

SOUTH KOREA'S PRE-ASSESSMENT AT THE PORT
OF ENTRY UNDER THE NON-REFOULEMENT
PRINCIPLE OF THE REFUGEE CONVENTION OF
1951

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INTRODUCTION

The historical flow of refugees from all around the world has long been making its way to Europe, Australia, and the United States¹ ever since the establishment of the Convention Relating to the Status of Refugee of 1951 (“Refugee Convention”)² and the Protocol Relating to the Status of Refugees of 1967 (“Refugee Protocol”).³ During the 1990s, Asian countries began joining the Refugee Convention, especially those Contracting States that were gaining economic stability within the international community.⁴ The Republic of Korea (“South Korea”) was one of those newly trending destination countries for the asylum seekers ever since it first acceded to the Refugee Convention and the Refugee Protocol in December 1992.⁵ In 1993, South Korea added the definition of “refugee” into its Immigration Control Law⁶ and then in 2012 it finally legislated its Refugee Act,⁷ becoming the first signatory state in Asia to implement the Refugee Convention into its domestic law.⁸ However, while there was a sharp increase in the number of asylum seekers to South Korea between 2013 and 2018, jumping from 1,574 to 16,173, only 57 in 2013 and 144 in 2018 were granted refugee status.⁹ The Organization for Economic Co-operation and Development (“OECD”) rated South Korea’s refugee acceptance rate at less than 3%, which was below the average of 38%,

¹ UNHCR Field Information and Coordination Support Section, UNHCR HISTORICAL REFUGEE DATA, <http://data.unhcr.org/dataviz/> (last visited Sep. 21, 2020).

² Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259 [hereinafter Refugee Convention].

³ Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter Refugee Protocol].

⁴ UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL (April 2015), <https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

⁵ UNHCR, Fact Sheet: The Republic of Korea (Feb. 2016), <https://www.unhcr.org/protection/operations/500019d59/republic-of-korea-fact-sheet.pdf>; UNHCR & OECD, 2019 International Migration and Displacement Trends and Policies Report to the G20, <https://www.oecd.org/migration/mig/G20-migration-and-displacement-trends-and-policies-report-2019.pdf>.

⁶ Chul-ibguggwanli beob [Immigration Control Law], amended by Ministry of Justice Decree No. 16344, Apr. 23, 2019, art. 2 (S. Kor.), *translated in* Korean Legislation Research Institutes online database, https://elaw.klri.re.kr/eng_service/main.do (search required).

⁷ Nanmin beob [Refugee Act], amended by Ministry of Justice Decree No. 14408, Dec. 20, 2016, arts. 2, 3, 5(6) (S. Kor.), *translated in* Korean Legislation Research Institutes online database, https://elaw.klri.re.kr/eng_service/main.do (search required).

⁸ KOREA IMMIGR. SERV., HANDBOOK FOR RECOGNIZED REFUGEES, HUMANITARIAN STATUS HOLDERS, AND REFUGEE STATUES APPLICANTS: REFUGEE STATUS DETERMINATION PROCEDURES IN KOREA 4 (2015).

⁹ Korea IMMIGR. SERV., MONTHLY STATISTICAL REPORT OF KOREA IMMIGRATION SERVICE 34 (Jan. 2019), http://www.moj.go.kr/viewer/skin/doc.html?rs=/viewer/result/bbs/227&fn=temp_1566174851478100 [hereinafter KOREA IMMIGRATION STATISTICS].

ranking it as third in last among the Member States.¹⁰ This low refugee acceptance rate was criticized as the outcome of the asylum seekers' inaccessibility to South Korea's refugee status determination ("RSD") procedure that carried an important role in assessing the *well-founded fear* of the asylum seekers upon entry.¹¹ Since the enactment of the Refugee Act, many scholars and asylum seekers were left disappointed at the reality of South Korea's RSD procedure.¹²

The United Nations High Commissioner for Refugees ("UNHCR")¹³ previously made comments and gave suggestions to South Korea about its Refugee Act in 2013.¹⁴ UNHCR suggested a revision of Article 8(5) of the Refugee Act that allowed direct repatriation of asylum seekers without the RSD procedure.¹⁵ The provision justified such direct repatriation based on the seven factors provided under Article 5 of the Enforcement Decree of the Refugee Act ("Enforcement Decree"), which disqualified asylum seekers from accessing the RSD procedure if they satisfied even one of the seven factors.¹⁶ One of the factors was "knowingly concealing facts . . . by submitting a false document."¹⁷ The controversial nature of this one factor was that it was not assessing whether the claimed fear met the required standard of *well-founded fear* under the Refugee Convention.¹⁸ The factor was merely testing the credibility of the asylum seekers based on their documents and interviews brought before the chief of immigration.¹⁹ The assessment failed to recognize the asylum seekers' potential trauma induced by the persecution they were fleeing from and it failed to assess the essential factors to determine the existence of *well-founded fear*.²⁰ In reality, asylum seekers did not always have proper documents or understand the

¹⁰ Shin-wha Lee, *South Korea's Refugee Policies: National and Human Security Perspectives*, in HUMAN SECURITY AND CROSS-BORDER COOPERATION IN EAST ASIA 227, 231 (Carolina G. Hernandez, Eun Mee Kim, Yoichi Mine, Ren Xiao, eds., 2019).

¹¹ *Id.*; *Refugee Laws in South Korea: Issues & Controversies*, THE PENINSULA REPORT, (Dec. 12, 2019), <https://thepeninsulareport.com/2019/12/10/refugee-laws-in-south-korea-issues-controversies/>.

¹² Jieun Lee, *A Pressing Need for the Reform of Interpreting Service in Asylum Settings: A Case Study of Asylum Appeal Hearings in South Korea*, 27 J. REFUGEE STUD. 62, 63 (2014); Il Lee, *Koreas Landmark Case for Improving the Legal Process of Asylum Seekers*, 3 KOREAN J. INTL & COMP. L. 171, 172 (2015).

¹³ UNHCR, Commissioner Antonio Guterres, <https://www.unhcr.org/en-us/antonio-guterres-portugal-2005-2015.html> (last visited Oct. 5, 2020).

¹⁴ UNHCR, UNHCRs Comment on the Draft Presidential Decree and Regulations to the Refugee Act of the Republic of Korea (2013).

¹⁵ *Id.* at 10.

¹⁶ Refugee Act, art. 8(5) (S. Kor.); Nanminbeob Sihaenglyeong [Enforcement Decree of the Refugee Act], *amended* by Presidential Decree No. 28870, May 8, 2018, art. 5 (S. Kor.).

¹⁷ Enforcement Decree of the Refugee Act, art. 5(3) (S. Kor.).

¹⁸ UNCHR Comment *supra* note 14, at 12.

¹⁹ *See Id.* at 9–13.

²⁰ *Id.* at 12–13.

sophisticated administrative procedures that were provided in unfamiliar languages.²¹ Given the new environment asylum seekers were arriving into after a long hard journey, the majority of the asylum seekers struggled to convey clear and precise recollection of their claim of a *well-founded fear* of persecution.²²

As opposed to the seven factors in the Enforcement Decree, Article 1(A)(2) of the Refugee Convention provided five factors as part of the RSD procedure to help its Contracting States determine whether the asylum seekers had a *well-founded fear* of persecution to qualify as refugees.²³ The Refugee Convention emphasized that the purpose of assessing *well-founded fear* was to make sure the asylum seekers are not repatriated back to countries of origin where persecutions exist.²⁴ This *non-refoulement* principle makes the RSD procedure a minimal obligation or duty of the Contracting States. Unfortunately, South Korea's current pre-assessment before the RSD procedure seriously conflicts with the Refugee Convention's requirement of the RSD procedure.²⁵ South Korea's pre-assessment does not only fail to assess *well-founded fear*, but it also makes it difficult for asylum seekers to gain access to the RSD procedure that assesses *well-founded fear*.²⁶

South Korea is not alone when it comes to varying RSD procedures that allow the Contracting States to practice state sovereignty when determining *well-founded fear*.²⁷ Many Western countries, such as the U.S. and Australia, were forerunners in establishing RSD procedures that varied.²⁸ A comparative study of these countries alongside South Korea will significantly expand the understanding of the core issues in South Korea's Enforcement Decree and RSD procedure. It will help examine whether South Korea is at risk of noncompliance with the Refugee Convention because of its pre-assessment at the port of entry, which fails to assess *well-founded fear* and honor the *non-refoulement* principle.

²¹ See Jeun Lee *supra* note 12.

²² See Jason Strother, *South Korea Faces Criticism Over Refugee Policy*, VOICE OF AMERICA (Aug. 5, 2016), <https://www.voanews.com/east-asia-pacific/south-korea-faces-criticism-over-refugee-policy>.

²³ Refugee Convention, *supra* note 2, art. 1(A)(2) (“[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

²⁴ UNHCR, *Determination of Refugee Status*, at 6–7 (1989).

²⁵ See Andrew Wolman, *Koreas Refugee Act: A Critical Evaluation under International Law*, 2 J. EAST ASIA & INT. L. 479, 487–488 (2013).

²⁶ See UNHCR, UNHCRs Comment on the Draft Presidential Decree and Regulations to the Refugee Act of the Republic of Korea 11–15 (2013).

²⁷ See discussion *infra* Part COMPARING DIFFERENT REFUGEE STATUS DETERMINATION PROCEDURES at 23.

²⁸ Compare Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, *with Migration Act 1958* (Cth) s 5J (Austl.).

I. REFUGEE STATUS DETERMINATION PROCEDURE UNDER THE REFUGEE CONVENTION

Article 35 of the Refugee Convention grants the UNHCR supervisory responsibility,²⁹ subjecting the Contracting States to the monitoring evaluations of the UNHCR upon accession to the Refugee Convention.³⁰ Article II of the Refugee Protocol requires the Contracting States to cooperate with the UNHCR by acknowledging its supervisory role³¹ and follow the guidelines provided in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”).³² The UNHCR Handbook states that the Refugee Convention should be interpreted “with fundamentally humanitarian objectives.”³³ Nevertheless, the Refugee Convention gives the Contracting States freedom and discretion in conducting their RSD procedures as long as they defer to the *non-refoulement* principle that bars forced repatriation of asylum seekers back to persecution.³⁴ In other words, while the “[f]reedom to grant or to refuse permanent asylum remains” with the Contracting States due to state sovereignty, they were not to deprive the asylum seekers of their right to the minimum protection of not being sent back into persecution.³⁵ Article 33 of the Refugee Convention prohibits forced repatriation of asylum seekers to countries where there exists a “direct threat to the refugee’s life or freedom.”³⁶ This comes into connection with the definition of a refugee provided under Article 1(A)(2) of the Refugee Convention.³⁷ Therefore, investigating and collecting evidence to determine whether the asylum seekers’ *well-founded fear* of persecution exists is at the core of the RSD procedure.³⁸

²⁹ Refugee Convention, *supra* note 2, art. 35.

³⁰ GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 532 (3d ed. 2007).

³¹ Refugee Protocol, *supra* note 3, art. II.

³² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* U.N. Doc. HCR/1P/4/ENG/REV.4 (2019) [hereinafter *UNHCR Handbook*]; ATLE GRAHL-MAHDSSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW: REFUGEE CHARACTER* 195-205 (1966).

³³ GOODWIN-GILL & MCADAM, *supra* note 30, at 54.

³⁴ Manuel Angel Castillo & James C. Hathaway, *Temporary Protection, in RECONCEIVING INTERNATIONAL REFUGEE LAW* 2 (James C. Hathaway ed., 1997).

³⁵ GOODWIN-GILL & MCADAM, *supra* note 30, at 416.

³⁶ Refugee Convention, *supra* note 2, art. 33; Executive Committee on International Protection of Refugees, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees on Its Fortieth Session*, at 77, U.N. Doc. A/AC.96/737 (1989); UNHCR, *NOTE ON INTERNATIONAL PROTECTION* ¶ 11, U.N. Doc. A/AC.96/815 (1993); 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* ¶¶ 26–31 (2007).

³⁷ Refugee Convention, *supra* note 2, art. 1(A)(2).

³⁸ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 373 (2nd ed. 2014).

A. *Determining the Existence of Well-Founded Fear*

In general, a migrant is a person who voluntarily left his or her state of origin “for reasons other than those contained in the definition”³⁹ to take up new residence in a different state. Because a migrant moves not based on fear but based exclusively on economic considerations, the person is not a refugee under the Refugee Convention.⁴⁰ The distinction between migrants and refugees is in many cases very blurry as it depends on how the state views the effects economic measures have on a person’s livelihood.⁴¹ Determination must be made as to how compelled a person was against his or her will to leave the state of origin because of an economic difficulty caused by a persecutor that amounted to a *well-founded fear* of persecution.⁴² There could have existed some level of “racial, religious or political aims or intentions directed against a particular group” behind those economic measures being manifested as persecution.⁴³ And there were cases where these economic measures enforced by the state of origin “destroy[ed] the economic existence of a particular section of the population.”⁴⁴ Victims of these economic measures would then become refugees that were forced to abandon their state of origin because economic measures made it difficult for them to continue residing there.⁴⁵

Therefore, the Contracting States were given the discretion to identify whether an asylum seeker was a refugee or a migrant based on varying evidence through the RSD procedure.⁴⁶ The UNHCR guideline emphasized that the Contracting States should consider not only the objective factors but also the subjective factors of the asylum seekers to “ascertain and evaluate the relevant facts and the credibility of the applicant.”⁴⁷ The asylum seekers carried the burden of proof to present evidence that would “suffice to establish the requisite intention” of the persecutor from whom the asylum seekers were escaping from as the cause of *well-founded fear*.⁴⁸ However, the asylum seekers were not in the best situation to meet the ideal standard of proof due to the challenges in the availability of documents, memory loss, cultural misunderstandings, language barriers, and other practical hindrances.⁴⁹ Hence, the guideline deemed evidence

³⁹ UNHCR Handbook, *supra* note 32 at 22.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² GOODWIN-GILL & MCADAM, *supra* note 30, at 63.

⁴³ UNHCR Handbook, *supra* note 32 at 22.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See HATHAWAY, *supra* note 38, at 385–86.

⁴⁷ GOODWIN-GILL & MCADAM, *supra* note 30, at 54.

⁴⁸ HATHAWAY, *supra* note 38, at 371–72.

⁴⁹ Oh Tae Kon, *Legal Implication about Refugee Recognition Issue*, 7 J. OF HUMAN. AND SOC. SCI. 431, 449 (2016).

that established favorable inferences sufficient.⁵⁰ And the country of asylum was then to carry the burden to rebut those inferences while detaining the asylum seekers at the border.⁵¹

The U.S. courts have consistently decided against adopting a strict standard when proving *well-founded fear* of persecution.⁵² In *INS v. Cardoza-Fonseca*, the U.S. Supreme Court held that the “clear probability” standard of proof does not govern asylum applications under §208(a) [of the Immigration and Nationality Act].⁵³ In *Mohammed v. Gonzales*, an asylum seeker from Somalia appealed the order of the Board of Immigration Appeals that rejected her motion to review her rejected refugee application.⁵⁴ The Ninth Circuit Court of Appeals looked into the issue of whether *well-founded fear* for future persecution continued to exist when the persecution, which was in the form of female genital mutilation (“FGM”), already occurred.⁵⁵ The court held in favor of the asylum seeker, concluding that FGM was a “permanent and continuing” act of persecution” and that the “presumption of well founded fear in such cases cannot be rebutted.”⁵⁶

Because the Refugee Convention requires its Contracting States to comply with their duty to assess *well-founded fear*, all asylum seekers have at least the right of access to the RSD procedure.⁵⁷ In essence, the requirement for RSD procedure stems from the presumption that the asylum seekers are potential victims of a *well-founded fear* of persecution.⁵⁸ When the asylum seekers reach the port of entry, they are presumed as refugees with claims that are “declaratory, rather than constitutive.”⁵⁹ Therefore, access to the RSD procedure is an obligation of the Contracting States to provide the asylum seekers at the port of entry rather than an option the asylum seekers must earn.⁶⁰

⁵⁰ See UNHCR Handbook, *supra* note 32 at 22–25.

⁵¹ *R. v. Governor of Brixton Prison, ex p. Ahson* [1969] 2 QB 222, 233 (appeal taken from Eng.).

⁵² *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060–61 (9th Cir. 2017) (en banc); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

⁵³ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427–49 (1987); Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. OF INTL L. 1, 7 (1997) (“In some respects, Justice Stevens opinion in *Cardoza-Fonseca* is a high-water mark among U.S. asylum cases in its attention to international norms.”).

⁵⁴ *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005).

⁵⁵ *Id.* at 800.

⁵⁶ *Id.* at 801.

⁵⁷ 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 ¶ 8 (2007).

⁵⁸ UNHCR Handbook, *supra* note 32 at 20–22.

⁵⁹ UNHCR Handbook, *supra* note 32, at 17; GRAHL-MAHDSSEN, *supra* note 32 at 340.

⁶⁰ See HATHAWAY, *supra* note 38, at 34; See GOODWIN-GILL & MCADAM, *supra* note 30, at 394.

B. Non-Arrival Policies and the Non-Refoulement Principle

The *non-refoulement* principle is “not an absolute principle,”⁶¹ given the possibility that the circumstances would change and the different public interests of the states. If the *well-founded fear* no longer exists, the states were given the discretion to disqualify and expel the asylum seeker that was granted refugee status.⁶² Article 1(C) of the Refugee Convention provides six categories under which the refugee definition provided by Article 1(A) “cease to apply.”⁶³ Also known as the *cessation clause*, Article 1(C) determines that the asylum seekers once recognized as refugees are no longer qualified to carry that status due to a change of circumstances.⁶⁴ Unlike the *cessation clause*, Article 1(F) provides an *exclusion clause*, where a state can determine that the asylum seeker does not deserve international protection based on a determination process.⁶⁵ The exclusion of such asylum seekers is “with respect to whom there are *serious reasons* for considering’ that they have committed a crime against peace, a war crime or a crime against humanity.”⁶⁶ Lastly, asylum seekers who have been granted refugee status can become subject to repatriation under Article 33(2) of the Convention “whom there are reasonable grounds for regarding as a danger to the security of the country.”⁶⁷ Under Article 32, or the *expulsion clause*, States are permitted to expel the refugee “on grounds of national security and public order.”⁶⁸ Unlike the *cessation clause*, the *expulsion clause* revokes the granted refugee status because of the subsequent conduct of the refugee while within the territory of the State.⁶⁹

Nevertheless, despite the viable exceptions to the *non-refoulement* principle, forced repatriation against the will of an asylum seeker is still prohibited as a direct violation of the prohibition of *refoulement*.⁷⁰ The threshold is harder to reach when it comes to disqualifying an asylum seeker of his or her refugee status in

⁶¹ GOODWIN-GILL & MCADAM, *supra* note 30, at 234.

⁶² *Id.*

⁶³ Refugee Convention, *supra* note 2, art. 1(C).

⁶⁴ *UNHCR Handbook*, *supra* note 32, at 29 (The “cessation clauses” are provided under Article 1 (C)(1) to (6) of the Refugee Convention and it spells “out the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified.”).

⁶⁵ Refugee Convention, *supra* note 2, art. 1(C); *UNHCR Handbook*, *supra* note 32, at 35–37.

⁶⁶ GOODWIN-GILL & MCADAM, *supra* note 30, at 165.

⁶⁷ Refugee Convention, *supra* note 2, art. 33(2).

⁶⁸ *Id.* at art. 32.

⁶⁹ Refugee Convention, *supra* note 2, arts. 1(F)(a) & (c); *UNHCR Handbook*, *supra* note 32, at 100.

⁷⁰ 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 ¶¶ 7–8 (2007).

comparison to that of satisfying the refugee status definition.⁷¹ In addition, the refugees are given the right to appeal those disqualifications, “except where compelling reasons for national security otherwise require.”⁷² In other words, once the asylum seekers are granted refugee status, the only way to repatriate them is through their voluntary departure.⁷³

Because the Contracting States must meet the high threshold when they repatriate either an unqualified asylum seeker or a refugee already in the territory, their RSD procedures have developed overtime to filter out potential non-asylum seekers upon their arrival at the port of entry.⁷⁴ The purpose was mostly for efficiency in case of a mass influx of incoming asylum seekers.⁷⁵ Guy S. Goodwin-Gill criticized this regular practice among the Contracting States that classified asylum seekers either as “illegal immigrants” or “economic migrants” early on to avoid recognizing them as potential refugees upon their arrival.⁷⁶ This practice was also known as “interception,” where the States would “prevent, interrupt, or stop the movement of people without the necessary immigration documentation from crossing their borders by land, sea, or air.”⁷⁷ These measures that have long been practiced by the U.S. and Australia were heavily criticized as “denial of access,” a tactic used by States that were “anxious to avoid the requirement to abide by certain peremptory obligations, such as *non-refoulement*.”⁷⁸ Nevertheless, it was also difficult to clearly define these measures as a violation of the *non-refoulement* principle because the States were merely “deny[ing] admission in ways not amounting to the breach of the principle.”⁷⁹

Some efforts were made by the Contracting States to mitigate case-by-case complications with regards to asylum seekers isolated at sea.⁸⁰ The U.S. Supreme Court decided in favor of Haitian asylum seekers when the Federal Government attempted interception by blocking the Haitian asylum seekers from entering the country through the ocean by boat.⁸¹ In *Sale v. Haitian Centres Council*,⁸² the

⁷¹ *UNHCR Handbook*, *supra* note 32 at 29.

⁷² GOODWIN-GILL & MCADAM, *supra* note 30, at 262.

⁷³ *UNHCR Handbook*, *supra* note 32, at 29.

⁷⁴ GOODWIN-GILL & MCADAM, *supra* note 30, at 370–371.

⁷⁵ *See Id.* at 267.

⁷⁶ *Id.* at 370–371.

⁷⁷ GOODWIN-GILL & MCADAM, *supra* note 30, at 371; Executive Committee of the High Commissioners Programme Eighteenth Meeting, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, ¶ 10, U.N. Doc. EC/50/SC/CRP.17 (Jun. 9, 2000).

⁷⁸ GOODWIN-GILL & MCADAM, *supra* note 30, at 370.

⁷⁹ *Id.* at 267.

⁸⁰ *Id.*

⁸¹ *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

⁸² *Sale*, 509 U.S. at 165–166 (“We must decide only whether Executive Order

issue arose from the “Haitian interdiction programme” where the “U.S. Coast Guard was instructed to stop and board specified vessels.”⁸³ The Coast Guard returned the boats to their country of origin after examining and concluding that the vessel and the passengers did not comply with the U.S. immigration laws.⁸⁴ The asylum seekers’ noncompliance to the immigration laws of the destination country was considered a potential threat to the national security and public order under Article 33(2) of the Refugee Convention.⁸⁵ However, this did not negate the requirement for the assessment of *well-founded fear* of the asylum seekers, even if they failed to carry proper immigration documents with them.⁸⁶ Observing the facts in the case, the U.S. Supreme Court differentiated the immigration process from the exclusion process under Article 33(2) as a procedure that was meant to be applied to migrants, not asylum seekers.⁸⁷ It additionally concluded that the Haitian asylum seekers were not subject to the exclusion process because they were never physically present in the destination country when they were intercepted on the high seas.⁸⁸ This made the application of Article 33(2) premature and an “absurd anomaly.”⁸⁹ In other words, the *non-refoulement* principle under Article 33(1) of the Refugee Convention was meant to apply at the frontier to the asylum seekers who have yet to enter into the territory to receive proper RSD.⁹⁰ The assessment of *well-founded fear* was required even before the arrival of the asylum seekers at the port of entry.⁹¹

The main issue is whether the *well-founded fear* of the asylum seekers was assessed either at sea or within the territory of the Contracting State.⁹² The Refugee Convention allows some level of control in the movement of the asylum seekers in the form of “burden-sharing” among the Contracting States.⁹³ James C. Hathaway, a

No. 12807, 57 Fed.Reg 23133 (1992), which reflects and implements those choices, is consistent with § 243(h) of the INA.”); see *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (“In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely on the threshold of initial entry.”).

⁸³ GOODWIN-GILL & MCADAM, *supra* note 30, at 271.

⁸⁴ *Id.*

⁸⁵ *Id.* at 372.

⁸⁶ Wolman, *supra* note 25, at 489.

⁸⁷ *Sale*, 509 U.S. at 179–183.

⁸⁸ *Id.* at 178–180.

⁸⁹ *Id.* at 179–180.

⁹⁰ See Refugee Convention, *supra* note 2, art. 33(1); see UNCHR, Safe Avenues to Asylum?: The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests (2002).

⁹¹ See UNCHR, *supra* note 70.

⁹² James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INTL L. J. 129, 165 (1990).

⁹³ *Id.*

scholar in international refugee law,⁹⁴ looked into how refugee protection was first characterized as a duty shared by the international community “as a whole” during post-World War II, especially in Europe.⁹⁵ The asylum countries responded to the overwhelming number of asylum seekers that could not be protected by a single nation.⁹⁶ Hathaway stated that the Refugee Convention was drafted to “construct a forward-looking system of refugee burden-sharing”⁹⁷ in times of war-like situations where massive flow of asylum seekers would be incurred.⁹⁸ This shows the flexibility of the Refugee Convention in times when the Contracting States are overburdened with the incoming asylum seekers. While there exists some flexibility within the Refugee Convention, the one non-negotiable duty of a Contracting State is to assess the *well-founded fear* of the asylum seekers and determine whether they are refugees with rights to *non-refoulement* protection.⁹⁹

II. SOUTH KOREA'S REFUGEE ACT AFTER SIX YEARS

The current refugee status applications in South Korea were processed under the Ministry of Justice and its Refugee Division since 2013.¹⁰⁰ Once the asylum seekers enter South Korea, they must pass the pre-assessment process to become eligible to be examined by the RSD officers and become entitled to the protection and support provided under the Refugee Act.¹⁰¹ The asylum seekers undergoing the RSD procedure are provided with humanitarian measures, such as a permission to stay and work and living expenses if separately applied for during the 90-day determination period.¹⁰² Despite this supportive structure ready for the asylum seekers, the pre-assessment process that the asylum seekers encounter first is what gives rise to the issue of South Korea's compliance with the *non-refoulement* principle under the Refugee Convention.¹⁰³ The pre-assessment process gives the chief immigration officer the authority to determine whether the asylum seekers' applications are eligible to be referred to

⁹⁴ *Faculty Bio: Hathaway, James C.*, UNIV. MICH. L. SCH., <https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=jch> (last visited Oct. 9, 2019).

⁹⁵ Hathaway, *supra* note 93, at 178.

⁹⁶ *Id.* at 179.

⁹⁷ See Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295, 300 (1998); Peter H. Shuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INTL L. 243, 246, 249, 253, 275 (1997).

⁹⁸ James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 170, 192 (1997).

⁹⁹ Anker, *supra* note 97, at 295, 297, 308.

¹⁰⁰ KOREA IMMIGRATION STATISTICS, *supra* note 9.

¹⁰¹ *Id.*

¹⁰² *Id.* at 12–13, 18.

¹⁰³ Wolman, *supra* note 25 at 489.

the RSD procedure.¹⁰⁴ The process takes place at the transfer zone in the airport based on the factors provided under Article 5 of the Enforcement Decree.¹⁰⁵ If the asylum seekers fail to pass this process, their applications will not be referred to the RSD procedure and they will be subject to repatriation.¹⁰⁶ Because the repatriation decision solely depends on the pre-assessment process, it becomes crucial that Article 5 of the Enforcement Decree assess *well-founded fear* in the pre-assessment process.¹⁰⁷ Otherwise, South Korea's pre-assessment violates the Refugee Convention.¹⁰⁸

South Korea is not without understanding that the *non-refoulement* principle aims to prevent the repatriation of asylum seekers back to their place of *well-founded fear* of persecution.¹⁰⁹ South Korea actively has been reaching out to protect and receive North Korean defectors without a single record of repatriation.¹¹⁰ It enacted the North Korea Refugees Protection and Settlement Support Act ("North Korean Refugee Act") in 1997¹¹¹ and allowed the defectors to enter South Korea and obtain citizenship.¹¹² The North Korean Refugee Act provided basic social welfare and naturalization services for North Korean defectors through the Settlement Support Center for North Korean Refugees (or *Hanawon*).¹¹³ This resulted in a total of 32,476 North Korean defectors accepted as refugees and eventually citizens into South Korea from 1998 to 2019.¹¹⁴ For North Korean defectors, exiting the Democratic People's Republic of Korea ("DPRK") was treason punishable by torture and imprisonment in labor camps (or *gulag*).¹¹⁵ When they did succeed in escaping DPRK, they were met with the automatic repatriation policy in the People's Republic of China ("China").¹¹⁶ The Chinese Ministry of Foreign Affairs issued a

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; Enforcement Decree of the Refugee Act, art. 5 (S. Kor.).

¹⁰⁶ Wolman, *supra* note 25 at 488–489.

¹⁰⁷ Refugee Convention, *supra* note 2.

¹⁰⁸ Wolman, *supra* note 25 at 488–489.

¹⁰⁹ GOODWIN-GILL & MCADAM, *supra* note 30, at 234.

¹¹⁰ *Id.*

¹¹¹ Bughan-italjumin-ui Boho Mich Jeongchagjiwon-e Gwanhan Beobyul [North Korean Refugees Protection and Settlement and Support Act], Act No. 5259, Jan. 13, 1997, *amended by* Act No. 16223, Jan. 15, 2019 (S. Kor.).

¹¹² Refugee Convention, *supra* note 2.

¹¹³ Ash Abraham, *After Hanawon*, CARLETON UNIV. SCH. JOURNALISM & COMMUN (2019) <https://cusjc.ca/mrp/strainedrelations/life-after-hanawon/>.

¹¹⁴ MINISTRY OF UNIFICATION, 2019 UNIFICATION WHITE PAPER 429 (2019).

¹¹⁵ Hum. Rts. Council, Rep. of the Detailed Findings of the Commn of Inquiry on Hum. Rts. in the Democratic Peoples Republic of Korea [DPRK], A/HRC/25/CRP.1, at 113 (Feb. 7, 2014) [hereinafter *HRC Report on DPRK*]; DAVID HAWK & AMANDA MORTWEDT OH, THE PARALLEL GULAG: NORTH KOREAS "AN-JEON-BU" PRISON CAMPS VIII (2017) ("[W]e in the outside world, have come to know the gulags for what they are: instruments of fear and control by the leadership of the DPRK that has imposed on North Korea a huge system of detention that breaches United Nations law and universal, civilised standards.") [hereinafter *The Parallel Gulag*].

¹¹⁶ *Id.* at 18.

letter to all its foreign embassies and consulates, stating that they did not have the right to receive asylum seekers according to the principles of international law.¹¹⁷ It then required them to “inform the Consular Department of Chinese Ministry of Foreign Affairs in case the illegal intruders were found, and hand over the intruders to the Chinese public security organs.”¹¹⁸ In opposition to this demand, the South Korean embassies continued to protect the North Korean defectors by receiving them and granting them refugee status as well as citizenship in South Korea.¹¹⁹

The stark difference between South Korea’s acceptance rate for asylum seekers from North Korea and its acceptance rate of other refugees clearly shows South Korea’s discrimination towards the non-Korean asylum seekers.¹²⁰ While the North Korean defectors are automatically given access to RSD with automatic acknowledgment of their *well-founded fear*, the non-Korean asylum seekers are filtered through the pre-assessment at the port of entry, which is based on factors that focuses not on their *well-founded fear* of persecution but on the credibility of their presented evidence.¹²¹ Such differentiated applications of South Korea’s commitment to the Refugee Convention cannot be justified.

A. *Article 5 of the Enforcement Decree and the Refugee Act*

Pre-assessment is based on the stipulated grounds of rejection provided under Article 5(1) of the Enforcement Decree.¹²² It ensures that “[t]he Minister may not refer a refugee status applicant to refugee recognition review procedures if a person falls under any of the following subparagraphs.”¹²³ And as provided in the statistics, the most frequented stipulated grounds for rejecting access to the RSD procedure was the seventh ground, where the asylum seekers’ reason for applying for refugee status is “made solely for economic reasons.”¹²⁴ Through this simplified determination method, the process was easily complete within a limited period of seven days.¹²⁵ The third and fourth grounds for rejection were mostly incorporated with the seventh ground under Article 5(1) because they did not have much practical

¹¹⁷ *The Invisible Exodus: North Koreans in the Peoples Republic of China*, 14 HUM. RTS. WATCH 8(C), 35 (2002) [hereinafter THE INVISIBLE EXODUS].

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4.

¹²⁰ *Id.* at 31.

¹²¹ *Id.* at 4, 31.

¹²² Enforcement Decree of the Refugee Act art. 5(1) (S. Kor.).

¹²³ *Id.*

¹²⁴ *Id.* art. 5(1)(7); Choi Kae-young, *Asylum Procedure at Ports of Entry and the Due Process*, 55 ADMIN. L. J. 153, 162 (2018).

¹²⁵ *Id.*

function to determine asylum seekers as a non-refugee.¹²⁶ The third ground merely condemned asylum seekers who were “knowingly concealing facts, including, but not limited to, by submitting a false document.”¹²⁷ This triggers a potential violation of Article 31 of the Refugee Convention that prohibits giving punitive measures against asylum seekers for their initial illegal entry before their refugee status determination.¹²⁸ In general, the asylum-seekers brought many various documents to prove *well-founded fear* without sufficient prior knowledge of what materials and documents the destination countries would require and acknowledge for credibility.¹²⁹ Given the circumstances of a genuine refugee, it would be unreasonable to negate the fundamental possibility of the existence of *well-founded fear* solely based on falsified documents or concealment of information.¹³⁰ These grounds limiting the application of refugee status did not seem to address the core issue the RSD procedure was meant to target and resolve, which was whether the asylum seeker was actually fleeing from a *well-founded fear* of persecution in the country of origin.¹³¹

The fourth ground for rejection under Article 5(1)(4) of the Enforcement Act is “[w]hen the person came from a safe country of origin or a safe third country, in which little possibility of persecution exists.”¹³² This is controversial as it provides no legal standard to help determine the definition of a “safe third country.”¹³³ While *well-founded fear* claimed by the asylum seekers could apply to either that one individual or the entire community, to rely on a generalized observation that a country of origin is presumably “safe” overly simplifies the application of the *non-refoulement* principle.¹³⁴ Under the Refugee Act, forced repatriation of asylum seekers is broadly prohibited, even when the determination concludes that the refugee status did not apply.¹³⁵ And the Refugee Convention allows asylum seekers to claim asylum in the first country they set foot in

¹²⁶ CHAE HYUN-YOUNG, UNHCR KOREA, *Keynote Address at the Judicial Policy Research Institute Seminar: Human Rights of Refugees and Private Law* (2017).

¹²⁷ Enforcement Decree of the Refugee Act, art. 5(1)(3) (S. Kor.); Choi, *supra* note 124.

¹²⁸ Refugee Convention, *supra* note 2, art. 31.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Enforcement Decree of the Refugee Act, art. 5(1)(4) (S. Kor.).

¹³³ See Incheon Jibangbeobwon [Incheon Dist. Ct.], June 17, 2016, 2016Gu-Hap326, (S. Kor.) (The Ministry of Justice expressed that the word safe country with regards to the fourth ground for rejection was prone to carry varying meanings based on different subjective interpretations. Therefore, it was difficult to apply such standard as an independent ground for rejection of refugee status); GOODWIN-GILL & MCADAM, *supra* note 18, at 392; Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT. J. REFUGEE L. 567 at 673–676 (2003).

¹³⁴ *Id.* at 673–75.

¹³⁵ See Refugee Act, arts. 2, 3, 5(6) (S. Kor.).

immediately after they leave their country of origin.¹³⁶ Despite these legal frameworks that exist to prevent asylum seekers from being criminalized for merely seeking asylum, many destination countries have associated qualification for refugee status with how many countries the asylum seekers passed through to reach theirs.¹³⁷ Such approach left a dent on the credibility of the asylum seekers' testimonies of *well-founded fear*.¹³⁸ The Refugee Convention recognizes that seeking asylum in more than one country is a reasonable phenomenon among asylum seekers who are compelled to do *asylum shopping*.¹³⁹ *Asylum shopping* is when the asylum seekers claim for asylum in more than one country because of preference towards the country's favorable reception, living condition, economic support specifically allocated for refugees, and other subjective reasons.¹⁴⁰ The United Kingdom ("UK") acknowledged *asylum shopping* to be reasonable and has a case law holding that an asylum seeker is still a refugee even if he or she reached the UK after passing through another safe third country.¹⁴¹

Canada has recently made efforts to end *asylum shopping* by proposing to amend its Refugee law to reject asylum claims made by those who already made the same in other countries, regardless of whether or not they were rejected.¹⁴² Canada's reason for proposing this omnibus budget bill was in response to the mass number of asylum seekers arriving at its border from the U.S. after being rejected through the RSD procedure.¹⁴³ Canada believed that because their immigration system was similar to that of the U.S., it would have similarly rejected these asylum seekers.¹⁴⁴ The omnibus bill proposed additional provisions for the Immigration and Refugee Protection Act to "introduce a new ground of ineligibility for refugee protection if a claimant has previously made a claim for refugee protection in another country."¹⁴⁵ Bill Blair, the Border Security Minister of Canada, stated,

¹³⁶ See Refugee Convention, *supra* note 2, art. 31.

¹³⁷ *Do Refugees Have to Stay in the First Safe Country They Reach?*, FULL FACT (Jan. 17, 2019), <https://fullfact.org/immigration/refugees-first-safe-country/> [hereinafter FULL FACT].

¹³⁸ Refugee Convention, *supra* note 2.

¹³⁹ FULL FACT, *supra* note 137.

¹⁴⁰ *Migration and Home Affairs: Asylum Shopping*, EUROPEAN COMMN, https://ec.europa.eu/home-affairs/e-library/glossary/asylum-shopping_en (last visited Oct. 5, 2020).

¹⁴¹ See FULL FACT, *supra* note 137.

¹⁴² Charles Gallmeyer, *Canada Proposes Changes to Asylum Laws*, JURIST (April 10, 2019), <https://www.jurist.org/news/2019/04/canada-proposes-changes-to-asylum-laws/>.

¹⁴³ Mark Moore, *Canada Plans to End "Asylum Shopping" by Limiting Refugee Claims*, N.Y. POST (Apr. 10, 2019), <https://nypost.com/2019/04/10/canada-plans-to-end-asylum-shopping-by-limiting-refugee-claims/>.

¹⁴⁴ See *id.*

¹⁴⁵ An Act to Implement Certain Provisions of the budget tabled in Parliament on March 19, 2019 and other Measures, H.C.C. 2019, C-97 (Can.).

“There’s a right way to come to the country to seek asylum and/or to seek to immigrate to this country, and we’re trying to encourage people to use the appropriate channels and to disincentivize people from doing it improperly.”¹⁴⁶

B. *Pre-Assessment at the Port of Entry*

Taking the difficulties in gathering evidence into account, the Refugee Convention requires the Contracting States not to cast a strict burden of proof on the asylum seekers and repatriate them solely based on lack of evidence.¹⁴⁷ More deference should be given to the testimony of asylum-seeker based on the logic and consistency of the testimony.¹⁴⁸ Although the burden of proof is on the applicant, it must be the state’s duty to lower the threshold or burden of proof and determine those evidence and look to inferences.¹⁴⁹ When retrieving evidence found in the testimonies of the asylum-seekers, there are various hindrances to take into account, such as trauma, memory loss, education level, shame, culture, competence based on age, mental health, and other aspects of human psychology.¹⁵⁰ When treating a victim, there are basic requirements for the standard of treatment and appropriate care.¹⁵¹ This does not imply, however, that the testimonies of the asylum-seekers must be blatantly accepted without any degree of scrutiny. Detailed facts should be required from the testimonies of the asylum seekers “to satisfactorily establish refugee status according to the given standard” according to consistency and persuasiveness when corroborated with other evidence.¹⁵² Not granting the asylum seekers the opportunity to present their evidence or oversimplifying the RSD procedure by adding a pre-assessment procedure would violate the Refugee Convention standard for evidence.¹⁵³

The recent controversial entry of asylum seekers to South Korea occurred in 2018 when around five hundred Yemeni asylum seekers suddenly sought refuge in Jeju Island, South Korea.¹⁵⁴ The asylum seekers came not from their state of origin but from Malaysia, where

¹⁴⁶ Moore, *supra* note 143.

¹⁴⁷ Refugee Convention, *supra* note 2, art. 31.

¹⁴⁸ Daebeobwon [S. Ct.], July 24, 2008, 2007Du3930 (S. Kor.).

¹⁴⁹ See Refugee Convention, *supra* note 2, art. 31.

¹⁵⁰ See Daebeobwon [S. Ct.], Apr. 26, 2012, 2010Du27448 (S. Kor.).

¹⁵¹ KOREA IMMIGR. SERV., *supra* note 8, at 4–5.

¹⁵² See Daebeobwon [S. Ct.], Mar. 10, 2016, 2013Du14269 (S. Kor.).

¹⁵³ Chae Hyun-young, Associate Legal Officer, UNHCR KOREA, *Keynote Address at the Judicial Policy Research Institute Seminar: Human Rights of Refugees and Private Law* 61 (Sept. 12, 2017).

¹⁵⁴ Choe Sang-Hun, *Just 2 of More Than 480 Yemenis Receive Refugee Status in South Korea*, N.Y. TIMES (Dec. 14, 2018),

<https://www.nytimes.com/2018/12/14/world/asia/yemen-south-korea-refugees.html>.

they had also sought asylum.¹⁵⁵ The asylum seekers relied on Malaysia's 90 days visa-free policy even though Malaysia was not a signatory state to the Refugee Convention.¹⁵⁶ Nevertheless, when 90 days were soon expiring, the asylum seekers had to move to another country with a similar visa-free policy to avoid deportation.¹⁵⁷ Within Asia, the asylum seekers found Jeju Island, South Korea, that allowed foreigners to enter the island visa-free for 30 days.¹⁵⁸ In 2000, Jeju Island, under Article 7(2) of the Immigration Act of South Korea, opened its borders visa-free to foreigners who were from countries other than the eleven listed countries, such as Iran, Syria, and Nigeria.¹⁵⁹ The leniency in the visa application process was aimed to attract many foreign tourists to the island.¹⁶⁰ Because flights were also available directly from Malaysia to Jeju Island and because there was already a "well-established Muslim community in places such as *Itaewon* after they were granted refugee status," the Yemeni asylum seekers immediately saw this trip as an opportunity for refuge.¹⁶¹

During the waiting period and the restricted stay within Jeju Island, the Yemeni refugee applicants were granted permission to stay for 90 days with the necessities promised under the Refugee Act.¹⁶² On October 17, 2018, the Ministry of Justice granted 339 of the Yemenis asylum seekers one-year *humanitarian status holder* permits,¹⁶³ "acknowledging that their 'right to life and personal liberty' would be put at risk if they were deported."¹⁶⁴ Thirty-four were rejected refugee status on grounds for "criminal charges or were judged to have sought asylum for economic reason[s]," and eighty-five had their determination decision postponed.¹⁶⁵ Although not many were granted refugee status, South Korea has given all of the Yemeni

¹⁵⁵ Se Jin Kim, *Failing to Protect Refugees: South Korea's Dismal Global Ranking*, 112 E. ASIA FOUND. POLY DEBATES 1, 3–4 (2019); Huh Ho-joon, *S. Korean Government Doesn't Recognize Single Refugee in 2nd Review of Yemeni Asylum Seekers*, HANKYOREH (Oct. 18, 2018), http://english.hani.co.kr/arti/english_edition/e_international/866408.html.

¹⁵⁶ Huh Ho-joon, *supra* note 155.

¹⁵⁷ Kim, *supra* note 155, at 1, 3.

¹⁵⁸ *Id.*

¹⁵⁹ Immigration Act, art. 7(2) (S. Kor.).

¹⁶⁰ *Id.*

¹⁶¹ Se Jin Kim, *South Korea: Your Tired, Your Hungry, Your Yearning to Be Free Needn't Apply*, ASIA SENTINEL (Jan. 29, 2019), <https://www.asiasentinel.com/society/south-korea-no-asylum-refugees/>.

¹⁶² *Id.* at 4.

¹⁶³ Min Joo Kim & Simon Denyer, *South Korea Denies Refugee Status to Hundreds of Yemenis Fleeing War*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/world/asia_pacific/south-korea-denies-refugee-status-to-hundreds-of-yemenis-fleeing-war/2018/10/17/5d554d1e-d207-11e8-8c22-fa2ef74bd6d6_story.html.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*; *Jeju Yemeni Refugee Recognition Rate 0.4%...Controversy Over Refugee Engagement Seems to be Fierce*, YUNHAP NEWS (Dec. 14, 2018), <https://www.yna.co.kr/view/AKR20181214073200004>.

asylum seekers access to the RSD procedure.¹⁶⁶ This itself was an obligation fulfilled by South Korea as a Contracting State with due respect to the due process rights of the asylum seekers.¹⁶⁷ At the same time, South Korea practiced state sovereignty as it investigated and determined refugee status with the gathered evidence differently from what UNHCR suggested.¹⁶⁸ The mere difference in how the determination was carried out did not amount to a Refugee Convention violation.¹⁶⁹

South Korea's proper discretion in the RSD procedure and its violation of due process required under the Refugee Convention must be distinguished. This is because the *non-refoulement* decision and the preliminary entry rejection are legally different in content and effect.¹⁷⁰ Under the *non-refoulement* decision, the asylum seekers are rejected for refugee status through the RSD procedure and are given a chance to appeal the decision.¹⁷¹ The courts in South Korea recognized this legal right of asylum seekers to appeal their rejected refugee status decision for reevaluation under the Refugee Act.¹⁷² However, the preliminary entry rejection occurs at the pre-assessment stage that disqualifies the asylum seeker from accessing the RSD procedure itself with no right to appeal that rejection.¹⁷³ From the language provided in Article 5 of the Enforcement Decree, the pre-assessment resonates with the underlying motivation to eliminate "economic migrants" from the RSD procedure completely for efficiency. There is no denying that even the Refugee Convention would not recognize economic migrants as refugees and economic migrants would categorize into an immigrant rather than a refugee."¹⁷⁴ However, the issue in South Korea's preliminary entry rejection raises a question as to whether the pre-assessment is enough to determine the *well-founded fear* of persecution of the asylum seekers within seven days solely based on the seven factors provided under Article 5 of the Enforcement Decree.¹⁷⁵

¹⁶⁶ YUNHAP NEWS, *supra* note 155.

¹⁶⁷ GOODWIN-GILL & MCADAM, *supra* note 30, at 531–32; Se Jin Kim, *supra* note 161.

¹⁶⁸ GOODWIN-GILL & MCADAM, *supra* note 30, at 531–32; Se Jin Kim, *supra* note 161.

¹⁶⁹ Se Jin Kim, *supra* note 161.

¹⁷⁰ GOODWIN-GILL & MCADAM, *supra* note 18, at 531–532; Wolman, *supra* note 25 at 488–489.

¹⁷¹ KOREA IMMIGRATION STATISTICS, *supra* note 8, at 20, 31–33.

¹⁷² Incheon Jibangbeobwon [Incheon Dist. Ct.], May 16, 2014, 2014Gu-Hap30385 (S. Kor.); Incheon Jibangbeobwon [Incheon Dist. Ct.], June 17, 2016, 2016Gu-Hap326 (S. Kor.).

¹⁷³ 2016Gu-Hap326 at 3.

¹⁷⁴ *See id.*

¹⁷⁵ *See* Enforcement Decree of the Refugee Act, art. 5(1).

III. COMPARING DIFFERENT REFUGEE STATUS DETERMINATION PROCEDURES

The Refugee Convention makes it clear that while the Contracting States have the freedom and discretion to conduct their RSD procedures, they are bound to abide by the essential requirement to assess the existence of *well-founded fear*.¹⁷⁶ If the asylum seekers were guaranteed the necessary procedure of determination of *well-founded fear*, the Contracting State would have honored its obligation even if the refugee acceptance rate drops. The U.S., Australia, and China are some of the Contracting States in possession of either the most innovative or controversial RSD procedures due to their unique ways of applying or not applying the *non-refoulement* principle and the *well-founded fear* assessment.¹⁷⁷ Comparing these RSD procedures with that of South Korea will help understand where the limitation lies when complying with the Refugee Convention. This comparative study will show why South Korea's pre-assessment falls short in its compliance with the principles upheld in the Refugee Convention.

A. *The United States and its Refugee Screening Procedure*

The U.S. Congress amended and incorporated the Immigration and Nationality Act of 1952 and the Migration and Refugee Assistance Act of 1962 into the U.S. Refugee Act of 1980 to “revise the procedures for the admission of refugees” and “establish a more uniform basis for the provision of assistance to refugees.”¹⁷⁸ It ratified the Refugee Protocol in 1968 and established the definition for refugees “directly upon the language of the Protocol.”¹⁷⁹ Thereafter, many of the refugee cases decided by the U.S. courts actively turned to the Refugee Protocol and the UNHCR's interpretation of the definition with a consistent goal to “bring United States refugee law into conformance” with it.¹⁸⁰ The RSD procedure was immediately translated into the U.S. Refugee Admission Program (“USRAP”) as a safeguarding process with security screening and background checks of the incoming asylum seekers.¹⁸¹ Currently, the U.S. Citizenship and

¹⁷⁶ See Refugee Convention, *supra* note 2, art. 1(A)(1)–(2).

¹⁷⁷ *Id.*; STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, U.N. HIGH COMMR FOR REFUGEES (2015).

¹⁷⁸ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

¹⁷⁹ S. Rep. No. 96-590, at 20 (1980); see H.R. Rep. No. 96-781, at 19 (1980); *Cardoza-Fonseca*, 480 U.S. at 437.

¹⁸⁰ *Cardoza-Fonseca*, 480 U.S. at 436–37; Fitzpatrick, *supra* note 53, at 6.

¹⁸¹ *Refugee Security Screening Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERV. 2 (June 3, 2020), <https://www.uscis.gov/sites/default/files/document/fact->

Immigration Service (“USCIS”) is responsible for the “immigration service functions of the federal government,”¹⁸² including the RSD procedure. According to the USCIS, any asylum seeker who is “physically present in the United States” is eligible to apply for asylum in the U.S.¹⁸³ This extremely minimal requirement is strikingly different from what South Korea’s pre-assessment requires from the asylum seekers, which is to pass a preliminary credibility test to be eligible for the RSD procedure.¹⁸⁴

But in recent years, since 2017, the Refugee Admissions Ceiling that was usually set at 80,000 between 2008 and 2016 drastically dropped to 50,000, and continued to decrease down to 45,000 in 2018 and to 30,000 in 2019.¹⁸⁵ President Donald Trump signed the executive order in 2017 to put a halt on the refugee admissions program for 120 days as well as barring the entry of Syrian refugees¹⁸⁶ while lowering the Fiscal Year Refugee Admissions Ceiling.¹⁸⁷ Then through the Presidential Proclamation,¹⁸⁸ President Trump resumed the refugee program with “Enhanced Vetting Capabilities,” where the USRAP assessed “any risks to the security and welfare of the United States that may be presented by the entry into the United States” among the asylum seekers.¹⁸⁹ It was a “specialized screening for refugee applicants who are nationals of certain high-risk countries.”¹⁹⁰ After these executive orders were passed, the actual admission of

sheets/Refugee_Screening_and_Vetting_Fact_Sheet.pdf; *The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities> (last visited Mar. 5, 2019).

¹⁸² *Our History*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/about-us/our-history> (last visited Oct. 9, 2019).

¹⁸³ *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> (last visited Sept. 22, 2020).

¹⁸⁴ KOREA IMMIGR. SERV., *supra* note 8, at 17.

¹⁸⁵ U.S. DEPT OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2019 7–8 (2018), <https://www.state.gov/wp-content/uploads/2018/12/Proposed-Refugee-Admissions-for-Fiscal-Year-2019.pdf> [hereinafter FISCAL YEAR 2019]; *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL (Jan. 8, 2020), <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy>.

¹⁸⁶ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017), *replaced by* Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

¹⁸⁷ AM. IMMIGR. COUNCIL, *supra* note 185.

¹⁸⁸ Exec. Order No. 13780, 82 Fed. Reg. 13209; *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*, NATL SEC. & DEF. (Sept. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

¹⁸⁹ Exec. Order No. 13815, 82 Fed. Reg. 50055 (Oct. 27, 2017); *see* Ted Hesson, *Trump Targets 11 Nations in Refugee Order*, POLITICO (Oct. 24, 2017), <https://www.politico.com/story/2017/10/24/refugee-nations-trump-administration-muslim-244135>.

¹⁹⁰ FISCAL YEAR 2019, *supra* note 185, at 6.

refugees sharply decreased below the average of more than 50,000 to the lowest number of 18,000 in 2020.¹⁹¹ Although the refugee acceptance rate was reduced, the enhanced screening assessment did not violate the *non-refoulement* principle, as it only tightened the standard for refugee status.¹⁹² The asylum seekers were still screened as to whether they had a *well-founded fear* of persecution or were more of a threat to national security.¹⁹³

In 2019, “Expedited Removal” was established by the U.S. Congress in compliance with the U.S. Supreme Court’s holdings that “the government may exclude such aliens without affording them the due process protections that traditionally apply to persons physically present in the U.S.”¹⁹⁴ The Department of Homeland Security (“DHS”) was given the discretion to apply the procedure to certain foreigners entering the U.S. territory under the INA Section 235(b)(1).¹⁹⁵ And under the INA Section 212(a)(6)(C) and (a)(7), the DHS referred the asylum seekers to expedited removal based on the inadmissibility of their documents and statements.¹⁹⁶ However, under INA Section 235(b)(1), if the asylum seekers indicated “an intention to apply for asylum . . . or a fear of persecution,” they were spared the expedited removal.¹⁹⁷ Instead, they were then moved to a secondary inspection called the “formal removal,” where they would be subject to examination by an immigration officer¹⁹⁸ or the “Credible Fear Screenings.”¹⁹⁹ The screening aimed to assess “credible fear of persecution,” which was defined by the INA as “significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility of asylum.”²⁰⁰ This “low screening standard”²⁰¹ was intended to only require “substantial and realistic possibility of success on the merits”²⁰² of the asylum seekers’ claims. When the asylum seekers receive “negative credible

¹⁹¹ AM. IMMIGR. COUNCIL, *supra* note 185, at 3.

¹⁹² Jaya Ramji-Nogales, *Non-Refoulement Under the Trump Administration*, 23 AM. SOC’Y INT’L L., no. 11, 2019, <https://www.asil.org/insights/volume/23/issue/11/non-refoulement-under-trump-administration>.

¹⁹³ *Id.*

¹⁹⁴ HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK (2019).

¹⁹⁵ *Id.* at 7, 9, 13.

¹⁹⁶ *Id.* at 11–12.

¹⁹⁷ 8 U.S.C. § 1225(b)(A)(i) (1990); 8 C.F.R. § 235.3(b)(4) (1998).

¹⁹⁸ 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.3(b)(4); SMITH, *supra* note 194, at 18.

¹⁹⁹ SMITH, *supra* note 194, at 13; *Credible Fear Screenings*, U.S. CITIZENSHIP & IMMIGR. SERV. (Sep. 26, 2008), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/credible-fear-screenings>.

²⁰⁰ 8 U.S.C. § 1225(b)(1)(B)(v) (2011).

²⁰¹ See 142 CONG. REC. S11491–02 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

²⁰² SMITH, *supra* note 194, at 17.

fear finding,” they were allowed to “request for reconsideration” before the immigration judge (“IJ”) in compliance with the *non-refoulement* principle.²⁰³ Because of its role as a safeguard for the asylum seekers who fail the screening, the “IJ review is a crucial stopgap in the expedited removal regime.”²⁰⁴ Overall, due to the exceptional procedures made available to the asylum seekers, the expedited removal and the credible fear screening of the U.S. continues to embody the principle of *non-refoulement* and the *well-founded fear* assessment in compliance with the Refugee Protocol.²⁰⁵ Comparatively, South Korea’s pre-assessment lacks even the exceptional procedures through which the rejected asylum seekers could request for revision and most crucially for the *well-founded fear* assessment.²⁰⁶

B. Australia’s Interdiction of the Asylum Seekers at Sea

Australia was a signatory state to the Refugee Convention since 1954 and it has been named as a “failing state” with regards to its obligation to protect refugees.²⁰⁷ Australia had the most number of asylum seekers from 1978 to 1983 and it maintained the number of around 300,000 asylum seekers during those six years.²⁰⁸ Afterward, Australia had asylum seekers below the number of 100,000 seek asylum in its territory across the ocean.²⁰⁹ However, 117,710 asylum seekers sought asylum in Australia in 2018, among which 56,933 were recognized as refugees, ranking Australia as the 14th country to receive the most asylum seekers among the Contracting States of the Refugee Convention.²¹⁰ Among those recognized refugees, 12,706 refugees were resettled in Australia, ranking it as the “third overall for resettlement (behind Canada and USA).”²¹¹ However, despite

²⁰³ SMITH, *supra* note 194, at 19; 8 U.S.C. § 1225; 8 U.S.C. § 1225(b)(1)(B)(iii)(III); *see* 8 C.F.R. §§ 208.30(g)(2)(i), 1003.42(a)–(h), 1208.30(g)(2)(i)–(ii) (2017).

²⁰⁴ Katherine Shattuck, Comment, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459, 520 (2018).

²⁰⁵ *See id.* at 473.

²⁰⁶ *See* Shin-wha Lee, *South Korea’s Refugee Policies: National and Human Security Perspectives*, RESEARCHGATE (Jan. 2019), <https://www.researchgate.net/publication/327389786>.

²⁰⁷ Khalid Koser, *Australia and the 1951 Refugee Convention*, LOWY INST. (Apr. 30, 2015), <https://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention>.

²⁰⁸ *UNHCR Statistics: The World in Numbers*, UNHCR POPULATION STAT. DATABASE (June 30, 2017), <https://unhcr.github.io/dataviz-popstats/dist/index.html>.

²⁰⁹ *Id.*

²¹⁰ *Global Trends: Forced Displacement in 2018*, UNHCR, 65 (June 20, 2019), <https://www.unhcr.org/statistics/unherstats/5d08d7ee7/unhcr-global-trends-2018.pdf>.

²¹¹ Refugee Council of Australia, *An Analysis of UNHCRs 2018 Global*

these outstanding refugee acceptance rates maintained by Australia, it has long struggled with the mass number of people increasingly making attempts to enter into the territory by boat.²¹² These entrants at sea were termed as “Illegal Maritime Arrival” (“IMA”)²¹³ after when they were “screened into a refugee status determination process.”²¹⁴ Once the IMAs were determined based on their lack of valid visa, they were then provided with the choice to “apply for a three-year Temporary Protection Visa (“TPV”) or a five-year Safe Haven Enterprise Visa (“SHEV”).”²¹⁵ The number increased from 7,373 to 18,119 between 2012 and 2013.²¹⁶ When the entrants were asylum seekers, they were mandatorily screened through the RSD procedure, which then decided whether to provide permanent or temporary protection based on possession of a valid visa. Although Australia did apply assessment for “conflict and fear of persecution” as “push factors,”²¹⁷ the consistent findings and investigations of the IMAs “suggest[ed] that migrants are motivated by economic factors.”²¹⁸ Australia has long been a popular destination for migrant smuggling from Southwest Asia since 2000²¹⁹ and this led Australia to drastically change its policy against the incoming boats carrying smuggled migrants.²²⁰

In 2013, then prime minister of Australia, Tony Abbott, established “Operation Sovereign Borders” (“OSB”) that further protected the border of Australia against the incoming asylum seekers

Refugee Statistics: How Generous is Australia's Refugee Program Compared to Other Countries?, RELIEFWEB (July 10, 2019), <https://reliefweb.int/report/australia/analysis-unhcr-s-2018-global-refugee-statistics-how-generous-australia-s-refugee>.

²¹² Koser, *supra* note 207.

²¹³ NICHOLAS HENRY, ASYLUM, WORK, AND PRECARIETY: BORDERING THE ASIA-PACIFIC 85 (2018).

²¹⁴ *Id.*

²¹⁵ *Factsheet: Australia's Refugee Policy: An Overview*, ANDREW & RENATA KALDOR CTR. FOR INTL REFUGEE L. (July 2020), https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Australian%20Refugee%20Policy_Apr2019.pdf.

²¹⁶ AUSTRAL. GOV. DEPT IMMIGR. & BORDER PROT. [DIBP], ASYLUM TRENDS—AUSTRALIA: 2012–13 ANNUAL PUBLICATION 4 (2013), <https://www.homeaffairs.gov.au/research-and-stats/files/asylum-trends-aus-2012-13.pdf>.

²¹⁷ HENRY, *supra* note 213, at 85.

²¹⁸ *Id.*

²¹⁹ U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON SMUGGLING OF MIGRANTS 2018, at 122, U.N. Sales No. E.18.IV.9 (2018); U.N. OFFICE ON DRUGS & CRIME, MIGRANT SMUGGLING IN ASIA AND THE PACIFIC: CURRENT TRENDS AND CHALLENGES, Vol. II, at 39 (2018) https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/2018-2019/SOM_in_Asia_and_the_Pacific_II_July_2018.pdf [hereinafter MIGRANT SMUGGLING].

²²⁰ MIGRANT SMUGGLING, *supra* note 219, at 39.

at sea.²²¹ The main concern of the Australian government was to discourage trafficking in person and smuggling of migrants across the sea borders under dangerous conditions.²²² To achieve this border protection, Regional Deterrence Framework was implemented to detect and intercept Suspected Illegal Entry Vessels (“SIEVs”) to return the SIEV passengers to their country of origin or provide TPV to the asylum seekers who passed the RSD procedure.²²³ According to the Australian government, this strict policy turning the boats back to where they came from in a form of interdiction effectively decreased the popularity in maritime smuggling routed to Australia.²²⁴ However, this policy was criticized as an interception that was not in compliance with the Refugee Convention.²²⁵ The UNHCR Regional Representation in Canberra commented that it “consider[ed] that actions to intercept and turn back boats carrying asylum-seekers are contrary to the spirit of the 1951 Refugee Convention.”²²⁶ Even if the RSD procedure was conducted, the repatriation process was forced instead of voluntary.²²⁷

In 2012, Australia began conducting RSD procedures in Nauru and Papua New Guinea as “offshore processing arrangements” for 4,183 asylum seekers sent to the island and 3,127 asylum seekers whose resettlement permit in Australia was rejected.²²⁸ By 2019, more than 3,000 asylum seekers were sent to “remote offshore camps” located on either Papua New Guinea’s Manus Island or the island nation

²²¹ Shalailah Medhora, *Tony Abbott Sticks to “Stop the Boat” in Face of Claims People Smugglers Paid*, GUARDIAN (June 14, 2015), <http://www.theguardian.com/australia-news/2015/jun/14/tony-abbott-sticks-to-stop-the-boats-in-face-of-claims-people-smugglers-paid>.

²²² Elibritt Karlsen & Janet Phillips, *Developments in Australian Refugee Law and Policy: The Abbott and Turnbull Coalition Governments (2013–2016)* 17 (Parliament of Austl., Research Paper Series 2017–18, Sept. 18, 2017), https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5529931/upload_binary/5529931.pdf.

²²³ THE COALITIONS OPERATION SOVEREIGN BORDERS POLICY, 7 (July 2013) https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2616180/upload_binary/2616180.pdf; *Outside Australia*, AUSTL. GOVT: OPERATION SOVEREIGN BORDERS, <https://osb.homeaffairs.gov.au/outside-australia> (last visited Oct. 9, 2019).

²²⁴ MIGRANT SMUGGLING, *supra* note 219, at 39.

²²⁵ Press Release, Statement by U.N. High Commissioner for Refugees Regional Representation in Canberra, Australia Should Not Coerce Vulnerable People to Return to Harm (Aug. 29, 2017), <https://www.unhcr.org/en-us/news/press/2017/8/59a558104/australia-coerce-vulnerable-people-return-harm.html> [hereinafter Statement by U.N. High Commissioner].

²²⁶ Position Paper of UNHCR Regional Representation in Canberra, UNHCR Position: Interception and Turn Back of Boats carrying Asylum-Seekers (July 23, 2015), <https://www.refworld.org/docid/5915a99b4.html>.

²²⁷ Statement by U.N. High Commissioner, *supra* note 225.

²²⁸ *Offshore Processing Statistics*, REFUGEE COUNCIL AUSTL. (Oct. 25, 2020), <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/>; *Offshore Processing*, ANDREW & RENATA KALDOR CTR. FOR INTL REFUGEE LAW, <https://www.kaldorcentre.unsw.edu.au/projects/offshore-processing> (last visited Nov. 3, 2020).

of Nauru.²²⁹ This was criticized by the UNHCR as “prolonged mandatory detention of refugees and asylum seekers” because the asylum seekers whose applications for refugee status were rejected were stuck in Nauru.²³⁰ However, Australia was not in violation of the *non-refoulement* principle due to its RSD procedures that assessed the *well-founded fear* of all its asylum seekers and did not repatriate them.²³¹ The criticism, therefore, was more concerned with the fact that the detention centers were lacking in “humane, fair reception conditions.”²³² In other words, even if Australia properly carried out its obligation under the Refugee Convention to assess *well-founded fear* and avoid repatriation, it was constantly reminded of its further duties to satisfy the humanitarian standard of accommodating the asylum seekers.²³³

In response, Australia exercised its discretion to share the burden by establishing a bilateral agreement to relocate the asylum seekers with some of the countries of origin, such as Cambodia.²³⁴ Through a bilateral agreement, Australia and Cambodia cooperated to return the Cambodian asylum seekers who failed the RSD procedure in Nauru back to Cambodia with a condition that they would be received back according to the humanitarian standard.²³⁵ The UNHCR was concerned about this agreement and viewed it as Australia’s attempt to transfer its international responsibility to Cambodia, where the

²²⁹ Elaine Pearson, *Trump Attack on Asylum-Seekers Was Made in Australia*, FOREIGN POLY (July 24, 2019), <https://foreignpolicy.com/2019/07/24/trumps-attack-on-asylum-seekers-was-made-in-australia-png-manus-island-nauru-new-zealand-refugees-offshore-detention>.

²³⁰ Eliza Laschon, *United Nations Human Rights Commissioner Criticises Australias Asylum-Seeker Policies*, ABC NEWS (Oct. 9, 2019), <https://www.abc.net.au/news/2019-10-09/un-bachelet-criticises-australia-asylum-seeker-policies/11588084?pfmredir=sm>.

²³¹ *Asylum Seekers and Refugees Guide*, AUSTL. HUM. RTS. COMM. (Aug. 14, 2015), <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/asylum-seekers-and-refugees-guide>.

²³² Amy Remeikis, *Australia Must Use Past Success to Reset Future Asylum Policy, Professor Says*, GUARDIAN (June 12, 2019), <https://www.theguardian.com/australia-news/2019/jun/13/australia-must-use-past-success-to-reset-future-asylum-policy-professor-says>.

²³³ *See id.*

²³⁴ *Cambodia Agreement*, ASYLUM SEEKER RES. CTR. [ASRC], <https://www.asrc.org.au/resources/fact-sheet/cambodia-agreement/> (last visited Oct. 9, 2019); Memorandum of Understanding Between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Settlement of Refugees in Cambodia, REF WORLD (Sept. 26, 2014), <https://www.refworld.org/docid/5436588e4.html>.

²³⁵ Lauren Crothers & Ben Doherty, *Australia Signs Controversial Refugee Transfer Deal with Cambodia*, GUARDIAN (Sept. 26, 2014), <https://www.theguardian.com/world/2014/sep/26/australia-signs-refugee-deal-cambodia>.

asylum seekers have fled from.²³⁶ Nevertheless, UNHCR's concern does not amount to any violation of the Refugee Convention.²³⁷ In comparison to South Korea's pre-assessment, Australia is a step further in its humanitarian efforts to properly receive and assess the asylum seekers in compliance with the Refugee Convention.²³⁸

C. *China's Repatriation of North Korean Defectors*

In 1982, China acceded to the Refugee Convention and the Refugee Protocol.²³⁹ With the effort to implement its commitment to protecting the refugees, the Standing Committee of China's National People's Congress adopted a refugee provision into its Exit-Entry Administration Law in 2012.²⁴⁰ Under Article 46 of the Exit-Entry Administration Law, all "[f]oreigners applying for refugee status may, during the screening process, stay in China on the strength of temporary identity certificate issued by public security organs."²⁴¹ Once they were recognized as refugees, the refugees were allowed to stay in China temporarily with "an identity document issued by Chinese competent authorities."²⁴² This singular provision, along with Article 32 of the Chinese Constitution,²⁴³ is the only Chinese law concerned with refugees.²⁴⁴ And despite its refugee-friendly language, the provision was not practically implemented, making the UNHCR concerned with some of the asylum seekers who were not given the promised protection upon their entry to China.²⁴⁵ UNHCR named three groups: the Indo-Chinese refugees, the Vietnam, Laos and Cambodia refugees, and the North Korean defectors.²⁴⁶ The Chinese government allowed only the first and second refugee groups access to its RSD procedure, which the Macao Refugee Commission ("MRC")

²³⁶ Press Release, UNHCR, UNHCR Statement on Australia-Cambodia Agreement on Refugee Relocation (Sept. 26, 2014), <https://www.unhcr.org/news/press/2014/9/542526db9/unhcr-statement-australia-cambodia-agreement-refugee-relocation.html>.

²³⁷ *See generally id.*

²³⁸ AUSTL. HUM. RTS. COMMN, *supra* note 231.

²³⁹ *Fact Sheet: The Peoples Republic of China*, UNHCR (Dec. 2015), <https://www.unhcr.org/protection/operations/5000187d9/china-fact-sheet.pdf>; U.N. High Commissioner for Refugees Submission for the Office of the High Commissioner for Human Rights Compilation Report, *Peoples Republic of China and the Special Administrative Regions of Hong Kong and Macao*, (July 2018), <https://www.refworld.org/topic,50ffbce5220,50ffbce5247,5b56ffde9,0,UNHCR,,CHN.html> [hereinafter *UNHCR Submission on China*].

²⁴⁰ *See* Exit and Entry Administration Law of the Peoples Republic of China (promulgated by the Standing Comm. Natl Peoples Cong., June 30, 2012, effective July 1, 2013), No. 57, *translated in* CLI.1.178090 (China).

²⁴¹ *Id.* art. 46.

²⁴² *See id.*; *UNHCR Submission on China*, *supra* note 239, at 1.

²⁴³ XIANFA [CONSTITUTION] 1982, art. 32 (China).

²⁴⁴ Lili Song, *China and the International Refugee Protection Regime: Past, Present, and Potentials*, 37 REFUGEE SURV. Q. 139, 147 (2018).

²⁴⁵ *UNHCR Submission on China*, *supra* note 239, at 1.

²⁴⁶ *Id.*

was responsible for conducting.²⁴⁷ When the UNHCR observed that the MRC did not sometimes conduct the RSD procedure, the responsibility was transferred to the UNHCR Beijing Office through an agreement with China on cooperation in refugee status determination.²⁴⁸

Unlike many other Contracting States that conducted their RSD procedure, China stands out for having invited “UNHCR’s involvement in the absence of hard evidence that those to be helped were not refugees.”²⁴⁹

China was criticized for a long time for its blatant violation of the *non-refoulement* obligation under the Refugee Convention concerning the North Korean defectors.²⁵⁰ China’s justification for its treatment of the defectors was that it had an established alliance with the DPRK through the PRC-DPRK Escaped Criminals Reciprocal Extradition Treaty (“Repatriation Treaty”).²⁵¹ China made serious effort to honor the bilateral agreement to repatriate North Korean defectors back to the DPRK by automatically categorizing them as illegal economic migrants, not refugees.²⁵² There were a few cases in which the North Korean defectors did “migrate to China seeking only economic opportunity.”²⁵³ However, the main problem with the automatic repatriation was presented when the defectors were repatriated back to the DPRK. Upon repatriation, a *well-founded fear* of persecution came into existence in the form of “post-repatriation imprisonment

²⁴⁷ *Id.* at 2.

²⁴⁸ Agreement on the Upgrading of the UNHCR Mission in the Peoples Republic of China to UNHCR Branch Office in the Peoples Republic of China, China-UNHCR, art. 2–4, Dec. 1, 1995, 1899 U.N.T.S. 32371.

²⁴⁹ GOODWIN-GILL & MCADAM, *supra* note 30, at 53.

²⁵⁰ Yoonok Chang et al., *The North Korean Refugee Crisis: Human Rights and International Response*, U.S. COMM. FOR HUM. RTS. N. KOR., 7, 9, 11 (2006), https://www.researchgate.net/publication/40904757_The_North_Korean_Refugee_Crisis_Human_Rights_and_International_Response.

²⁵¹ *Chinas Repatriation of North Korean Refugees: Hearing before the Cong. Exec. Comm’n on China*, 112th Cong. 1–2 (2012) (statement of Hon. Chris Smith, Chairman, Cong. Exec. Comm’n on China) [hereinafter *Hearing*]; see Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas China - N. Kor., art. 4, 9–10, Aug. 12, 1986, NKFREEDOM, http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral_treaty.pdf (agreement signed Aug. 12, 1986, providing the text of a Sino-North Korean bilateral treaty through which China promised to repatriate all unauthorized North Korean migrants in China).

²⁵² MORSE TAN, NORTH KOREA, INTERNATIONAL LAW AND THE DUAL CRISES: NARRATIVE AND CONSTRUCTIVE ENGAGEMENT 157 (2015); Jeanyoung Jeannie Cho, *Systemizing the Fate of the Stateless North Korean Migrant: A Legal Guide to Preventing the Automatic Repatriation of North Korean Migrants in China*, 37 FORDHAM INTL L. J. 175, 184 (2013).

²⁵³ Cho, *supra* note 252, at 214; THE INVISIBLE EXODUS, *supra* note 117, at 9–10.

and forced labor” in the gulag.²⁵⁴ Because the North Korean defectors developed *well-founded fear* not immediately after leaving their country of origin but due to subsequent risk of persecution when repatriated, they became *refugee sur place*.²⁵⁵ Unfortunately, China refused, and continues to refuse, to acknowledge the DPRK’s gulags to which the repatriated North Korean defectors are sent to.²⁵⁶ During the Security Council meeting in 2014, Mr. Liu Jieyi, the representative of China, continued to evade discussions concerning the agenda of whether to refer Kim Jong-un of the DPRK to the International Criminal Court based on the report drafted by the Human Rights Council on the crimes of torture committed in the gulags.²⁵⁷ Liu criticized the report for distracting the purpose and objective of the Security Council, stating “We hope that the members of the Council and the relevant parties will place priority on the overall interests of denuclearization and the maintenance of peace and stability on the Korean peninsula.”²⁵⁸ In response, Samantha Power, the United States ambassador, emphasized that suggesting human rights are not worth trading for a nuclear deal is a false choice.²⁵⁹

To an extreme extent, China barred the UNHCR from monitoring the North Korean defectors under restrictive regulations.²⁶⁰ Spokesperson Chunying Hua for the Ministry of Foreign Affairs of China spoke in defense of China’s position.²⁶¹ He argued that the government was complying with the Refugee Convention because it allowed the UNHCR to conduct the RSD procedure in China to further proper implementation for the asylum seekers selectively.²⁶² Hua argued that the North Korean defectors were unlike those eligible asylum seekers, as they were illegal economic migrants who are not

²⁵⁴ DAVID HAWK, *THE HIDDEN GULAG: THE LIVES AND VOICES OF “THOSE WHO ARE SENT TO THE MOUNTAINS”* 112 (2d ed. 2012); *Hearing, supra* note 251, at 3 (statement of Hon. Edward R. Royce, Member, Cong. Exec. Comm’n on China).

²⁵⁵ *UNHCR, Refugee Protection and International Migration*, UNHCR 5 (Jan. 17, 2007), <https://www.unhcr.org/4a24ef0ca2.pdf>.

²⁵⁶ *See* U.N. SCOR, 69th Sess., 7353 mtg. at 2, 6, 8, 11, 16, U.N. Doc. S/PV.7353 (Dec. 22, 2014).

²⁵⁷ *Id.* at 2 (statement of Mr. Liu Jieyi, Member of Sec. Council, Rep. of China to the UN) (“The Security Council should work more to facilitate dialogue and ease tensions and refrain from doing anything that might cause an escalation of tensions.”).

²⁵⁸ *Id.* at 16.

²⁵⁹ *Id.* at 11.

²⁶⁰ Kris Janowski, *UNHCR Seeks Access to North Koreans Detained in China*, UNHCR (Jan. 21, 2003), <http://www.unhcr.org/3e2d81b94.html>; Andrej Mahecic, *China: UNHCR Calls for Access to Myanmar Refugees*, UNHCR (Sep. 4, 2009), <http://www.unhcr.org/news/briefing/2009/9/4aa108159/china-unhcr-calls-access-myanmar-refugees.html?query=kokang>; Adrian Edwards, *UNHCR Reaches Kachins Sent Back from China*, UNHCR (Sep. 7, 2012), <http://www.unhcr.org/5049cdba9.html>.

²⁶¹ *China Rejects U.N. Criticism in North Korea Report, No Comment on Veto*, REUTERS (Feb. 18, 2014), <https://www.reuters.com/article/us-china-korea-north/china-rejects-u-n-criticism-in-north-korea-report-no-comment-on-veto-idUSBREA1H0E220140218>.

²⁶² *See id.*

entitled to the RSD procedure.²⁶³ Nevertheless, China was continuously under criticism that it was indirectly supporting the crimes of “torture, arbitrary imprisonment and other gross human rights violations” through its “rigorous policy of forced repatriation of DPRK.”²⁶⁴ China’s “active measures to ensure that DPRK nationals cannot get access to foreign embassies and consulates to seek protection or asylum” by punishing those who harbored the North Korean defectors has also been heavily criticized.²⁶⁵ Already when the UNHCR had initial access to the North Korean defectors, before China could permanently bar any further association, the North Korean defectors were assessed and determined to be people of concern.²⁶⁶ Only after such discoveries and initiatives to protect the North Korean defectors did China begin to prohibit the agency from going near the borders and monitoring the entry of North Korean defectors.²⁶⁷ Overall, China only wanted to cooperate with the UNHCR and facilitate the UNHCR’s functions selectively and deprived certain asylum seekers of their due process rights, no matter the proven evidence of *well-founded fear* of persecution.²⁶⁸ Despite China’s seemingly cooperative RSD procedures available for the asylum seekers, China is gravely in violation of the crucial *non-refoulement* principle under the Refugee Convention.²⁶⁹

CONCLUSION

The Refugee Convention first requires its Contracting States to provide fundamental protection to the asylum seekers at their borders with the RSD procedure and assess their *well-founded fear* of persecution.²⁷⁰ In deference to state sovereignty, the Contracting States are also given discretion as to how to conduct the RSD procedure.²⁷¹ And various policies and methods have been demonstrated through the analysis of different RSD procedures in the U.S., Australia, and China that were either in compliance with or in violation of the Refugee Convention. Based on the comparative study, it is difficult to deny that South Korea’s RSD procedure most resembles that of China, especially concerning its discriminatory application and difficult accessibility. While criticisms against South Korea’s Refugee Act is concerned with its low refugee admittance rate,

²⁶³ *See id.*

²⁶⁴ *HRC Report on DPRK*, *supra* note 115, at 127.

²⁶⁵ *Id.* at 127–28.

²⁶⁶ *Perilous Journeys: The Plight of North Koreans in China and Beyond*, ASIA REP. N. 122 (Intl Crisis Grp.), Oct. 26, 2006, at 30, <https://www.refworld.org/pdfid/4565e3fa4.pdf>.

²⁶⁷ Cho, *supra* note 252, at 208–209.

²⁶⁸ TAN, *supra* note 252, at 157.

²⁶⁹ *Id.* at 156–58.

²⁷⁰ Refugee Convention, *supra* note 2, at 13–14.

²⁷¹ *Id.* at 18.

the crucial point of noncompliance of South Korea with the Refugee Convention rises from its lack of *well-founded fear* assessment in its pre-assessment at the port of entry.²⁷² The U.S. and Australia understood how to comply with the Refugee Convention and its *non-refoulement* principle. Although their RSD procedures changed overtime and expanded in various ways, they never diverted from the requirement of the *well-founded fear* assessment.²⁷³ Therefore, even under UNHCR's disapproval, they were still in compliance with the Refugee Convention. South Korea will have to similarly recognize the most basic procedural obligation set forth by the Refugee Convention to its Contracting States, which is to never deprive the asylum seekers of their right to access the *well-founded fear* assessment. South Korea will have to amend or abandon its pre-assessment so that even the asylum seekers with weak evidence could gain access to the RSD procedure, and most crucially its assessment of the existence of *well-founded fear* of persecution.

²⁷² See Gabriel Dominguez, *No Country for Refugees? Japan and South Korea's Tough Asylum Policies*, DW (Nov. 4, 2014), <https://www.dw.com/en/no-country-for-refugees-japan-and-south-koreas-tough-asylum-policies/a-18037765>.

²⁷³ Ramji-Nogales, *supra* note 192; AUSTL. HUM. RTS. COMMN, *supra* note 231.