

## Human Rights Protection of North Koreans in a Third Country: A Legal Approach

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### Abstract

*A primary purpose of writing this article is to investigate the situation of North Korean escapees in a third country including China, Russia or other countries and to search for international legal measures protecting their human rights. Since the mid-1990s, many North Koreans have escaped from either their country or from working places in another country, not to return to North Korea for political and economic reasons. Their defections have been accelerated by the severe food crisis and human rights abuses plaguing North Korea. As the number of the escapees has grown, their status has become a hot issue among the states concerned. It finally became a critical point at issue in international society with the forcible repatriation of seven North Korean escapees in January 2000. In order not to hand over these seven people and to protect their human rights, every possible international legal measure was taken at that time. Notwithstanding they should come back to North Korea. This question was a trigger of the discussion of human rights protection of North Korean escapees in a third country. The major tools of this study will be the 1951 Convention relating to the Status of Refugees and other relevant legal measures. Diplomatic considerations should be also taken on these legal grounds.*

*This paper mainly consists of three parts. The first part goes over the definition of escapees and refugees under international law. The main concerns of this part are two: who the North Korean escapees are and where they are located. The second part analyzes the legal status of North Korean escapees. The measures of their human rights protection will be checked under the 1951 Convention and other relevant legal measures. The third part will be devoted to searching for the diplomatic considerations over the issue on the legal grounds. For a final resolution, the paper will look at international cooperation of governments and NGOs.*

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## I. An Overview

### A. Background

Since the mid-1990s, many North Koreans have escaped from either their country or from working places in another country, not to return to North Korea for political as well as economic reasons. Their defections have been accelerated by the severe food crisis plaguing North Korea. As the number of the escapees has grown, their status has become a critical point of contention among the states concerned. It finally became a major issue with the forcible repatriation of seven North Korean escapees in January 2000 and the following defections. In order to protect the human rights and to establish a workable precedent for these defectors, legal measures should be quickly considered.

The primary purpose of this article is to examine the current situation of North Korean escapees staying in a third country including China and Russia and to search for national and international legal measures protecting their human rights. This question will be examined with this paper in light of the principles of the 1951 Convention relating to the Status of Refugees and other relevant legal measures including the relevant South Korean laws. Crucial points in answer to this question thus may be found within the legal framework. Diplomatic considerations should be also taken on these legal grounds. For a final resolution, the international cooperation of governments and NGOs is urgently required.

### B. Current Situation

What prompts these people to escape from their own country or working places, then? The main reasons are reported to be either extreme food shortages or harsh human rights violations. The first and primary reason that North Koreans flee from their country is to eat. An extreme food shortage apparently started in the early 1990s, as the country's economic situation began to severely decline. This food crisis became critical after heavy rains in the summer of 1995 resulted in devastating floods.<sup>1)</sup> Then to make matters still worse, due to the new policies of China and the

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1) On the result of the floods, see FAO World Food Program, *FAO WFP Crop and Food Supply Assessment*

former Soviet Union adopting market price and hard currency payment systems, North Korea was essentially precluded from importing food from its traditional trading sources. These factors mandated food rationing. In addition, the official daily ration has been steadily reduced to finally fall between 200 and 300 grams per person per day.<sup>2)</sup> In spite of emergent humanitarian aid from international sources,<sup>3)</sup> many people were allegedly starving to death in North Korea.<sup>4)</sup> This desperate situation has been driving many North Koreans to flee from their country to search for food. The second is the dreadful human rights violation, the North Korean government seems to have almost completely monopolized information. As a result, the human rights situation in North Korea largely remains a black hole. Amnesty International reports, however, evidence that there are not a few political prisoners and prisoners of conscience in North Korea.<sup>5)</sup> The severe restriction of civil and political freedom and harsh human rights abuses to the political prisoners inside North Korea are presumed to be another reason for North Korean citizens to defect from their own country.

## II. Who are North Korean Refugees?

### *A. Definition*

North Korean refugees in this paper may be defined as North Korean people who intentionally escaped from either their own country or a third country since the mid-1990s, and who currently refuse to return to North Korea. They are mainly to be found in China, Russia or other Southeast Asian countries. In general, North Korean refugees can be categorized in two groups: the first group having escaped directly

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*Mission to the Democratic People's Republic of Korea* (Special Alert No. 277), Sept. 11, 1997. <http://www.fao.org/giews/english/alertes/sa277kor.htm> See Timothy Min, *Food Shortage in North Korea: Humanitarian Aid Versus Policy Objectives*, <http://www.wcl.american.edu/pub/humanrights>

2) *Ibid.*

3) In accordance with the announcement of the UN Under-Secretary for Humanitarian Affairs, the international community firstly donated \$31million for flood-related emergency aid in June 1996. *Ibid.*

4) During the period between 1995 and 1999, at least 220,000 people were presumed to die for famine. See Amnesty International, *Country Report 2000: Democratic People's Republic of Korea*, p. 1.

5) *Ibid.*, p. 2.

from North Korean territory by crossing either the north-Chinese or the north-Russian border. Members of the second group have been escaping from a third country like Russia, where they originally went to work as miners or loggers.

### *B. Realities of North Korean Escapees in a Third Country*

#### 1. China

North Korea and China share a long national border; accordingly a great number of escapees from North Korea are said to stay in the northeastern part of China proper. There are two kinds of border crossings: individuals crossing for short-term visits to their relatives or acquaintances in order to get money and goods, and long-term defections to China for political and economic reasons. The first cases are in a sense like business trips. Until mid-1996, most of the North Korean escapees were in this category. After the short-term visit, they often went back to North Korea. Even if arrested by the border patrol, they were detained just for some short period and released.<sup>6)</sup>

Since the beginning of the full-scale exodus in 1997, however, the situation has been fundamentally changed. Many North Korean people who fled from their hometowns did not return to North Korea and remained illegally in China working either in the homes of Korean-Chinese, or in warehouses mainly in the Yanbien Korean Autonomous Prefecture.<sup>7)</sup> The area of their stay continues to expand and now includes Heilongjiang province, a place relatively far from the border police and with many legitimate Korean businessmen and travelers. The number of North Korean escapees in China is now supposed to be more than 100,000.<sup>8)</sup> The main reason for this growing number is that the food crisis is still not fully over. Life in China is allegedly very harsh for these people. Until mid-1996, young male and female North Koreans would work in Chinese lumberyards or taverns or brothels

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6) See Lee Young-hwa, *Situation and Protection of North Korean Refugees in China*, Research paper submitted to the International Conference on North Korean Refugees and Human Rights held on December 3, 1999, p. 5.

7) About 1.9 million Korean-Chinese are living in the Yanbien Korean Autonomous Prefecture.

8) See Yoon Yeo-sang, *Prospect and Solution of the Refugees in China*, <http://www.jungto.org/gf/archive/korean>, p. 1.

under the auspices of their Korean- Chinese relatives. When the Chinese officials began to tighten controls however, even these job opportunities were notably decreased. After 1997, North Korean escapees remained hidden in either Korean-Chinese homes or warehouses. More seriously, a large number of young women are allegedly sold into slavery, as they could find no jobs.<sup>9)</sup>

## 2. Russia

North Korean escapees in Russia can be divided into two groups. The first group includes those who left their working places mainly in the Siberian logging sites, and remained in Russian territory not to return to North Korea. The second group, although rather fewer, is composed of those who have illegally made their way into Russia without proper documentation.<sup>10)</sup> It was not until the mid-1990s that the North Korean escapees in Russia gained international recognition. At that time, many North Korean workers were fleeing from the Siberian logging sites and complaining of harsh human rights violations. Their life conditions are said to be very harsh especially during the winter. The long and extremely cold winter in Russia makes it impossible for the escapees to survive without shelter. Under the circumstances, most of the North Korean escapees tried to get jobs in the houses, estates, farms or factories owned by Russians simply in return for the shelter or small wages. As they are illegal aliens, however, there is no guarantee that they would receive wages commensurate with their labor. The situation is more serious for the majority of the escapees who cannot speak Russian. That uncertain condition pushes the escapees to commit crimes to survive, like theft. This has understandably caused antipathy among the local communities toward North Korean escapees. Only a small number of escapees is lucky enough to be protected by relatives and local activists. Aside from the fact that the North Korean escapees do not have shelter or means of earning a living, they suffer from the constant threat of arrest by the local police and North Korean security agents.<sup>11)</sup> Regrettably, most of the North Korean escapees are not

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9) See Lee Young-hwa, *supra* note 9.

10) See Amnesty International, *Democratic People's Republic of Korea and Russian Federation Pursuit, Intimidation and Abuse of North Korean Refugees and Workers* (Report ASA 24/06/96), p. 6.

11) See Yoon, Yeo-sang, *Situation and Protection of North Korean Refugees in Russia*, Research paper

aware of the rights they should enjoy under international law.

### *C. Basic Policies of the States Concerned over the North Korean Escapees*

#### 1. China

The number of North Korean escapees staying in China for a long period is reported not less than 30,000.<sup>12)</sup> The living standard of these escapees in a third country is allegedly very harsh. Young North Koreans are used for work in lumberyards, taverns or brothels under the awfully harsh working conditions. More seriously, a large number of young women are allegedly sold into slavery, as they could find no jobs.<sup>13)</sup> With regard to the specific question of North Korean escapees, the Chinese government took no official position, tackling it as a simple criminal question of illegal border-cross. However, the Chinese government has issued a manifesto that the North Korean escapees in China are not refugees, but simply illegal residents.<sup>14)</sup> In addition, the Chinese have begun to exert tighter control over the NGOs and religious groups working for the North Korean escapees.<sup>15)</sup> This new position may be understood in light of the diplomatic posture of the Chinese government with respect to North Korea. In any case, such a negative response by the Chinese government is not likely to help solve the problem of North Korean escapees smoothly.

#### 2. Russia

The Federal Government of Russia has maintained a policy of toleration over North Korean escapees in the territory of Russia. Granting these escapees neither legitimate refugee status, nor residence permission, nor appropriate protection of

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submitted to International Conference on North Korean Human Rights and Refugees held on December 3, 1999, p. 3.

12) See Yoon Yeo-sang, *North Korean Escapees Staying Abroad*, <http://www.iloveminority.com/talbukja>  
Around 2000 escapees are supposed to stay in Russia.

13) See Lee Young-hwa, *Ibid.*

14) See Chosun Ilbo (December 9, 1999 and April 1, 2000).

15) See Chosun Ilbo (October 23, 1999).

their rights under international law, the Russian authorities simply encourage the North Korean escapees to leave Russia and resettle elsewhere. A more serious aspect of the problem is that the central authorities of Russia do not exercise full control over the practices of local authorities with respect to the North Korean escapees. Local authorities often adopt their own policies or even refuse to acknowledge that the problem of the North Korean escapees exists.<sup>16)</sup> Due to the pressures from international society and new constitutional principles on human rights,<sup>17)</sup> however, Russia tries to protect the basic human rights of the North Korean escapees more positively.<sup>18)</sup>

### 3. South Korea

Since the Chinese began to tighten controls in mid-1997 and the job opportunities have notably decreased, more North Korean escapees have been choosing South Korea as their final destination. Table 1 shows that the number of North Korean escapees who finally arrive in South Korea has suddenly increased since the mid-1990s.

**[ Table 1 ] Number of North Korean Escapees Arriving in South Korea in the 1990s**

Year	90~93	94	95	96	97	98	99	00
Escapees	34	52	41	56	85	72	148	312

\* Source: ROK Ministry of Reunification Homepage (available at <http://www.unikorea.co.kr>)

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16) See Amnesty International, *op. cit.*, p. 9.

17) See Eric Y. J. Lee, *Protection of North Korean Escapees under International Law*, Asia-Pacific J. of Human Rights and the Law, Vol. 2(2000), p. 118.

18) See Yoon Yeo-sang, *supra* note 12., pp. 4-5. An explicit measure to guarantee the human rights of the North Korean loggers in the Siberian logging sites is the Agreement on the Development of Forestry Resources of 1995.



Another statistic illustrates that their age group ranges widely from children below the age of 10 to the elderly, some over 60, although most escapees are from age 20 to 39. It means that the recent escape of North Koreans abroad is not just a unique phenomenon of a young generation, but reflects a comprehensive crisis in contemporary North Korean society.

**[ Table 2 ] The Age Group of North Korean Escapees Arrived in South Korea**

Age	Below 10	Below 20	Below 30	Below 40	Below 50	Below 60	Over 60
Number	34	146	451	302	113	59	30

\* Source: Yoon Yeo-sang, Statistics of North Korean Escapees: Domestic (available at <http://www.iloveminority.com>)

The sudden increase of North Korean escapees' entering South Korea has become an important legal and policy question in South Korea. Regarding North Korean refugees as nationals, South Korea is willing to protect them under its territorial jurisdiction. The South Korean government is to coordinate its legal and policy instruments with international ones.

### **III. What is the Legal Status of North Korean Refugees?**

#### *A. Legal Grounding*

As the matter of North Korean escapees has become a point at issue among the states concerned, the question on their status under international law has been naturally raised: whether they are entitled to get the status of refugee or not. With a view to examining the status of North Korean escapees, we should first check the internationally-recognized definition of "refugees." The modern definition of refugees<sup>19)</sup> was adopted by the UNHCR through the principal legal instrument, the

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19) The early concern of the international community for protecting refugees was started in 1921 by the League of Nations. The pattern of international action for refugees established by the League of Nations led the adoption of

1951 Convention relating to the Status of Refugees (The 1951 Convention).<sup>20)</sup> The 1951 Convention defines refugees in Article 1 as follows:<sup>21)</sup>

those who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.<sup>22)</sup>

As provided at Article 1 of the 1951 Convention, a person who wishes to be given refugee status should satisfy several basic requirements as follows. First, the refugee must be under the “well founded fear of being persecuted.” This phrase is the primary condition to evaluate whether he or she is qualified to be a refugee under international law. As noted, an applicant of refugee status should suffer from the actual fear of being persecuted. Inferred from Article 33 (1) of the 1951 Convention,<sup>23)</sup> persecution covers a threat to life or freedom on account of race,

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a number of international agreements. The definitions of refugees in these instruments related each category of refugees to their national origin, to the territory that they left and to the lack of diplomatic protection by their former home country. With this type of definition “by categories” interpretation was simple and caused no great difficulty in ascertaining who was a refugee. See UNHCR, *The UNHCR Handbook on Procedure and Criteria for Determining Refugees Status* [hereinafter, The UNHCR Handbook] (1992), p. 1.

20) Convention relating to the Status of Refugees of July 28, 1951 [hereinafter, The 1951 Convention]. See U.N.T.S. 189:137. *Statute of the Office of the United Nations High Commissioner for Refugees* [hereinafter, The UNHCR Statute], Art. 1. The original copy of the Statute of the UNHCR may be found in the Annex to the UN GA Res. 428:V (December 14, 1950).

21) Art. 1(A) of the 1951 Convention. This definition was slightly expanded at the meeting of the Organization of African Unity in 1969, but its substance still revolves around the concept of political defection. For details, see P. Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (Dordrecht, 1997), pp. 49-62.

22) This definition was supported by the following regional instruments concerning refugees. Important ones are the Principles concerning Treatment of Refugees concluded at the Asian-African Legal Consultative Committee at its 8<sup>th</sup> session held in Bangkok in 1966 and the African Convention on Human Rights concluded on September 10, 1969. See generally E. Jahn, *Refugees*, in R. Bernhardt (ed.), 8 *Encyclopedia of Public International Law* (1985), p. 453.

23) See *supra* note 17, p. 127.

region, nationality, political opinion or membership of a particular social group.<sup>24)</sup> Together, the fear of being persecuted should be well-founded. Fear is rather a subjective feeling. The well founded fear thus can be constituted only if the objective elements support the situation surrounding the refugee.<sup>25)</sup> Second, the well founded fear of being persecuted should appear “for reasons of race, religion, nationality, membership of a particular social group or political opinion.” It does not matter whether that persecution arises from either any single one of these reasons, or a combination of two or more of them. It is not the duty of the applicant of refugee status to analyze his or her case to such an extent as to identify the reasons in detail.<sup>26)</sup> Third, the refugee with those conditions above mentioned should be “outside the country of his nationality.” In this sense, the refugee should not be a stateless person,<sup>27)</sup> but retain any nationality, and be outside the territorial jurisdiction of his or her home country. It is a general requirement without exceptions.<sup>28)</sup> Fourth, the refugee “is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.” Being unable to avail himself [or herself] of such protection implies circumstances that are beyond the will of the person concerned. There may be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective.<sup>29)</sup> The term “unwilling” refers to refugees who refuse to accept the protection of the government of the country of their nationality. This should be of course accompanied by the well founded fear of persecution.<sup>30)</sup> Last, a person “who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” may be a refugee. This phrase relates to stateless refugees. It will be, however, pointed out that not all the stateless persons are refugees; they must be outside the country of their former habitual residence for the reasons indicated in this definition.<sup>31)</sup> In the case of stateless refugees, the “country of nationality” is replaced

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24) See the UNHCR Handbook, para. 51.

25) *Ibid.*, para. 37.

26) *Ibid.*, para. 66.

27) *Ibid.*, para. 87.

28) *Ibid.*, para. 88.

29) *Ibid.*, para. 98.

30) *Ibid.*, para. 100.

by the “country of his former habitual residence.”<sup>32)</sup>

### *B. Legal Status: Refugees or Not?*

Following the modern definition of refugees, could the North Korean escapees be granted refugee status under international law?<sup>33)</sup> In order to obtain refugee status, any North Korean escapee should be evaluated by the following two steps: first, the relevant facts concerning a North Korean escapee should be ascertained; and second, the facts so ascertained should be checked by the 1951 Convention and its Protocol of 1967.<sup>34)</sup> More specifically, under the provisions of the 1951 Convention, the North Korean escapees should satisfy three criteria in order to get refugee status: inclusion, cessation and exclusion.<sup>35)</sup> If fulfilling these criteria, the North Korean escapees are inherently given refugee status under international law and the protection measure should be given to them.

## **IV. Human Rights Protection of North Korean Refugees: A Legal and Diplomatic Perspective**

### **A. International Law and Protection of Refugees**

Most people may look to their own governments to guarantee and protect their basic human rights and safety. In the case of refugees, however, the country of origin has proven itself unable or unwilling to protect those rights. In an attempt to resolve

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31) *Ibid.*, para. 102.

32) *Ibid.*, para. 101.

33) On the criteria for the determining refugee status, see the UNHCR Handbook, at Part 1.

34) *Ibid.*, para. 29.

35) The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. As provided at Chapter II of the UNHCR Handbook, they form the positive basis upon which the determination of refugee status is made. Different from the inclusion, the cessation and exclusion clauses, provided at Chapter III and IV of the UNHCR Handbook respectively, have a negative significance; the cessation indicates the conditions under which a refugee ceases to be a refugee, and the exclusion enumerate the circumstances in which a person is excluded from the application of the 1951 Convention. *Ibid.*, para. 31.

refugee matters, the international community thus has made continual efforts. The first meaningful action taken by the postwar international community was to establish the Office of the United Nations High Commissioner for Refugees (UNHCR) in January 1951.<sup>36)</sup> As a principal agency of the UN,<sup>37)</sup> its function is to provide international protection and seek permanent solutions for the refugees.<sup>38)</sup> The UNHCR began to settle the refugee question non-politically by adopting important legal measures, the 1951 Convention and the Protocol of 1967.<sup>39)</sup> The following are the basic legal principles for protecting North Korean escapees under the 1951 Convention:

First, Article 31 (1) lays down: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”<sup>40)</sup> This provision gives a basic protection to refugees unlawfully entering or staying in the country of their refuge. Pursuant to this provision, no contracting state should take any unfavorable measures to the North Korean escapees just because they illegally entered the territory or are staying without permission.

Second, the 1951 Convention prohibits the unconditional expulsion of refugees. This principle has been substantiated at Article 32 (1) that prevents the contracting states from expelling a refugee in their territory just for national security or public order.<sup>41)</sup> The expulsion of the refugees may be permitted only by the decision drawn through the due process of law.<sup>42)</sup> The refugees may enjoy lawful stay in the territory

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36) The UNHCR protects, assists and seeks lasting solutions for refugees in a variety of ways. To carry out its protection function, it promotes adherence to international agreements on refugees and constantly monitors compliance by governments. See UNHCR, *Helping Refugees: An Introduction to UNHCR* (1998). <http://www.unhcr.ch/un&ref/what/what.htm>

37) art. 1 of the UNHCR Statute.

38) *Ibid.*

39) U.N.T.S. 606: 267.

40) art. 31(1) of the 1951 Convention.

41) It reads: “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.” See art. of the 1951 Convention.

42) art. 32 (1) of the 1951 Convention.

of the refuge country for a reasonable period within which they can seek legal admission into another country.<sup>43)</sup> In this period, the refugees may enjoy the freedom of movement under Article 26 of the 1951 Convention.<sup>44)</sup> Based on these principles of non-expulsion and freedom of movement, North Korean escapees in China or Russia should not be forcibly returned without the legitimate decision, but allowed to stay and move freely until they seek legal admission to a refuge country.

Third, international law has established the principle of non-refoulement for the protection of refugees. The principle of non-refoulement prescribes that no state shall return a refugee in any manner to a country where his or her life or freedom may be endangered or persecuted.<sup>45)</sup> This principle has been codified in Article 33(1) of the 1951 Convention as follows: “No contracting State shall expel or return 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.” Pursuant to Article 33(1), the forcible expulsion or return of North Korean escapees against their will may be prohibited.<sup>46)</sup>

Last, a possible method of protecting North Korean escapees may be found at the principle of temporary protection. Temporary asylum is a measure of this protection for a limited, although not necessarily defined, time by the country of refuge, usually in situations of large-scale influx. It is an interim form of protection, which must give way to a durable solution.<sup>47)</sup> Most temporary protection has premised the temporary asylum to everyone fleeing an area of human rights abuses as a measure of safeguarding their basic rights pending a lasting solution.<sup>48)</sup> Following the current international legal practice, temporary asylum may also apply to North Korean

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43) art. 32 (3) of the 1951 Convention.

44) It reads: “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”

45) See UNHCR *Refword*, <http://www.unhcr.ch/refworld>

46) The possible application of *non-refoulement* to those outside the 1951 Convention and the 1967 Protocol is also considered, as is the relationship between *non-refoulement* and asylum. See Goodwill-Gill, *The Refugee in International Law* (Oxford, 1996), p. 117.

47) See UNHCR, *What is temporary protection?*, <http://www.unhcr.ch/un&ref>

48) *Ibid.*

escapees in China or Russia.

### *B. Diplomatic Considerations over North Korean Refugees*

Notwithstanding the purely juristic analysis so far, we have recognized that there is a clash of legal and policy directions between South Korea and the international community concerning the question of North Korean escapees: South Korea regards them directly as its own nationals, while the international community tries to protect their human rights as refugees under international law.<sup>49)</sup> Even if a North Korean escapee obtains refugee status under international law in China or Russia, he or she will change their status to a South Korean national just after arriving in South Korea. Such an inconsistency has created a political problem dealing with this affair in actuality and finally makes it a more difficult problem to solve. A striking example was the incident of seven North Korean escapees who had been arrested by the Russian border guards for their crossing the border, and, notwithstanding the earnest diplomatic efforts of South Korea, were forcibly repatriated into their own country by the Chinese government in January 2000.<sup>50)</sup> This has been a highly debated question between the parties concerned from a legal and a diplomatic perspective.

With respect to the protection of North Korean escapees, an essential point at issue is who has jurisdiction over them. Concerning the jurisdiction over refugees, international law provides definite codification. An appropriate provision may be found at the UN Declaration on Territorial Asylum.<sup>51)</sup> Article 1 of the UN Declaration on Territorial Asylum provides: "Asylum granted by a State to persons who invoke Article 14<sup>52)</sup> of the Universal Declaration of Human Rights (The Universal Declaration) shall be respected by all other States." Article 3, para. 2 of the Principles concerning Treatment of Refugees<sup>53)</sup> stipulates: "The exercise of the

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49) On the human rights concerns over refugees, see L. Franco, *Protection of Refugees and Solutions to the Refugee Problem: A Human Rights Perspective*, in A.P. Schmid (ed.), *Whither Refugee?: The Refugee Crisis Problems and Solutions* (Leiden: Ploem, 1996), pp. 201-7.

50) See *Korea Times* (January 12, 2000) For details, see *A Chronological Report on the Incident of the Seven North Korean Escapees*. [http://www.nkhumanrights.or.kr/kor/int\\_campaign/7nk1\\_1.html](http://www.nkhumanrights.or.kr/kor/int_campaign/7nk1_1.html)

51) UN GA Res. 2312: XXII (December 14, 1967).

52) It provides: "Everyone has the right to seek and enjoy in other countries asylum from persecution."

53) It was adopted at the 8<sup>th</sup> session of the Asian-African Legal Consultative Committee, Bangkok, 1966.

right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.” As provided by Article 31 (1) of the 1951 Convention, moreover, temporary protection may be granted to escapees even before a form of durable protection is established for them by legitimate procedures.<sup>54)</sup> Following these regulations, the states of reception are obligated to avoid in any case returning refugees immediately to their country. The parties concerned should follow and respect the intentions of the refugees and the state granting asylum.<sup>55)</sup>

Considering the legal grounds mentioned above, the first and most critical question when a North Korean escapee actually applies for asylum may be which country has the primary right to grant asylum to him or her? As noted above, different legal and policy standards for North Korean escapees would create an international standoff, if refugees were seeking asylum in South Korea while staying in a third country. The host country might not approve their seeking asylum in South Korea for diplomatic convenience. The incident of seven North Korean escapees was a typical case in which such diplomatic consideration applied. In this case, two legally controversial issues may arise: the first is which country has the prior right to grant the asylum to North Korean escapees, and the second, what is the legitimate procedure for granting asylum to them. These questions would have different solutions given the following situations. The first case is if a North Korean escapee goes directly to the South Korean embassy in China or Russia and expresses his or her wish to seek asylum in South Korea. This is a bilateral problem between the South Korean government and the UNHCR.<sup>56)</sup> In this case, the government of South Korea is entitled to give asylum in its territory or not, under the auspices of the UNHCR.<sup>57)</sup> Actually however, South Korean authority does not grant them asylum as refugees under international law, but protects them as intentional defectors from the illegitimate regime existing in the northern part of the Korean peninsula. They are inherently South Koreans. The second case occurs if the North Korean escapee

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54) See M.A. Castillo & J. Hathaway, *Temporary Protection*, in Hathaway, *op. cit.*, at 1-7. See also J.F. Hartman, *The Principles and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict*, in D. Martin (Ed.), *The New Asylum Seekers in the 1980s* (The Hague: Kluwer Law International, 1988), pp. 87-97

55) See Park Choon-ho, *Legal Status of North Korean Loggers*, 2 *Korea Focus* 3 (1994), p. 135.

56) See Lee, *supra* note 17, p. 129.

57) See Park Choon-ho, *supra* note 55.



goes to the authorities of China or Russia, and then seeks asylum in South Korea. This question would become complicated because the host country might take political considerations into account. Pure international legal analysis is necessary to solve this question more reasonably. The current legal practice shows that China tends towards arresting North Korean escapees and forcibly repatriating them for the illegal border cross.<sup>58)</sup> Thus, a critical legal issue before China is how to coordinate the multinational treaty - the 1951 Convention and the 1967 Protocol - with its policy direction.<sup>59)</sup> A pure legal analysis would provide that Article 31(1)<sup>60)</sup> and Article 32(1)<sup>61)</sup> of the 1951 Convention should control the question of North Korean cross-border escapees exclusively, unless the escapees are definitely recognized to have escaped to China under criminal suspicion. Accordingly, without having committed ordinary crimes in their country, North Korean escapees in China should neither be expelled nor forcibly repatriated, but legitimately allowed to enjoy the right to choose their place of residence under Article 26 of the 1951 Convention<sup>62)</sup> as well as under the principle of non-refoulement.<sup>63)</sup> Unfortunately, at the repatriation of the seven North Korean escapees and other relevant incidents following, neither the principle of non-refoulement nor the 1951 Convention were respected.

Different from the Chinese, the Russian stance on that escapee question seems to

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58) This policy is supposed to be implemented based on the Agreement on Mutual Extradition of Escapees and Criminals (The Return of Illegal Aliens Agreement) allegedly concluded with North Korea in the 1960s. The concrete stipulation of the Return of Illegal Aliens Agreement, however, is not clarified yet.

59) China joined the 1951 Convention and the 1967 Protocol on September 24, 1982.

60) It provides: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

61) It provides: "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

62) It provides: "Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances."

63) See *Refworld*, <http://www.unhcr.ch/refworld> On the non-refoulement principle, see Guy S. Goodwin-Gill, *Nonrefoulement and the New Asylum Seekers*, in D.A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s: The Ninth Sokol Colloquium on International Law* (The Hague: Kluwer Law International, 1986), pp 103-16. Regarding this question, an evident legal measure currently working is the North Korea-China Service Agreement of National Border Region concluded in 1986.

be rather favorable for granting refugee status to North Korean escapees if they escaped from the Siberian logging sites for harsh human rights abuses.<sup>64)</sup> Russia and North Korea have been regulating the forestry development of Siberia within a special legal setting (The Forestry Agreement). The first bilateral agreement 1967 was amended in August 1991 due to human rights abuses of North Korean loggers at the Siberian logging site, and replaced again with the Agreement on the Development of Forestry Resources on February 24, 1995.<sup>65)</sup> The new Forestry Agreement of 1995 finally contains a regulation that guarantees the human rights of loggers.<sup>66)</sup> Under the new Forestry Agreement, Russia may recognize the illegality of human rights abuses to North Korean workers at the Siberian logging sites and naturally grant the refugee status under international law, so long as human rights violations can be proved.<sup>67)</sup> Together, the new Russian Constitution of 1991 establishes a comprehensive set of provisions for observance and enforcement of basic human rights set forth in the Universal Declaration.<sup>68)</sup> Inferring from these events, Russia seems to have given some priority to the protection of human rights and the recognition of refugee status of North Korean escapees from the Siberian logging sites over the diplomatic convenience between Russia and North Korea.<sup>69)</sup> However, for the cross-border escapees from North Korea, the Russian Far East authority has not yet fully clarified

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64) See Dong-A Ilbo Daily (February 25, 1995).

65) See Pak Chi-young, *The Legal Status of North Korean Refugees*, in Choi Sung-chol (Ed.), *Understanding Human Rights in North Korea* (Seoul, 1997), p. 325.

66) E.g., the right to work eight hours a day, the freedom to travel to other countries, etc. For details on the universal rights of loggers, see K. Michelson, *Seeing the Forest, the Trees and the People: Coming to Terms with Developing Country Perspectives on the Proposed Global Forest Convention*, in S.P. Johnson (ed.), *Global Forest and International Environment Law* (The Hague: Kluwer Law International, 1996), pp. 254-7. For the international legal source of human rights in developing forests, see art. 5(a) of *Non-Legally Binding Authoritative Statement of Principles for A Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*.

67) See Lee, *supra* note 17, pp. 130-1.

68) See Chapter II (arts. 17-64) of the 1991 Russian Constitution. For details, see H. Steiner & P. Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 1996), pp. 19-20. In accordance with the constitutional principles, meanwhile, Russia has signed the Convention relating to the Status of Refugees of 1951 and its Protocol of 1967, and become a full member of the Council of Europe in 1996 that aims to protect human rights. In addition, a comprehensive refugee law was adopted by the Russian *Duma* (Parliament) in March 1993 and the UNHCR was permitted to establish its office in Moscow.

69) See Park Choon-ho, *supra* note 55.

its legal and policy stance. Meanwhile, South Korea continues to ask Russia not to forcibly repatriate the escapees back to North Korea.

### *C. Domestic Protection*

Unlike the international legal position on North Korean escapees, the domestic laws of South Korea maintain that North Korean escapees are not refugees under international law, but directly South Korean nationals. A primary legal basis may be provided in Article 3 of the Republic of Korea Constitution of 1987.<sup>70)</sup> This lays down: “The territory of the Republic of Korea shall consist of the [whole] Korean peninsula and its adjacent islands.” The juridical inference of Article 3 of the Constitution shows that North Korean escapees may be automatically granted legitimate status as South Korean citizens.<sup>71)</sup> Based on this constitutional principle, the government of South Korea enacted a special Act for the Protection and Settlement Support of North Korean Escapees in January 1997<sup>72)</sup> and detailed regulations. (See Table 3) Pursuant to the principles laid down at the Act for the Protection and Settlement Support of North Korean Escapees,<sup>73)</sup> South Korea decided to provide special protection for persons escaping from North Korea and desiring protection in South Korea. In practice, South Korea’s overseas missions used to accept North Korean escapees and issue passports or necessary travel documents if they seek asylum or temporary refuge there.<sup>74)</sup> In conclusion, North Korean escapees can enjoy preferential treatment as South Korean nationals through various domestic legal and policy measures shown in Table 3 after their entering the territory of South Korea.<sup>75)</sup>

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70) See art. 3 of the ROK Constitution of 1987. A relevant provision may be also found at Article 2, para. 2 of the ROK Constitution of 1987.

71) See Huh Young, *Korean Constitutional Law* (Seoul, 1990), p. 186.

72) Act for the Protection and Settlement Support of Residents Escaping from North Korea of January 13, 1997. (Act No. 5259)

73) 1) The Republic of Korea shall provide persons requiring protection with special protection on the principle of humanitarianism; 2) Persons requiring protection shall strive to lead a healthy and cultural life by adapting themselves to the free and democratic legal order of the Republic of Korea. Art. 4 of Act on the Protection and Settlement Support of North Korean Escapees.

74) See *A Directory of the ROK Ministry of Foreign Affairs* (Seoul, April 3, 1983).

75) See Eric Y.J. Lee, *National and International Legal Concerns regarding Recent North Korean Escapees*,

**[ Table 3 ] Detailed Regulations for the Protection and Settlement of North Korean Escapees**

Detailed Regulations	Date	Contents
Enforcement Regulations on Act for the protection and Settlement Support of Residents Escaping from North Korea	Feb. 15, 2000	Academic Career, Education Support, Housing Support, etc.
Enforcement Ordinances on Act for the protection and Settlement Support of Residents Escaping from North Korea	Jan. 28, 2000	Criteria of Academic Career, Recognition of Qualification, Special Employment of Government Officer, etc.
Enforcement Regulation on Act for National Basic Life Guarantee	Jul. 27, 2000	Grant of Rent Fee, Support of School Fee, Acquisition of A Qualification Certificate, etc.
Guides of Settlement Support of North Korean Escapees	Mar. 2000	Pension, Employment of the Old Age, etc.
Report for Employment Protection of North Korean Escapees		Interpretation of Relevant laws and regulations.
Manual for Handling Dead Bodies of North Koreans	Jun. 8, 2000	Regulations for handling dead bodies of North Koreans
Manual for Employment Protection of North Korean Escapees	Feb. 17, 2000	Application for employment support money, etc.
Special Criteria for Selecting the beneficiaries of Basic Life Guarantee	Aug. 2000	Special class protection
Manual for Protecting the Residences of North Korean Escapees	Mar. 2000	Residence Protection, current situation and policy support of North Korean escapees, etc.
Enforcement Ordinances on High Education Act	Nov. 28, 2000	Admission and transfer of high educational institution
Enforcement Ordinances on Act for National Technical Qualification	Oct. 11, 1999	Waiving procedures of examination subjects, etc.
Promotion Act for Occupation Training of Workers	Dec. 24, 1997	Promoting measures for workers' occupation training.
Enforcement Ordinances for Technical College Act	Sept. 8, 2000	Admission to technical college of North Korean escapees.

Regulations for Housing Supply		Special supply of housing, etc.
Enforcement Ordinances for Office Regulations of the Ministry of National Reunification and its Subsidiary Organs	May 24, 1999	Departments in the Office of Settlement Support of North Korean escapees & the Office of Humanitarian Support

\* Source: Oh Young-sil, Detailed Regulations on Act for the Protection and Settlement Support of North Korean escapees (available at <http://www.oysil.ce.ro>)

## V. Conclusion

The North Korean escapees issue has emerged as a great concern of international society. Now is the time to tackle this question through international cooperation between governments and international organizations. Article 35 (1) of the 1951 Convention provides for the cooperation of national authorities with the United Nations for the refugee matter.<sup>76)</sup> International cooperation for refugees has been also substantiated by various domestic and international NGOs including Amnesty International. These NGOs, are actively working to assist North Korean escapees on both the local and international levels. Their activities, however, are limited because China restricts NGO assistance of North Korean escapees within their territories.<sup>77)</sup> Each effort of the NGOs will be more fruitful if relevant international legal frames can support it. To that end, new legal possibilities should be searched.<sup>78)</sup>

The 1997 Amnesty International Report, *Refugees: Human Rights have no border*,<sup>79)</sup> outlines why people flee, why they need protection and how the system should provide that protection. It demonstrates that refugee crises cannot be resolved

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76) It read: "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

77) See Chosun Ilbo (October 23, 1999)

78) For details on the NGOs' role in resolving the North Korean escapees question, see Park Heung-soon, *Improving North Korean Human Rights and the Role of NGOs*, Research paper submitted to the International Conference on North Korean Refugees and Human Rights held on December 3, 1999, pp. 13-7.

79) See Amnesty International, Report ACT 34/008/1997 (March 19, 1997).

unless the underlying human rights issues are addressed. Amnesty International therefore calls on all governments to take concrete measures to prevent human rights violations and to honor their obligations under international law to protect the fundamental human rights of their citizens. A new legal framework should be considered for the current question of North Korean escapees from a broader perspective.

The matter of North Korean escapees is a Pandora's box in which multilateral legal and diplomatic questions are deeply involved. This research illustrates that the points at issue may be divided into two: one is the inconsistency between national (South Korean) and foreign legal and policy standards, the other, the application of international legal principles for refugees to the North Korean escapee question. For the quick resolution of the first question, South Korea should arrange its domestic legal and policy stance more clearly on how to protect North Korean escapees in a third country. Its double standard - refugees in a foreign country and national citizens on its territory - will prevent the states concerned from resolving it under the procedure of international refugee law. South Korea should respect the refugee status of North Korean escapees under international law before their obtaining South Korean nationality via a legitimate process. Concerning the application of international legal principles, it is clearly provided that North Korean escapees in China or Russia satisfy the conditions to be considered refugees under international law and their basic human rights should not be infringed upon. Notwithstanding, the question of North Korean escapees is still hard to solve because each state concerned sometimes maintains an inconsistent political and diplomatic interest in determining the future of the escapees. We have seen this difficulty by the forcible repatriation of seven North Korean escapees in January 2000 and other similar incidents. In order not to make them victims of one-sided political considerations and to find an appropriate way of protecting them, their problems should be dealt under the universal principles of international law on refugees. In addition, if North Korean escapees under Chinese or Russian jurisdiction wish to seek asylum in South Korea and the South Korean government clarifies its intention to grant asylum to them, then the escapees should be permitted

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80) Before they seek the final asylum, the host country should provide provisional asylum. art. 3, Principles concerning Treatment of Refugees.

to go to South Korea<sup>80)</sup> under the auspices of the UNHCR.<sup>81)</sup>

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81) See Provision 1 of the UNHCR Statute.