Determining Refugee Status for North Korean Escapees under International and Domestic Laws

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ABSTRACT

This article asks how the Refugee Convention applies to North Korean escapees, specifically whether North Koreans who leave their country without government permission qualify as refugees in the first instance, and whether refugee status is negated by the fact that the South Korean Constitution confers South Korean nationality to anyone born on the Korean Peninsula, which thus gives dual nationality to North Koreans. This article addresses how states and other actors interpret the Refugee Convention in handling North Koreans settling or seeking asylum in various jurisdictions and probes how the availability of South Korean dual nationality can complicate the determination of refugee status for North Koreans globally.

Keywords: Refugee Convention, North Korea, refugee law, asylum

Introduction

As of 2011, approximately 20,000 North Koreans have settled in South Korea. Estimates on the number of North Koreans living illegally in China range reportedly between 50,000 and 300,000, with realistic estimates being closer to the lower end. Despite crackdowns along the North Korean border by both the North Korean and Chinese governments, North Koreans continue to leave their homeland in large part to escape the famine and poverty plaguing many families in North Korea (Democratic People’s Republic of Korea, or DPRK). Those who flee from North Korea fall prey not only to the physical risks associated with crossing borders illegally, such as trafficking and repatriation, but to the gaps and realities of international law the longer they reside outside their homeland. Once North Koreans cross the Sino-DPRK border in search of better living conditions, they enter a realm of uncertainty regarding their legal status. North Koreans who have escaped North Korea but have not found legal residence in South Korea or in another state must deal with their ambiguous legal status worldwide. International refugee law traditionally exists to protect stateless citizens, yet North Koreans are rarely protected within the framework of international refugee law. This article addresses the puzzling and peculiar fate of North Korean escapees within the refugee rights framework.

While North Koreans who escape their country are often referred to as refugees in the media, in reality it has been very difficult to apply refugee protection to them as provided under the 1951 Convention relating to the Status of Refugees...
(Refugee Convention) and the 1967 Protocol relating to the Status of Refugees (Optional Protocol). Originally intended to protect the rights of refugees, a strict reading of the Refugee Convention has often ended up impeding the recognition of North Korean escapees as refugees. This is not altogether surprising given the inherent tension between international refugee protection and states’ priorities in regulating immigration. While the predicament of North Korean escapees is consistent with patterns worldwide for other refugees who find little receptivity from other states, what is distinctive here is the availability of South Korea as a host state and concomitant nationality, and the further restrictions this entails under refugee law. North Korean escapees are funneled into a category of dual nationality which makes it difficult for them to avail themselves of the Refugee Convention. On the one hand, this institutional streaming makes it easier for North Koreans to settle in South Korea, yet on the other, it makes it extremely challenging for them to contest South Korean settlement procedures or to seek asylum elsewhere.

This article asks how the Refugee Convention applies to North Korean escapees. More specifically, the article addresses two issues. The first is whether North Koreans who leave their country without government permission qualify as refugees in the first instance, and the second is whether refugee status is negated by the fact that the South Korean Constitution confers South Korean nationality to anyone born on the Korean Peninsula, which thus gives dual nationality to North Koreans. After a brief discussion introducing the framework of refugee law in relation to human rights, it addresses how states and other actors interpret the Refugee Convention in handling North Koreans residing or trying to settle or seek asylum in various jurisdictions (e.g., China, Thailand, South Korea, the United States, and the United Kingdom), and probes how the availability of South Korean dual nationality can complicate the determination of refugee status for North Koreans globally.

1 The author gratefully acknowledges support from the National Research Foundation of Korea Grant funded by the Korean Government (NRF-2010-330-B00146).


5 While these are not the only countries in which North Koreans transit through, seek asylum, or ultimately settle, they serve as a representative sample of the settlement opportunities available to them. This article is structured to follow the general migratory pattern and experiences of North Korean escapees who first reside in China, then transit to a third country, such as Thailand, before going to South Korea. The examples of the United Kingdom and the United States illustrate asylum-seeking options for those who choose not to settle in South Korea.
The Conceptual Pairing of Refugee Law and Human Rights

The Convention relating to the Status of Refugees was created in 1951 to provide a framework for the legal protection of vast numbers of displaced persons in Europe after World War II. The International Refugee Organization (IRO) had already helped relocate over one million Europeans to various continents, but a plan was needed to deal with more refugees once the UN special agency IRO would terminate. This gap resulted in the drafting of the Refugee Convention and the creation of the United Nations High Commissioner for Refugees (UNHCR). The Optional Protocol to the 1951 Refugee Convention was drafted to expand the scope of the original convention so that it was no longer limited to displaced persons fleeing their war-torn countries. Since 1954, 144 states have become signatories to the Refugee Convention and 145 states have become party to the Optional Protocol.

Over the years, the field of refugee law has shifted from a positivist tradition to a human rights approach. One of the leading refugee law scholars, James Hathaway, insists that refugee law and human rights are naturally connected, calling refugee law “a remedial or palliative branch of human rights law” where refugees can “invoke rights of substitute protection in any state party to the Refugee Convention” in the event their basic human rights cannot be protected in their country of origin. He further explains that refugee law is a “means to a human rights end” and is “a system for the surrogate or substitute protection of human rights.” This approach has become the prevalent view in refugee law.

Some critics challenge this view. For example, law professor David Kennedy questions the utility of defining rights for refugees, explaining that “human rights places the state at the center of the emancipatory promise.” He elaborates that “However much one may insist on the priority or pre-existence of rights, in the end rights are enforced, granted, recognized, implemented, their violations remedied, by the state” with no one but the state to “triage among rights and right holders.” According to this argument, the state is ultimately the rights-protector, and if citizens leave the state or cannot enter another legally, the notion of that citizen as...
a rights-bearer becomes more illusory than actual. Kennedy is concerned that the fixation on refugee rights is counterproductive to human rights discourse overall, creating a class of millions of people who believe they are entitled to rights as refugees when in reality such implementation is pragmatically difficult.\(^\text{16}\)

Hathaway acknowledges that the international human rights framework is not adequate to protect the rights of refugees, and that therefore “refugee-specific rights” are a separate necessity where international human rights law fails.\(^\text{17}\) Accordingly, refugee law should be respected by states in their ratification and implementation of the Refugee Convention and Optional Protocol. Refugee law scholars and practitioners claim that refugee law is in crisis because states are shirking their responsibilities in abiding by the Refugee Convention despite ratification.\(^\text{18}\) Without an independent monitoring agency, the predicament is that states which have signed the Refugee Convention do not consistently comply, limiting the intake of refugees and asylum-seekers, turning them away at borders, detaining them, and deporting or repatriating them as they see fit.\(^\text{19}\)

The Refugee Convention and the 1967 Optional Protocol are the most widely signed among the UN treaties, and yet refugee law scholars view international refugee law as being in crisis because a number of states do not comply with the treaties.\(^\text{20}\) Legal scholars have conducted empirical studies to find that states are more inclined to ratify than implement treaties for their costless “expressive” benefit, being rewarded “for positions rather than for effects” in light of lack of external monitoring.\(^\text{21}\) The fundamental paradox lies in trying to ensure the right to asylum for refugees when states are unwilling to do so. States tend to have a very narrow definition of political persecution and thus selectively choose which refugees to accept as asylum-seekers. The difficulty, however, comes with the ever increasing number of refugees who may fall within the category of the refugee as defined under the Refugee Convention, and the directly opposing interest of the state in restricting serious migrant flow into its territory. While refugee law scholars may argue for the protection of refugees who cannot find human rights protection in their home country or while transiting, the practical reality is that states do not want to accept everyone claiming to be a refugee for fear of opening their borders to heavy flows of foreign populations for various economic, social, and political reasons. States are intent on regulating migrant population growth

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\(^\text{16}\) Ibid.

\(^\text{17}\) J. Hathaway (2005), 13.


\(^\text{19}\) Lambert, 346.

\(^\text{20}\) Hathaway and Neve, 115-16.

for a host of socioeconomic reasons, and consequently, restrictive rather than expansive interpretations of the Refugee Convention and domestic immigration laws have been more prevalent. What makes the Refugee Convention even more challenging to enforce among member states is also its lack of a monitoring body to check treaty compliance, unlike other major UN treaties, such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.

Given state-centric tensions toward refugee law, more recent calls have been made to reevaluate it from more transnational and participatory approaches to account for the roles of non-state actors in refugee assistance. For instance, refugee law scholar Helene Lambert encourages an examination of global advocacy networks in place to assist refugees vis-à-vis the state, while international law professor Beth Simmons similarly points out that states can unexpectedly be held accountable by local and international NGOs and activists to the treaties they sign. While this article focuses primarily on the legal and policy actions of the states in their approaches toward North Korean escapees, examples of non-state actors’ involvement are also noted and worthy of future studies.

**Are North Koreans “Refugees” as Defined under the Refugee Convention?**

The term “refugee” has both broad and specific meanings. Media sources and nongovernmental organizations have often used the term broadly to refer to anyone forced to flee his or her country for various reasons, such as war and ethnic conflicts, but increasingly for other reasons such as famine and natural disasters. However, the specific legal definition of “refugee” under the Refugee Convention is anyone who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”

The Refugee Convention has been interpreted differently as to whether North Koreans who leave North Korea in fact have refugee status. North Koreans have been subjected to various labels once they leave their homeland without permission. For example, the UNHCR has consistently referred to them as refugees. China has named them as economic migrants, while the South Korean government has called them *talbukja* (literally, one who has escaped the north), *bukhan italjumin* (similarly, residents who have escaped from North Korea, a more formalized version of *talbukja*), and more recently *saeteomin* (new settlers). During the more serious famine years, domestic NGOs used the term *nanmin* (refugee) when discussing North Korean escapees, replacing the older term *gwisunja* (defector),

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22 Lambert, 349-53.
23 Simmons, 78-79.
24 Furthermore, a refugee is one “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.” Art. 1.A(2).
which was initially used by South Korean media but has fallen out of use with the ever increasing influx of North Koreans.\textsuperscript{25} This section reviews the respective positions of the UNHCR, China, transit countries such as Laos, Mongolia and Thailand, and is telling of the difficulty in consistently applying the Refugee Convention to North Koreans. The dilemma is whether to use the term “refugee” at all in referring to North Koreans who depart their country of origin illegally.\textsuperscript{26}

**UNHCR**

The UNHCR’s position is unequivocal in defining North Korean escapees as refugees. Although Article 75 of the DPRK Constitution states that citizens have the “freedom to reside in and travel to any place,” Article 233 of the DPRK Criminal Code stipulates that those who illegally cross the border are subject to labor sentencing of up to five years.\textsuperscript{27} Over the years, the degree of enforcement has waxed and waned depending on the level of famine, the purposes of border-crossers, whether they return voluntarily, and to what extent border guards demand or take bribes. According to accounts of North Korean escapees, labor detention can vary among prisoners, some being released early within one or two years, some being physically beaten while questioned or confined, and some dying from starvation once imprisoned.\textsuperscript{28}

As voiced by UNHCR representatives and the UN Special Rapporteur for human rights, North Koreans in China are considered refugees *sur place* because they face the threat of persecution upon returning to North Korea even if they did not during departure.\textsuperscript{29} If the mere act of leaving North Korea would subject them to serious harm amounting to persecution, this could be construed as imputed political opinion, political opinion being one of the categories on the basis of which one might be persecuted.\textsuperscript{30} Although many North Koreans may initially leave for food and better living conditions, repatriation means that they would then be subject to political persecution in the form of detention, arrest, imprisonment, torture, or worse, death, upon their return for illegally leaving the country.


\textsuperscript{26} This article uses the term “escapee” in line with current usage and relative lack of political connotation, but questions whether a more neutral term such as “settler” or “migrant” may need to be more frequently used in the future. The definition suffices for now to denote simply that North Koreans have departed their homeland illegally.

\textsuperscript{27} DPRK Criminal Law Code, art. 233.


\textsuperscript{30} Marshall, 3 (explaining this viewpoint of human rights NGOs).
China became a state party to the Refugee Convention in 1982, and under Article 32 of its Constitution, the government “may grant asylum to foreigners who request it for political reasons.” However, the Chinese government is adverse to accepting North Koreans who have crossed illegally into their territory as refugees. Chinese officials have proclaimed that North Koreans come to China not because they are escaping political persecution but in order to find better living conditions, terming them “economic migrants” instead.\(^{31}\) Thus, under this reasoning, North Korean escapees do not have the status of refugee as defined by the Refugee Convention. Additionally, China and North Korea entered into a bilateral agreement in the 1960s, further supplemented in 1986, which obligates Chinese authorities to repatriate any North Koreans found illegally residing in China.\(^{32}\)

Research findings support the Chinese perception that the vast majority of North Koreans leave for economic reasons.\(^{33}\) One 2004-2005 survey of 1,346 North Koreans living in Northeast China found that 95 percent cited “economy” as the reason for leaving North Korea, while only two percent cited political dissatisfaction.\(^{34}\) Motivations for leaving North Korea include not only hunger for many during the famine period, but also “loss of status, frustration over lack of opportunities, political persecution due to family history, and wish to live in similar conditions as those North Koreans who live outside of North Korea” as well as “following others who had already left.”\(^{35}\) While this data appears to support the Chinese government’s assertion of North Korean escapees being economic migrants, researchers caution against reaching an easy conclusion given that food security is linked to political conditions and that North Koreans may have a genuine fear of persecution upon repatriation.\(^{36}\)

The UNHCR has taken issue with the Chinese government’s repatriation of North Koreans precisely for the fear of persecution upon return to North Korea. It notes that the Refugee Convention provides for the principle of non-refoulement: “No Contracting State shall expel or return [“refouler”] a refugee in any manner whatsoever to … territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group


\(^{34}\) Chang, Haggard, and Noland, 5.

\(^{35}\) Ibid.

or political opinion."\(^{37}\) The UNHCR has yet to convince the Chinese government of the application of the Refugee Convention to North Koreans, but it has raised the issue formally and dialogue has continued quietly with government officials.\(^{38}\)

Because the Chinese government has rejected the categorization of North Korean escapees as refugees, international law scholars and UN agencies have also raised the obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), which stipulates that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."\(^{39}\) Furthermore, to determine substantial grounds, "all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights" must be taken into account.\(^{40}\) Though China has ratified the CAT, it has not considered its application to those North Koreans who are deported or otherwise at risk of deportation.

China is in a difficult position when it comes to handling North Korean escapees. From the viewpoint of many in the international community, the Chinese government is not abiding by either the Refugee Convention or CAT. However, it must balance international treaties on the one hand with other priorities, such as preserving its relationship with a political ally and the practical and costly matter of preventing a mass influx of North Koreans across its borders.\(^{41}\) This balancing act is highlighted by past events where some NGOs organized embassy rushes (and media coverage) for North Koreans seeking either settlement in South Korea or asylum in other countries. While highlighting the plight of many North Koreans worldwide, such actions had a backlash effect resulting in stricter border surveillance, arrests of Chinese citizens assisting North Koreans, and clampdowns against Chinese citizens and other NGOs that worked more quietly in getting North Koreans out of China.\(^{42}\) Reports have also surfaced, however, that a temporary visa program was created in 2001 to permit legal travel to North Koreans wanting to purchase food or visit relatives for a period of up to one year in the Yanbian Prefecture of China along the North Korean border, suggesting that the Chinese government has sought alternative mechanisms to provide temporary legal residence to North Koreans.\(^{43}\) It remains to be seen, however, how the Chinese

\(^{37}\) Convention relating to the Status of Refugees, art. 33.

\(^{38}\) Margesson et al., 11-12.


\(^{40}\) Convention Against Torture, art. 3(2).

\(^{41}\) Margesson et al., 12.

\(^{42}\) Lankov, 870.

\(^{43}\) Cara Cutler, "China's Provisions of Temporary Visas to North Koreans," *Stanford Journal of East Asian Affairs*, Vol. 6 (2006). While the author cites the high level of cost in procuring visas as a significant flaw in the visa program, it is also not clear whether this has been a sustainable program, how easy it is for North Koreans to apply for these visas in their country procedurally, and the level of danger in alerting the North Korean government to individuals who seek to leave either temporarily or permanently.
government will otherwise ease its repatriation efforts of North Koreans.

**Transit Countries (Laos, Mongolia, and Thailand) and Non-State Actors**

For the many North Koreans who have no intention to stay in China permanently for fear of repatriation, they must travel through a third country such as Laos, Thailand, or Mongolia, usually via private brokers or NGOs with an underground network, to eventually settle in South Korea or seek asylum elsewhere. Countries like Laos, Thailand, and Mongolia are not members of the Refugee Convention and can independently determine how they will treat illegal migrants. In the case of Laos, North Koreans who are caught crossing the border illegally are sent back to China. Thailand and Mongolia also do not recognize North Koreans as refugees, arresting those who cross the borders for illegal trespassing. However, these two countries are more tolerant and do not usually repatriate them to North Korea as a matter of course. Thai authorities instead usually detain North Koreans for settlement processing by the South Korean embassy, while Mongolian authorities work with NGOs or other governments more quietly to find resettlement or asylum-seeking options for the North Koreans. For these countries, changing official policy to accept North Koreans as refugees remains difficult because formal recognition risks attracting even more North Koreans (the “pull factor”), thus potentially amplifying existing problems such as border transgressions, trafficking networks, crowded detention facilities, unwanted international scrutiny, and worsening relations with North Korea.

The relative willingness of Thailand and Mongolia not to deport North Koreans provides space for private brokers and NGO and church networks to assist North Koreans around the realities of refugee law. These non-state actors work in the shadows of the law, sheltering North Koreans from Chinese authorities and assisting them across borders without proper travel documents or in some cases forged papers. This illustrates that where a positivist treatment of refugee law fails, grassroots networks have taken over to work on the fringes of the law, often flouting domestic immigration and border control laws to get North Koreans out of China and into a third country as safely as possible. While NGO (often Christian) networks such as Durihana, Life Funds for North Korean Refugees, and LiNK work to support itinerant North Koreans, one important statistic to keep in mind is that, despite media portrayals, North Koreans have relied largely on private brokers instead of NGOs or missionaries for help while in China. Interviews of over 1,300 North Koreans residing illegally in Northeast China show that 88 percent received help from the Korean-Chinese community while only five percent received assistance from “missionaries.” This means that North Korean escapees are also at risk of encountering brokers who are more interested in profiteering than in their welfare, often exploiting women and girls by leading them into fraudulent nuptial arrangements, indentured servitude, or sexual slavery in China without

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44 Margesson et al., 15.
45 Chang, Haggard, and Noland, 7.
recourse for legal protection. Meanwhile, the work of NGOs becomes increasingly more difficult as the Chinese government steps up surveillance and punishes those harboring North Koreans.

**Does South Korean Nationality Negate Refugee Status?**

This brings us to the matter of how the South Korean government treats North Korean escapees within the context of refugee law, and whether there are repercussions for North Koreans seeking asylum from member countries of the Refugee Convention. Over 20,000 North Koreans have managed to reach and reside in South Korea, and the latest findings show that 64 percent of over 1,300 North Koreans interviewed in Northeast Asia prefer South Korea for resettlement. Nearly 20 percent prefer the United States next, followed by 14 percent for China, one percent for North Korea, and less than one percent respectively for Russia, Japan, and other countries. These numbers show a growing preference for the United States as information spreads among the North Korean community about dwindling subsidies, socioeconomic disparities, and societal discrimination in South Korea. Some North Koreans have successfully sought asylum in other countries, such as the United Kingdom, Germany, Canada, Belgium, and Israel.

This is not to say that every North Korean escapee will necessarily find asylum in these countries based solely on their refugee status. States have dealt with North Korean asylum applications on a case-by-case basis with varying results: acceptance on grounds of refugee status, acceptance on grounds of separate humanitarian protection, or straightforward rejection. This section focuses on South Korea’s legal framework to settle North Koreans, and investigates the asylum procedures of the United States and the United Kingdom as primary examples of how states handle North Korean asylum applications given South Korea’s legal treatment of North Korean escapees.

**South Korea**

Though South Korea acceded to the Refugee Convention and Optional Protocol in 1992, it has a separate legal framework to accept North Korean escapees within its territory. Asylum seekers from other countries have been treated on a much more restrictive basis. South Korea accepted its first non-North Korean refugee in 2001, and has accepted approximately 270 asylum seekers (175 as refugees, and 93 on grounds of humanitarian protection) out of around 2,500 asylum applications.

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46 For more about the perils of trafficking, see Lankov, 860-62.
47 Ibid., 870.
48 Chang, Haggard, and Noland, 24.
submitted between 1994 and 2009. A bill is currently pending to enact a separate refugee law to improve asylum procedures and protection for refugees. In comparison, the availability of South Korean nationality has benefited thousands of North Koreans to date, giving them the option to resettle in a country which has otherwise been very difficult for other asylum seekers to gain refugee recognition and subsequent legal residence.

However, the availability of South Korean nationality for North Koreans can also complicate the global application of the Refugee Convention in the case of North Korean asylum seekers. Article 1.A(2) of the Refugee Convention provides 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. [Emphasis added.]

The question here is whether a North Korean escapee qualifies as a refugee as provided under the Refugee Convention, given that the South Korean Constitution and domestic legislation confer South Korean nationality to all Koreans born on the Korean Peninsula, including Koreans born in North Korea. The South Korean Constitution essentially provides a default nationality for North Koreans. Specifically, the ROK Constitution provides that the “territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent lands,” while it also claims that “[n]ationality in the Republic of Korea is prescribed by law.” Meanwhile, the Nationality Act explains that a Korean national is one “whose father or mother is a national of the Republic of Korea at the time of his or her birth.” Taken together, any North Korean with a Korean national parent (by virtue of being a national in the peninsular territory of Korea) has South Korean nationality.

In light of the dual nationality, a strict reading of Article 1.A(2) results in excluding North Korean escapees from falling under the Refugee Convention. South Korean courts have likewise interpreted that North Korean escapees possess “latent” nationality. The Supreme Court in 1996 decided that North Koreans have automatic South Korean nationality which does not require any action.

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51 Refugee Convention, art. 1.A(2).
52 ROK Constitution (1987), art. 2, 3.
53 Ibid., art. 3.
54 Ibid., art. 2.
55 Nationality Act (ROK), art. 2.
56 Supreme Court of Korea, 96Nu1221 (1996).
In 1997, the *Act on the Protection and Settlement Support of Residents Escaping from North Korea* (hereafter Protection and Settlement Act) was enacted to help those North Koreans “desiring protection” from South Korea to “adapt themselves to, and settle down in, all spheres of their lives, including political, economic, social and cultural spheres.”\(^{57}\) Under this Act, the South Korean government is obligated to “provide persons subject to protection with special protection on the principle of humanitarianism” and that it “shall make all of its diplomatic efforts to protect and support residents escaping from North Korea, who are presently staying in foreign countries.”\(^{58}\)

While the existing legal framework gives the impression that North Korean escapees all have South Korean nationality and need only go through determined procedures to become official citizens of South Korea, a close reading of the Protection and Settlement Act evinces some procedural and substantive hurdles. While North Koreans may have latent South Korean nationality, protection and settlement are not immediate. In the first place, under the Protection and Settlement Act, the North Korean must “have expressed [his or her] intention to be protected by the Republic of Korea.”\(^{59}\) In some cases, protection does not apply to persons who pose a national security risk, criminal offenders, those who have “earned their living for not less than ten years in their respective countries of sojourn,”\(^{60}\) and others deemed unfit as provided by Presidential Decree (usually in relation to security concerns).\(^{61}\)

Furthermore, North Koreans must then be subject to investigation usually for a period of 30 days but up to a maximum of 90 days, passing which they are kept in a detention center known as Hanawon for another 90 days where they undergo training to adapt to South Korean culture. Only after submitting themselves through this process are they then granted resident identification cards and financial support. The final granting of identification cards may be considered verification of their equal status as citizens with the average South Korean, though this has not always been true given that the identification number often gives away their status as former North Koreans, which has resulted in discrimination of various sorts. The Protection and Settlement Act has since been revised to allow North Koreans to apply for a different identification number that would not reveal their origins.\(^{62}\)

Given the practical considerations of triggering the latent South Korean nationality according to the requirements of the Protection and Settlement Act, an argument may be made that South Korean nationality would not immediately

\(^{57}\) *Act on the Protection and Settlement Support of Residents Escaping from North Korea*, art. 1.

\(^{58}\) Ibid., art. 4(1) and 4(2).

\(^{59}\) Ibid., art. 3.

\(^{60}\) Some exceptions exist under the relevant Presidential Decree, especially as related to involuntary detention.

\(^{61}\) *Act on the Protection and Settlement Support of Residents Escaping from North Korea*, art. 8 and 9.

\(^{62}\) Ibid., art. 23.
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qualify as “the country of his nationality” under Art. 1.A(2). This interpretation should thereby allow those North Koreans who leave their home country to retain refugee status so long as they do not express the desire to avail themselves of citizenship in South Korea and pursue this process as provided for under the Protection and Settlement Act.

**United States**

In 2004, Congress passed the North Korean Human Rights Act (“NKHR Act”), which explicitly calls upon the State Department to facilitate refugee applications. The lobbying and passage of the NKHR Act came largely from the NGO networks bridging South Korea and the United States. Though the ROK Constitution provides that North Koreans also have South Korean citizenship, the NKHR Act helps to overcome this legal technicality by stating that:

(a) ... North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea. It is not intended in any way to prejudice whatever rights to citizenship North Koreans may enjoy under the Constitution of the Republic of Korea, or to apply to former North Korean nationals who have availed themselves of those rights.

(b) For purposes of eligibility for refugee status … or for asylum ..., a national of the [DPRK] shall not be considered a national of the Republic of Korea.

Despite passage of the Act in 2004, NGO activists and North Korea observers raised concerns that asylum processing would remain slow under the post 9/11 milieu of the US Department of Homeland Security. As of May 2011, the United States has accepted 101 North Koreans as asylum-seekers. The 2008 reauthorization of the Act tried to address the slow intake by recommending better coordination between the United States and South Korea for North Korean refugees to resettle in the

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63 Conversation with a Korean attorney working on refugee issues, February 8, 2011, Seoul, Korea.
United States.  

Furthermore, the Refugee Convention would not apply to those North Koreans who make their way to South Korea but for various reasons find life unsatisfactory (besides a well-founded fear of persecution) and wish to claim refugee status in a third country. States have rejected North Koreans because they have already availed themselves of South Korean citizenship. For example, a Los Angeles immigration court in 2006 granted refugee/asylum status to a North Korean who had already availed him/herself of citizenship in South Korea. The Board of Immigration Appeals in the Department of Justice later overturned this ruling stating that the Act did not apply to those North Koreans who had already availed themselves of South Korean citizenship.

Therefore, the United States has a specific statutory provision which circumvents the dual nationality conditions of South Korean law. While the application of refugee acceptance has been slow to date, it nonetheless provides a channel for North Koreans to seek asylum despite the availability of citizenship in South Korea.

**United Kingdom**

Between 2006 and 2009, the United Kingdom received 665 applications from North Koreans seeking asylum, of which it approved 350 on grounds of either refugee status or humanitarian protection (with applications spiking during 2007, but dropping drastically by 2009). Between 2000 and 2009, Germany granted asylum status in 191 out of 329 applications filed by North Koreans, and for the same period, Canada granted asylum in 76 out of 217 applications. The UK Border Agency has very clear guidelines on how to handle asylum applications by North Koreans, having both a Country of Origin Information Report on the DPRK as well as a corresponding Operational Guidance Note (OGN) for the agency’s case managers. The latter document was issued in 2010, drawing explicit guidelines on how to treat North Korean cases. The OGN especially takes into account South Korea’s Protection and Settlement Act and issues instruction with the following language:

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70 Art. 1.C(3) states “This Convention shall cease to apply to any person falling under the terms of section A if: … He has acquired a new nationality, and enjoys the protection of the country of his new nationality.” Art. 1.E states “This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”


73 Ibid.
An application for asylum owing to a fear of persecution in North Korea is, therefore, likely to fall for refusal as there is reason to believe that the applicant will be admitted to South Korea on the basis that:

(i) such refusal will not result in the applicant being required to go to a country in breach of the Refugee Convention (Para 334(v) Immigration Rules); and

(ii) the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship (Para 339J(iv))

This text is found throughout the OGN for many of the grounds that a North Korean might assert for asylum. Humanitarian protection may be granted to those who can show that they would be at risk of the death penalty, unlawful killing, or torture if sent to South Korea, but this would be difficult to argue for most North Koreans. However, there was a recent case in which a North Korean couple was granted asylum based on humanitarian protection grounds since they would otherwise have been precluded from the benefits of the Protection and Settlement Act, given that they had been in living in China for over ten years.

Countries like the United Kingdom and Australia have sought clarification of the Protection and Settlement Act from the South Korean government, and the newly issued OGN demonstrates a growing understanding and sophistication of immigration procedures with respect to North Koreans and what other settlement opportunities are available to them. The initial acceptance rate of the United Kingdom led to an increasing number of North Korean applications, but soon the UK Border Agency had to be on guard for applications from North Koreans who had already availed themselves of citizenship in South Korea but were unhappy with their lives there and decided to seek asylum in the United Kingdom on the pretense that they never reached South Korean territory. The OGN makes reference to this possibility, as well as to the matter of false applications being submitted by Chinese citizens of Korean ethnicity. Overall, the asylum procedures of the United Kingdom show a more discerning approach to accepting North Korean asylum applicants, especially in how it balances the Refugee Convention against the domestic laws of South Korea for the benefit of its own immigration policies.

Conclusion

In the case of protecting the right to asylum of North Koreans who flee their
homeland, the Refugee Convention has been a problematic instrument. North Koreans face both definitional and procedural hurdles in asylum-seeking. Most North Korean escapees spend their time in China at risk of repatriation since they are recognized as economic migrants instead of political refugees despite their imputed political opinion and risk of persecution upon return to North Korea. Non-signatory countries have either returned North Koreans to China (then on to North Korea) or detained North Koreans for processing via the embassy route to South Korea. North Koreans who proceed to South Korea are accepted not on the basis of the Refugee Convention but on domestic laws consisting of the Constitution, Nationality Act, and the Protection and Settlement Act, of which the latter subjects North Koreans to strict investigation and detention procedures. While North Koreans ultimately benefit from being able to resettle in South Korea, they still have limited options in seeking asylum elsewhere because of the dual nationality restriction in the Refugee Convention. The availability of South Korean nationality has complicated asylum-seeking in other countries. The United States has circumvented the nationality restriction with its own domestic legislation, which does allow for asylum status, though slow and restrictive in procedure. The United Kingdom is more likely to reject North Korean applications on the basis of the nationality restriction, but it has understood the Protection and Settlement Act carefully to provide humanitarian protection to those North Koreans who would not be able to seek protection under Korean law. Overall, North Korean escapees have limited choices for resettlement as circumscribed by the Refugee Convention and the domestic South Korean law on protection and settlement. For North Koreans, recognition as a refugee as provided under the Refugee Convention is hard to come by. Strict application of the Refugee Convention challenges whether it is truly a workable concept for the protection of North Koreans seeking legal residence outside of North Korea, and for that matter, outside of South Korea.

GLOSSARY

| The Convention relating to the Status of Refugees | 난민의 지위에 관한 협약 |
| The Protocol relating to the Status of Refugees | 난민의 지위에 관한 의정서 |

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