception of asylum seekers. UNHCR suggests that these include i) the issuance of at least temporary documentation (for which registration is necessary, see below), ii) ensuring the availability of adequate food, shelter, water, clothing, and basic health care, whether this is provided by the government, the NGO community or achieved through provision of work authorization or other means of self-reliance; iii) ensuring that those with special physical, psychological, emotional or other needs have an opportunity to have those needs recognized and met; iv) ensure respect for family unity, including, if necessary, family tracing.³⁷

Appropriate and continuing registration of asylum-seekers can be an important protection tool for the benefit of the individual concerned. Good registration and a good database also benefits the State concerned, as it offers the ability to keep track of numbers, locations and status of all asylum-seekers. The basic principles which should inform the registration process are to be found in the Executive Committee Conclusion on the matter, No. 91 (LII) 2001.³⁸ No more than the most important principles need to be specified in the legislation. These would be, in UNHCR's view, the following: i) provision for registration and issuance of a certifying document as promptly as possible; ii) provision for the individual registration of each asylum-seeker, including recording of all basic biographical data as well as a photograph; iii) registration should be accessible, confidential and conducted in a non-adversarial manner; and iv) personnel conducting registration should be adequately trained and knowledgeable about the procedures and requirements as well as about the need for confidentiality.

3. Right to a personal interview

UNHCR notes that the draft law does not explicitly foresee that every applicant is entitled to a personal interview, in a language that he/she understands. In UNHCR's view, it is essential that the competent authority conducts a personal interview with *all* applicants for asylum, and this procedural right should not be subject to any discretion. Such an interview not only provides the required fair opportunity to every asylum-seeker to make known his or her individual case. The personal

interview is also a key tool for the decision-maker to assess the credibility of the asylum-seeker. The requirement of the personal interview thus can help to prevent the submission of non-genuine asylum requests by individuals or through written submissions of a third party. In this sense the requirement for a personal interview is a key safeguard against abuse of asylum systems.

Executive Committee Conclusions Nos. 8, 30 and 64 provide useful guidance in regard to the personal interview right.³⁹ See the following in particular:

Conclusion 30 - "(e)(i) As in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official...

Conclusion 64 - "(a)(iii) Provide, whenever necessary, skilled female interviewers in procedures for the determination of refugee status..."

UNHCR therefore recommends that the draft law should contain a clear provision specifying that all asylum applicants, including at the appeal level, should be interviewed by a competent official, with the assistance of an interpreter if necessary. Additionally, there should be reference in the law or in regulations or decrees specifying that asylum-seekers with special need should be treated accordingly, so that separated children, the elderly, survivors of rape or torture, the handicapped and others who may need it are provided with special appropriate procedures, including the possibility for a same-sex interviewer, if necessary or desired.

4. Confidentiality

UNHCR finds that unlike in previous drafts, the current draft law does not contain any guarantee that information gained about an asylum-seeker or refugee during the refugee status determination procedure must remain confidential. In addition to the Korean domestic law, international human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference with their privacy. This is of particular importance with respect to asylum-seekers and refugees, since information about their asylum claim, if revealed to the wrong sources, could put them or others at risk. Effective measures should, therefore, be taken to ensure that information concerning a refugee's claim or private life does not reach the hands of third parties that might use such information for purposes incompatible with international human rights and refugee law. Furthermore, respect for the confidentiality of the claim assists in creating the climate of trust and confidence that needs to exist between an asylum-seeker and the refugee status determiner.

The consent of the asylum seeker should be sought before individual case information about his or her claim for refugee status is shared with other parties. Such information should never be shared with the country of origin of the asylum-seeker or refugee, unless the individual concerned has specifically authorized the

disclosure and it is for a purpose compatible with the person's status, for example, for purposes of implementing voluntary repatriation.

UNHCR recommends that the draft law contain a provision stipulating that information relating to asylum-seekers and refugees is protected with regard to third parties, in particular the authorities of the country of origin.

5. Access to legal assistance

UNHCR notes that the current draft law does not contain any provision concerning access to legal assistance by asylum-seekers. UNHCR recommends that the draft law ensures that applicants have a right to have their legal advisers or counselors present during the asylum interview and subsequent proceedings.

In addition, UNHCR recommends that the draft law recognize the right to legal assistance, free of charge for especially needy asylum-seekers or for those who are detained, at both first instance and appeal stage. It is to be recalled that various domestic laws provisions entitle every needy person staying in Korea the right to free legal aid.

**Submitted by
United Nations High Commissioner for Refugees
Representation in the Republic of Korea
Seoul, 11 August 2006.**

Endnotes:

¹ UNGA Resolution 319 (iv) of 3 December 1949 and *Statute of the Office of the United Nations High Commissioner for Refugees*, UNGA Resolution 428(v) of 14 December 1950, Chapter 1, Article 1.

² *Ibid.*, Article 8.

³ Article 35 of the *1951 Convention*, and Article II of the *1967 Protocol*

⁴ See the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR Geneva, 1979, re-edited 1992) paragraphs 189 – 219 generally, and paragraph 190 and paragraphs 196 - 199 in particular.

⁵ The one reservation entered by Korea is to Article 7, paragraph 2, which accords to refugees exemption from legislative reciprocity after three years' residence.

⁶ Article 6 of the Constitution states: "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea."

⁷ No reservations are permitted to several key Articles. See Article 42 of the *1951 Convention*.

⁸ See the *International Thesaurus of Refugee Terminology* at www.refugeethesaurus.org, where it is explained that the term "protection" when used in relation to refugees and asylum-seekers refers to the protection of the refugee and human rights of the individuals concerned.

⁹ Regarding this last point, such a solution is likely to be necessary or appropriate only when a situation of mass influx occurs. In the case of individual stowaways found to be in need of international protection, the Republic of Korea will be expected, as is the case with other refugees, to allow their integration in the Republic.

¹⁰ See the *Thesaurus* referenced in endnote #8. See also the Opinion produced for UNHCR's Global Consultations on International Protection, *The Scope and Content of the Principle of Non-refoulement*, by Sir Elihu Lauterpacht and Daniel Bethlehem, which has been published in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by Erika Feller, Volker Turk and Frances Nicholson (Cambridge University Press, Cambridge, 2003) at 87, and can also be accessed on UNHCR's website at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3b33574d1>.

¹¹ It is well-established that asylum-seekers, who may be refugees but whose status has not yet been definitively determined, must be protected from *refoulement*. See for example paragraph 28 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* and numerous Executive Committee *Conclusions on the International Protection of Refugees* including Conclusions No. 53 (XXXIX) 1988, No. 71 (XLIV) 1993, para. (I) and No. 99(LV) 2004, para. (I).

¹² See in particular the conclusions of the opinion on *non-refoulement* referred to in note 9.

¹³ See Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, paragraph 12 (21/04/2004; CCPR/C/74/CRP.4/Rev.6.)

¹⁴ See Executive Committee Conclusion No. 44 (XXXVII) 1986 on the detention of refugees and asylum-seekers. See also UNHCR's *Guidelines on the Detention of Asylum-seekers*, which can be accessed at: <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bd036a74>, where the basic law and principles which govern the detention of asylum-seekers is set out. The *Guidelines* make it clear that detention of asylum-seekers which should only occur in exceptional cases of necessity. The *Guidelines* also contain helpful suggestions on alternatives to detention which are less intrusive and less expensive than detention, and on procedural guarantees for detained people which should be in place.

¹⁵ See in particular the first paragraph of the *Guidelines* document, and Guidelines 6, 7 and 8 for advice specifically regarding children, people with special needs and women.

¹⁶ See Article 42.

¹⁷ Cf. Excom Conclusion No 69 (XLIII) – 1992- *Cessation of Status*; UNHCR, *The Cessation Clauses: Guidelines on their Application*, Geneva, April 1999; UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, Geneva, 10 February 2003; UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, Geneva, 4 September 2003.

¹⁸ UNHCR's Guidelines point out that it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Numerous Executive Committee Conclusions affirm that the 1951 Convention and principles of refugee protection look to durable solutions for refugees. Accordingly, cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should therefore not result in persons residing in a host State with an uncertain status. It should not result either in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution and could also cause additional or renewed instability in an otherwise improving situation, thus risking future refugee flows. Acknowledging these considerations ensures refugees do not face involuntary return to situations that might again produce flight and a need for refugee status. It supports the principle that conditions within the country of origin must have changed in a profound and enduring manner before cessation can be applied.

¹⁹ There are some specific instances outlined in paragraph 31 of the UNHCR Exclusion Guidelines referred to in note 17 above when exclusion may be done without a consideration of the inclusion criteria. For a fuller explanation, see the *Background Note on the Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees* (4 September 2003), at paragraph 100.

²⁰ See Paragraph 117 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, referenced in Note 4 above, for a fuller explanation.

²¹ Sybille Kapferer, *Cancellation of Refugee Status*, Geneva, UNHCR, Legal and Protection Policy Research Series, PPLA/2003/02, March 2003, 53 p.

²² See paragraph (d).

²³ See lines 3 and 4 of Article 28 (1).

²⁴ The Conclusion can be accessed on UNHCR's website at <http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&id=43576e292>, and the background papers explaining the issue and the need for such a harmonization of language can also be accessed there, at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=3b95d7174>.

²⁵ Examples of such compassionate reasons cited in the paper include age, medical condition, family reasons unrelated to the refugee definition and practical impossibility of return.

²⁶ See in particular paragraph (n) of Conclusion No. 103.

²⁷ For more specific and detailed information and analysis on the rights of recognized refugees, recourse may be had to a paper recently published by UNHCR on the integration rights of refugees, available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=44bb90882>.

²⁸ See the paper on reception conditions at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b95d6244>, which outlines both UNHCR's thinking on this topic and best state practice. On the point of allowing asylum-seekers to work, see paragraph 13. Following consultations on the above-referenced paper,

the Executive Committee of the High Commissioner's Programme adopted a Conclusion on the topic, which can be found at <http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&page=home&id=3dafdd344>. In the conclusion it is highlighted in paragraph (b) (ix) that reception arrangements can be mutually beneficial where they are premised on the understanding that asylum-seekers can attain a certain degree of self-reliance, if provided with the requisite opportunities (in other words, the right to work legally.)

²⁹ See the papers and Conclusion referred to above in note 16.

³⁰ See UNHCR's Guidelines for Unaccompanied Children seeking Asylum at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d4f91cf4>. See also the recommendation in the Final Act of the Conference of Plenipotentiaries who agreed and adopted the text of the *Convention*, part IV, paragraph B (2) where it is recommended that States take measures to protect refugees who are minors with particular reference to guardianship and adoption.

³¹ It should be borne in mind at all times that as regards the rights of children, the 1989 *Convention on the Rights of the Child*, to which the Republic of Korea is a state party, specifically refers to the rights of asylum-seeking children in its Article 22, and requires, by virtue of Article 3, that in all decisions regarding the rights of the child, the best interests of the child shall be a primary consideration. The Committee on the Rights of the Child, which oversees the implementation of the Convention, has issued useful guidance with respect to the treatment of unaccompanied and separated children outside their country of origin in its General Comment No. 6 of September 2005, which has a section dealing with asylum-seeking children. The note can be accessed in the treaty bodies database of the Office of the High Commissioner for Human Rights, at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/\\$FILE/G0543805.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/$FILE/G0543805.pdf). Further helpful guidance on the treatment of separated children can be obtained from the *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, jointly published in 2004 by the International Committee of the Red Cross, UNICEF, UNHCR, IRC, Save the Children/UK and World Vision. These can be accessed, among other places, on the UNHCR public website at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=4098b3172>.

³² See the *Universal Declaration of Human Rights*, where Article 16 (3) states that the family is the natural and fundamental group unit of society and is entitled to the protection by society and the State. See also Article 23 of the *International Covenant on Civil and Political Rights*, and Article 10 of the *International Covenant on Economic, Social and Cultural Rights*, where the Declaration's statement is codified in enforceable instruments.

³³ Although the right to family unity is not specifically mentioned in the terms of the 1951 *Convention* or the 1967 *Protocol*, it was recommended by the Conference of Plenipotentiaries who agreed and adopted the text of the *Convention* in their Final Act, part IV, paragraph B, that, as the family unity of the refugee is constantly threatened, Governments should take the necessary measures for the protection of the refugee's family especially with a view to ensuring the unity of the family is maintained, particularly where the head of the family has fulfilled the necessary conditions for admission to a particular country.

³⁴ See Executive Committee Conclusion No. 85 (XLIX) 1998, at (v), (w) and (x) and Conclusion No. 88 (L) 1999 at (b) (i), (ii) and (iii).

³⁵ Ibid.

³⁶ For more information on the nature of the requirement of cooperation in Article 35, reference may be had to the paper on *Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and Beyond*, prepared for the Global Consultations and published in the book referred to in note 9, at 613. The paper is also accessible online at

UNHCR's website at <http://www.unhcr.org/cgi-bin/teXis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3b3357a69>.

³⁷ See the paper for the Executive Committee found at <http://www.unhcr.org/cgi-bin/teXis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b95d6244>.

³⁸ These can be accessed on UNHCR's website at <http://www.unhcr.org/cgi-bin/teXis/vtx/excom/opendoc.htm?tbl=EXCOM&page=home&id=3bd3e1d44>. See paragraph (b) points (i) through (vi) for the basic principled considerations.

³⁹ See also Global Consultations on International Protection, Asylum Processes (Fair and Efficient asylum Procedures), EC/GC/01/12, 31 May 2001.