

## NOTE

### EMPOWERING THE UNHCR TO PROVIDE MORE CONSISTENT PROTECTION FOR REFUGEES

CARLY SESSIONS\*

#### I. INTRODUCTION

“I was born in hell, but now live in heaven.”<sup>1</sup> This is how Eun Hye Jo describes the transformation in her life after moving to the United States as a refugee from North Korea.<sup>2</sup> “[At age five], [Eun Hye] was so malnourished that her black hair had turned yellow and stiff,” and when her mother happened upon five baby mice one day, she gladly ate them without a moment’s hesitation.<sup>3</sup> She, her mother Song Ee Han, and her sister Jin Hye Jo first fled North Korea when Eun Hye was just seven years old.<sup>4</sup> Her father had been arrested and presumably tortured and killed after he illegally crossed into China to obtain food for his starving family.<sup>5</sup> Her mother, who accompanied her husband on the journey, was also arrested and beaten, but later released without explanation.<sup>6</sup> Her baby brother died of starvation at the age of two months, and her family believes that her oldest sister was trafficked into China when she disappeared after leaving home in search of food.<sup>7</sup> When they fled North Korea, Eun Hye’s mother was forced to leave behind her five-year-old son Bo Kum Jo.<sup>8</sup> He was too weak to walk without assistance, and none of his family members had enough strength to carry him.<sup>9</sup> They left him with a trusted friend and planned to return for him

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1. Madison Park, *In North Korea, a Brutal Choice*, CNN U.S. (Mar. 26, 2012, 11:11 AM), <http://www.cnn.com/2012/03/24/us/north-korean-refugees/index.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

a short time later, but by the time they were able to save enough money to bring him to China, the boy had been abandoned by the friend and died.<sup>10</sup>

Once they reached China, Eun Hye and her family did their best to fit in by learning Chinese and imitating local mannerisms.<sup>11</sup> However, over the course of ten years they were regularly detained by Chinese officials and repatriated to North Korea.<sup>12</sup> Eun Hye was repatriated twice and sent to orphanages and re-education camps, and her mother and sister were each sent back to North Korea four times.<sup>13</sup> Miraculously they were able to sneak out and bribe their way back into China each time.<sup>14</sup> The last time they were repatriated to North Korea in 2006, a Korean-American pastor named Philip Buck, whom the family had befriended in China, paid a \$10,000 bribe to allow them to come back to China.<sup>15</sup> Shortly thereafter, realizing that China did not offer them the security they needed, the family went to the Office of the United Nations High Commissioner of Refugees (UNHCR) in Beijing and applied to be admitted as refugees to the United States.<sup>16</sup> Sixteen months later, the United States granted their applications, and they became permanent legal residents of the United States.<sup>17</sup>

Now at the age of twenty, Eun Hye lives in Virginia and works full time at a healthcare agency that provides assistance to seniors.<sup>18</sup> She rarely sees her mother and sister together because she also attends night school to finish the requirements for a high school diploma.<sup>19</sup> She plans to attend college and law school, where she will pursue her dream of becoming an international lawyer who works with Korean defectors.<sup>20</sup>

Had she stayed in China, Eun Hye's life would be drastically different.<sup>21</sup> Because the Chinese government does not recognize people like Eun Hye as refugees with a valid claim for permanent residence in the country she would have lived in constant fear of being found out by Chinese authorities and repatriated to North Korea for good.<sup>22</sup> She may

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.*

15. *Id.*

16. *See id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *See id.*

22. *See id.*

have faced more severe punishment, such as long-term imprisonment in labor camps or possible execution.<sup>23</sup> If Eun Hye had remained in China, her undocumented status would have made her vulnerable to sex trafficking.<sup>24</sup> Instead, Eun Hye was lucky enough to find protection as a refugee in the United States. In China, she lived a life of fear and uncertainty.<sup>25</sup> As a refugee in the United States, however, she has a home, a car, a job, an education, and a chance to pursue her dreams.<sup>26</sup>

Ideally, international refugee law would protect people like Eun Hye and her family in any country where they seek refuge. As illustrated by the fact that Eun Hye only obtained full protection once she came to the United States, it is failing to do so. The 1951 Convention Relating to the Status of Refugees (Convention) defines a refugee as a person who “owing to 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.”<sup>27</sup> Signatories to the Convention are obligated to provide certain protections to those who meet that definition, including protection from “refoulement,” or return to a territory where the person would face similar persecution.<sup>28</sup> The UNHCR is tasked with the worldwide protection of refugees,<sup>29</sup> and the Statute of the UNHCR emphasizes the UNHCR’s responsibility to ensure that refugees receive the protection they need.<sup>30</sup> Although both the United States and China have adopted obligations set out in the Convention, as amended,<sup>31</sup> the disparate treatment that people

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23. Elim Chan & Andreas Schloenhardt, *North Korean Refugees and International Refugee Law*, 19 INT’L J. REFUGEE L. 215, 221 (2007).

24. Nergis Canfe, *The Fragmented Nature of the International Refugee Regime and Its Consequences: A Comparative Analysis of the Applications of the 1951 Convention*, in CRITICAL ISSUES IN INTERNATIONAL REFUGEE LAW: STRATEGIES TOWARD INTERPRETIVE HARMONY 174, 192 (James C. Simeon ed., 2010); see also Mary Soo Anderson, “Modern Day Slavery”: *The Plight of North Korean Women in China*, SINO NK (Feb. 24, 2012), <http://sinonk.com/2012/02/14/modern-day-slavery-the-plight-of-north-korean-women-in-china>.

25. See Park, *supra* note 1.

26. *Id.*

27. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.

28. See *id.* art. 33.

29. See *About Us*, UNHCR: UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c2.html> (last visited May 5, 2014).

30. G.A. Res. 428 (V), annex para. 1, U.N. Doc. A/RES/428(V) (Dec. 14, 1950).

31. See *Status of Protocol Relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=V-5&chapter=5&lang=en) (last visited May 5, 2014). Although the United States is not a signatory to the 1951 Convention Relating to the Status of Refugees, it is a signatory to the 1967 Protocol Relating to the Status of Refugees, the sole amendment made to the Convention since its inception. See *id.*; *Status of Convention Relating to the Status of Refugees*, UNITED

like Eun Hye and her family receive in these countries underscores the shortcomings of the Convention and the inadequacy of UNHCR's authority.

The state parties to the Convention have, through statute, case law, and the creation of regional agreements, applied the Convention's definition of refugee in widely divergent ways as they adjudicate the cases of individuals seeking refuge within their borders.<sup>32</sup> Thus, some immigrants who qualify for relief as a refugee in one country do not qualify in another country.<sup>33</sup> The definition of refugee, as contained in the Convention, is not specific enough to ensure universal protection for some of those who need the protection of the Convention most, and the UNHCR does not have adequate authority to carry out the task of protecting some of the world's most vulnerable populations of refugees.

There is no easy solution to ensure that people like Eun Hye receive the protection they need regardless of where they seek refuge. However, at least part of the solution should be for the UNHCR to use the authority it has already been given to apply the definition of refugee, as contained in the Convention, and to create a "Non-Refoulement List," essentially designating certain groups of immigrants as "per se refugees." Groups placed on this list would be identified as meeting the Convention's basic definition of "refugee," thereby encouraging countries to afford them the protections they need and giving the UNHCR greater ability to extend more consistent protection to groups of immigrants all over the world, regardless of where they seek refuge.

This Note will first explore the history and current scope of the UNHCR and the 1951 Convention on the Status of Refugees, including a closer examination of two important provisions of the Convention: one that defines the term "refugee" and another that ensures protection from refoulement, or the forcible return of those who qualify as refugees. Second, it will discuss how these definitions are currently applied in Chinese refugee law as it relates to two groups of refugees: North Korean defectors and ethnic Kachins fleeing civil war in Burma. Third, this Note will explain the role the UNHCR plays in the administration of refugee law in the United States and China as a basis for understanding some of the limitations the UNHCR currently faces. Finally, this Note will focus on how the UNHCR can be empowered to provide more

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NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetailsII.aspx?&src=UNTSO&mtmsg\\_no=V-2&chapter=5&Temp=mtmsg2&lang=en](https://treaties.un.org/Pages/ViewDetailsII.aspx?&src=UNTSO&mtmsg_no=V-2&chapter=5&Temp=mtmsg2&lang=en) (last visited May 5, 2014). By becoming a signatory to the Protocol, the United States also adopted some of the provisions of the Convention. *See* Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

32. *See* Canfe, *supra* note 24, at 186–89.

33. *See id.* at 186–87.

even-handed protection to vulnerable refugee populations through the creation of a “Non-Refoulement List.”

## II. BACKGROUND

### A. *The History and Function of the UNHCR*

Both the UNHCR and the 1951 Convention were born out of a desire to protect European refugees who fled the destruction and political upheaval of their homelands during and after the Second World War.<sup>34</sup> The General Assembly of the United Nations found inspiration in Article 14 of the 1948 Universal Declaration of Human Rights, which provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>35</sup> On December 3, 1949, it passed Resolution 319 (IV), declaring its intention to establish “a High Commissioner’s Office for Refugees.”<sup>36</sup> Subsequently, the General Assembly adopted the Statute of the Office of the High Commissioner for Refugees (Statute) through passage of Resolution 428 (V) on December 14, 1950.<sup>37</sup>

The Statute vests the UNHCR with responsibility to provide international protection to refugees and to seek permanent solutions to the problems facing refugees.<sup>38</sup> Section 8 of the Statute more specifically outlines the primary protective functions of the UNHCR.<sup>39</sup> Among

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34. See *History of UNHCR*, UNHCR: UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646cbc.html> (last visited May 5, 2014).

35. Universal Declaration of Human Rights, G.A. Res. 217 (III) (A), art. 14, U.N. Doc A/RES/217(III) (Dec. 10, 1948).

36. G.A. Res. 319 (IV), U.N. Doc. A/RES/319(IV) (Dec. 3, 1949).

37. G.A. Res. 428 (V), *supra* note 30.

38. *Id.* annex para. 1.

39. Section 8 in full provides as follows:

The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:

- (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
- (b) Promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
- (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
- (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
- (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
- (f) Obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
- (g) Keeping in close touch with the governments and inter-governmental organizations concerned;
- (h) Establishing contact in such manner as he may think best with private organizations

these functions, the UNHCR is tasked with “[p]romoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States.”<sup>40</sup> The General Assembly has since expanded the protective role of the UNHCR through the passage of subsequent resolutions,<sup>41</sup> but the primary functions remain the same.<sup>42</sup>

Today, the UNHCR plays an important role in securing safe resettlement for refugees all over the world.<sup>43</sup> The head of the UNHCR, the High Commissioner on Refugees, oversees the UNHCR’s work, and over seventy-six hundred staff members are present in over 120 countries to assess and address the needs of the refugees.<sup>44</sup> Over eighty-five percent of these staff members work in the field, often in dangerous or precarious circumstances, so the nature of the UNHCR work is very hands-on.<sup>45</sup> The UNHCR also plays a role in advising nations about how to handle the admission of large groups of refugees and adjudicate individual cases of asylum seekers.<sup>46</sup> For instance, the UNHCR published the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Handbook)*, designed to assist states in making determinations about who qualifies for refugee status.<sup>47</sup> Although Article 35 of the Convention obliges contracting states to “co-operate” with the UNHCR, states are under no obligation to accept the recommendations of the UNHCR or follow the guidelines published thereby.<sup>48</sup>

The UNHCR reports directly to other organizations within the United Nations, including the General Assembly and the Economic and Social Council.<sup>49</sup> Section 4 of the Statute allows the U.N. Economic and So-

dealing with refugee questions;

(i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

*Id.* annex para. 8.

40. *Id.* annex para. 8(d).

41. Walter Kälin, *Supervising the 1951 Convention Relating to the Status of Refugees*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 613, 620 n.27 (Erika Feller et al. eds., 2003).

42. *See What We Do*, UNHCR: UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646cbf.html> (last visited May 7, 2014).

43. *Id.*

44. *The High Commissioner*, UNHCR: UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c8.html> (last visited May 7, 2014).

45. *See id.*

46. *See* OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES* (1992).

47. *See id.*

48. *See* Convention Relating to the Status of Refugees, *supra* note 27, art. 35.

49. *See* G.A. Res. 428 (V), *supra* note 30, annex para. 3.

cial Council (ECOSOC) to “establish an advisory committee on refugees, which shall consist of representatives of states members and states nonmembers of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem.”<sup>50</sup> Today, the Executive Committee on the High Commissioner’s Programme (Executive Committee) fills this role.<sup>51</sup>

Membership on the Executive Committee began with twenty-four states and includes ninety-seven today.<sup>52</sup> The Executive Committee operates independently of the UNHCR in an oversight capacity and meets on an annual basis in October to adopt “Conclusions on International Protection” regarding various aspects of the UNHCR’s work.<sup>53</sup> Conclusions of the Executive Committee are not formally binding, but authorities in international law regard them as relevant in the interpretation of the Convention and other aspects of international refugee law.<sup>54</sup>

### B. *The History and General Application of the Convention*

The Convention was adopted shortly after the establishment of the UNHCR.<sup>55</sup> During July 1951, twenty-six nations met in Geneva, Switzerland, to forge an agreement about who would qualify for international protection as a legally recognized refugee.<sup>56</sup> Desiring to “revise and consolidate previous international agreements relating to the status of refugees,” the representatives unanimously adopted the Convention on July 25, 1951, and it entered into force on April 22, 1954.<sup>57</sup> The Convention in its original form applied to only those who were considered refugees under previous international agreements or who fled their country of residence “[a]s a result of events occurring before 1 January 1951.”<sup>58</sup> Furthermore, contracting states were left to declare at the time of signing or ratification whether they would apply the principles in the Convention to those who fled due to “events occurring in Europe” or “events occurring in Europe or elsewhere.”<sup>59</sup>

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50. *Id.* annex para. 4.

51. *ExCom Mandate and Statute*, UNHCR: UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c86.html> (last visited May 7, 2014).

52. Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, *supra* note 41, at 87, 98. Both the United States and China are current members of the Executive Committee. *Id.*

53. *Id.*

54. *See, e.g., id.* at 148.

55. *History of UNHCR*, *supra* note 34.

56. Convention Relating to the Status of Refugees, *supra* note 27, 189 U.N.T.S. at 138.

57. *See id.* at 150 & n.1.

58. *Id.* art. 1(A)(2).

59. *Id.* art. 1(B)(1).

The Convention has been amended only once since its initial inception.<sup>60</sup> The 1967 Protocol Relating to the Status of Refugees (Protocol) removed the restrictions on time and geography imposed by the original Convention, effectively expanding protection to anyone from anywhere who could prove that they qualified as a refugee under the definition and standards outlined in the Convention.<sup>61</sup> The Convention and Protocol continue to serve as the basic legal sources of international refugee protection today.<sup>62</sup>

However, the signatories to the Convention and the Protocol have chosen to apply the provisions of these agreements in widely divergent ways.<sup>63</sup> As noted by one author, “[d]uring [the] processes of implementation . . . even the key principles of the 1951 Convention and the 1967 Protocol receive markedly different readings, as a result of which the treatment of refugees worldwide takes the form of a highly fragmented as opposed to a unified regime.”<sup>64</sup> Thus, the protections afforded to individuals in one country may vary widely from the protection individuals receive in another country, although each country claims to be guided by the terms of the Convention.<sup>65</sup>

### C. Important Definitions Contained in the Convention

#### 1. The Meaning of “Refugee”

As explained above, the Convention’s basic definition of a refugee is found in Article 1(A)(2) and refers to a person who “owing to 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.”<sup>66</sup> The definition also includes those recognized as refugees under specific agreements preceding the Convention and those without a specific nationality who face a well-founded fear of persecution and lack of protection in the country of their “former habitual residence.”<sup>67</sup>

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60. See Protocol Relating to the Status of Refugees, *supra* note 31.

61. *Id.* art. I(2).

62. See Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, pmb. para. 2, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002) (calling the 1951 Convention Relating to the Status of Refugees the “primary refugee protection instrument”).

63. See Canfe, *supra* note 24, at 186–89.

64. *Id.* at 187.

65. See *id.*

66. Convention Relating to the Status of Refugees, *supra* note 27, art. 1(A)(2).

67. *Id.* art. 1(A).

In addition to the standards for inclusion as a refugee, the Convention also provides standards for exclusion from refugee status for those who would otherwise meet the definition.<sup>68</sup> Article 1 of the Convention excludes from refugee protection someone who has voluntarily reavailed himself of the protection of the country of his nationality or acquired new nationality in a country that offers him protection; someone whose circumstances have changed so he can now avail himself of protection from the country of his nationality or former habitual residence; someone who is receiving protection or assistance from other organs or agencies of the United Nations other than the UNHCR; and someone who is reasonably suspected of committing a crime against peace, a war crime, a crime against humanity, a serious nonpolitical crime, or an act contrary to the purposes and principles of the United Nations.<sup>69</sup>

Notably, the UNHCR has clarified that a state's formal recognition of an individual as a refugee is not what in fact makes that individual a refugee.<sup>70</sup> Instead, satisfaction of the requirements contained in Article 1(A)(2) is what makes a person a refugee.<sup>71</sup> The *Handbook* provides as follows:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>72</sup>

Thus, even without being formally recognized by a state, individuals can qualify as refugees, be recognized by the UNHCR and other international organizations as such, and be entitled to the protections afforded refugees in the Convention.<sup>73</sup>

## 2. The Meaning and Scope of Non-Refoulement

Once a person meets the definition of refugee, the Convention affords that individual certain protections.<sup>74</sup> The most basic is protection from "refoulement," or removal from a host country to a threatening place.<sup>75</sup>

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68. *Id.* art. 1(C)–(F).

69. *Id.*

70. OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, *supra* note 46, para. 28.

71. *Id.* paras. 28–29.

72. *Id.* para. 28.

73. *See id.*

74. *See, e.g.*, Convention Relating to the Status of Refugees, *supra* note 27, art. 4 (requiring that refugees be accorded "treatment at least as favorable as that accorded to . . . nationals with respect to" religious freedoms).

75. *See id.* art. 33.

This protection is found in Article 33 of the Convention, which provides, “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>76</sup> However, Article 33 of the Convention also states that a refugee who is deemed dangerous to the security of a country based on certain criminal conviction cannot claim protection from refoulement.<sup>77</sup> In this sense, countries are not obligated to admit or protect dangerous criminals.<sup>78</sup>

The principle of non-refoulement is widely accepted as a principle of customary international law.<sup>79</sup> Acting on a request from the UNHCR, two scholars determined that the principle of non-refoulement contained in Article 33 of the Convention was a “non-derogable obligation” that “embodies the humanitarian essence of the Convention.”<sup>80</sup> The Executive Committee<sup>81</sup> and the U.N. General Assembly<sup>82</sup> also have affirmed the fundamental importance of non-refoulement as a basic principle of international refugee law. The Declaration of States Parties to the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees agreed that the principle of non-refoulement is “embedded in customary international law.”<sup>83</sup> As a principle of customary international law, the concept of non-refoulement need not be found in a treaty to which a potentially offending state is party for that state to be held responsible for violating the principle.<sup>84</sup> For example, even if a country like China was not a signatory to the Convention, its government would still be obligated to not send refugees back to their home countries or territories where they would face similar persecution.

Refoulement has been further interpreted to include any act of return,

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76. *Id.*

77. *Id.* art. 33(2).

78. *See id.*

79. *See* Lauterpacht & Bethlehem, *supra* note 52, at 149.

80. *Id.* at 89, 107.

81. *Id.* at 107 (“The Executive Committee, indeed, has gone so far as to observe that ‘the principle of non-refoulement . . . was progressively acquiring the character of peremptory rule of international law.’”).

82. *See, e.g.,* G.A. Res. 48/116, para. 3, U.N. Doc. A/RES/48/116 (Mar. 24, 1994); G.A. Res. 49/169, para. 4, U.N. Doc. A/RES/49/169 (Feb. 24, 1995); G.A. Res. 50/152, para. 3, U.N. Doc. A/RES/50/152 (Feb. 9, 1996); G.A. Res. 51/75, para. 3, U.N. Doc. A/RES/51/75 (Feb. 12, 1997).

83. *See* Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, *supra* note 62, pmb. para. 4.

84. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, paras. 181–82 (June 27) (finding that even though the United States had made reservations about the principles of non-use-of-force found in the U.N. Charter, it was still bound by those principles because they were also principles of customary international law).

such as expulsion, deportation, rejection, and even extradition.<sup>85</sup> Even though a state is not bound to admit any person who shows up at their borders or frontiers and manifests a well-founded fear of persecution on the basis of one of the five protected grounds, the state also must not take any action that amounts to refoulement if the person in fact meets the definition of refugee.<sup>86</sup> This essentially means the state cannot simply send the person back to the territory where the persecution is taking place or to another territory where the individual would face similar persecution.<sup>87</sup> If the state does not wish to permanently admit the individual, however, it may remove the person to a safe third country or provide temporary protection.<sup>88</sup> A “safe” third country is considered one where the refugee would not face either similar persecution or the risk of refoulement.<sup>89</sup>

In summary, the Convention, as amended by the Protocol, was designed to protect individuals who qualify as refugees because they face a well-founded fear of persecution in their home countries on the basis of one of the five protected grounds.<sup>90</sup> Although other countries are not obligated to accept every refugee who shows up at their borders, they may not, as a principle of customary international law, send a refugee to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social class, or political opinion.<sup>91</sup> This is the case whether or not that country is a signatory to the Convention.<sup>92</sup>

#### D. *A Case Study: Applying the Definition of Refugee and the Principle of Non-Refoulement in China*

Although China is a signatory to the Convention and the Protocol, it has not yet fully implemented the Convention’s definition of refugee into its domestic law.<sup>93</sup> Although the Convention does not require signatories to implement its provisions into the state’s domestic law, failure to do so makes it more difficult for refugees within the state to obtain

85. See Lauterpacht & Bethlehem, *supra* note 52, at 112–14.

86. *Id.* at 113.

87. *Id.* at 113, 122.

88. *Id.* at 113.

89. See *id.* at 122.

90. See Convention Relating to the Status of Refugees, *supra* note 27, art. 1(A)(2); Protocol Relating to the Status of Refugees, *supra* note 31, art. I(2).

91. See Lauterpacht & Bethlehem, *supra* note 52, at 128.

92. See *id.* at 107.

93. See 2014 UNHCR Regional Operations Profile—East Asia and the Pacific, UNHCR: UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49e487cd6.html> (last visited May 8, 2014).

the protections they are entitled to under the Convention.<sup>94</sup> Until recently, the domestic law governing matters of immigration in China (passed in 1985) provided only a cursory allusion to refugee status.<sup>95</sup> Article 15 of the 1985 law contained the only provision that was directly pertinent to refugee status: “Aliens who seek asylum for political reasons shall be permitted to reside in China upon approval by the competent authorities of the Chinese Government.”<sup>96</sup> Unlike the Convention’s definition of refugee, this provision does not require a showing of a well-founded fear of persecution in the home country and provides protection only for those seeking refuge for political reasons.<sup>97</sup> Furthermore, there was no formal process in China by which individuals seeking to claim protection under Article 15 of the 1985 Chinese immigration law could do so.<sup>98</sup>

The 1985 immigration law expired on July 1, 2013, and was replaced by a new law, the “Exit and Entry Administration Law.”<sup>99</sup> The new law also does not fully implement the Convention’s provisions, although Article 46 provides: “Foreigners applying for refugee status may, during the screening process, stay in China on the strength of temporary identity certificates issued by public security organs; foreigners who are recognized as refugees may stay or reside in China on the strength of refugee identity certificates issued by public security organs.”<sup>100</sup> There are also some reports that the Chinese Ministry of Civil Affairs is drafting legislation that would fully implement the Convention and the Protocol into domestic law.<sup>101</sup> Nevertheless, because the full implication of China’s new immigration laws is not yet understood, this Note will look at how China’s 1985 immigration law continues to affect two groups of refugees: North Korean defectors and ethnic Kachins from Burma.

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94. *See id.*

95. *See* Law on Control of the Entry and Exit of Aliens (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 22, 1985, effective Feb. 1, 1986) art. 15, [http://english.gov.cn/2005-08/27/content\\_26735.htm](http://english.gov.cn/2005-08/27/content_26735.htm).

96. *Id.*

97. *See id.*

98. *World Refugee Survey: 2009: China*, U.S. COMM. FOR REFUGEES & IMMIGRANTS, <http://www.refugees.org/resources/refugee-warehousing/archived-world-refugee-surveys/2009-wrs-country-updates/china.html> (last visited May 8, 2014).

99. *See* *Chujing Rujing Guanli Fa* (出境入境管理法) [Exit and Entry Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 30, 2012, effective July 1, 2013), [http://www.gov.cn/flfg/2012-06/30/content\\_2174944.htm](http://www.gov.cn/flfg/2012-06/30/content_2174944.htm).

100. *Id.* art. 46.

101. Zhao Yanan, *Legal Status for Seekers of Asylum*, CHINA DAILY USA (July 2, 2012, 12:27 AM), [http://usa.chinadaily.com.cn/china/2012-07/02/content\\_15540683.htm](http://usa.chinadaily.com.cn/china/2012-07/02/content_15540683.htm).

### 1. The Treatment of North Korean Defectors in China

In recent years, there were an estimated eleven thousand North Koreans hiding near the border between North Korea and China.<sup>102</sup> Many North Koreans fled in violation of North Korea's strict laws against border crossing in search of food, jobs, and better economic opportunities.<sup>103</sup> Upon returning to North Korea, they face harsh punishments for violation of these laws.<sup>104</sup> However, China's law does not recognize these North Koreans as refugees; instead, the country classifies them as illegal economic migrants (which the Convention does not protect) and if discovered, returns them to North Korea, rather than allowing them to stay in China or go to a safe third country such as South Korea.<sup>105</sup> Other countries and international organizations argue that the Convention's definition of "refugee" and the principle of non-refoulement apply to these groups of North Koreans because so many face serious persecutions at home if they are found out and returned.<sup>106</sup> In this sense, North Koreans who flee the country fit the Convention's definition of refugee because they face a well-founded fear of persecution either based on a political opinion (because they violated the law by crossing the border) or as a member in a specific social group (namely, those who have defected from the nation in search of better economic opportunities).<sup>107</sup> Due to this fundamental disagreement about whether North Korean defectors should be recognized as refugees, China has come under harsh international scrutiny for their treatment of North Koreans within their borders.<sup>108</sup> For instance, the Human Rights Watch released a report in 2002, condemning the actions taken by the Chinese government against the North Korean refugees within its borders and calling upon China to begin honoring the obligations it undertook as a signatory to the Convention.<sup>109</sup>

### 2. The Treatment of Ethnic Kachins from Burma in China

China has also come under international scrutiny for their treatment of ethnic Kachin refugees from the Kachin state in Burma (Myanmar).<sup>110</sup> Recently, the UNHCR expressed concern over reports that

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102. Canfe, *supra* note 24, at 191.

103. Chan & Schloenhardt, *supra* note 23, at 219–21.

104. *Id.* at 221.

105. See Canfe, *supra* note 24, at 191.

106. See, e.g., HUMAN RIGHTS WATCH, *THE INVISIBLE EXODUS: NORTH KOREANS IN THE PEOPLE'S REPUBLIC OF CHINA 4* (2002).

107. See *id.*

108. See *id.*

109. *Id.* at 4–6.

110. *UNHCR Concerned About Welfare of Kachins Sent Back from China*, UNHCR: UN

close to five thousand ethnic Kachins were forced to leave China and return to their war-torn home state before it was safe for them to do so.<sup>111</sup> These refugees fled Burma after civil war broke out between ethnic Kachin rebels and the Burmese government in June 2011.<sup>112</sup> They had been living in makeshift camps in the Yunnan province of China until August 2012 when the UNHCR began receiving reports that Chinese officials had forcibly removed them.<sup>113</sup> Both before and during the forced removal, China denied the UNHCR and other organizations access to these refugees to assess their refugee status and provide humanitarian relief.<sup>114</sup> Instead, China claimed that the ethnic Kachins were not refugees and justified their return by claiming that the conflict in Burma had subsided.<sup>115</sup>

China's actions drew concern, from not only the UNHCR but also groups like the Human Rights Watch, which has published several reports that document both the persecutions that ethnic Kachins have faced at the hands of the Burmese government<sup>116</sup> and the poor living conditions they faced in China.<sup>117</sup> In September 2012, the Human Rights Watch wrote a letter to the Chinese Foreign Minister, condemning the Chinese government for its actions and for "fail[ing] to establish or implement any procedure for screening asylum seekers and determining the validity of their claims to refugee status."<sup>118</sup> The letter cited, as a basis for its concern, the Chinese government's failure to adhere to the definition of refugee and application of the principle of non-refoulement as contained in the Convention.<sup>119</sup>

Thus, even though China is a signatory to the Convention and is obligated to observe the principle of non-refoulement as a principle of customary international law, the Chinese government is not honoring its obligations to protect North Korean refugees and ethnic Kachin refugees from the persecutions they face upon their return to North Korea

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REFUGEE AGENCY (Sept. 7, 2012), <http://www.unhcr.org/5049e42b6.html>.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *China: Stop Expelling Refugees: Forced Return of Kachin to Burma Violates International Law*, HUM. RTS. WATCH (Sept. 6, 2012), <http://www.hrw.org/news/2012/09/06/china-stop-expelling-refugees>.

116. *See, e.g.*, HUMAN RIGHTS WATCH, "UNTOLD MISERIES": WARTIME ABUSES AND FORCED DISPLACEMENT IN BURMA'S KACHIN STATE (2012).

117. HUMAN RIGHTS WATCH, ISOLATED IN YUNNAN: KACHIN REFUGEES FROM BURMA IN CHINA'S YUNNAN PROVINCE (2012).

118. Letter from Human Rights Watch to Yang Jiechi, Chinese Ministry of Foreign Affairs, Forced Return of Kachin Refugees from Yunnan Province (Sept. 5, 2012).

119. *Id.*

and Burma, respectively. Furthermore, the UNHCR has little authority to help these refugees because of China's unwillingness to honor its obligations.

#### E. *The Current Role of the UNHCR in Determining Refugee Status*

The present process for obtaining protection based on a formal recognition of refugee status varies widely from country to country, and likewise, the UNHCR's involvement in making determinations concerning refugee status varies.<sup>120</sup> In a manner consistent with ideals of state sovereignty, it is largely up to an individual country to decide how much influence it will allow the UNHCR to have in addressing the needs of the refugees within its borders, resulting in a "highly fragmented" and inconsistent application of the Convention's key definition of refugee.<sup>121</sup> To illustrate the wide spectrum of the UNHCR's involvement in refugee status determinations, this Note will describe the UNHCR's relationship with the United States and the People's Republic of China.

#### 1. The UNHCR's Relationship with the United States

There are two main processes for making refugee status determinations in the United States: one that does not involve the UNHCR to any large extent and another that heavily involves the UNHCR. The first process, as outlined in the Refugee Act of 1980, allows individuals to claim refugee status within a year of arriving in the United States.<sup>122</sup> Filing an affirmative application for asylum with the U.S. Citizenship and Immigrations Services (USCIS) accomplishes this.<sup>123</sup> This process for obtaining refugee status is purely administrative and involves only domestic institutions.<sup>124</sup> In these instances, the UNHCR does not participate to any large extent in the determination of whether a person qualifies as a refugee under the Convention.<sup>125</sup> Even so, the definition of refugee that the United States uses for such adjudication, as codified in 8 U.S.C. § 1101(a)(42), is nearly identical to that of the Convention.<sup>126</sup>

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120. See Canfe, *supra* note 24, at 186–96.

121. See *id.*

122. 8 U.S.C. § 1158(a) (2012).

123. *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum> (last updated Jan. 22, 2013).

124. See *id.*

125. See *id.* (making no mention of the United Nations High Commissioner of Refugees (UNHCR)).

126. The statute reads as follows:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to,

On the other hand, the second process for granting refugee protection in the United States heavily involves the UNHCR.<sup>127</sup> Each year, the president, in consultation with his cabinet, determines that the United States will admit a certain number of refugees who are still abroad.<sup>128</sup> These may include people like Eun Hye who arguably meet the definition of refugee under the Convention but are in a country like China that will not afford them permanent residence.<sup>129</sup> Some of the refugees who come to the United States in this category are recommended by the UNHCR.<sup>130</sup> Such cooperation with the UNHCR accords with the undertaking set out in Article II of the Protocol.<sup>131</sup> The case of Eun Hye exemplifies this process.<sup>132</sup> She first went to the UNHCR office in Beijing.<sup>133</sup> The Beijing office determined that she was in fact a refugee and recommended that the United States admit her for residence.<sup>134</sup> After the United States made its own determination that she was a refugee and would qualify for permanent residence in the United States that year, Eun Hye was allowed to come to the United States and settle on a permanent basis.<sup>135</sup>

## 2. The UNHCR's Relationship with the People's Republic of China

According to the UNHCR, its involvement in China is limited because China's new immigration legislation has not been fully implemented to conform to the Convention's mandates.<sup>136</sup> Asylum seekers in China have no legal status and rely entirely on the UNHCR to register their status and provide limited assistance.<sup>137</sup> Consequently, the UNHCR's "operational resources are stretched."<sup>138</sup> Despite these heavy

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and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

8 U.S.C. § 1101(a)(42) (2012).

127. See *The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities> (last updated Apr. 8, 2013).

128. *Id.*

129. See Park, *supra* note 1.

130. *The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, *supra* note 127.

131. See Protocol Relating to the Status of Refugees, *supra* note 31, art. II(1).

132. See Park, *supra* note 1.

133. *Id.*

134. See *id.*

135. See *id.*

136. 2014 UNHCR Regional Operations Profile—East Asia and the Pacific, *supra* note 93.

137. *Id.*

138. *Id.*

constraints, the UNHCR currently maintains a field office in Beijing and a suboffice in Hong Kong.<sup>139</sup> In light of these difficulties, the UNHCR's future goals for work in China include working to "strengthen the public's awareness of refugee issues," "seek[ing] greater engagement with relevant national actors to expand protection and humanitarian space," and "work[ing] closely with the Government on registration and the issuance of State documentation."<sup>140</sup>

In summation, the role of the UNHCR varies widely from country to country. As exemplified by the United States, the role of the UNHCR can vary even between the different processes utilized by a single country. As exemplified by China, the enormity of a problem may severely limit their operations. Thus, although the UNHCR has been delegated specific authority to protect refugees, its ability to do so varies widely from one country to the next.

### III. ANALYSIS

#### A. *Summary of the Problem*

The experiences of North Korean and Burmese refugees in China<sup>141</sup> and the UNHCR's varied involvement in refugee issues in several states<sup>142</sup> illustrate the failure of current international refugee law to provide protection for some of the world's most vulnerable refugee populations. The UNHCR was established to protect refugees across the world.<sup>143</sup> The Convention and the Protocol define the term "refugee,"<sup>144</sup> and signatories to the Convention have ratified that definition and are under international obligation to protect those who meet the definition from refoulement.<sup>145</sup> Even countries that are not signatories to the Convention are obligated to uphold the principle of non-refoulement as a principle of customary international law.<sup>146</sup> Nonetheless, China, a signatory to the Convention, continues to expel refugees from within its borders and send them back to territories where their freedom and lives are at stake.<sup>147</sup> China's treatment of North Korean and Burmese refugees, compared to the other countries' treatment of these refugees, illustrates how the varied applications of the Convention's definition of ref-

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139. *See id.*

140. *Id.*

141. *See supra* Part II.D.

142. *See supra* Part II.E.

143. *Supra* Part II.A.

144. *Supra* Part II.C.1.

145. *See supra* Part II.C.2.

146. *See supra* Part II.C.2.

147. *See supra* Part II.D.

ugee have led to fragmentation in the field of international refugee law.<sup>148</sup> Furthermore, the UNHCR's inability to fully protect these individuals demonstrates that it lacks the necessary resources to carry out its express purpose.<sup>149</sup>

B. *The Proposed Solution: Creation of a "Non-Refoulement List"*

Part of the solution for ensuring that China and other countries both (1) correctly recognize refugees and (2) meet their obligation of non-refoulement is for the UNHCR to better utilize the limited authority it already has and create a "Non-Refoulement List" (List). This List would consist of specific groups of people who, according to the UNHCR, meet the Convention's definition of refugee.<sup>150</sup> In other words, the UNHCR would predetermine that anyone who is a member of a group contained on the List is a refugee under the terms of the Convention and is therefore entitled to protection from refoulement.<sup>151</sup> This solution would help prevent countries like China from finding ways to argue that groups they do not want to protect, for whatever reason, are not refugees. States would feel more pressure to recognize members of these groups as refugees when those groups are explicitly identified on a U.N.-sanctioned list as people who require refugee protection.

The UNHCR's delegated protective functions, as expressed in Section 8 of the Statute,<sup>152</sup> already provide the UNHCR with any necessary authority it would need to create a Non-Refoulement List. Those protective functions include "[p]romoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States."<sup>153</sup> The creation of a Non-Refoulement List is a measure designed to promote the admission of certain groups of refugees, many of whom would likely qualify as "those in the most destitute categories."<sup>154</sup> The List would effectively say to the world, "The groups of people on this list qualify for protection from refoulement because they meet the Convention's definition of refugee; we encourage you to accept them in into your territories." Thus, the UNHCR would simply be making use of the limited authority it has already been afforded to attempt to carry out its overall mission of protecting refugees across the

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148. See Canfe, *supra* note 24, at 192–93.

149. See generally *supra* Part II.E.2.

150. See *supra* Part II.C.1.

151. See *supra* Part II.C.2.

152. G.A. Res. 428 (V), *supra* note 30, annex para. 8.

153. *Id.* annex para. 8(d).

154. See *id.*

world.<sup>155</sup>

This Note proposes that the High Commissioner be given the specific task of maintaining and updating the Non-Refoulement List. He is already well equipped to take on this responsibility because the UNHCR already has the staff and infrastructure in place to identify groups that meet the Convention's definition of refugee.<sup>156</sup> The large majority of the seventy-six hundred UNHCR staff members are "on the ground," working directly with displaced persons and governmental organizations.<sup>157</sup> As the High Commissioner receives reports from the various field offices, he and the other administrators of the organization would have sufficient information to determine that certain groups of people meet the Convention's definition of refugee.

As the High Commissioner updates the Non-Refoulement List, by either adding groups to the List or removing groups that are no longer in danger, he would not be acting without oversight.<sup>158</sup> Both the U.N. General Assembly and the ECOSOC's Executive Committee already provide independent oversight to the work of the UNHCR.<sup>159</sup> The oversight provided by these entities will almost certainly be sufficient to check the UNHCR's use of its authority. In fact, the Executive Committee already holds annual meetings in October to review and comment on the actions taken by the UNHCR.<sup>160</sup> At these annual meetings, the Executive Committee could review the List created by the High Commissioner and approve or disapprove of any new groups added to or removed from the List. If necessary, the Executive Committee could also review the existing groups on the List and make recommendations to ECOSOC and the U.N. General Assembly to remove any groups that they determine do not continue to meet the definition of refugee.

For purposes of clarity and legitimacy, the UNHCR would need to be somewhat specific in identifying the groups placed on the List. To avoid confusion and clearly demonstrate *how* certain groups meet the Convention's definition of refugee, the UNHCR would need to identify in which of the five protected categories<sup>161</sup> the groups fit. For example, the UNHCR would not be able to simply add "North Koreans" to the List because not all North Koreans face persecution in their home coun-

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155. See *What We Do*, *supra* note 42.

156. See *supra* Part II.A.

157. See *supra* Part II.A.

158. See *supra* Part II.A.

159. See *supra* Part II.A.

160. See *supra* Part II.A.

161. See Convention Relating to the Status of Refugees, *supra* note 27, art. 1(A)(2) (listing race, nationality, religion, political opinion, and membership in a social group as protected categories).

try on account of one of the five legally protected grounds. In other words, not all North Koreans meet the Convention's definition of refugee. Instead, the UNHCR would need to specifically identify a group such as "North Koreans who face persecution as members of a social group that defected from the country in search of better economic opportunities." As another example, the UNHCR could not simply add "Ethnic Kachins" to the List because not all ethnic Kachins face persecution in Burma. The UNHCR would need to demonstrate more specifically *how* the group meets the Convention's definition of refugee, perhaps by identifying them as "Ethnic Kachins who face persecution on account of their nationality or political opinion because they have fled the civil war in Burma." Thus, by being clear and specific, the UNHCR would lend legitimacy to the List by demonstrating precisely how the group has met the Convention's definition of refugee.

### C. *An Example of How the Non-Refoulement List Would Work*

To better understand how the Non-Refoulement List would function, consider again the situation of North Korean defectors and ethnic Kachin refugees in China.<sup>162</sup> Suppose the UNHCR had authority to create the Non-Refoulement List, and suppose that "North Koreans who face persecution as members of a social group that defected from the country in search of better economic opportunities" and "Ethnic Kachins who face persecution on account of their nationality or political opinion because they have fled the civil war in Burma" were both groups included on the List. In this case, the UNHCR and other organizations like Human Rights Watch would have a stronger argument when they lobby the Chinese government to make changes within its domestic legal system to better handle the protections of vulnerable refugee populations.<sup>163</sup> These organizations would be able to point to the List as an authoritative source, demonstrating that the particular groups of people on the List are recognized as refugees and thus require protection from refoulement. With this additional pressure from the UNHCR, perhaps countries like China would be more willing to take the necessary steps to protect such groups.

### D. *Potential Challenges to the Creation of Non-Refoulement List*

#### 1. Diminished Individual Assessment

Some may argue that empowering the UNHCR to create a "Non-Refoulement List" in which they declare certain groups of people to be

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162. See *supra* Part II.D.

163. See *supra* Parts II.D, II.E.2.

per se refugees would undermine the important principle that the country where a person seeks refuge should give that person an individual assessment. Admittedly, pressuring countries to accept the UNHCR's predeterminations limits the degree of individual assessment that a state would conduct in deciding who it will recognize as a refugee. Although individual assessment is important, it is also partially responsible for creating the problem of a highly fragmented application of the Convention's terms in the first place.<sup>164</sup> Without clear and specific direction about which groups of people qualify as refugees, countries make the determinations completely independently and will expectedly come to various conclusions.

In addition, this Note's proposal may have the effect of limiting individual assessment to some extent, but a state's ability to make individual determinations would not be completely undermined. The UNHCR would simply conclude that certain groups meet the Convention's definition of refugee, and it would still be up to each state to make individual assessments to determine whether a particular person who claims refugee status belongs to a group indicated on the List. The state's inquiry would go from, "Does this person fit the Convention's definition of 'refugee'?", to "Is this individual a member of a group that the UNHCR has identified as meeting the definition of refugee?"

Presumably, it would be easier for an individual seeking refugee protection to prove that he or she is a member of a group that has already been clearly identified by the UNHCR, rather than try to prove (1) that he or she is a member of a group (2) that faces persecution at home and (3) that the persecution is based on one of the five protected grounds. The UNHCR would essentially have already determined that the second and third requirements are met, and the individual would only need to prove membership in the group. Thus, although empowering the UNHCR to create a Non-Refoulement List may change the extent to which a state is able to conduct individual assessments, such a change is not a negative development.

## 2. Encouraging States like China to Follow the UNHCR's Recommendations

Some may agree that empowering the UNHCR to create a Non-Refoulement List might result in a more consistent application of the principle of non-refoulement, but they would rightly point out that the international community will still face significant obstacles in making sure that nations like China take steps to protect those groups of refugees that the UNHCR places on the List. These challenges are reflec-

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164. See Canfe, *supra* note 24, at 192–93.

tive of the difficulties the international community already faces in the implementation of the Convention in general.

As indicated above, Article 35 of the Convention states, "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."<sup>165</sup> Even with this provision, the UNHCR has expressed concern at the failure of China to assist the agency in protecting refugees.<sup>166</sup> This Note does not and cannot claim that the creation of a Non-Refoulement List will automatically ensure that nations like China immediately will begin to fully live up to their Convention-based obligations. The creation of a list cannot solve all the problems that the UNHCR and other concerned organizations face in trying to ensure correct implementation of the Convention's provisions. The international community would most assuredly need to continue applying solutions proposed by others in the past and explore the future use of other implementation procedures, yet to be discussed by other scholars and diplomats.

Nevertheless, this Note does argue that empowering the UNHCR to create a "Non-Refoulement List" would be an important step in ensuring uniform protection for refugees wherever they may be in the world. Authorizing the UNHCR to produce a Non-Refoulement List simply creates one more pressure point that could be used to incentivize nations like China to comply with the Convention's protections.

In recent history, China has shown some willingness to improve in meeting its international obligations to refugees.<sup>167</sup> The country seems poised to implement the new Entry and Exit Law, which will provide greater general protection for refugees, and may even be taking steps to fully implement its international refugee obligations into domestic law.<sup>168</sup> In light of China's manifest intent to further protect refugees, it is even more likely that the country would respond favorably under additional pressure from the UNHCR and other international organizations to protect individuals who fall into groups placed on a Non-Refoulement List.

### 3. Ensuring the UNHCR Does Not Abuse Its Authority

Others may be concerned that allowing the UNHCR to create a list of per se refugees would give the organization too much power. This is

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165. Convention Relating to the Status of Refugees, *supra* note 27, art. 35(1).

166. *See supra* Part II.D.

167. *See supra* Part II.D.

168. *See supra* Part II.D.

also an understandable concern because the existence of a Non-Refoulement List would certainly have legal implications. Groups placed thereon would have access to a protection that is rooted in customary international law,<sup>169</sup> namely protection from refoulement, and in this sense, the UNHCR is making a quasi-legal determination. However, the protective functions designated to the UNHCR in Section 8 of the Statute already provide the authority necessary for the creation of this List.<sup>170</sup> Furthermore, the actions taken by the UNHCR would be subject to the system of oversight already in place, wherein the ECOSOC's Executive Committee holds annual meetings to review any actions taken by the UNHCR.<sup>171</sup>

#### IV. CONCLUSION

In its current state, international refugee law is failing to protect some of the world's most vulnerable refugee populations. This is because the UNHCR lacks adequate authority and because the Convention's definition of refugee lacks sufficient specificity. Thus, the UNHCR should use the authority it already possesses to create a Non-Refoulement List, specifically identifying groups of people that qualify as *per se* refugees. While this solution may not fully convince countries like China to live up to their treaty obligations, it will put more pressure on them to do so and provide other countries and international organizations greater leverage in encouraging them to do so.

If the UNHCR had been empowered to place North Korean defectors on a "Non-Refoulement List" when Eun Hye and her family were fleeing North Korea, China may have felt greater international pressure to recognize them as refugees and they may have received the protection that they needed sooner. After ten years of uncertainty, fear, and hardship, Eun Hye and her family were lucky to finally make their way to the UNHCR's office in Beijing and find refuge in the United States, but there are still so many others in similar situations who are left without protection. Empowering the UNHCR to specifically identify and publish a list of the refugee groups who so desperately need protection will bring us one step closer to ensuring the most vulnerable among us will receive the help they need, regardless of where they seek it.

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169. *See supra* Part II.C.2.

170. *See supra* Part III.B.

171. *See supra* Part III.B.