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Citation: Wolman, A. (2011). North Korean Escapees' Right to Enter South Korea: An International Law Perspective. *Yonsei Law Journal*, 2(2), pp. 141-159.

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Essay: North Korean Escapees' Right to Enter South Korea: An International Law
Perspective

Keywords: North Korea; Refugees; Right of Entry; South Korea; ICCPR

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North Korean Escapees' Right to Enter South
Korea: An International Law Perspective
By Andrew Wolman*

Abstract

This essay poses the question of whether North Korean escapees have a right to enter and reside in South Korea under international law. The answer to this question may seem obvious to those unfamiliar with inter-Korean relations. Of course, all countries have the right to determine whether foreigners may gain entry to their countries; that is a fundamental attribute of sovereignty. In the context of the Korean peninsula, however, the answer is not so simple. Under South Korean law, individuals born in North Korea are normally considered South Korean nationals, and under the International Covenant on Civil and Political Rights and (arguably) customary international law, countries have a general duty to allow entry and residence to their own nationals. The interesting question, then, is whether this general duty extends also to the specific circumstances of the Korean peninsula, when most North Koreans have relatively little connection to South Korea, despite their formal South Korean citizenship. After considering different aspects of the issue, this essay will conclude that South Korea does have a duty to accept North Korean escapees under the International Covenant on Civil and Political Rights. However, this duty is solely treaty-based, and customary international law does not currently impose any analogous requirements.

I. Introduction

Ever since the drafting of its nationality laws in 1948, South Korea has considered individuals born in North Korea to be South Korean nationality.¹ In general, this South

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¹ For the sake of readability, this essay will refer to the Democratic People's Republic of Korea as 'North Korea' and the Republic of Korea as 'South Korea'.

Korean nationality has been more theoretical than practical. After all, South Korean authorities have little to no ability to influence the lives of individuals in North Korea, regardless of nationality. However, as more and more North Koreans have succeeded in escaping from their closed society, they are increasingly attempting to claim the natural fruit of their South Korean nationality: the right to enter and live in South Korea.

The number of such escapees was relatively small prior to the early nineties.² However, in the wake of the devastating famine of 1995-1998, thousands of North Koreans left their country in search of food, and the number of escapees continues to be high, due in part to economic deprivation and in part to the brutal repression of the Kim Jong Il regime. In October 2010, South Korea accepted its 20,000th North Korean escapee;³ a substantial figure, but still small in comparison to the number of North Korean escapees currently in China (estimates range from 10,000 to 300,000)⁴ or to the potential number of escapees that could result from a regime collapse or environmental catastrophe.

One of the most sensitive questions of Korean immigration policy has been how to treat these immigrants from the north. Until the early nineties, North Korean escapees – or defectors, as they were then generally called – were greeted with open arms and generous financial subsidies.⁵ Over the last two decades, however, the increased volume of escapees and closer inter-Korean ties have sparked more of a debate as to whether it is good policy to always allow entry to North Koreans. To many South Koreans, a welcoming policy is an important demonstration of the fundamental unity of the Korean peninsula, as well as a humanitarian necessity. Others argue that despite their formal South Korean nationality, North Korean escapees should be admitted selectively to avoid social and economic disruption.⁶ Some also fear that if South Korea truly welcomed all North Korean escapees, it would

² Andrei Lankov, *Bitter Taste of Paradise: North Korean Refugees in South Korea*, in *THE NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE* 53, 54 (Stephan Haggard & Marcus Noland, eds., 2006).

³ Lee Sun-Young, *Number of Defectors to Top 20,000*, *KOR. HERALD*, Oct. 6 2010.

⁴ Rhoda Margesson et al., *North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Options*, 4 (Cong. Research Serv., CRS Report for Congress Order Code RL34189, Sep. 26, 2007), available at <http://www.fas.org/sgp/crs/row/RL34189.pdf>.

⁵ Lankov, *supra* note 2, at 55.

⁶ *Id.*, at 66.

destabilize the North Korean regime, and they fear the results of sudden regime collapse.⁷

Some also object to classifying North Korean escapees as South Korean nationals because doing so may harm the escapees' chances of receiving asylum in third countries.⁸

The issue of North Korean escapees' right of entry to South Korea is usually addressed through the framework of domestic law and policy. This essay aims to take a step further, and examine the question of whether Korea has an international law duty to accept all North Korean escapees that wish to settle in the South. The answer to this question is non-obvious. While states clearly may exclude non-nationals,⁹ there is, in general, an international law obligation to allow entry to nationals: as one commentator noted, "[t]he duty to admit nationals is considered so important a consequence of nationality that it is almost equated with it."¹⁰ It is far less clear, however, whether this general obligation also applies to the situation of North Koreans seeking entry to South Korea. In one recent case involving a refugee determination for North Korean escapees in the United Kingdom, the tribunal suggested without analysis that any South Korean refusal would be challenged as a violation of international law.¹¹ This essay will argue that such a challenge would indeed be successful, and that denyin entry to North Korean escapees

⁷ *Id.*, at 57.

⁸ In Seop Chung et al., *The Treatment of Stateless Persons and the Reduction of Statelessness: Policy Suggestions for the Republic of Korea*, 13 KOREA REV. OF INT'L STUD. 7, 23 (2010). This results from the definition of "refugee" in Art. 1(A)(2) of the 1951 Refugee Convention, which specifies that "in the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national". Convention Relating to the Status of Refugees, 28 Jul. 1951, 189 U.N.T.S. 137, art. 1(A)(2).

⁹ See, e.g., PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 45 (2d ed. 1979); Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in, and Leave a Country*, 49 INT'L AFFAIRS 341, 344 (1973); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 372-73 (2d ed. 1966).

¹⁰ HARO F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW 56 (1959).

¹¹ KK and ors (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC) at para. 67 (stating in the context of a discussion of North Korean escapees' right to enter South Korea that "[i]f it were ever to be shown that a country had a general practice of not receiving its own nationals, there would be likely to be pressure through diplomatic channels, and perhaps litigation at the Hague").

would be considered a violation of the International Covenant on Civil and Political Rights ('ICCPR').

The essay will be organized as follows. Section II will provide background on the domestic legal framework for allowing entry to North Korean escapees, and an overview of current practices. Section III will investigate whether the ICCPR requires the South Korean government to accept North Korean escapees. Section IV will address whether customary international law duties exist. Finally, section V will provide a brief conclusion. This essay will not address possible arguments that South Korea (or indeed any country) has a duty to accept North Korean escapees under the Refugee Convention or Convention Against Torture, as these arguments are well developed elsewhere in the literature.¹² Rather, it will concentrate on possible international law duties emanating from the escapees' formal South Korean nationality.

II. Background

A. North Koreans and South Korean Nationality Law

Under international law, the possible South Korean duty to accept North Korean escapees is entirely dependent on the fact that North Koreans are also considered South Korean nationals. This is the case due to the combined actions of the 1948 South Korean Constitution¹³ and the South Korean Nationality Act from the same year.¹⁴ The Constitution states in article 3 that "[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands."¹⁵ While the exact state boundaries cannot be inferred from such a brief statement, in general terms it is clear that Korean peninsula encompasses the

¹² See, generally, Elim Chan & Andreas Schloenhardt, *North Korean Refugees and International Refugee Law* (2007) 19 INT'L J. REFUGEE L. 215; Russell Aldrich, *An Examination of China's Treatment of North Korean Asylum Seekers*, 7 N. KOREAN REV. 36 (2011); Eric Yong-Joong Lee, *National and International Legal Concerns regarding Recent North Korean Escapees*, 13 INT'L J. REFUGEE L. 142 (2001).

¹³ Constitution of the Republic of Korea, adopted on 17 July 1948.

¹⁴ Nationality Act (ROK), Law Number 16, 20 Dec. 1948 ('Nationality Act').

¹⁵ Constitution of the Republic of Korea, *supra* n. 13, at art. 3.

territory administered by both North and South Korea.¹⁶ The Constitution also speaks to nationality in article 2, which states simply that “[n]ationality in the Republic of Korea is prescribed by law. It is the duty of the State to protect citizens abroad as prescribed by law.”¹⁷

The prescription of nationality is implemented with the Nationality Act, which specifies that any person falling in one of the following categories ‘shall be a national of the Republic of Korea at birth’¹⁸:

1. A person whose father or mother is a national of the Republic of Korea at the time of a person’s birth;
2. A person whose father was a national of the Republic of Korea at the time of the father’s death, if the person’s father died before the person’s birth;
3. A person who was born in the Republic of Korea, if both of the person’s parents are unknown or have no nationality.¹⁹

Therefore, in principle, any North Korean would also be a South Korean national from birth, provided he or she is not descended from two foreign (i.e., non-North or South Korean) parents. This conclusion is widely (but not unanimously) accepted by Korean legal scholars.²⁰ It has also been confirmed by the Korean Constitutional Court.²¹

There are, however, some circumstances in which it seems clear that North Korean escapees – despite being South Korean nationals from birth – will in fact be denied entry into

¹⁶ See Chang Hyo Sang, *Nationality in Divided Countries: A Korean Perspective*, in NATIONALITY AND INTERNATIONAL LAW: A KOREAN PERSPECTIVE 255, 257 (Ko Swan Sik ed., 1990) (citing Korea Supreme Court judgment 4292 of Sep. 28, 1961, Case of Administration Action No. 48).

¹⁷ *Id.*, at art. 2.

¹⁸ Nationality Act, *supra* n. 14, at art. 2.

¹⁹ *Id.*

²⁰ See, e.g., Chulwoo Lee, *South Korea: The Transformation of Citizenship and the State-Nation Nexus*, 40 J. CONTEMP. ASIA 230, 232 (2010); Jeanyoung Lee, *Ethnic Korean Migration in Northeast Asia*, in PROCEEDINGS OF INTERNATIONAL SEMINAR: HUMAN FLOWS ACROSS NATIONAL BORDERS IN NORTHEAST ASIA 118, 128 (2002); Chung et al., *supra* n. 8, at 22 (“the South Korean judiciary and the dominant scholarly opinion regard North Korean territory as a part of the territory of the Republic of Korea, and therefore all North Korean people as nationals of the Republic of Korea.”)

²¹ *Nationality Act Case*, 12-2 KCCR 167, 97Hun-Ka12 [Kor. Const. Ct.] (31 Aug. 2000).

South Korea, or at least denied the visa or passport that would allow them to board a plane or ferry bound for South Korea (overland migration is virtually impossible due to the highly fortified border with North Korea). These denials can be broken down into three categories; 1) denials under the Act on the Protection and Settlement Support of Residents Escaping from North Korea (“Protection Act”);²² 2) denials of entry to North Korean escapees present in China, and 3) denials of entry to individuals outside of China whose eligibility has not been investigated under the Protection Act (or who have been investigated and do not fall into any of that Act’s categorical exclusions). Each of these categories will be reviewed in turn.

B. Protection Act Denials

In 1993, the South Korean government passed the Protection Act, which, among other things, specifies which North Korean escapees qualify for “protection”. While the South Korean government has been vague as to whether the Protection Act formally regulates entry into South Korea or solely other benefits such as resettlement assistance, as a matter of practice, it is fairly clear that the right of entry is in fact conditional upon receipt of “protection”.²³

The Protection Act limits the ability of North Korean escapees to enter South Korea in three main ways. First, it only applies to “residents escaping from North Korea”, a category which it defines quite vaguely as covering “persons who have their residence, lineal ascendants and descendants, spouses, workplaces and so on in North Korea, and who have not acquired any foreign nationality after escaping from North Korea”.²⁴ This could disqualify from protection

²² Act on the Protection and Settlement Support of Residents Escaping from North Korea (ROK), Law Number 6474, partial revision, 24 May 2001 (‘Protection Act’).

²³ See, Chung et al., *supra* n. 8, at 24. (“While ‘protection’ in principle refers to the package of resettlement benefits available to North Korean escapees settling in the South, in practice it seems clear that protection is interpreted as a much broader concept, covering various measures ranging from admission to a diplomatic mission and then to South Korea, to providing economic, social and educational benefits on Korean territory.”); Refugee Review Tribunal 1000331 [2010] RRTA 932 [Australia] (25 October 2010), para. 56 (citing a report from Pillkyu Hwang stating that South Korean citizenship does not convey an automatic right to enter the country, and that the only legal avenue for a North Korean escapee to enter South Korea is by applying for ‘protection’).

²⁴ Protection Act, *supra*, n. 22, at art. 2(1).

certain individuals who would be considered South Korean nationals under the terms of the Nationality Act.²⁵

Second, pursuant to article 3 and article 7 of the Protection Act, the Act has been interpreted as applying only to individuals with a “will and desire” to reside in South Korea.²⁶ This interpretation has been confirmed by officials of the South Korean embassy in Canada²⁷ and representatives of the Ministry of Unification and the Ministry of Foreign Affairs and Trade.²⁸ This restriction is probably most relevant in the context of individuals who are seeking asylum in third countries: in an official letter from 2010, the Korean Embassy to the United Kingdom specified that “[t]he first and most important criterion in the determination of offering protection and settlement support to North Koreans is to ascertain whether the person in question desires to live in the Republic of Korea. ... As such, the protection of the Government of the Republic of Korea for North Koreans does not apply to those North Koreans who wish to seek asylum in a country other than the Republic of Korea.”²⁹

Third, and most importantly, article 9 of the Protection Act specifically rejects protection for the following persons:

²⁵ There is anecdotal evidence of a few North Koreans present in South Korea who are caught in a legal limbo due to Chinese ancestry, however these individuals have to date been allowed to stay in South Korea. H. Cho, ‘*Wonsungimando mothan... ’ mugukjeok talbukjaui hansum*’ [‘Less than a monkey...’ Sigh of a North Korean Defector who has no Nationality], NOCUT NEWS, 17 Apr. 2011, at <<http://www.nocutnews.co.kr/show.asp?idx=1776839>>. See also, Chung, *supra* n. 8, at 26.

²⁶ Article 3 of the Protection Act states the Act “shall apply to residents escaping from North Korea who have expressed their *intention* to be protected by the Republic of Korea”, while article 7 provides that ‘[a]ny person who has escaped from North Korea and *desires* to be protected under this Act, shall apply for protection to the head of an overseas diplomatic or consular mission, or the head of any administrative agency ...’ (*italics added*). Protection Act, *supra*, n. 22, at arts. 3; 7.

²⁷ See *Kim v. Canada*, 2010 FC 720, para. 15 [Canada] (30 June 2010) (citing a 2008 letter from the South Korean Embassy in Canada stating that North Koreans must demonstrate that they possess the “will and desire” to live in [South] Korea in order to be considered South Korean citizens).

²⁸ KK and ors, [2011] UKUT 92, at para. 35 (citing Choi Kang-sok from the Inter-Korean Policy Division at the Ministry of Foreign Affairs and Trade and Jo Jae-sop at the Ministry of Unification).

²⁹ *Id.*, at para. 28.

1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc.
2. Offenders of non-political, serious crimes such as murder, etc.;
3. Suspects of disguised escape;
4. Persons who have for a considerable period earned their living in their respective countries of sojourn; and
5. Such other persons as prescribed by the Presidential Decree as unfit for the designation as persons subject to protection.³⁰

There is an administrative procedure for determining qualification for protection under the Protection Act, with the Ministry of National Unification conducting investigations and determining eligibility for protection, unless national security might be affected, in which case the Korean National Intelligence Service makes the final decision.³¹ There is no appeal procedure available from outside the country.³²

Many scholars have noted that escapees covered by the article 9 exceptions will not be allowed entry into South Korea or treated as nationals in other respects.³³ This has also been confirmed on occasion by South Korean government officials.³⁴ Article 9(4) provides a potentially broad and significant ground for exclusion, given the fact that many North Korean escapees spend a period of time working in China prior to continuing to a third country and attempting to settle in Korea. South Korean authorities appear in practice to have interpreted

³⁰ Protection Act, *supra* n. 22, at art. 9.

³¹ Chung et al., *supra* n. 8, at 24.

³² While two alternate mechanisms for receiving a nationality determination are available once an individual is within Korea, these are of no use to those attempting to gain entry in the first place. *Id.*, at 24-5.

³³ C. Lee, *supra* n. 20, at 232; KK and ors, [2011] UKUT 92, at para. 34-35.

³⁴ For example, the South Korean embassy in Canada stated that some North Korean escapees are ineligible for South Korean citizenship, including “‘bogus” defectors, persons who have resided in a third country for an extended period of time; and international criminals such as persons who have committed murder, aircraft hijacking, drug trafficking or terrorism.’ Kim v. Canada, 2010 FC 720, at para. 15. The relevant officer at the South Korean Ministry of Foreign Affairs and Trade was also quoted as saying that the South Korean government can refuse to recognize or grant South Korean nationality in cases covered by article 9 of the Protection Act. KK and ors, [2011] UKUT 92, at para. 35.

the clause as disallowing entry to individuals who have been outside of North Korea for ten years or more at the time of application.³⁵

C. Denial of entry to North Korean escapees present in China

The majority of North Korean escapees live in China, which has a 1,360 km long border with North Korea that is relatively easily crossed. Some of these individuals are content to live in the Chinese border region, which has a large ethnic Korean population, despite the continuous danger or persecution or deportation back to North Korea. Many others, however, wish to move to South Korea. This is usually accomplished through clandestinely transiting China to get to Vietnam, Thailand, or Mongolia, from where Korean authorities will facilitate transport to South Korea.

The journey, however, is dangerous, and there are many other cases of North Korean escapees approaching South Korean officials within China and requesting assistance to enter South Korea directly. This assistance is, according to reports, regularly denied, and escapees are not provided the visa or passport that would allow them to board a plane to South Korea.³⁶ The only two exceptions to this rule have traditionally been particularly high value defectors (i.e., those who previously held important positions in the North Korean government), who have reportedly been given protection by South Korean authorities, and individuals who have successfully stormed a diplomatic compound and demanded asylum. This latter technique has been little-used in recent years because of increased security outside embassies and consulates and negative reactions from Chinese authorities.³⁷

³⁵ An expert lawyer noted that “it is almost impossible for North Koreans who have been outside North Korea for more than ten years and applied abroad to get approved entry into South Korea and acquire South Korean citizenship.” KK and ors, [2011] UKUT 92, at para. 55.

³⁶ Don Kirk, *Refugee Aid Groups Say Seoul is Playing Politics*, N.Y. TIMES, June 28, 2001; Lankov, *supra* n. 2, at 58 (“Stories about would-be defectors who went to South Korean embassies or consulates but were unconditionally denied assistance are numerous. [citations omitted] In the South Korean press, one can find virtually hundreds of testimonies about this semiofficial stance toward defectors. Indeed, I have never seen a single report about a defector whose escape was seriously assisted by the China-based South Korean diplomatic staff (unless such a person was a very high-ranking individual)”).

³⁷ Jamie Miyazaki, *‘Invisible’ N. Korean Refugees all too Visible in China*, ASIA TIMES, May 14, 2004.

D. Denials of entry to individuals outside of China whose eligibility has not been investigated under the Protection Act

Finally, there is at least anecdotal evidence of other North Korean escapees outside of China being denied entry to South Korea without investigation under the Protection Act, and without being told the reason for their rejection. For example, in a widely reported incident, Kim Jong-ryul, who was formerly Kim Il Sung's personal shopper, asserted that Korean Embassy officials had denied him permission to enter South Korea because, he suspected, they thought that he was too much of a hard-core communist.³⁸

More recently, the Upper Tribunal of the United Kingdom Immigration and Asylum Chamber investigated this issue, and while it found some evidence suggesting that North Koreans are always permitted to enter and reside in South Korea, there was also considerable anecdotal evidence to the contrary.³⁹ For example, one solicitor noted that out of fourteen clients who had applied for assistance from the South Korean Embassy in London, none had received passports or citizenship papers.⁴⁰ In an expert submission to the Tribunal, Professor Christopher Bluth alleged that even in Southeast Asian countries, "the policy of the South Korean government remains to discourage refugees and not all 'North Korean defectors' will be accepted as such."⁴¹ It should be emphasized, however, that these reports of denials are anecdotal and isolated.

III. International Covenant on Civil and Political Rights

As one of the three pillars of the international bill of rights, along with the Universal Declaration of Human Rights ('UDHR') and International Covenant on Economic, Social, and Cultural Rights, the ICCPR holds particular importance in the international system. It was ratified by South Korea in 1990 and as of July 6, 2011, has 167 parties.⁴² The ICCPR protects

³⁸ Kim Se-Jeong, *Kim Il-Sung's Former Crony Denied Asylum*, KOR. TIMES, Mar. 12, 2010

³⁹ KK and ors, [2011] UKUT 92, at para. 44

⁴⁰ *Id.*

⁴¹ *Id.*, at 35.

⁴² See United Nations Treaty Collection, International Covenant on Civil and Political Rights, at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. South Korea has also ratified the Optional Protocol to the ICCPR, so an individual North Korean could

the right to enter one's own country in article 12(4), which states that: "[n]o one shall be arbitrarily deprived of the right to enter his own country".⁴³ This right can only be derogated in times of public emergency which threaten the life of the nation and are officially proclaimed.⁴⁴

First, it is worth noting that while the terminology of article 12 of the ICCPR is largely derived from the UDHR, the texts of the two documents differ in important respects. The first paragraph of article 13 of the UDHR states that "[e]veryone has the right to leave any country, including his own, and to return to his country."⁴⁵ The second paragraph provides for "freedom of movement and residence within the borders of each state."⁴⁶ Thus, article 13 of the UDHR can be interpreted as protecting four distinct rights and freedoms, namely 1) a freedom of internal movement (i.e., within the borders of a particular state; 2) a freedom of residence (again, within the borders of a particular state); a right to leave, or emigrate from, any country, and 4) a right to return to one's country.⁴⁷ However, by referring to a "right to return" rather than a "right to enter", the plain language of the UDHR would not seem to protect the entry rights of an individual who has never been to "his country". While the travaux préparatoires shed little light on this point, later interpretations have been more expansive,

challenge a denial of the right of entry in a petition to the Human Rights Committee, although none have yet done so.

⁴³ International Covenant on Civil and Political Rights, art. 12(4), Dec. 16, 1966, 999 U.N.T.S. 171.

⁴⁴ *Id.*, at art. 4(1). Korea has not proclaimed such a public emergency.

⁴⁵ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, art. 13(1) (Dec. 10, 1948).

⁴⁶ *Id.*, at art. 13(2). These rights may be subject "only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." *Id.*, at art. 29.

⁴⁷ Atle Grahl-Madsen et al., *Article 13, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 265, 265 (Gudmundur Alfredsson & Asbjørn Eide, eds., 1999). Some have inferred a fifth right, namely the right to enter any country, as a corollary of the right to leave. However, the existence of such a right has not been generally accepted by States or commentators in either the UDHR or subsequent human rights documents. *Id.*, at 276.

asserting an implied right of entry in the UDHR for nationals to their country of nationality in all circumstances.⁴⁸

The ICCPR, on the other hand, explicitly embraces a “right to enter” rather than a “right to return”. This clarifies that even individuals who have never set foot in their “own country” have a right to enter that country. As the Human Rights Committee stated in General Comment No. 27, the right to enter “includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality).”⁴⁹ Thus, even if a North Korean escapee has never set foot in South Korea, he or she would not for that reason lack the right to enter. However, while it is well accepted that Article 12(4) may apply to individuals entering their “own country” for the first time, it is still necessary to evaluate whether a deprivation is “arbitrary”, what constitutes one’s “own country”, and whether article 12(4) applies extraterritorially.

A. Arbitrariness

Commentators have long debated how the Article 12(4) arbitrariness qualifier should be interpreted. The dominant opinion holds that the legislative history of the ICCPR’s drafting makes clear that only one type of denial of entry was intended to be considered non-arbitrary, namely those rare cases of lawful exile as a punishment for a crime.⁵⁰ This relatively broad conception of arbitrariness has been embraced by the Human Rights Committee, which stated in General Comment 27 that “there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable”.⁵¹ If one accepts this broad characterization of

⁴⁸ See UN SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS OWN COUNTRY, final report prepared by C.L.C. Mubanga-Chipoya, paras. 91, 98, UN Doc. E/CN.4/Sub.2/1988/35 (June 20, 1988).

⁴⁹ HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 27: FREEDOM OF MOVEMENT (ART. 12), para. 19, U.N. Doc CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999). The Human Rights Committee’s opinions are not binding, although they are often considered ‘authoritative’ interpretations of the ICCPR.

⁵⁰ Sander Agterhuis, *The Right to Return and its Practical Application*, 58 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL, 165, 172 (2005); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 219 (1st ed., 1993).

⁵¹ HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 27, *supra* n. 49, at para. 21.

arbitrariness, then the exclusion of North Korean escapees by the South Korean authorities would in all cases be arbitrary, as such exclusions are not the result of lawful exile as punishment for a crime.

Even if one were to embrace a more narrow characterization of arbitrariness than that accepted by the Human Rights Committee, there would still be a strong argument that South Korean denials of entry that are *not* pursuant to the Protection Act (including those in China) are arbitrary, because they are not undertaken according to valid domestic legal laws and regulations. Denials of entry pursuant to the Protection Act would most likely be considered arbitrary as well, because they discriminate against South Korean nationals of North Korean origin. After all, ordinary South Korean nationals are not subject to expulsion upon conviction of a crime or denied re-entry after working overseas for ten years.⁵²

Despite a stated reluctance to accept that denials of entry can be non-arbitrary, the Human Rights Committee in fact did rule in the State's favour in response to one denial of entry, in the case of *Toala v. New Zealand*.⁵³ The case is worth describing in detail, due to certain similarities with the Korean situation. Mr. and Mrs. Toala and Mr. and Mrs. Tofaeono were born in Western Samoa between 1932 and 1934. In July, 1982, while the Toalas and Tofaeonos were living in Western Samoa, the Judicial Committee of the Privy Council held that under the British Nationality and Status of Aliens (in New Zealand) Act 1928, all persons born in Western Samoa between 13 May 1924 and 1 January 1949 are automatically New Zealand citizens, along with their descendants.⁵⁴ Thus, it was undisputed that as of July 1982 the Toalas were New Zealand citizens. However, the Privy Council's decision was unpopular in New Zealand, and, following the negotiation of a Treaty of Friendship between New Zealand and Western Samoa, the New Zealand government enacted the Citizenship (Western Samoa)

⁵² If, however, the terms of the Protection Act were changed to deny entry to individuals who had acquired a third (i.e., non-North or South Korean) nationality, this would probably not be found to be arbitrary, as South Korean law denationalizes adult citizens who voluntarily acquire a second nationality. See, Helen Lee, *South Korea: Permanent Dual Nationality Allowed after 60 years*, U.S. LAW LIBRARY OF CONGRESS (Aug. 24, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402187_text (noting that despite recent amendments, the Nationality Act "remains unchanged in regard to persons who voluntarily become foreign nationals after attaining majority; in such cases there is automatic deprivation of their Korean citizenship.")

⁵³ Human Rights Comm., *Toala v. New Zealand*, Communication No. 675/1995, U.N. Doc. CCPR/C/70/D/675/1995 (Nov. 22, 2000).

⁵⁴ *Id.*, at para. 2.5 (citing *Lesa v. The Attorney-General of New Zealand* [1983] 2 A.C. 20).

Act 1982, which effectively nullified the Privy Council's decision.⁵⁵ When this new law went into effect, in October 1982, the Toalas and Tofaeonos, who were still resident in Western Samoa, lost their New Zealand citizenship.

In 1999, the Toalas and Tofaeonos were residing in New Zealand when they received deportation orders. They then filed a claim to the Human Rights Committee, alleging that New Zealand had violated Article 12(4) of the ICCPR by depriving them of citizenship and the right to enter New Zealand through passage of the Citizenship (Western Samoa) Act.⁵⁶ The Human Rights Committee found in favor of New Zealand. It concluded that the Toalas and Tofaeonos' denationalization should not be considered arbitrary because none of them had at the time ever applied for a New Zealand passport or claimed to exercise any rights as New Zealand citizens, and they lacked ties of birth, descent, residential or other ties with New Zealand.⁵⁷ Essentially, it appears that the Human Rights Committee undertook a type of genuine links analysis (as in the well-known *Nottebohm* Case⁵⁸ from the International Court of Justice) and found that the lack of connections with New Zealand at the time the denationalization law meant that denationalization was not arbitrary.

While the *Toala* holding suggests the possibility that the refusal of entry to North Korean escapees could be legitimate, I do not find it to be a persuasive precedent even if one accepts the (very debatable) preliminary point that the denial of entry to a national without genuine links to their state of nationality is non-arbitrary. This is because far greater links exist between North Korean escapees and South Korea than did between Western Samoans and New Zealand. Under classical *jus sanguinis* doctrine North Koreans are descendants of citizens of the Republic of Korea, assuming one accepts South Korea as successor to the pre-division Korean State, and descent has always been accepted as a valid "genuine link". Some North Koreans may have also fled their country in reliance on the presumed availability of sanctuary in South Korea, bringing up interesting questions of estoppel. In addition, it should be emphasized that the *Toala* case did not address the denial of entry to nationals (as is the case

⁵⁵ *Id.*, at para. 2.7.

⁵⁶ *Id.*, at para. 2.1.

⁵⁷ *Id.*, at para. 11.5.

⁵⁸ In the *Nottebohm* case, the International Court of Justice determined that while international law does not determine who may be considered a national, other states are not required to recognize a state's granting of nationality to a person if there is no genuine link between that person and the nationality-granting state. *Nottebohm Case (Liech. v. Guat.) (Second Phase)*, 1955 I.C.J. 5, 11 (Apr. 6).

with North Korean escapees); rather, it discussed denationalization and the denial of entry to denationalized individuals. At least arguably, it is inherently arbitrary to deny entry to a national without prior denationalization, as would be the case with North Korean escapees.⁵⁹

B. Meaning of “one’s own country”

The next issue that must be addressed is whether the right to enter one’s “own country” encompasses the right of North Korean escapees to enter South Korea. The question of whether one’s “own country” should be interpreted synonymously with “country of nationality” dates back to the drafting of the ICCPR. The ICCPR’s first draft initially referred to the individual’s right of entry into “the country of which he is a national”.⁶⁰ Thus, the fact that the language was changed to one’s “own country” would indicate, according to the principle of effectiveness, that a different meaning was intended. On the other hand, however, in response to requests for clarification by some state delegates to the Third Committee of the UN General Assembly, the drafting committee explained that “one’s own country” was meant to denote the country of which one was a citizen.⁶¹

For decades, commentators have debated whether “one’s own country” should be interpreted *more* broadly than a simple reference to country of citizenship, to include resident aliens, for example. The dominant opinion would certainly now favour a broader interpretation.⁶² General Comment 27, for example, explicitly states that the “scope of ‘his own country’ is broader than the concept ‘country of his nationality’”.⁶³ This statement has been repeated by the Human Rights Committee in *Stewart v. Canada*.⁶⁴ However, this general conclusion has never been made in the context of nationals with minimal links to their country of nationality.

⁵⁹ Pellonpää argues that the denial of entry to nationals is inherently arbitrary because the ability to reside in one’s home country is integral to the concept of nationality. MATTI PELLONPÄÄ, *EXPULSION IN INTERNATIONAL LAW*, 25, 138 (1984).

⁶⁰ AMNESTY INTERNATIONAL, *NATIONALITY, EXPULSION, STATELESSNESS AND THE RIGHT TO RETURN*, 20 (Sep. 2000), AI Index: ASA 14/01/00.

⁶¹ *Id.*

⁶² *Id.*, at 2.

⁶³ HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 27, *supra* n. 49, at para. 20.

⁶⁴ Communication No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (Nov. 1, 1996), para. 12.3.

The Human Rights Committee addressed the more specific question directly only in the *Toala* case, albeit in dicta, where it suggested that New Zealand may not have qualified as the appellants' "own country" because none of the authors had any connection with New Zealand through birth, descent, ties or residence at the time of the Privy Council decision.⁶⁵ This suggests that while dual nationals have the right to entry in both countries, some 'genuine links' must exist before a State can be deemed to be one's 'own country', and at least in certain cases formal citizenship may not be sufficient to constitute such a link.⁶⁶ Rightly or wrongly, the Human Rights Committee in *Toala* seems to have embraced the same analytical framework for determining arbitrariness and determining the identity of one's "own country".

It would be difficult to predict whether or not the Human Rights Committee or another tribunal would consider that South Korea qualifies as North Korean escapees' "own country". If one simply asserts that one's "own country" is the dominant country in cases of dual nationality, then it probably would not: clearly, North Korean escapees have greater connections to North Korea than they do to South Korea. On the other hand, if one uses a genuine links analysis, as suggested in *Toala*, then South Korea is more likely to qualify. As noted earlier, there are real links of descent between North Korean escapees and Korea (as a pre-1945 unified sovereign entity). Other links such as kinship may also be present. At any rate, to the extent that South Korea positions itself constitutionally and otherwise as the inheritor of Korea's sovereignty, it would be hard-pressed to deny being the "own country" of people born in the North. In addition, the mere fact that the escapees are attempting to enter and reside in South Korea implies that their allegiance does not lie with the North Korean state (or the regime in power there).

C. Extraterritoriality

⁶⁵ *Toala v. New Zealand*, *supra* n. 53, at para. 11.5 ("The Committee notes that in 1982 the authors had no connection with New Zealand by reason of birth, descent from any New Zealander, ties with New Zealand or residence in New Zealand. They were unaware of any claim to New Zealand citizenship at the time of the *Lesa* decision and had acquired New Zealand citizenship involuntarily. It also appears that, with the exception of Mr Toala, none of the authors had ever been in New Zealand. All these circumstances make it arguable that New Zealand did not become their "own country" by virtue of the *Lesa* decision.")

⁶⁶ SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS & COMMENTARY* 376 (2d. ed. 2004).

To the extent that South Korean officials are denying entry to North Korean escapees, such denials are taking place in embassies and consulates outside of the country – there is no real evidence of North Koreans actually being turned away once they have arrived in South Korea.⁶⁷ Thus, it is necessary to look at whether the ICCPR applies extraterritorially to the actions of South Korean officials.

Article 2(1) of the ICCPR places an obligation upon state parties to respect and to ensure rights “to all individuals within its territory and subject to its jurisdiction”.⁶⁸ This clause has been consistently and repeatedly interpreted by the Human Rights Committee disjunctively, to mean that states are liable within their borders as well as for the actions of their agents when those actions take place overseas.⁶⁹ Thus, in General Comment 31, the Committee stated that the ICCPR applies to all individuals “who may find themselves in the territory or subject to the jurisdiction of the State Party.” (italics added).⁷⁰ The International Court of Justice also held that the ICCPR applies extraterritorially in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.⁷¹ This conclusion has been echoed by many commentators.⁷²

⁶⁷ There were suspicions that North Korean escapees had been returned against their will after one 2008 incident where 22 North Koreans were repatriated (and later reportedly executed) upon arriving in South Korean waters in a fishing boat. However, these allegations were refuted by South Korean government sources who asserted that the North Koreans had accidentally drifted across the border and did not wish to defect. 22 *N. Korean Drifters Executed after Returning Home: Source*, YONHAP NEWS, at Feb. 17, 2008, at <http://english.yonhapnews.co.kr/national/2008/02/17/95/0301000000AEN20080217001500315F.HTML>.

⁶⁸ ICCPR, *supra* n. 43, art. 2(1).

⁶⁹ As the Human Rights Committee stated in *Burgos/Lopez v. Uruguay*, “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.” *Burgos/Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1, para. 88 (July 29, 1981). See also, *Casariago v. Uruguay*, Communication No. 56/1979, U.N. Doc. CPR/C/13/D/56/ 1979, paras. 10.1–10.3 (July 29, 1981),

⁷⁰ Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 10, U.N. Doc. CCRR/C/21/Rev.1/Add.13 (May 26, 2004).

⁷¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) ICJ

The extraterritorial scope of the ICCPR is not universally accepted, however. The United States in particular has long held that the ICCPR is not applicable extraterritorially.⁷³ The U.S. position is based on the plain language of the treaty – the use of “and” instead of “or” in article 2(1) – as well as an examination of the travaux préparatoires, which, the U.S. claims, demonstrate that an extraterritorial scope for the ICCPR was the subject of considerable debate before being explicitly rejected.⁷⁴

This essay will not attempt an in depth analysis of the relative merits of the U.S. position versus the position taken by the Human Rights Committee, ICJ, and most commentators. However, as a practical matter, it is clear that the majority of international law experts, states, and institutions accept the extraterritorial scope of the ICCPR, especially in the context of overseas treatment of one’s own citizens.⁷⁵ If a North Korean escapee ever brought an article 12(4) case before the Human Rights Committee, there is little to no chance that the case would be lost on extraterritoriality grounds, and indeed South Korea would be very unlikely to argue the point.

Gen. List No. 131, decided July 9, 2004, at para. 111.(“the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”)

⁷² See, e.g., Theodor Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L 78, 79 (1995); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Delegations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 74 (Louis Henkin ed., 1981); Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES*, 73 (Fons Coomans & Menno Kamminga, eds., 2004).

⁷³ Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Dep’t of State, Opening Statement at ICCPR Presentation (July 17, 2006) (“It is the long-standing view of my government that applying the basic rules for the interpretation of treaties described in the Vienna Convention on the Law of Treaties leads to the conclusion that the language in Article 2, Paragraph 1, establishes that States Parties are required to respect and ensure the rights in the Covenant only to individuals who are BOTH *within* the territory of a State Party *and* subject to its jurisdiction.”)

⁷⁴ Patrick Walsh, *Fighting for Human Rights: The Application of Human Rights Treaties to United States’ Military Operations*, 28 PENN ST. INT’L L. REV. 45, 51 (2009).

⁷⁵ Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9:4 HUM. RTS. L. REV. 521, 523 (2009).

D. Conclusion

As the preceding analysis indicates, the question of whether art. 12(4) of the ICCPR would prohibit South Korea from denying entry to North Korean escapees would largely depend on how the term “arbitrary” is interpreted, whether South Korea would be considered to be the “own country” of North Korean escapees, and whether art. 12(4) is considered effective extraterritorially. Given the broad interpretation of arbitrariness that has been accepted by the Human Rights Committee, it seems unlikely that such denials would be considered arbitrary, as they are not the result of lawful exile. While the Toala Case brings up the possibility that denial of entry to an individual who lacks genuine links to his or her country of nationality would be non-arbitrary, it is likely that North Korean escapees would be found to have genuine links (of descent) with the South Korean state.

It is harder to predict whether the Human Rights Committee or another tribunal would consider South Korea to be the “own country” of North Korean escapees. The Toala case indicates that a genuine links test might be used to determine one’s “own country” as well as arbitrariness. If this is the case, then South Korea would likely qualify as the escapees’ own country. In any event, the South Korean government might be loath to argue that it is not the North Koreans’ “own country”, considering its long-standing constitutional insistence that it is the true representative of a Korean state encompassing the entire Korean peninsula. Similarly, the Korean government might be reluctant to assert that the ICCPR is not effective extraterritorially, because that position, while certainly not frivolous, has been roundly rejected by the Human Rights Committee and the vast majority of commentators and states. Thus, it is likely that the Human Rights Committee or other tribunal would in fact find that South Korea’s denial of entry to North Korean escapees to be a violation of its ICCPR commitments.

IV. Customary International Law

A country’s possible duty to accept its own nationals under customary international law can be conceived of in one of two ways. First, there may be a duty owed to other states under classical customary international law.⁷⁶ Second, there is a possible duty owed to the

⁷⁶ This duty is owed not simply to the expelling state or state from where entry is sought, but also to other states whose territories the individual would be forced to enter if entry was not permitted. Pellonpää, *supra* n. 59, at 26 (1984).

individual being denied entry, that could potentially exist under customary international human rights law. Oftentimes, these two potential duties are not adequately differentiated in the legal literature and there is sparse case law relating to the responsibility to accept one's own citizens under customary international law.

A. Duty owed to States

For many years, there has been considerable disagreement among international lawyers as to whether a customary international law duty existed for states to allow entry to their nationals. Analyses by Clemens Huffman⁷⁷ and Yoram Dinstein⁷⁸ found there to be no such general duty under customary international law. The more widely accepted conclusion, however, is that a duty to accept nationals does indeed exist. This duty was regularly pronounced by commentators as far back as the nineteenth century⁷⁹ and more recently has been generally accepted by the major experts in nationality law.⁸⁰ In addition, a United Nations survey of international instruments and national laws from 1987 concluded that the right to leave and return is "a legal obligation according to customary international law."⁸¹ The

⁷⁷ Clemens Hufmann, *Duty to Receive Nationals?*, 24 FORDHAM L. REV. 235, 263 (1955) ("general international law does not obligate States to receive back their nationals from other countries ... the development of such an obligation is not desirable.")

⁷⁸ Yoram Dinstein, *The Israeli Supreme Court and the Law of Belligerent Occupation: Deportations*, 23 ISRAELI YEARBOOK ON HUM. RTS. 1, 8-9 (1993).

⁷⁹ See, Siegfried Wiessner, *Blessed be the Ties that Bind: The Nexus Between Nationality and Territory*, 56 MISS L.J. 447, 483 (1988).

⁸⁰ See, e.g., GUY GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES, 137 (1978); Kay Hailbronner, *Nationality in Public International Law and European Law*, in ACQUISITION AND LOSS OF NATIONALITY VOLUME I: COMPARATIVE ANALYSES 35, 78 (Rainer Bauböck et al., eds. 2006) ("Although there have often been difficulties and barriers to enforcing such duties, state practice supports the assumption of a duty of states under public international law to readmit their own nationals.")

⁸¹ C. MUBANGA-CHIPOYA, ANALYSIS OF THE CURRENT TRENDS AND DEVELOPMENTS REGARDING THE RIGHT TO LEAVE ANY COUNTRY INCLUDING ONE'S OWN, AND TO RETURN TO ONE'S OWN COUNTRY, AND SOME OTHER RIGHTS OR CONSIDERATION ARISING THEREFROM 11, U.N. ESCOR, 39th Sess., Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/1987/10 (1987).

principle has been accepted by courts as well, most prominently in the European Court of Justice's opinion in *Van Duyn v. Home Office*, which stated that as "a principle of international law ... a State is precluded from refusing to its own nationals the right of entry or residence".⁸²

While it seems fair to conclude that a general customary international law rule exists that states must allow entry to nationals, it has been argued that there is an exception to that rule, which is pertinent to the situation of North Korean escapees; namely, that dual nationals have no right of entry under customary international law. After all, the reason for the international legal requirement to accept nationals is to avoid creating stateless individuals who will come to burden other countries, and, to the extent that a second state of nationality exists, such concerns do not arise.

Certainly, if one looks at state practice, there are many examples of countries that have denationalized and then expelled dual nationals, as surveyed by William Worster.⁸³ There are fewer cases of states refusing entry to or expelling dual nationals that have not been denationalized, but some examples exist, most significantly involving the United Kingdom.⁸⁴ Most recently, the U.K. developed a much-criticized domestic law category of "British Nationals (Overseas)", which applied to U.K. nationals from Hong Kong without the right to reside in the European territory of the U.K.⁸⁵ Similar categories such as "British Subjects without Citizenship" and "British Protected Persons" had previously been employed to categorize other colonial subjects without the right to live in Britain, most notably applying to many Asians resident in East Africa.⁸⁶ In defending this policy, U.K. leaders expressed their understanding that international law requires that admission be granted to nationals only in

⁸² 1 CMLR (1975) 18 (E.C.J. 1975).

⁸³ William Worster, *International Law and the Expulsion of Individuals with More than One Nationality*, 14 UCLA J. INT'L L. & FOREIGN AFF. 423 450-51 (2009) 450-451 (listing examples from nineteen countries).

⁸⁴ Other examples given include cases from Mexico and Turkmenistan. *Id.*, at 497-98.

⁸⁵ *Id.*, at 496-97.

⁸⁶ Weis, *supra* n. 9 at 51-3. See, also, Mark McElreath, *Degrading Treatment - From East Africa to Hong Kong: British Violations of Human Rights*; 22 COLUM. HUM. RTS. L. REV. 331 (1990-1991); Randall Hansen, *The Kenyan Asians, British Politics, and the Commonwealth Immigrants Act, 1968*, 42(3) THE HISTORICAL JOURNAL 809 (1999).

those cases where they have nowhere else to go.⁸⁷ The majority opinion, therefore, is that dual nationals have no customary international law protection against expulsion or denial of entry,⁸⁸ or alternately that such protection exists only exists vis à vis the country of dominant nationality.⁸⁹

If one accepts this limitation on the right of entry, then there would be no customary international law duty owed by South Korea to other states to accept North Korean escapees. North Korean escapees are all (at least) dual nationals, as they possess both North and South Korean nationality. To the extent that one of the two states has a legal obligation to allow entry, that duty would fall to North Korea, as the state of dominant nationality (given that most of the escapees would have never even set foot in South Korea).

B. Duty owed to Individuals

It is notoriously difficult to identify those norms that have attained the status of customary international human rights law. The Restatement of Foreign Relations, which is often cited by U.S. lawyers, provides a relatively narrow list, asserting that a country violates international law if:

as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial

⁸⁷ Frank Wooldridge & Vishnu Sharma, *International Law and the Expulsion of Ugandan Asians*, 9(1) INT'L LAWYER 30, 42(citing Sir Alec Douglas-Home (then Secretary of State for Foreign and Commonwealth Relations) statement that "under international law, a state has a duty to accept those of its nationals who have nowhere else to go.")

⁸⁸ Worster, *supra* n. 83 at 498 ("we must regard dual nationality as a valid, non-arbitrary exception to a general practice of the right to residence, if so provided under municipal law).

⁸⁹ Int'l Law Comm'n, Fourth report on the expulsion of aliens by Maurice Kamto, Special Rapporteur, para. 17, U.N. Doc. A/ CN.4/594 (Mar. 24, 2008). (arguing that in cases of dual nationality, the country of dominant nationality may not expel a national without agreement from another country to admit that person, but the other state of nationality is under no such prohibition).

discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.⁹⁰

Others have asserted that a much broader spectrum of rights should be considered as customary international law, claiming that those rights contained in the Universal Declaration of Human Rights have – at least in part – evolved into customary international law.⁹¹ Even if one accepts this thesis, though, it would not provide for a customary right to enter one's country of nationality for the first time, and thus would not by its plain terms apply to the vast majority of North Korean escapees.⁹²

It has also been claimed that the origin of customary international human rights law lies in the expanding web of multilateral treaties that have been widely accepted in the field.⁹³ If one accepts this premise, one can find some evidence that a new norm is emerging to protect the right to enter one's country of nationality. Article 3(2) of Protocol 4 of the European Convention on Human Rights states that "No one shall be deprived of the right to enter the territory of the state of which he is a national."⁹⁴ Article 22(5) of the American Convention on Human Rights provides that "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it".⁹⁵ In the realm of soft law, it is worth noting the Strasbourg Declaration on the Right to Leave and Return adopted by the International Institute of Human Rights, which states that "no one shall be deprived of the right to enter his or

⁹⁰ Restatement (Third) of Foreign Relations Law § 702 (1987).

⁹¹ See, e.g., Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1995-96) ;PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 213 (7th ed. 1997).

⁹² Article 13(2) of the UDHR states that "Everyone has the right to leave any country, including his own, and to return to his country". UDHR, *supra* n. 45, at art. 13(2).

⁹³ Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GEORGIA J. OF INT'L & COMP. L. 47, 98 (1995-96) ("the only logically satisfying and empirically validating position to take on the source of human rights norms is that they derive from provisions in treaties").

⁹⁴ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3(2), Europ. T.S. No. 46 (entered into force May 2, 1968).

⁹⁵ Organization of American States: American Convention on Human Rights, art. 22(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

her own country”,⁹⁶ a somewhat broader formulation than found in the ICCPR, as it does not contain an arbitrariness requirement.

Nevertheless, other human rights systems fail to provide a right of entry. Article 12(2) of the African Charter on Human and Peoples’ Rights echoes the narrower “right of return” language of the UDHR, stating that “Every individual shall have the right to leave any country including his own, and to return to his country.”⁹⁷ The Arab Charter on Human Rights likewise protects the right to return rather than the right to enter,⁹⁸ as does the Convention on the Elimination of All Forms of Racial Discrimination.⁹⁹ Given the disparate language, it would be very difficult to claim that the right of entry to one’s country of nationality has yet attained the status of customary international human rights law.

Conclusion

As this essay demonstrates, while there is currently no customary international law duty for South Korea to accept North Korean escapees, such a duty does exist under the ICCPR. There are also real-world adverse consequences to a policy that claims North Koreans as South Korean nationals but then does not always permit them to enter and reside in South Korea. Most notably, third countries may choose to deny asylum to North Korean escapees on the grounds that they are South Korean nationals: some have already done so.¹⁰⁰

⁹⁶ Strasbourg Declaration on the Right to Leave and Return, art. 6(a), adopted by a meeting of experts, Strasbourg, France, Nov. 26, 1986, *reprinted in* Hurst Hannum, *The Right to Leave and to Return in International Law and Practice*, 81 AM. J. INT’L. L. 432, 436 (1987).

⁹⁷ African Charter on Human and Peoples’ Rights, art. 12(2), June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58.

⁹⁸ League of Arab States, Arab Charter on Human Rights, Art. 27(2), May 22, 2004, *reprinted in* 12 INT’L HUM. RTS. REP. 893 (2005) (“No one shall be expelled from his country or prevented from returning thereto.”)

⁹⁹ International Convention on the Elimination of all Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (guaranteeing equality before the law in the enjoyment of “[t]he right to leave any country, including one’s own, and to return to one’s country.”)

¹⁰⁰ Many North Korean escapees have been denied asylum due to their South Korean nationality in Australia. *See, e.g.*, Australia Refugee Review Tribunal decisions 0909449 [2010] RRTA 763 [Australia] (7 Sep. 2010); 1000331 [2010] RRTA 932 (25 October 2010); 0909118 [2010] RRTA 1054 (24 Nov.

There are three ways that South Korea could resolve this dilemma and come into compliance with its ICCPR obligations, none of which would be easy paths. The first option would be for the government to change its policy so as to accept all North Korean escapees. This would be a tremendously difficult change to effectuate and would lead to serious international tensions, considering the strong Chinese opposition to facilitating emigration of North Koreans to South Korea. There would also be deep fears that in the event of political instability, South Korea would be flooded with North Korean escapees before putting into place a process to integrate them into the society in an orderly fashion.

Thus, if South Korea does intend to continue treating entry and residence as a discretionary privilege for North Korean escapees, rather than a right, there would be two possible legislative reforms that would bring it into compliance with the ICCPR. First, the Nationality Act could be reformed to clarify that North Korean escapees are not born South Korean nationals, but must instead apply for nationality (analogously to how non-Israeli Jews must apply for Israeli citizenship, which they are entitled to under the Israeli Law of Return). This would be a controversial measure, as it would be seen as a step away from treating North Koreans and South Koreans as equals in the eyes of the law, which would perhaps not bode well for equal rights and equal treatment for North Koreans in the (widely anticipated) eventuality of a North Korean regime collapses and peninsular reunification.

The other option would be to amend the constitution, so as to clarify that the territorial boundaries of South Korea are limited to the area that it actually administers, rather than the entire peninsula. Constitutional amendment in Korea is not a simple process, however, requiring approval by two thirds of the members of the National Assembly as well as a majority of voters in a referendum attracting a turnout of at least half of eligible voters.¹⁰¹ Evidently, an amendment would be extraordinarily controversial, as it would be seen by some as a sign of weakness or a sign that the government is giving up on unification. On the other hand, it could

2010). Prior to 2004, asylum denials based on dual nationality status also were handed down in the United States. Nicole Hallett, *Politicizing U.S. Refugee Policy Toward North Korea* 1(2) YALE J. INT. AFF. 72, 76 (Winter/Spring 2006). This changed with the passage of the North Korean Human Rights Act of 2004, which statutorily clarified that for refugee determination purposes “a national of the Democratic People's Republic of Korea shall not be considered a national of the Republic of Korea”. North Korean Human Rights Act, H.R. 4011 § 302(B) (2004).

¹⁰¹ Constitution of the Republic of Korea, *supra* n. 13, at arts. 128-130.

be seen by others as a gracious confidence-building measure towards the North.¹⁰² Such an amendment would automatically result in the Nationality Act ceasing to apply to North Koreans, allowing for a new naturalization process to be developed, most likely based on the criteria set out in the Protection Act.

¹⁰² See, e.g., Kang Sung-Hack, *Steps to Confidence-Building for Disarmament between North and South Korea*, in *KOREAN POLITICS: STRIVING FOR DEMOCRACY AND UNIFICATION* 501 (2002).