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## ARTICLES

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# Refugees and Korean Practices thereof

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### A. Overview of the International Refugee Law

The international protection of refugees began in the 1930's to deal with the massive numbers of refugees who fled from the former Soviet region after the Soviet Revolution. Since the inception of the United Nations, the UN General Assembly has entrusted the UNHCR with the responsibility of providing international protection to refugees worldwide and with seeking permanent solutions for them. In addition to the UN resolution on the Statute of the UNHCR<sup>1)</sup>, the 1951 Convention relating to the Status of Refugees (hereinafter “the 1951 Convention”) and the 1967 Protocol relating to the Status of Refugees (hereinafter “the Protocol”) provide the basic legal framework for the international protection of refugees.

The terms in the 1951 Convention and the Protocol are not exacting and precise as to the specific obligations of State Parties; rather, they allow States some margin of discretion. Nevertheless, international refugee law does provide standards and guidance regarding refugee

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recognition system and the treatment of asylum seekers.

These standards<sup>2)</sup> include unhindered access to asylum, and provide that asylum seekers should be exempt from punishment for illegal stays. Interviewers must be well trained and interviews must be held with interpreters who are fluent in both languages. Ideally, female asylum seekers should be interviewed by female officers so they can feel free to express themselves, particularly if they have suffered sexual and gender-based violence. Asylum seekers should be offered free legal counsel and proper explanation of the system through the government. The decision on whether or not to grant asylum should be based on sound information about the country of origin, taking into account reliable reports on the human rights situation of that country. International standards also require that negative decisions should be accompanied by full explanations and justifications for the rejection. The rejected applicant should be able to lodge an appeal within a reasonable time frame, and the appeals body, in a process entirely independent from the first decision maker, should base its decision on additional information.

Clearly, international standards have developed not only from the body of international refugee law but also from the international human rights law addressing gender perspective, due process, child protection etc. Also, customary international law has been codified in International Refugee Law and International Human Rights Law. The core principle of the refugee protection is the principle of *non-refoulement*, which forbids any state from forcibly deporting an asylum seeker or refugee to a country (usually the home country) where he/she fears persecution.

## **B. The Overall Situation of Refugees at the International Level: People under the Mandate of the UNHCR**

The UN General Assembly have authorized the UNHCR to protect people outside of the scope of the 1951 Refugee Convention and the Protocol. The UNHCR have sought to include to range of protection former refugees returned to their homeland, internally displaced people, and people who are stateless or whose nationality is disputed. At the beginning of 2005, the total number of persons of concern to UNHCR was 19.1 million.<sup>3)</sup> Out of them, there were 9.2 million people recognized as refugees by the UNHCR or the governments that have signed the Refugee Convention and other regional instruments relating to the status of refugees. Other main categories of persons of concern to the UNHCR are as follows: 840,000 for asylum-seekers<sup>4)</sup>; 1.5 million for Returnees<sup>5)</sup>; 1.5 million for stateless persons<sup>6)</sup>; 5.4 million for internally displaced persons<sup>7)</sup>

Seeing granted individual refugee status in regions, we notice that specific regions have more burden to protect refugees. For example, in Europe in 2005, 50,100 asylum seekers were granted individual refugee status under the 1951 Convention and another 37,700 were given a complementary form of protection(humanitarian status, subsidiary protection etc.). In Africa 49,000 asylum seekers were granted individual refugee status in 2005, the number for the Americas and Asia were slightly lower at 35,500 and 33,200 respectively.<sup>8)</sup>

## C. Current Situation of Korea

### 1. General

The Republic of Korea has been party to the 1951 Convention and the Protocol since 1992. Generally, the statistics on international refugee protection show that countries who border other nations involved in conflicts typically must protect a large number of refugees and must deal with a mass influx of refugees. However, in Korea, asylum seekers often come individually or with a small number of families due mainly to Korea's geopolitical circumstances.

Nevertheless, despite Korea's ratification of the 1951 Convention and the protocol, and the relatively small number of asylum-seekers, Korea recognized an asylum seeker as a refugee for the first time in 2001. The refugee population in Korea remains small. In early 2007, the recognized refugees numbered 61 and the holders of humanitarian status were 45. Yet the number of asylum seekers has been rapidly increasing. In particular, in 2005, the number of new applications increased by 282% (from 148 to 410). A strong crackdown on the

[Table 1] Statistics of Refugee Status Determination *provided by Ministry of Justice as of April, 2007*

	terminated					under review	
	application	accepted	humanitarian status	rejected	withdrawal	appeal	1 <sup>st</sup> instance
Total	1,329	61	45	276	153	42	752
2007	242	9	1	27	25	23	233
2006	278	11	16	111	46	14	218
2005	410	9	14	85	31	5	206
2004	148	18	1	6	10		78
2003	84	12	5	2	7		17
2002	34	1	8	7	14		
2001	37	1		3	11		
2000	43			1	1		
94-99	53			34	8		

remaining illegal migrants may explain the increase. Asylum might appeared to some aliens as a way to avoid deportation and have residence permits extended.<sup>9)</sup>

### ● Definition of Refugee

Korean legislation does not define “refugee” since the Korean Constitution provides, “Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea.”<sup>10)</sup> Accordingly, the 1951 Convention and the protocol have the same effect as statutes in Korea. The Immigration Control Act specifies the refugee recognition process as entrusted by the 1951 Convention.

Article 1 of the 1951 Convention specifies that a refugee is any person who:

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his 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···, is unable or, owing to such fear, is unwilling to return it.”

If persons claim to be refugees, they must show the Korean government officials who are reviewing their claim that they have a well-founded fear of being persecuted based on any of the five reasons listed above.

### ● Body of Refugee Recognition and Refugee Status Recognition Process

Under the 1951 Convention, as a party to the Convention, the Korean Government is the competent authority to determine refugee status in Korea. The Ministry of Justice (hereinafter “MOJ”) is mandated to determine refugee status by the Immigration Control Act. The Presidential Decree of the Act prescribes that the Minister of Justice may consult with the ministers of central administrative agencies, if deemed necessary, during the process of refugee determination. Details of the asylum process are prescribed in the Presidential Decree.<sup>11)</sup> According to these provisions, when an applicant submits an application, the chief official of a local immigration office must transfer to the MOJ the results of the examination after a fact-finding investigation, and the Minister of Justice must make a decision. During the Process, the Minister may consult with government officials in related agencies and with other experts. Since 2006, the first instance of the determination has been made by the MOJ (chief official of the Immigration Control Bureau) alone, which means, in practice, that the officers in the Immigration Control Bureau exercise the sole discretion in refugee status determination. If an asylum seeker appeals the first decision of rejection by the MOJ, then the case is brought to the Refugee Recognition Committee (the “RRC”), composed of the related government officials and civilian experts drawn from academic institutions, professional organizations, and NGOs. If the Minister finally recognizes the application, he must give the applicant a certificate of refugee recognition; otherwise, he must give a document that explains the reasons for rejection.<sup>12)</sup>

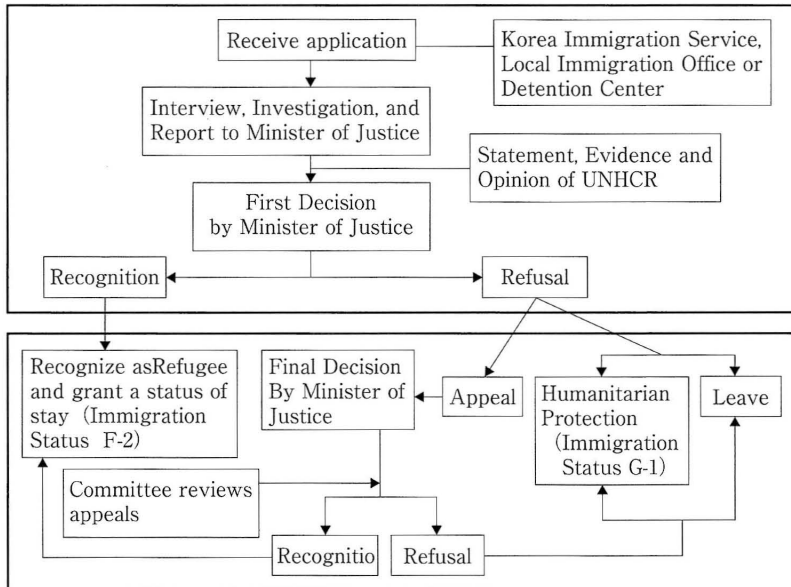
● Asylum Application

Foreigners who wish to be recognized with refugee status in Korea must submit an application within one year either after they disembarked in Korean territory or after new circumstances for refugee recognition take place, unless they have a serious disease or other justifiable cause.<sup>13)</sup> The Presidential Decree provides more details concerning the application process: An applicant who applies for refugee status must submit an application to a local immigration office, with documents that prove that he is eligible for refugee status and two photos.<sup>14)</sup> This provision places the burden of proof for refugee status on refugee applicants.

● Administrative Appeal

An applicant whose refugee status was rejected may bring his case

[Table 2] Procedure of Refugee Status Determination of Korea



to an administrative appeal proceeding within 7 days after the MOJ's rejection.<sup>16)</sup> According to the Presidential Decree, which provides substantive procedures, the applicant must submit the appeal to a local immigration office, bringing reasons for the appeal, and the local office must transfer the appeal without delay to the Minister with its opinion. Afterwards, the Minister of Justice must decide the appeal.<sup>17)</sup>

## **2. Problems in the Refugee Status Determination Process**

### **● Juxtaposition of Unregistered Migration and Refugee Matters**

A clear trend of the international community has been to consider matters regarding refugees as human rights issues, so that they can be dealt with from a human rights perspective. However, the Division of the Immigration Control Bureau office, under the MOJ, was in charge of punishment and deportation of unregistered immigrants and was mandated to recognize refugee status until 2006. In 2006, the MOJ established a new division of nationality and refugees, yet the number of officers dealing with refugees has not been enlarged enough to adequately deal with the increasing number of applications.

### **● Legal limitations of the Refugee Recognition Committee**

Currently, as the above mentioned, the recognition process is as follows. First, local immigration offices accept an asylum seeker's application and report to the Ministry of Justice after wrapping up facts and reference materials. Second, the MOJ (the Immigration Control Bureau) decides whether or not to grant refugee status in the first instance. If an asylum seeker whose application was rejected appeals to the MOJ, the MOJ convenes the Refugee Recognition Committee to review the appeal. The Committee is legally an advisory body of the Minister of Justice, but a final institution for refugee



recognition in practice. However, its legal status comes not from a parliamentary statute, but from the MOJ's regulations. Even so, an absolute majority of its members comes from government bodies. Recently 3-4 civilian experts have become involved in this process. Members from the government are usually non-experts in international refugee law as well as in refugee practice. Particularly, the National Intelligence Agency has a tendency to give conservative and negative views in most refugee cases.

#### ● **Negligence in Refugee Policy Making**

Currently the MOJ is in charge of policy-making on refugees, but the MOJ has not discharged its mandate. It has not yet tried to make refugee policy based on consultation between outside experts, human rights organizations, and the UNHCR. The above Committee has dealt with refugee cases, but not with refugee policy. The function of the Committee has focused on nothing but refugee recognition in a specific case.

#### ● **Lack of Specialty of the Officials**

The most important process in refugee recognition is dealt with by MOJ officials. However, there are not enough officials to properly deal with the refugee recognition process. Additionally, the officials' expertise in terms of foreign language competence and knowledge of international refugee law are said to be lower than those of any other countries.

#### ● **Lack of Due-Process in Appeals**

An applicant whose status was rejected in the first instance can appeal to the MOJ. However, the process of decision-making in the

appeal is largely the same as in the first instance despite the fact that appeal decisions are made by the Refugee Recognition Committee. In addition, the final authority to decide the appeals still lies within the mandate of the Minister of Justice.

Based on international standards, the appeal procedure must ensure asylum-seekers access to protection by enabling them to present the merits of their claim to an authority independent from the first decision-making body that has the necessary training to make a legally-informed and substantive decision. Korean legislation on refugee recognition is far removed from these international standards. Because the authority of decision-making is the same in both the first instance and on appeal, the right to be heard is not guaranteed during an appeal.

### **3. Problems in the Treatments of Refugees**

Once States have granted asylum to a refugee, the integration process starts. It is important that refugees take up a normal life as soon as possible, and if they cannot return to the home country voluntarily, they should be able to acquire citizenship. In addition, once asylum seekers have disembarked in States, they should be protected with consideration of their basic needs. Language training and access to health care, education, and the labor market will, in most cases, enable the refugee to become a useful member of society. The Refugee Convention specifies the treatment that refugees and asylum seekers are entitled to.

The treatment of refugees in Korea lacks coordination. On one hand, refugees are allowed to stay in Korea and they are entitled to work, to

basic health care, and to education. However, due to language difficulties, most refugees work in non-skilled sectors and there is no coordinated refugee integration program in the government. Accordingly, people who are given humanitarian status have limited access to work, education, and health care.

## **D. Required Policy Changes to Meet the International Standards**

### **1. Independent Body for Refugee Recognition**

The European system is considered to be very advanced in terms of the specialty and independence of recognition bodies.<sup>18)</sup> However, the immediate introduction of such a system into Korea is impossible because of limited resources and different situations regarding refugee issues. Therefore, while considering the advanced European system, Korea must tailor a system specifically to suit its own situation.

#### **● Establishment of Refugee Recognition Committee**

The Refugee Recognition Committee (RRC) should be equipped with a quasi-judicial character and independence from the MOJ.

##### **◆ The RRC's Functions**

- (a) To decide refugee application cases
- (b) To formulate an appeal process for rejected cases
- (c) To consider refugee policy
- (d) To establish guidelines for refugee recognition practices
- (e) To explore issues relevant to refugee recognition practice and refugee policy

\*(a) & (b) shall be dealt with by each chamber of RRC while (c)-(e) be dealt in principle with by plenary Committee.

#### ◆ The RRC's Structure and Composition

- (a) Number: 15 including the Committee chair
- (b) Qualifications: All members should be experts such as lawyers, academics, human rights activists, and government officers with expertise. They shall have established competence in relevant areas of refugee law such as international law, international refugee law, and domestic constitutional law.
- (c) Nomination: the Committee chair shall be appointed by the President on recommendation of the Minister of Justice while other Committee members are appointed by the Minister of Justice.
- (d) Structure: The Committee shall organize itself into divisions (chambers) of initial recognition chambers (3) and appeal chambers (2). Each chamber shall be composed of 3 members.

#### ● Establishment of Department of Refugee Recognition

In order to support the above Committee, the Devision of Refugee Recognition (the "DRR") shall be established under the MOJ. This department may be established under the Immigration Control Bureau, but shall not be established under or annexed to the Residence Control Division.<sup>19</sup> Officials of the devision shall be treated differently from other officials in order to strengthen their specialization through the appointment of specialists or a long-term guarantee of office.

#### ◆ The DRR's Function

- (a) To accept refugee applications and to perform the initial review of cases

- (b) To support each chamber
- (c) To Coordinate and provide social assistance for recognized asylum seekers and refugees

◆ **Initial Steps for the Establishment of the DRR**

- (a) The devisions shall have at least more than 5 officials at the initial stage.
- (b) Officials shall be chosen from people with good competence of foreign languages or an academic background in law.
- (c) Officials shall be provided with special training courses for their expertise in the field of international refugee law and interview techniques.

● **Summaries of Refugee Recognition Process by the Proposals**

■ Application submitted to DRR → Initial Review by DRR

→ Allocated the case to a Chamber of RRC



■ Recognized → case closed

■ Rejected → Appeal to Appeal Chamber of RRC



◆ Recognized → case closed

◆ Rejected → Judicial Review by High Court<sup>20)</sup>

**2. More Concrete Legal Status for Refugees and Asylum Seekers**

For asylum seekers, a minimum standard of social welfare shall be provided on an individual basis.<sup>21)</sup> In particular, medical insurance or minimum living expenses shall be provided in special situations. For recognized refugees, more systematic social assistance shall be provided such as in the areas of housing, education, and occupation.

Currently, existing laws fall short of fully covering and protecting refugees and asylum seekers. However, some areas of assistance may be possible even under present laws if the government enforces the laws by interpreting them positively. To this end, the DRR's role of coordination with other government's bodies will be very important.

Furthermore, asylum seekers' political activities shall be protected unless they involve internal political issues. Even though they are not recognized as convention refugees, they shall be provided humanitarian status as much as possible in case their deportations may result in a danger of persecution.

### **3. Systematic Cooperation with UNHCR**

The role of the UNHCR in Korea is to advise the Government on refugee issues and monitor the Government's asylum system. States parties ratifying the 1951 Convention must cooperate with the UNHCR in dealing with refugee matters. The UNHCR's view on general matters, and its opinion for specific cases, shall be respected by all Contracting States. The above RRC shall cooperate with the UNHCR in recognition of refugees. The RRC shall consider the UNHCR's opinion when it decides cases. To this end, the UNHCR's staff shall be permitted to participate in RRC, at least as an observer.

### **4. New Enactment for Reform**

A new law, the Act on Recognition of Refugees and their Status, shall be enacted, for the above reform, separately from the existing Immigration Control Law. This new law shall be enacted as soon as possible. However, if the enactment process takes some time, the existing Committee's composition of members shall be changed to the

extent that “civilian members will be more than 50% of the total number.” The DRR shall be established immediately. It is possible without the enactment of a new law.

#### **5. Establishment of Ad-Hoc Committee on Reform for Refugee Recognition System**

In order to discuss reform issues including this proposal, the Ad-Hoc Committee on Reform for Refugee Recognition System shall be established immediately under the MOJ. This committee shall be composed by experts such as lawyers, academics, human rights activists, and government officials concerned.

### **E. Recommendations of the National Human Rights Commission**

In 2006 the National Human Rights Commission of Korea (the “NHRCK”) recommended that the Korean government should amend the relevant provisions of the Immigration Control Act and other statutes in order to ensure that the Korean Refugee policy would meet international standards and would share the burden of protecting refugees in international society.

The NHRCK presented its opinion that the Korean Government should improve its overall policies concerning refugees. It also concluded that Korea’s domestic laws and policies on refugee status decision procedures and its social treatment toward refugees did not conform to international standards for refugee protection, even though the Government joined the 1951 Convention and the Protocol in 1992,

and has acted as a member of Executive Board of United Nations High Commissioner for Refugees (UNHCR) since 2001.

The NHRCK examined relevant domestic laws such as the Immigration Control Act and the National Basic Living Security Act, while referring to the UNHCR Executive Board's conclusion, refugee status determination criteria, the asylum procedure guidebook, the UN human Rights treaty monitoring bodies' reviews based upon Preamble, Article 6 and Article 12 of the Korean Constitution, as well as "the 1951 Convention, the Protocol," and UN human rights treaties. The Commission confirmed that the Government should develop the following policies to secure fair and effective asylum procedures and to give better social treatment to refugees and asylum seekers.

These recommendations are not legally binding, but must be respected by government bodies concerned according to Act of National Human Rights Commission. Many think that they will play a key role to reform refugee policies of Korea.

### **1. Steps for complying with international standards of refugee protection:**

—To put the "*Principle of Non-Refoulement*" in statutory form and to prescribe a restricted exclusion clause

—To create legal grounds for imposing a responsibility to collaborate with the UNHCR and to allow the UNHCR to give opinions on a particular case when it deems necessary

—To put the "Principle of Family Unity" of refugees in statutory form and to ensure legal residence and work by granting temporary status towards: asylum seekers who are necessarily protected by the "Principle of Non-Refoulement" ; prima facie refugees; and asylum seekers to be protected on humanitarian grounds



**2. Steps for securing fair and effective asylum procedures:**

—To improve accessibility for asylum seekers to refugee status decision procedures, to promote expertise in its administration by acquiring the appropriate number of officers, and to enhance interpretation skills in order to enable proper communications in an interview

—To create legal grounds for refugee status determination bodies and to ensure that the first and appeal hearings operate independently

—To guarantee asylum seekers the ‘right to an interview’ in the asylum procedure; to make a clear statement about reasons for declining any application, and to guarantee asylum seekers ‘access to relevant information regarding their’ application held by the government; to secure appropriate legal support for asylum seekers in asylum procedures such as applications for refugee status, administrative appeals, and administrative litigation.

**3. Steps for giving better social treatment to refugees and asylum seekers:**

—To enhance settlement programs such as Korean language training and vocational training for refugees to help them settle down in local environments, including providing education about the Korean legal system and culture

—To create legal grounds for a refugee’s children to attend compulsory education from primary school to high school

—To ensure that the Minister of the Ministry of Health and Welfare will approve refugees as recipients of the National Basic Living Security Act; to approve refugees as applicants for the National Pension Fund and its single sum repayment; to include refugees as recipients of the Medical Treatment Care Act and Welfare Support for

## Emergency Act

#### 4. Steps for securing fair and effective refugee status determination procedures and giving better social treatment to refugees and asylum seekers:

—To enact a single refugee law providing for refugee status determination procedures and social treatment for refugees on a long-term basis

—To withdraw the reservation to Article 7 of the “Convention Relating to the Status of Refugees” and exempt refugees in Korea from the principle of reciprocity<sup>22</sup>

- (1) G.A. Res. 428 (V), 14 December 1950
- (2) They include legally binding instruments as well as other non-binding ones such as resolutions made by UNHCR Executive Committee.
- (3) UNHCR, “UNHCR Global Appeal 2006”, pp. 13-14
- (4) Persons who have left their countries of origin and have applied for recognition as refugees in other countries and whose applications are still pending a decision by the appropriate government body or UNHCR.
- (5) Persons who were of concern to UNHCR when outside their country of origin and who remain so for a limited period (usually two years) after they return home.
- (6) Persons who are not considered as nationals by any State under the operation of its law.
- (7) Like refugees, IDPs may have been forced to flee their homes because their lives and/or liberty were at risk; but unlike refugees, they were either unable to or did not wish to cross an international border.
- (8) UNHCR, “Measuring Protection by Numbers”, p. 2.
- (9) UNHCR, “Country Operation Plan 2007: Republic of Korea”
- (10) Korean Constitution, Art. 6 (1)
- (11) Presidential Decree, Art. 88-2, 88-3, 88-4
- (12) Immigration Control Act, Art. 76-2, para.3
- (13) Immigration Control Act. Art. 76-2. Originally this limitation was 60 days like Japan in the past

- (14) Presidential Decree, Art. 88-2
- (15) Immigration Law, Art. 76-2, para.3
- (16) Immigration Control Act. Art. 76-4
- (17) Presidential Decree, Art.88-4
- (18) In European countries where many refugee applications happen, the department established in government, which is composed of experts in the field of refugee matters, are in charge of refugee recognition process. If the application is rejected by the government officer, an asylum-seeker is allowed to appeal to the different body which has quasi-judicial and independent characters. In addition to this, an applicant who was rejected even by the appeal body, he/she is allowed to bring the case to the court (whether ordinary court or special court) for judicial review.
- (19) Since 2005 refugee matters are dealt with in the Division for Nationality and Refugees, which was newly established.
- (20) Currently, a refugee case which wants judicial review must be brought to the Seoul Administrative Court in the first instance. I suggest, however, that the first judicial review shall be proceeded by Seoul High Court once quasi-judicial process is adopted .
- (21) Securing basic living standard of beneficiary population in Korea is one of the overall strategic goals of UNHCR in Korea. UNHCR, "Country Operation Plan 2007: Republic of Korea"
- (22) Due to this reservation, refugees may not be allowed to provide with social welfare programs such like national pension system.