

PROTECTION OF NORTH KOREAN DEFECTORS IN CHINA AND THE CONVENTION AGAINST TORTURE*

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I. INTRODUCTION

Since 1990, a considerable number of North Korean defectors have escaped from North Korea and are illegally residing in third countries such as China or Russia. It is impossible to fathom the actual conditions of these defectors who cannot ask for help due to their illegal status. The Chinese government estimates the number of North Korean defectors residing in China to be about 10,000.¹ But, non-governmental organizations (NGOs) estimate this number to be from 100,000 to 300,000.² The South Korean government estimates the number of North Korean defectors in third countries to be around 10,000 to 30,000.³

In the early 1960s, China and North Korea secretly entered into the People's Republic of China-Democratic People's Republic of Korea (DPRK) Escaped Criminals Reciprocal Extradition Treaty.⁴ Furthermore, on August 12, 1986, in Dandong, China, the two countries entered into the Mutual Cooperative Protocol Between China and North Korea for National Security and Social Order and Maintenance Sur-

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¹ Korea Institute for National Unification, *White Paper on Human Rights in North Korea*, 321 (2005) [hereinafter *White Paper 2005*].

² *Id.*

³ *Id.*

⁴ *Id.* at 342 (Democratic People's Republic of Korea (DPRK) is the official name of North Korea).

rounding Its Border Region.⁵ Article 4 of this Protocol provides for mutual cooperation in preventing illegal entry of aliens,⁶ while Article 5 provides for mutual cooperation in fugitive extradition.⁷ After having inspected the border towns in the three Northern provinces, a Chinese state-run research institute reported that the number of North Korean defectors repatriated by the Chinese government increased from 589 in 1996 to 5,439 in 1997, and 6,300 in 1998.⁸ The U.S. Committee for Refugees, a U.S. NGO, stated that “at least 6,000 North Koreans were forcibly [repatriated] to [North Korea] every year, including 15,000 in [June 2000].”⁹

The purpose of this article is to examine whether the act of repatriating North Korean defectors by China violates prohibition of forcible repatriation provided for in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁰ This article analyzes whether the CAT can be used as an international legal basis for prohibiting the forcible repatriation of North Korean defectors in China.

A question, however, can be raised as to whether this article is necessary due to the existence of the Convention Relating to the Status of Refugees (Refugee Convention).¹¹ Article 33 of the Refugee Con-

⁵ ILYOUNG JEONG & CHUNHO PARK, HANJUNG SUGYO SIBNYEON JUNGUGGUGJEOG JOSEONJOGGWA TALBUGNANMIN MUNJE [10TH ANNIVERSARY OF KOREA-CHINA RELATIONS: ISSUES ON KOREAN-CHINESE NATIONALS AND NORTH KOREAN DEFECTOR REFUGEES] 251-64 (Baegsangaedan 2003) (S. Korea) [hereinafter KOREA-CHINA RELATIONS]. The Protocol was kept secret by both China and North Korea; however, it became known through a Japanese NGO dealing with North Korean issues. *Id.* at 251.

⁶ *Id.* at 253.

⁷ *Id.* at 253-54.

⁸ *White Paper 2005*, *supra* note 1, at 322.

⁹ *Id.* at 344.

¹⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, art. 3, U.N. Doc. A/RES/39/46 (*entered into force* June 26, 1987) [hereinafter CAT]. S. Korea acceded this Convention in 1995. See Status of Multilateral treaties deposited with the Secretary-General, United Nations Treaty Collection, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (last visited Nov. 8, 2007) [hereinafter Status of CAT].

¹¹ Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 189 U.N.T.S. 137 (*entered into force* Apr. 22, 1954) [hereinafter Refugee Convention]. See Status of Multilateral treaties deposited with the Secretary-General, United Nations Treaty Collection, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterV/treaty2.asp> (last visited Nov. 13, 2007) (indicating that S. Korea acceded Refugee Convention on Dec. 3, 1992).

vention already prohibits forcible repatriation of refugees.¹² There are, however, different opinions as to whether North Korean defectors fall under the definition of refugees in the Refugee Convention. If North Korean defectors in China fit the definition of Convention refugees,¹³ this article would not be necessary because an international legal basis for prohibiting the forcible repatriation of North Korean refugees in China would already exist through the Refugee Convention. On the other hand, if the North Korean defectors in China do not fall under the definition of Convention refugees, finding a means to protect North Korean defectors under international human rights law would still be necessary.¹⁴

In order to examine whether the Refugee Convention or the CAT can be used as an international legal basis to prohibit the forcible repatriation of North Korean defectors in China, this article will first compare Article 33 of the Refugee Convention with Article 3 of the CAT. This article will then examine whether torture is being committed against repatriated North Korean defectors.

II. ARTICLE 3 OF THE CAT AND ARTICLE 33 OF THE REFUGEE CONVENTION

A. Comparison between Article 3 of the CAT and Article 33 of the Refugee Convention

Article 3 of the CAT, prohibiting forcible repatriation, was drafted based on Article 33 of the Refugee Convention dealing with the prohibition of expulsion or return of refugees.¹⁵ The two provisions provide as follows:

Article 33 of the Refugee Convention

1. No Contracting State shall expel or return

Article 3 of the CAT

1. No State Party shall expel, return ("refouler") or

¹² Refugee Convention, *supra* note 11, art. 33.

¹³ *See id.*

¹⁴ Chankyu Kim, *Talbugja-ui boho-e gwanhan gugjebeobjeog gochal* [Study on the Protection of North Korean Defectors Under International Law], in *KOREA-CHINA RELATIONS*, *supra* note 5, at 155, 165.

¹⁵ J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 125 (Martinus Nijhoff 1988).

("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.¹⁶

extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account 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.¹⁷

The two articles have several differences. First, the applicability of the Refugee Convention is limited to Convention refugees,¹⁸ whereas the CAT is applicable to "a person."¹⁹ Second, the Refugee Convention only prohibits expulsion and return,²⁰ whereas the CAT also incorporates extradition which includes "all possible measures by which a person is physically transferred to another State."²¹ Third, the Refu-

¹⁶ Refugee Convention, *supra* note 11, art. 33.

¹⁷ CAT, *supra* note 10, art. 3.

¹⁸ See Refugee Convention, *supra* note 11, art. 33(1).

¹⁹ CAT, *supra* note 10, art. 3(1).

²⁰ Refugee Convention, *supra* note 11, art. 33(1).

²¹ David Weissbrodt, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 7-8 (1999).

gee Convention prohibits expulsion or return only for reasons based on race, religion, nationality, membership of a particular social group, or political opinion,²² whereas the CAT does not have such limits.²³ Fourth, there is an exception to the prohibition of forcible repatriation under Article 33(2) of the Refugee Convention,²⁴ whereas a corresponding exception does not exist in Article 3 of the CAT.²⁵ A refugee may not benefit from Article 33(2) of the Refugee Convention if the State Party has reasonable grounds to regard him as a danger to the security of the country, or a danger to the community of that country, having been convicted by a final judgment for a particularly serious crime.²⁶

The crucial difference between Article 33 of the Refugee Convention and Article 3 of the CAT is the applicability as to the repatriation of North Korean defectors. Article 33(1) of the Refugee Convention only applies to Convention refugees,²⁷ whereas Article 3 of the CAT applies to all persons.²⁸ In this context, the main issue is whether Article 3 of the CAT is more effective than Article 33 of the Refugee Convention in prohibiting forcible repatriation of North Korean defectors in China. Since Article 3 of the CAT applies to all persons,²⁹ it appears that it has a broader scope than Article 33 of the Refugee Convention.³⁰ However, it cannot be affirmed that Article 3 of the CAT is more effective than Article 33 of the Refugee Convention because the former requires stricter conditions, namely, "substantial grounds for believing that he would be in danger of being subjected to torture,"³¹ whereas the latter only requires a threat to his life or freedom.³² Thus, the question is whether it is possible to regard North Korean defectors in China as Convention refugees. This issue will be further examined in the next section.

²² Refugee Convention, *supra* note 11, art. 33(1).

²³ See CAT, *supra* note 10, art. 3.

²⁴ See Refugee Convention, *supra* note 11, art. 33(2).

²⁵ See CAT, *supra* note 10, art. 3.

²⁶ Refugee Convention, *supra* note 11, art. 33(2).

²⁷ See *id.* art. 33(1).

²⁸ CAT, *supra* note 10, art. 3(1).

²⁹ *Id.*

³⁰ Compare CAT, *supra* note 10, art. 3(1) with Refugee Convention, *supra* note 11, art. 33(1).

³¹ CAT, *supra* note 10, art. 3(1).

³² Refugee Convention, *supra* note 11, art. 33(1).

B. Whether North Korean Defectors Fall Under the Definition of Convention Refugees

The concept of refugees includes “political refugees, war refugees, economic refugees, humanitarian refugees,”³³ and “mandate refugees.”³⁴ New concepts have arisen, such as “environmental refugees” or “ecological refugees,” which refer to those who are forced to leave their hometowns due to environmental disruption or deterioration of environmental conditions, respectively.³⁵ It is difficult to define “refugees” because the Refugee Convention and regionally adopted international instruments define the term differently.³⁶ However, whether China is prohibited from forcibly repatriating North Korean defectors depends on whether North Korean defectors satisfy the Refugee Convention’s definition of refugees.

South Korean scholars differ among themselves as to whether North Korean defectors abroad are regarded as Convention refugees. One scholar who considers North Korean defectors as Convention refugees comments that even though China is a State Party to the Refugee Convention, it is not complying with its international duty to protect North Korean defectors as refugees.³⁷ Another scholar comments that, in accordance with the individual and specific circumstances, North Korean defectors should be Convention refugees to whom the Refugee Convention is *directly* applicable, or they need to be granted the status of mandate refugees, or at least *de facto* refugees after screening by the United Nations High Commissioner for Refu-

³³ Seongho Jhe, *Hae-oe talbugja-ui beobjeog ji-wi-wa cheoli banghyang* [Legal Status of North Korean Defectors Abroad and Some Possible Solutions for Their Fair Treatment], 9 SEOUL GUGJEBEOB YEON GU [SEOUL INT’L L. J.] 21, 43 (No.1, 2002) (S. Korea).

³⁴ *Id.* at 45.

³⁵ Byeongdo Park, *Hwangyeongnanmin-ui beobjeog ji-wi* [Legal Status of Environmental Refugees], 47 GUGJEBEOBHAGHOE [KOREAN SOC’Y INT’L L. J.] 121, 121-44 (No. 3, 2002) (S. Korea).

³⁶ See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 3-31 (Oxford Univ. Press, 2d ed. 1996); INTERNATIONAL REFUGEE LAW: A READER 1-81 (B.S. Chimni eds., Sage Publications Pvt. Ltd. 2000); *cf.* REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 13-150 (Frances Nicholson & Patrick Twomey eds., Cambridge Univ. Press 1999).

³⁷ Bokhee Jang, *Daelyang talbugnanmin-e daehan gugjebeobjeog boho* [Protection of North Korean Defector Refugees Under International Law], in KOREA-CHINA RELATIONS, *supra* note 5, at 191, 193.

gees (UNHCR).³⁸ Contrary opinions are that North Korean defectors do not fit the definition of refugees under international law since it is impossible to protect them under the Refugee Convention or its Protocol.³⁹ Another view is that obtaining refugee status seems difficult for North Korean defectors both *legally* and *practically*, but according to the practice of the UNHCR, they are subject to humanitarian protection as refugees in a broader sense.⁴⁰

Article 1(A)(2) of the Refugee Convention requires fear of persecution as one of the elements in determining refugee status.⁴¹ There are five grounds for fear of persecution: race, religion, nationality, membership of a particular social group, or political opinion.⁴² However, it is difficult to regard North Korean defectors as Convention refugees because in many cases they flee North Korea for economic reasons. When the food shortage was the most serious from 1996 to 1997, many defectors crossed the border simply to avoid starvation.⁴³ In examining the statistics as of June 2004, more than half of the North Korean defectors (2,263 among the total of 4,075) fled North Korea because of economic hardship.⁴⁴

On the other hand, in certain cases, the motives for defection may be interpreted to satisfy one of the five grounds for fear of persecution stipulated in the Refugee Convention. The North Korean government classifies the entire population into three groups based on their level of political loyalty: *haegsimgunjung* (Core class), *gibongunjung* (Waver-

³⁸ Yongjung Lee, *Gugjenanminbeobgwa talbugja boho* [*International Refugee Law and Protection of North Korean Defectors*], in KOREA-CHINA RELATIONS, *supra* note 5, at 131, 141.

³⁹ Chankyu Kim, *supra* note 14, at 155, 165.

⁴⁰ Hojin Lee, *Talbugjamunje-ui gugjebeobjeog gochal: isanggwa hyeonsil* [*Study on the Issue of North Korean Defectors Under International Law*], in YUNKYEONG OH ET AL., 21SEGI HYEONDAE GUGJEBE OBJILSEO [MODERN INTERNATIONAL LAW SYSTEM IN THE 21ST CENTURY] 252, 262 (2d ed. Bagyeongsa 2001) (S. Korea).

⁴¹ Refugee Convention, *supra* note 11, art. 1(A)(2).

⁴² *Id.*

⁴³ NAT'L ASSEM. SECRETARIAT SPEC. COMM. ON BUDGET AND ACCT., GUGJEONGGAMSAJALYOJIB TONG-IL-OEGYOTONGSANG-WI-WONHOE SOGWAN [YEAR 2001 INSPECTION REPORT: THE UNIFICATION, FOREIGN AFFAIRS AND TRADE COMMISSION], at 235 (2001) (S. Korea).

⁴⁴ As of June 2004, out of the total of 4,075 North Korean defectors, 2,263 (55.53%) fled North Korea due to economic hardship, 356 (8.74%) for fear of persecution, 367 (9.01%) due to regime instability, 823 (20.2%) while accompanying other defectors, 105 (2.58%) for settling in China, 135 (3.31%) due to domestic discord, and 26 (0.64%) for other reasons. See *White Paper 2005*, *supra* note 1, at 334.

ing class), and *bogjabgunjung* (Hostile class).⁴⁵ Core class constitutes 28%, Wavering class 45%, and Hostile class 27% of the entire population.⁴⁶ These classes are further divided into fifty-one sub-classes.⁴⁷ People are discriminated based on the class to which they belong when the North Korean government grants educational benefits or elects core cadres.⁴⁸ The North Korean government also assigns housing or forcibly relocates its citizens according to their backgrounds.⁴⁹ In particular, criminals, defectors, and family members with unfavorable personal backgrounds are forcibly relocated to remote mountains.⁵⁰ Since one of the grounds for fear of persecution stipulated in the Refugee Convention is being a member of a particular social group,⁵¹ the North Koreans who belong to Wavering class or Hostile class could fall under this category.

Opposing political opinion is another ground for fear of persecution stipulated in the Refugee Convention.⁵² Those who have unfavorable personal backgrounds, those subject to punishment by censure or demotion, and criminals subject to severe punishment would fall under the category of opposing political opinion.⁵³ The motives for defection of North Koreans to China are food shortage, unfavorable personal backgrounds, punishment by censure or demotion, criminal conviction subject to severe punishment, and visits to relatives which lead to prolonged illegal stay.⁵⁴

Although Article 68 of the Democratic People's Republic of Korea (DPRK) Socialist Constitution states, "Citizens have freedom of religious beliefs,"⁵⁵ the North Korean government has been actively engaged in religious persecution, severely punishing Christians in particular.⁵⁶ According to the testimony of a North Korean defector re-

⁴⁵ *White Paper 2005*, *supra* note 1, at 106.

⁴⁶ *See id.* at 110.

⁴⁷ *Id.*

⁴⁸ *See id.* at 112-14.

⁴⁹ *See id.* at 120.

⁵⁰ *See id.* at 121.

⁵¹ Refugee Convention, *supra* note 11, art. 33(1).

⁵² *Id.*

⁵³ *See id.*

⁵⁴ Guseop Kim, *Talbug leosi bunggoe-ui jeonjo-inga* [*Rush to Flee North Korea, a Precursor to the Regime Collapse?*], 440 SHINDONG-A 640, 648 (May 1996).

⁵⁵ JOSEONMINJUJU-UI-INMINGONGHWAGUG SAHOEJU-UI HEONBEOB [Constitution] art. 68 (N. Korea).

⁵⁶ *White Paper 2005*, *supra* note 1, at 163.

cently resettled in South Korea,⁵⁷ the North Korean government has “investigated for three years to uncover the existence of an underground church.”⁵⁸ The International Religious Freedom Report released by the U.S. Department of State designates North Korea as a “Country of Particular Concern.”⁵⁹ The North Korean Human Rights Act of 2004 states that “[g]enuine religious freedom does not exist in North Korea, [and] [t]he North Korean state severely represses public and private religious activities with penalties that reportedly include arrest, imprisonment, torture, and sometimes execution.”⁶⁰ In this regard, if a North Korean citizen escaped from North Korea due to fear of religious persecution, this person could constitute a Convention refugee.

The problem is that the Refugee Convention does not have a specific provision regarding the determination of the status of refugees and leaves it wholly up to the domestic law of each State Party.⁶¹ This means that the selection of procedures in determining refugee status depends upon the domestic law of each State Party.⁶² Consequently, even if North Korean defectors satisfy the elements of refugee status under the Refugee Convention, there still remains an issue since the granting of refugee status would solely depend upon the domestic law of each State Party.

C. Concluding Remarks

In interpreting the Refugee Convention, North Korean defectors could fall under the definition of Convention refugees when they flee North Korea due to fear of persecution based on religion, membership of a particular social group, or opposing political opinion.⁶³ In fact,

⁵⁷ Based on the opinion poll in 2004, the South Korean Ministry of Unification replaced the term for North Koreans resettled in South Korea from *bughan-italjumin* (North Korean escapees) and *talbugja* (North Korean defectors) to *saeteomin* (new settlers). See Ministry of Unification, *Tong-il baeg seo* [Unification White Paper], 171 (2005) (S. Korea) [hereinafter *Unification White Paper 2005*].

⁵⁸ *White Paper 2005*, *supra* note 1, at 163.

⁵⁹ *Unification White Paper 2005*, *supra* note 57, at 180, citing 2004 DEP'T ST. ANN. REP. ON INT'L RELIGIOUS FREEDOM 36, available at <http://www.uscirf.gov/countries/publications/currentreport/2004annualRpt.pdf> (last visited Oct. 29, 2007).

⁶⁰ North Korean Human Rights Act of 2004, Pub. L. No. 108-333, § 3(10), 118 Stat. 1287, 1295 (2004).

⁶¹ See Refugee Convention, *supra* note 11.

⁶² DAESUN KIM, GUGJEBEOLBLON [PRINCIPLES OF PUBLIC INTERNATIONAL LAW] 644 (10th ed. Samyeongso 2005) (1996) (S. Korea).

⁶³ Refugee Convention, *supra* note 11, art. 33(1).

several European countries and the United States have accepted North Korean defectors as refugees.⁶⁴ However, the Chinese government, under its own political discretion, has refused to grant North Korean defectors refugee status.⁶⁵ Since 1999, China has refused to recognize North Korean defectors as refugees, but instead has treated them as “food-seeking floaters.”⁶⁶ As for South Korea, the government regards North Korean defectors as South Korean citizens under Article 3 of the Constitution of the Republic of Korea,⁶⁷ also known as the *territory provision*. The South Korean government’s position creates a difficult problem in applying the refugee regime under international law because such regime is only applicable to nationals of a country other than the receiving state.⁶⁸

Since Article 3 of the CAT applies to “a person,”⁶⁹ the CAT has a broader scope of application than the Refugee Convention,⁷⁰ and hence, can be applied to North Korean defectors. Meanwhile, an issue could arise as to whether Article 3 of the CAT has crystallized into customary international law, or whether it is only binding on the States Parties to the CAT.⁷¹ However, even if the CAT has limited legal effect, China has a duty under international law to comply with Article 3

⁶⁴ According to a recent report, 320 North Koreans have been recognized as refugees and have resettled in five Western European countries: Germany (276), Great Britain (17), the Netherlands (15), Denmark (7), and Ireland (5). Yonhap, *Talbugnammin 320myeong seo-yuleob Sgaegug geoju* [320 North Korean Defectors Residing in Five Western European Countries], NK CHOSUN, March 9, 2006, http://nk.chosun.com/news/news.html?ACT=detail&cat_id=11&res_id=77321&page=1 (S. Korea). The United States granted refugee status to six North Koreans for the first time since the North Korean Human Rights Act (2004) was enacted. Yongbeom Heo, *Talbugja 6myeong mido-chak...nambukmodu ab-bag* [Six North Korean Defectors Arrive in the United States...Pressuring Both North and South Korea], CHOSUN ILBO, May 8, 2006, at A6 (S. Korea).

⁶⁵ Jhe, *supra* note 33, at 51.

⁶⁶ *White Paper 2005*, *supra* note 1, at 344.

⁶⁷ HEONBEOB [Constitution] art.3 (S. Korea) (Republic of Korea is the official name of South Korea).

⁶⁸ Gi-gap Park, *Gugjeboobgwa hangug: gwageo-eseo milaelo* [International Law and Korea: From the Past to the Future], 19 GUGJEBEOB PYEONGLON [COMMENT ON INT’L L.] 1, 16 (2003) (S. Korea). *But cf.* North Korean Human Rights Act of 2004, Pub. L. No. 108-333, § 302(b), 118 Stat. 1287, 1295 (2004) (providing that North Korean defectors are not regarded as South Koreans for the purposes of granting refugee status).

⁶⁹ CAT, *supra* note 10, art. 3(1).

⁷⁰ *Compare id. with* Refugee Convention, *supra* note 11, art. 33(1).

⁷¹ For the legal nature of Article 3 of the CAT, see KYUCHANG LEE, CHUBANGGWA OEGUG-IN INGWON [EXPULSION AND HUMAN RIGHTS OF FOREIGNERS] 298-99 (Korean Studies Information 2006) (S. Korea).

of the Convention because it is a State Party.⁷² In order to establish that China violated Article 3, there needs to be a reasonable ground to believe that North Korean defectors are in danger of being subjected to torture.⁷³ Here, the important issue is the definition of torture. The definition is provided in Article 1(1) of the CAT.⁷⁴ In Part III, this article will further examine whether North Korean defectors that are forcibly repatriated to North Korea are being subjected to torture as defined in the CAT.

III. WHETHER NORTH KOREAN DEFECTORS ARE BEING SUBJECTED TO TORTURE UNDER THE CAT

Article 1(1) of the CAT defines "torture" as the following:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷⁵

The definition of torture excerpted above can be divided into the following elements: (1) characteristic, (2) subject, (3) object, and (4) intent and purpose of the act. Acts that constitute "lawful sanctions" of the State Party are exempt from this definition.⁷⁶ Since the CAT applies to "a person,"⁷⁷ the third element of the definition of torture is satisfied and does not raise any interpretative issues. The other elements are examined below.

⁷² See Status of CAT, *supra* note 10 (indicating that China signed the CAT on Dec. 12, 1986, and ratified it on Oct. 4, 1988).

⁷³ CAT, *supra* note 10, art. 3(1).

⁷⁴ *Id.* art. 1(1).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* art. 3(1).

A. Characteristic of the Act

To constitute "torture" under Article 1(1) of the CAT, the act must inflict severe pain or suffering, whether physical or mental.⁷⁸ In 1986, Mr. Kooijmans, the UN Special Rapporteur on Torture, presented a report to the UN Commission on Human Rights (UNCHR).⁷⁹ The report provided a list which referred to certain methods of physical torture such as beating, extraction of nails and teeth, burns, electric shocks, suspension, suffocation, exposure to excessive light or noise, sexual aggression, administration of drugs in detention or psychiatric institutions, prolonged denial of rest or sleep, prolonged denial of food, prolonged denial of sufficient hygiene, prolonged denial of medical assistance, etc.⁸⁰ The actual text of the CAT only refers to commission of acts and not to omission of acts.⁸¹ However, not only commission, but also omission of acts can have the effect of inflicting severe physical pain or suffering. Therefore, to constitute torture, commission of acts is commonly required; however, it seems that the CAT does not preclude omission of acts in special circumstances under Article 1.⁸² It is noteworthy that Article 1 of the CAT includes within the scope of the characteristic of the act not only physical, but also mental pain and suffering.⁸³

The two main forms of torture are physical torture and psychological or mental torture, which are interrelated.⁸⁴ South Korean Judge Taechun Kim listed examples of mental torture or acts of inhuman treatment such as conspiracy to bury a person alive, conspiracy to execute, beating, deprivation of food, threats to engage in acts of inhuman treatment, threats to rape, threats to mutilate parts of the body, threats to kill, forcibly showing the torturing of other victims, threats to kill a third party for refusing to provide information, etc.⁸⁵ On the other

⁷⁸ *Id.* art. 1(1).

⁷⁹ U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 119, U.N. Doc. E/CN.4/1986/15 (Feb. 1986) (prepared by P. Kooijmans) [hereinafter *Report by Kooijmans*].

⁸⁰ *Id.*

⁸¹ See CAT, *supra* note 10.

⁸² Taehyeon Choi, *Gomunbangjihyeob-yag* [*The Convention Against Torture*], 1 GUGJE-INGWONBEOB [INT'L HUM. RTS.] 139, 147 (1996) (S. Korea).

⁸³ CAT, *supra* note 10, art. 1(1).

⁸⁴ *Report by Kooijmans*, *supra* note 79, ¶ 118.

⁸⁵ Taechun Kim, *Gomunbangjihyeob-yagsang gyujeonggwa gugnaehyeong-sabeobchegyewa-ui johwa mich chungdol* [*Reconciliation and Conflict Between the Rules of the Convention Against Torture and the Domestic Criminal Law System*], in

hand, in determining whether the physical or mental pain and suffering is severe, the facts of each individual case must be considered.⁸⁶ The severity of pain and suffering experienced by the victim is relative to the victim's physical condition, mental ability to resist, and other factors.⁸⁷ To determine the severity, the totality of circumstances must be considered, including the duration of the inhuman treatment, mental and physical effects of the treatment, and under certain circumstances, the sex, age, and health condition of the victim.⁸⁸

In determining whether North Korean defectors who have been forcibly repatriated to North Korea are subjected to severe physical or mental pain and suffering, the current human rights violations in North Korea must be examined. Before the DPRK Socialist Constitution was revised in 1998, Article 86 of the 1992 Constitution stipulated treason as "the most serious crime . . . against the fatherland and the people," and provided that "anyone found committing treason would be strictly punished under the law."⁸⁹ The North Korean government regarded North Koreans who were repatriated from China as political criminals, and "sent them to political prisoner camps for special supervision, and their families were forcibly transplanted to certain control regions."⁹⁰ However, as the number of defectors rapidly increased, the degree of punishment now varies depending on the motives for defection and the duration of the stay outside of North Korea.⁹¹

Article 47 of the 1987 DPRK Penal Code stipulated that anyone caught fleeing the country would be committing "treason against the fatherland" which is punishable by correctional labor for seven years or more.⁹² The revised 1999 Penal Code distinguished the act of border crossing into two categories.⁹³ First, under Article 117, "[s]imple

GOMUNBANGJIHYEOb-YAG MICH GEU SEONTAEG-UIJEONGSEO GWANLYEON JU-YOJAENGJEOM BUNSEOG [ANALYSIS OF MAIN ISSUES RELATING TO THE CONVENTION AGAINST TORTURE AND THE OPTIONAL PROTOCOL TO CAT] 1, 33 (National Human Rights Commission of the Republic of Korea 2005) (S. Korea) [hereinafter Taechun Kim, *Reconciliation and Conflict*].

⁸⁶ *Id.* at 12.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ JOSEONMINJUJU-UI-INMINGONGHWAGUG SAHOEJU-UI HEONBEOB [Constitution] art. 86 (amended 1998) (N. Korea).

⁹⁰ *White Paper 2005, supra* note 1, at 326.

⁹¹ *Id.*

⁹² *Id.* at 327 (*referring to* JOSEONMINJUJU-UI-INMINGONGHWAGUG HYEONGBEOB [DPRK PENAL CODE] art. 47 (1987) (amended 2004)).

⁹³ *Id.* (*referring to* JOSEONMINJUJU-UI-INMINGONGHWAGUG HYEONGBEOB [DPRK PENAL CODE] arts. 47, 117 (1999) (amended 2004)).

acts of crossing or 'those crossing the border illegally,' would be punished with correctional labor for up to three years.⁹⁴ Second, acts of crossing the border to flee from North Korea for another country with the aim of "toppling the Republic" would be punished with correctional labor for five to ten years.⁹⁵ "In more serious cases, correctional labor punishment for over [ten] years or death sentences would be handed down, along with the confiscation of all propert[y] in connection with the prisoner."⁹⁶

On April 29, 2004, North Korea revised its Penal Code according to the Supreme People's Assembly Presidium Order No. 432.⁹⁷ Article 62 of the 2004 Penal Code stipulates that a person who betrays the fatherland and flees to another country, surrenders, changes allegiance, or turns over confidential information shall be sentenced to five or more years of correctional labor.⁹⁸ In serious cases, the person will be sentenced to death or a life term in prison with confiscation of all of his or her property.⁹⁹ However, Article 4 of the revised 2004 Penal Code, also known as the Sentencing Guide for Those Repentant of Their Anti-State and Anti-People Crimes, stipulates that "[e]ven if a person ha[s] committed acts of treason against the fatherland and the people, the state would not prosecute the crime if [the person] were to demonstrate active efforts for the unification of the fatherland."¹⁰⁰ Article 5 of the Penal Code, also known as the Sentencing Guide for Self-Surrendering Persons, stipulates that even if a person has committed a crime, the state would pardon those who earnestly repent their wrongdoings and surrender themselves.¹⁰¹ Defectors are classified into two categories upon return: those who are subject to political punishment, and those who are subject to simple punishment and release.¹⁰²

⁹⁴ *Id.* (referring to DPRK PENAL CODE art. 117 (1999)).

⁹⁵ *Id.* (referring to DPRK PENAL CODE art. 47 (1999)).

⁹⁶ *Id.* (referring to DPRK PENAL CODE art. 47 (1999)).

⁹⁷ The North Korean Penal Code was enacted on March 3, 1950 during the fifth session of the first Supreme People's Assembly (SPA). It was later revised five times. The first revision was made on December 19, 1974, SPA Presidium Order No. 1; the second on February 5, 1987, SPA Presidium Order No. 2; the third on March 15, 1995, SPA Presidium Order No. 54; the fourth on August 11, 1999, SPA Presidium Order No. 953; and the fifth on April 29, 2004, SPA Presidium Order No. 432. JOSEONMINJUJU-UI-INMINGONGHWAGUG HYEONGBEOB [DPRK PENAL CODE] (2004).

⁹⁸ *White Paper 2005*, *supra* note 1, at 328 (referring to DPRK PENAL CODE art. 62 (2004)).

⁹⁹ *Id.* (referring to DPRK PENAL CODE art. 62 (2004)).

¹⁰⁰ *Id.* (referring to DPRK PENAL CODE art. 4 (2004)).

¹⁰¹ DPRK PENAL CODE art. 5 (2004).

¹⁰² *White Paper 2005*, *supra* note 1, at 329-30.

The serious issue arises in cases where forcibly repatriated defectors face political punishment. According to the testimonies of defectors, inhuman treatment abounds all over North Korea through detentions and acts of torture committed without due process of law.¹⁰³ One defector testified,

When I was repatriated to North Korea and detained in prison, they twisted my legs and ordered me to lift a heavy bar with both hands fully extended. If I moved a little[,] they would beat me, and if I uttered a word, they said I was lying or not telling the truth. If I kept quiet, they asked if my lips were frozen. Since I would get beat up either way, the best policy was to keep silent.¹⁰⁴

The UNCHR and the UN General Assembly human rights resolutions on North Korea confirm that North Korean defectors are subjected to torture. The UNCHR passed three consecutive human rights resolutions on North Korea in 2003,¹⁰⁵ 2004,¹⁰⁶ and 2005.¹⁰⁷ In its 2004 and 2005 resolutions, the UNCHR expressed deep concern about the acts of torture carried out on North Korean defectors repatriated to North Korea.¹⁰⁸ The relevant part provides as follows:

1. *Expresses its deep concern* about continuing reports of systemic, widespread and grave violations of human rights in the Democratic People's Republic of Korea, including:

- ...
- (b) Sanctions on citizens of the Democratic People's Republic of Korea who have been repatriated from abroad, such as treating their departure as treason leading to punishments of internment, *torture*, inhuman or degrading treatment or the death penalty, and infanticide in prison and labour camps¹⁰⁹

¹⁰³ *Id.* at 63.

¹⁰⁴ *Id.*

¹⁰⁵ C.H.R. Res. 2003/10, U.N. Doc. E/CN.4/RES/2003/10 (Apr. 16, 2003).

¹⁰⁶ C.H.R. Res. 2004/13, U.N. Doc. E/CN.4/RES/2004/13 (Apr. 15, 2004).

¹⁰⁷ C.H.R. Res. 2005/11, U.N. Doc. E/CN.4/RES/2005/11 (Apr. 14, 2005).

¹⁰⁸ C.H.R. Res. 2004/13, *supra* note 106, art. 1(b); C.H.R. Res. 2005/11, *supra* note 107, art. 1(b).

¹⁰⁹ C.H.R. Res. 2004/13, *supra* note 106 (second emphasis added). The last part of the sentence, "and infanticide in prison and labour camps," is included in the

In the human rights resolution adopted by the General Assembly on November 17, 2005, the General Assembly expressed serious concern about the systemic, widespread, and grave violations of human rights including torture.¹¹⁰ The relevant part provides as follows:

1. *Expresses its serious concern at:*

...

(b) Continuing reports of systemic, widespread and grave violations of human rights in the Democratic People's Republic of Korea, including:

(i) *Torture* and other cruel, inhuman or degrading treatment or punishment, public executions, extrajudicial and arbitrary detention, the absence of due process and the rule of law, the imposition of the death penalty for political reasons, the existence of a large number of prison camps and the extensive use of forced labour¹¹¹

In its 2004 report on North Korea, Amnesty International reported that "thousands of North Koreans were repeatedly apprehended in China and forcibly returned to North Korea" and that "on their return they often faced prolonged detention, interrogation and torture."¹¹² In its 2005 report, Amnesty International stated that "North Koreans forcibly repatriated from China were detained and interrogated in detention centers or police stations operated by the [North Korean] National Security Agency or the People's Safety Agency."¹¹³ Also, in September 2005, a South Korean newspaper article reported that a female defector in Thailand who was awaiting resettlement to South Korea was previously tortured in her first failed attempt to flee North Korea.¹¹⁴ The National Security Agency tortured her by burning, beat-

2004 resolution, but not in the 2005 resolution. *Compare id.* art. 1(b) with C.H.R. Res. 2005/11, *supra* note 107, art. 1(b).

¹¹⁰ G.A. Res. 60/173, ¶ 1(b)(i), U.N. Doc. A/RES/60/173 (Mar. 14, 2006).

¹¹¹ *Id.* (second emphasis added).

¹¹² Amnesty Int'l, Amnesty International Report 2004, AI Index POL 10/004/2004, May 26, 2004.

¹¹³ Amnesty Int'l, Amnesty International Report 2005, AI Index POL 10/001/2005, May 25, 2005.

¹¹⁴ Junho Ahn, *I bal-eobsneun dalilo!...gi-oseo tto talbug* [Defector Crawls Out of North Korea on Second Attempt of Escape with Decapitated Feet], CHOSUN ILBO, Sept. 21, 2005, at A9 (S. Korea).

ing, and rendering her legs useless as a punishment for the crime of crossing the border to flee North Korea.¹¹⁵

Moreover, there are testimonial reports not only of physical pain and suffering to the body, but also of mental pain and suffering. According to the accounts of some North Korean defectors, the number of public executions increased in 1997 due to the increase in thefts, robberies, *border violations*, and smuggling as the food shortages became more serious.¹¹⁶ The public executions serve as an example to the public of what the consequences would be for those who violate the law.¹¹⁷ When a person commits a crime of “treason against the fatherland,” he or she is detained in a political prisoner camp as a political prisoner.¹¹⁸ In addition, many prisoners detained in political prisoner camps suffer from miserable and inhuman conditions.¹¹⁹ Whoever is “unable to endure the harsh conditions [and] tries to escape, . . . physically resists or assaults security officers is [hung] or shot to death in front of . . . other prisoners.”¹²⁰ The public executions or imprisonment of North Korean defectors in political prisoner camps by the North Korean government could be considered as an act of inflicting severe physical or mental pain and suffering.

Looking at the human rights situation with respect to forcibly repatriated North Korean defectors leads to the conclusion that the North Korean government distinguishes between simple acts of illegal border crossing and acts of border crossing to flee North Korea for another country with the aim of “toppling the Republic.”¹²¹ The North Korean government also distinguishes the degree of punishment depending on the motives for defection and the duration of the stay outside of North Korea.¹²² Due to the pardon policy, where a person repents of his

¹¹⁵ *Id.*

¹¹⁶ *Bughan-ui gonggaechehyeong* [Public Executions in North Korea], 91 BUGHAN INGWON NYUSEULETEO [NORTH KOREAN HUM. RTS. NEWSLETTER] (Bughan ingwon simin yeonhab [Citizens' Alliance for North Korean Human Rights], Seoul), Apr. 2005, at 1 (S. Korea), available at http://www.nkhumanrights.or.kr/newsletter/news_view.html?page=19&no=254&keyfield=&key= (last visited Nov. 14, 2007).

¹¹⁷ *Id.*

¹¹⁸ *White Paper 2005*, *supra* note 1, at 290-91 (referring to JOSEONMINJUJU-UI-NMINGONGHWAGUG HYEONGBEOB [DPRK PENAL CODE] art. 62 (2004)).

¹¹⁹ *Id.* at 308.

¹²⁰ *Id.*

¹²¹ *White Paper 2005*, *supra* note 1, at 327 (referring to JOSEONMINJUJU-UI-NMINGONGHWAGUG HYEONGBEOB [DPRK PENAL CODE] arts. 47, 117 (1999) (amended 2004)).

¹²² *See id.*

wrongdoings, the person will not be punished even if the government finds that the act was one of crossing the border to “toppl[e] the Republic.”¹²³ For these reasons, it is difficult to claim that all North Korean defectors forcibly repatriated from China have been inflicted with severe physical or mental pain and suffering. However, with respect to those defectors who were found to have committed “treason against the fatherland,” and subsequently categorized as political prisoners, evidence shows that they are experiencing severe physical and mental pain and suffering as they are imprisoned in political prisoner camps, or in extreme cases, publicly executed.

B. Subject of the Act

Historically, the act of torture was considered to be a problem only when it was inflicted or instigated by a state official because it was typically used for obtaining evidence during the prosecutorial process.¹²⁴ The CAT also focuses on the applicability of the provisions in relation to the act of “a public official or other person acting in an official capacity.”¹²⁵ However, the language, “at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,”¹²⁶ indicates that even acts committed by non-public officials can also constitute torture under the CAT. On the other hand, pain or suffering intentionally inflicted by a private individual not through “instigation of or without the consent or acquiescence of a public official” is not torture as defined under the CAT; it is rather considered to be mere aggravated assault even though the resulting harm to the victim is similar to torture.¹²⁷

According to the testimony of one North Korean defector, various methods of torture and inhuman treatment are being used at different

¹²³ *Id.* at 328 (referring to JOSEONMINJUJU-UI-INMINGONGHWAGUG HYEONGBEOB [DPRK PENAL CODE] art. 4 (2004)).

¹²⁴ Taehyeon Choi, *The Convention Against Torture*, *supra* note 82, at 145.

¹²⁵ Article 7(2)(e) of the Rome Statute of the International Criminal Court includes torture as one of the “crimes against humanity.” Rome Statute of the International Criminal Court art. 7(2)(e), July 17, 1998, A/CONF.183/9. The same paragraph also defines “torture” as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” *Id.* It differs from the definition of “torture” in the CAT as it does not require the involvement of an official of the state. Compare *id.* with CAT, *supra* note 10, art. 1(1).

¹²⁶ CAT, *supra* note 10, art. 1(1).

¹²⁷ Taechun Kim, *Reconciliation and Conflict*, *supra* note 85, at 10.

detention facilities such as correctional centers, worker reinforcement training centers, collection points, and retention centers.¹²⁸ In fact, infliction of physical pain and suffering, such as beating, is usually carried out by other detainees under orders from *jido-won* at the detention centers, and not by *jido-won* themselves.¹²⁹ *Jido-won* is “a position or person who individually organizes and manages a particular field of work according to one’s professional ability, or a position or person supervising a unit or sub-unit that one is in charge of.”¹³⁰

Another North Korean defector testified that he was repatriated to North Korea after his arrest in China.¹³¹ He was detained at a detention center in Onseong-gun.¹³² He testified, “*Gyeho* dragged me, and chained my shackled hands to the iron bars, leaving me hanging in the air for the guards to kick and punch me like an animal.”¹³³ *Gyeho*, or *gyeho-won*, are equivalent to typical prison guards.¹³⁴ In September 2005, a picture was broadcasted on television and shocked viewers because of its brutality.¹³⁵ It showed a female defector being arrested and beaten up with a club by North Korean soldiers.¹³⁶

Under the CAT, to satisfy the subject of the act element there must be “pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹³⁷ The above instances reveal that *gyeho* and the North Korean soldiers directly, or others following orders from these

¹²⁸ *White Paper 2005*, *supra* note 1, at 66.

¹²⁹ *Id.*

¹³⁰ GUGLIB GUG-EO-WON [NATIONAL INSTITUTION OF THE KOREAN LANGUAGE], PYOJUN GUG-EO DAESAJEON [STANDARD KOREAN DICTIONARY] (1999), http://www.korean.go.kr/06_new/dic/search_input.jsp (last visited Oct. 28, 2007) (S. Korea) (translated by editors).

¹³¹ *Heomnanhan gil-eul hechigo hangug-eulo* [Through the Thorny Path and into South Korea], 32 SAENGYEONGGWA INGWON [LIFE & HUM. RTS. N. KOREA] (Bugnan ingwon simin yeonhab [Citizens' Alliance for North Korean Human Rights], Seoul), Summer 2004, at 17-18 (S. Korea).

¹³² *Id.*

¹³³ *Id.* (translated by editors).

¹³⁴ MINISTRY OF UNIFICATION, TONG-IL BUGHAN YONG-EO SAJEON [UNIFICATION NORTH KOREAN TERMINOLOGY DICTIONARY], <http://unibook.unikorea.go.kr/bukyong?cmd=list&oldmenu=submenu2&part=1> (last visited Oct. 28, 2007) (S. Korea).

¹³⁵ Yunseok Ahn, *Bughangun-e butjabhin talbug yeoseong, simmunbadneun sajin gonggae* [Broadcasted Picture of North Korean Female Defector Captured and Interrogated by North Korean Soldiers], CHRISTIAN BROADCASTING SYSTEM NOCUT NEWS, Sept. 26, 2005, <http://www.cbs.co.kr/nocut/show.asp?idx=75036> (S. Korea).

¹³⁶ *Id.*

¹³⁷ CAT, *supra* note 10, art. 1(1).

officials indirectly, inflict severe physical or mental pain and suffering upon North Korean defectors. Therefore, the subject of the act element can be established as provided under the language of the CAT.

C. "Lawful Sanctions" Exception

Article 1 of the CAT provides that the term "torture" does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions."¹³⁸ Therefore, whenever North Korean defectors in China or the South Korean government asserts that China's forcible repatriation subjects defectors to severe physical or mental pain and suffering, China is likely to argue that North Korean practices do not constitute torture under the CAT. China can argue that North Korea only inflicts severe physical or mental pain and suffering according to North Korean criminal law and procedure; and therefore, such acts constitute "lawful sanctions" under the CAT. In this respect, the question is whether the term "lawful sanctions" should be interpreted in accordance with domestic law only, or international law as well as domestic law.

The CAT does not provide a clear answer.¹³⁹ However, "lawful sanctions" should be interpreted not only under domestic law but also international law. Even though a state act complies with domestic law, it would not necessarily constitute a "lawful sanction." "It [should be] international law not domestic law which ultimately determines whether a certain practice may be regarded as 'lawful.'"¹⁴⁰ Therefore, the question is whether China complies with international law when it forcibly repatriates North Korean defectors who would be subject to threats of severe physical or mental pain and suffering.

Article 3 of the 1948 UN Declaration of Human Rights provides that "everyone has the right to life, liberty and security of person."¹⁴¹ Article 5 provides more specifically that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹⁴²

¹³⁸ *Id.*

¹³⁹ Taehyeon Choi, *The Convention Against Torture*, *supra* note 82, at 149.

¹⁴⁰ U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 42, U.N. Doc. E/CN.4/1988/17 (Jan. 1988) (*prepared by P. Kooijmans*).

¹⁴¹ Universal Declaration of Human Rights, G.A. Res. 217A, art. 3, U.N. GAOR, 3d Sess., 1st. plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

¹⁴² *Id.* art. 5.

As is generally known, most of the provisions in the UN Declaration of Human Rights are considered to be customary international law.

Moreover, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) provides that "everyone has the right to liberty and security of person,"¹⁴³ and Article 7 provides that "no one shall be subjected to torture."¹⁴⁴ The practice of inflicting severe physical or mental pain and suffering upon North Korean defectors would violate the ICCPR, as North Korea is a State Party to the ICCPR.¹⁴⁵ At the same time, China might argue that the ICCPR has no legal effect whatsoever on North Korea because North Korea withdrew from the ICCPR.¹⁴⁶ However, on September 23, 1997, the UN Secretary-General stated in his aide-mémoire to North Korea that it could withdraw from the ICCPR only upon the agreement of all States Parties to the ICCPR.¹⁴⁷ On December 8, 1997, the UN Human Rights Committee also noted through its General Comment that a State that has ratified, signed, or acceded to the ICCPR cannot denounce or withdraw from it.¹⁴⁸ Therefore, North Korea still remains a State Party to the ICCPR. After its proposed withdrawal, North Korea submitted its second State Party report to the UN Human Rights Committee on May 4, 2005.¹⁴⁹ This indicates that North Korea, by fulfilling its obligations

¹⁴³ International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200A (XXI), art. 9, U.N. Doc. A/6316 (*entered into force* Mar. 23, 1976).

¹⁴⁴ *Id.* art. 7.

¹⁴⁵ See Status of Multilateral treaties deposited with the Secretary-General, United Nations Treaty Collection, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp> (last visited Nov. 8, 2007) (indicating that North Korea became a State Party to the ICCPR on Sept. 14, 1981).

¹⁴⁶ On August 21, 1997, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a resolution, criticizing human rights violations in North Korea. See Sub-Comm'n on Human Rights Res. 1997/3, U.N. Doc. E/CN.4/SUB.2/RES/1997/3 (Aug. 21, 1997). On August 25, 1997, North Korea announced its withdrawal from the ICCPR to the UN Secretary-General. See UNITED NATIONS PUBLICATION, FINAL CLAUSES OF MULTILATERAL TREATIES: HANDBOOK at 112 n.105, U.N. Sales. No. E.04.V.3 (2003).

¹⁴⁷ See UNITED NATIONS PUBLICATION, FINAL CLAUSES OF MULTILATERAL TREATIES: HANDBOOK at 112 n.105, U.N. Sales. No. E.04.V.3 (2003).

¹⁴⁸ U.N. Office of the High Comm'r for Human Rights, General Comment No. 26: *Continuity of Obligations*, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

¹⁴⁹ Human Rights Committee, *Second Periodic Report of the Democratic Republic of Korea on Its Implementation of the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/PRK/2000/2 (May 4, 2000).

under the ICCPR, continued to recognize itself as a State Party to the ICCPR.¹⁵⁰

Under international law, torture is a violation of *jus cogens* (peremptory norms).¹⁵¹ In the *Pinochet* case, the House of Lords found that General Pinochet could not claim sovereign immunity for charges of torture and conspiracy to torture by a 6-1 decision.¹⁵² Judge Hutton stated that acts of torture had been recognized as crimes against international law, even before the CAT was adopted.¹⁵³ Judge Phillips stated that crimes of such gravity as torture shock the conscience of mankind and should never be tolerated by the international community.¹⁵⁴ Therefore, ongoing practices of torture in North Korea violate *jus cogens*.

In sum, the infliction of severe physical or mental pain and suffering on North Korean defectors is a violation of the Declaration of Human Rights, the ICCPR, and *jus cogens* set by existing international law. Therefore, the actions of the North Korean government should not constitute "lawful sanctions."

D. Intent and Purpose of the Act

To establish torture under the CAT, it is imperative to prove the intent and purpose of the actor. This is required under Article 1 of the CAT which, in relevant part, states that severe pain or suffering must be "intentionally inflicted."¹⁵⁵ In other words, severe physical or mental pain and suffering that is caused accidentally or negligently does

¹⁵⁰ For further discussion on North Korea's withdrawal from the ICCPR and its effects, see Myeonggi Kim, *Bughan-ui ingwongyu-yag taltoe-e gwanhan yeongu* [Study on the Withdrawal of North Korea from the ICCPR], 45 GUGJEBEOBHAGHOE [KOREAN SOC'Y INT'L L. J.] (No.1, June 2000) 21, 21-36 (S. Korea). See also Bongdo Ji, *Bughan-ui gugje-ingwongyu-yagtaltoe-ui beobjeog hyogwa* [Legal Effects of the Withdrawal of North Korea from the ICCPR], 42 GUGJEBEOBHAGHOE [KOREAN SOC'Y INT'L L. J.] 197, 197-213 (No.2, Dec. 1997) (S. Korea).

¹⁵¹ JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 188 (Cambridge Univ. Press 2002) ("Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.").

¹⁵² See Taehyeon Choi, *Pinochet sageon-e daehan gugjebeobjeog pyeongga* [Some Reflections on Pinochet Case from the International Law Perspective], 48 GUGJEBEOBHAGHOE [KOREAN SOC'Y INT'L L. J.] 271, 276 (No.1, June 2003) (S. Korea).

¹⁵³ *Id.* at 278.

¹⁵⁴ *Id.* at 271-94.

¹⁵⁵ CAT, *supra* note 10, art. 1(1).

not satisfy the intent and purpose element of the Convention.¹⁵⁶ Under Article 1, in order to establish the intent and purpose element, one of the following purposes must be found: (1) obtaining information or a confession from a victim or a third person; (2) punishing a victim for an act the victim or a third person has committed or is suspected of having committed; (3) intimidating or coercing a victim or a third person; and (4) any kind of discrimination.¹⁵⁷

Since the drafting stages of the Convention, there has been continuing debate on whether the four purposes stated above are mere illustrations or an exhaustive list requiring one or more of the purposes to be present in order to satisfy the intent and purpose element.¹⁵⁸ The language of the Convention, "such purposes as," suggests that the listed purposes are treated as merely illustrative in principle.¹⁵⁹ Yet, the drafters suggested limiting the purpose of the act to display some degree of similarity to the listed purposes of the CAT.¹⁶⁰

There are two main issues relevant to China's forcible repatriation of North Korean defectors: (1) whether the burden of proving the intent and purpose element lies with a North Korean defector or the South Korean government, and (2) who determines the existence of intent and purpose. In other words, if either a North Korean defector or the South Korean government claims that China's practice of subjecting North Korean defectors to the danger of forcible repatriation violates Article 3 of the CAT, important questions arise as to the burden of proof. One question is whether the North Korean defector or the South Korean government must prove that North Korea is intentionally inflicting severe physical or mental pain and suffering for the purposes listed in Article 1 of the CAT. Another question is whether China must prove that North Korean practice is not "torture" under the CAT because the requisite intent and purpose are absent. The Committee Against Torture commented that "with respect to the application of Article 3 of the Convention to the merits of a case, the burden is upon the complainant to present an arguable case."¹⁶¹ Therefore, the burden of proof is on the North Korean defector or the South Korean government claiming the illegality of forcible repatriation. The question then

¹⁵⁶ BURGERS & DANIELIUS, *supra* note 15, at 118.

¹⁵⁷ CAT, *supra* note 10, art. 1(1).

¹⁵⁸ Taechun Kim, *Reconciliation and Conflict*, *supra* note 85, at 12.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ U.N. Office of the High Comm'r for Human Rights, Committee Against Torture, General Comment No. 1: *Implementation of Article 3 of the Convention in the Context of Article 22*, ¶ 5, U.N. Doc. A/53/44 (Nov. 21, 1997).

becomes how a North Korean defector or the South Korean government might prove that North Korea intentionally inflicted physical or mental pain and suffering upon North Korean defectors.

In order to enforce the CAT, the Convention provides two types of compulsory procedures and two types of optional procedures for States Parties. Articles 19 and 20 provide for compulsory procedures. Article 19 provides that a State Party must submit reports,¹⁶² and Article 20 provides for an inquiry procedure where a State Party must cooperate with and submit observations to the Committee Against Torture.¹⁶³ The optional procedures are found in Articles 21 and 22 which provide for inter-state communications and individual communications respectively.¹⁶⁴

1. The State Party Report

The States Parties must submit reports to the Committee Against Torture on the measures that they have undertaken to effectuate the CAT provisions within one year after the entry into force of the Convention for the State Party concerned.¹⁶⁵ For any new measures undertaken and any other reports the Committee requests, the States Parties must submit supplementary reports every four years.¹⁶⁶ However, North Korea has not yet ratified the Convention.¹⁶⁷ As North Korea is not a State Party to the Convention, it has no obligation to submit a report to the Committee. Consequently, there is no possible way of examining whether the North Korean government is intentionally and purposefully inflicting physical or mental pain and suffering upon North Korean defectors. Meanwhile, China first submitted its report in December 1989,¹⁶⁸ and since then, it submitted the addendum to the initial report in October 1992,¹⁶⁹ its second report in December 1995,¹⁷⁰ and its third report in May 1999.¹⁷¹ In China's addendum to

¹⁶² CAT, *supra* note 10, art. 19(1).

¹⁶³ *Id.* art. 20.

¹⁶⁴ *Id.* arts. 21-22.

¹⁶⁵ *Id.* art. 19(1).

¹⁶⁶ *Id.*

¹⁶⁷ *See supra* note 72.

¹⁶⁸ Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Reports of States Parties Due in 1989*, U.N. Doc. CAT/C/7/Add.14 (Jan. 18, 1993) [hereinafter *Initial Reports*].

¹⁶⁹ *Id.*

¹⁷⁰ Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Par-*

the initial report regarding the degree of conformity with Article 3 of the CAT, China made a general statement that “when deciding on the appropriateness of extradition or refoulement, the judicial authorities consider carefully whether such a measure is compatible with the general principles of international law and the international obligation undertaken by China.”¹⁷² The second and third reports repeated similar statements.¹⁷³

2. Inquiry Procedure

If the Committee Against Torture receives reliable information which seems to support well-founded grounds that torture is being systematically committed in the territory of a State Party, the Committee must invite that State Party to cooperate in the examination of the information, and to this end, to submit observations with regard to the information concerned.¹⁷⁴ Taking into account any observations which may have been submitted by the State Party concerned, along with any other relevant information available, the Committee may designate one or more of its members to make a confidential inquiry and report to the Committee urgently if it decides that this is necessary.¹⁷⁵ Such an inquiry may include a visit to the territory of the State Party concerned.¹⁷⁶ In other words, where the Committee receives reliable information indicating that torture is being committed in the territory of a State Party, the Committee may make an inquiry, including visits to the territory of the State Party, to determine whether or not torture is committed. This procedure is considered one of the most innovative measures with respect to human rights treaties.¹⁷⁷ As noted above,

ties Due in 1993, U.N. Doc. CAT/C/20/Add.5 (Feb. 15, 1996) [hereinafter *Second Periodic Reports*].

¹⁷¹ Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Third Periodic Reports of States Parties Due in 1997*, U.N. Doc. CAT/C/39/Add.2 (Jan. 5, 2000) [hereinafter *Third Periodic Reports*].

¹⁷² *Initial Reports*, *supra* note 168, ¶ 73.

¹⁷³ *Second Periodic Reports*, *supra* note 170, ¶ 8; *Third Periodic Reports*, *supra* note 171, ¶ 11.

¹⁷⁴ CAT, *supra* note 10, art. 20(1).

¹⁷⁵ *Id.* art. 20(2).

¹⁷⁶ *Id.* art. 20(3).

¹⁷⁷ See THOMAS BUERGENTHAL, GUGJEINGWONBEOB [INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL] 53 (Geon Yang & Jaewon Kim trans., Kyoyookkwahaksa 2001) (1992) (S. Korea).

however, North Korea is not yet a State Party to the CAT,¹⁷⁸ and therefore, the Committee cannot make an inquiry visit to examine whether torture is systemically committed in North Korea.

3. Inter-State Communication Procedure

Under the inter-state communication procedure (inter-state complaint procedure), a State Party to the CAT may submit communications to the State Party concerned or the Committee Against Torture where a State Party concerned is not fulfilling its obligations.¹⁷⁹ To implement the inter-state communication procedure under the CAT, the communicating State Party must declare that it recognizes the competence of the Committee to receive and consider communications.¹⁸⁰ However, China has not recognized the competence of the Committee.¹⁸¹ Thus, South Korea cannot report to the Committee if China violates Article 3 of the CAT.

4. Individual Communication Procedure

The individual communication procedure (individual complaint procedure) allows an individual who claims a violation of his or her rights by a State Party to bring a communication before the treaty monitoring committee.¹⁸² Similar to the inter-state complaint procedure, the individual complaint procedure under the CAT can only be brought if the State Party makes a declaration, recognizing the competence of the Committee Against Torture to receive and consider communications from individuals.¹⁸³ Similar to the inter-state complaint procedure, China has not made such a declaration.¹⁸⁴ For this reason, North Korean defectors in China who are subjected to forcible repatriation cannot submit a complaint against China for the violation of Article 3 of the CAT.

¹⁷⁸ See *supra* note 72.

¹⁷⁹ INSUB JEONG, GUGJE-INGWONGYU-YAGGWA GAE-INTONGBOJEDO [INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE INDIVIDUAL COMMUNICATION PROCEDURE] 21 (Saramsaeng-gak, 2000) (S. Korea).

¹⁸⁰ CAT, *supra* note 10, art. 21(1).

¹⁸¹ See *supra* note 72.

¹⁸² Taechun Kim, *Gugje-ingwongyu-yag-ui gae-incheong-wonjedo* [The Optional Protocol to the International Covenant on Civil and Political Rights], in GUGJE-INGWONBEOB-UI SILCHEONJEDO [THE PRACTICAL SYSTEM OF INTERNATIONAL LAW] 145, 146 (Bagyeongsa, 1998) (S. Korea).

¹⁸³ CAT, *supra* note 10, art. 22(1).

¹⁸⁴ See *supra* note 72.

In sum, in order for either the North Korean defector or the South Korean government to satisfy the intent and purpose element under Article 1 of the CAT, the Committee Against Torture must be able to engage the issue by any one of the possible procedures. Since North Korea has not yet ratified the CAT,¹⁸⁵ it has no obligation to submit the State Party reports, and the Committee cannot make an inquiry visit to the territory of North Korea.¹⁸⁶ On the other hand, even though China is a State Party to the CAT,¹⁸⁷ China's State Party reports are not sufficiently comprehensive. As a result, it is more difficult to establish that China violates Article 3. Moreover, China has not made the requisite declaration for both inter-state and individual complaints.¹⁸⁸ Because of these limitations, the Committee finds it difficult to deal with issues surrounding the forcible repatriation of North Korean defectors. Therefore, although there is a high probability that forcibly repatriated North Koreans are being intentionally inflicted with physical or mental pain and suffering in North Korea, North Korean defectors in China or the South Korean government cannot easily establish the intent and purpose element under the current situation.

E. Concluding Remarks

The elements of torture under Article 1 of the CAT are: (1) characteristic, (2) subject, (3) object, and (4) intent and purpose of the act. "Torture" does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions."¹⁸⁹

First, with respect to the characteristic of the act, Article 1 of the CAT defines "torture" as an "act by which severe pain or suffering, whether physical or mental, is . . . inflicted."¹⁹⁰ The North Korean government distinguishes simple acts of illegal border crossing from border crossing to commit "treason against the fatherland."¹⁹¹ Since the North Korean government adopted a pardon policy for criminals including those who commit treason,¹⁹² it would not be plausible to argue that all North Korean defectors who have been forcibly repatri-

¹⁸⁵ *See id.*

¹⁸⁶ *See* INSUB JEONG, *supra* note 179, at 21.

¹⁸⁷ *See supra* note 72.

¹⁸⁸ *See id.*

¹⁸⁹ CAT, *supra* note 10, art. 1(1).

¹⁹⁰ *Id.*

¹⁹¹ *White Paper 2005, supra* note 1, at 327-28 (*referring to* JOSEONMINJUJU-UI-INMINGONGHWAGUG HYEONGBEOB [DPRK PENAL CODE] arts. 62, 233 (2004)).

¹⁹² *Id.* at 328 (*referring to* DPRK PENAL CODE art. 4 (2004)).

ated from China are inflicted with severe physical or mental pain and suffering. However, when individuals become political prisoners due to the act of crossing which amounts to "treason against the fatherland,"¹⁹³ not only do they experience severe physical pain and suffering, they also undergo severe mental pain and suffering by imprisonment in political prisoner camps or public execution.

Second, with respect to the subject of the act under Article 1 of the CAT, "torture" includes "[the acts] of a public official or other person acting in an official capacity," and also the acts conducted "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."¹⁹⁴ The testimonies of North Korean defectors¹⁹⁵ and the press reports¹⁹⁶ have established that North Korean *jido-won*, *gyeho*, and North Korean soldiers, directly or indirectly under their orders, intentionally inflict severe physical or mental pain and suffering upon North Korean defectors.

Third, it is not difficult to apply Article 1 of the CAT to North Korean defectors as it simply requires that the act of torture be towards "a person."¹⁹⁷

Fourth, "lawful sanctions" must comply with international law as well as domestic law.¹⁹⁸ However, by intentionally inflicting severe physical or mental pain and suffering upon North Korean defectors, North Korea violates the UN Declaration of Human Rights, the ICCPR to which North Korea is a State Party,¹⁹⁹ and *jus cogens*. Therefore, the acts committed by North Korea cannot constitute "lawful sanctions."

Finally, in order to satisfy the intent and purpose element, a complaint concerning forcible repatriation of North Korean defectors must be submitted to the Committee Against Torture regardless of the type of procedure. The complaint must be submitted to prove that the North Korean government is intentionally inflicting severe physical or mental pain and suffering upon North Korean defectors, and also to allow the Committee to determine whether the requisite intent and purpose is

¹⁹³ *Id.* (referring to DPRK PENAL CODE art. 62 (2004)).

¹⁹⁴ CAT, *supra* note 10, art. 1(1).

¹⁹⁵ *See, e.g., supra* text accompanying notes 131-33.

¹⁹⁶ *See, e.g., supra* text accompanying notes 135-36.

¹⁹⁷ CAT, *supra* note 10, art. 1(1).

¹⁹⁸ *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 42, U.N. Doc. E/CN.4/1988/17 (Jan. 1988) (prepared by P. Kooijmans).

¹⁹⁹ *See supra* note 145.

present. However, North Korea is not a State Party to the CAT,²⁰⁰ and China has not yet made a declaration subjecting it to the inter-state complaint procedure or the individual complaint procedure.²⁰¹ Therefore, it is difficult to prove that forcibly repatriated North Korean defectors are subjected to torture, even with the enforcement mechanisms of the CAT such as the State Party report, inquiry procedure, and individual and inter-state complaint procedure.

IV. CONCLUSION

This article attempts to analyze the CAT based on legal grounds for prohibiting forcible repatriation of North Korean defectors in China. First, forcible repatriation is prohibited by Article 33 of the Refugee Convention, but Article 33 only applies to Convention refugees.²⁰² However, it is unrealistic for North Korean defectors in China to be granted Convention refugee status as it is determined by the Chinese government. This article does not argue that the Refugee Convention should be disregarded. Rather, the South Korean government should continue to demand that China regard North Korean defectors as refugees because North Korean defectors could possibly be viewed as Convention refugees and be granted refugee status in other countries.²⁰³

On the other hand, the applicability of Article 3 of the CAT seems more favorable to North Korean defectors than the Refugee Conven-

²⁰⁰ See *supra* note 72.

²⁰¹ *Id.*

²⁰² See Refugee Convention, *supra* note 11, art. 33.

²⁰³ An issue arises when North Korean defectors are regarded as refugees under international law because they are deemed to be foreigners. This is contrary to Article 3 of the South Korean Constitution (territory provision) and a South Korean Supreme Court decision which held that a North Korean is a South Korean citizen. Judgment of Nov. 21, 1996, 96 Nu 1221 (Sup. Ct.) (S. Korea). See *supra* note 68 and accompanying text. However, taking into account that the effect of Korean law does not attain to China and that it is difficult to exercise diplomatic protection, an attempt to grant refugee status to North Koreans in China under international law is required apart from the effort to protect them as South Korean citizens. Concerning this opinion, there is criticism that if the South Korean government grants citizenship to North Korean defectors, they can be protected by the Constitution of the Republic of Korea, whereas granting refugee status would limit the degree of protection that the South Korean government and the UN can provide to North Korean defectors. Yeonghwa Jeong, *Bughanjumin-ui daelyang iju-e daebihan beobjeongchaeglon* [Discussion of Legal Policies in Preparation for the Mass Movement of North Korean Residents], 4 TONGIL YEON-GU NONCHONG [J. ON REUNIFICATION STUD.] 157, 163 (No.2, 1995) (S. Korea).

tion because Article 3 of the CAT applies to “a person.”²⁰⁴ However, it is difficult to affirm that the CAT is more effective than the Refugee Convention in protecting the North Korean defectors in China. Efforts should be made to find other legal grounds for prohibiting forcible repatriation rather than insisting on the Refugee Convention as the sole legal ground. In this regard, the CAT may be an effective legal ground for prohibiting forcible repatriation of North Korean defectors.

Second, Article 3 of the CAT prohibits expelling, returning, or extraditing a person to another State where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”²⁰⁵ Accordingly, China, a State Party concerned,²⁰⁶ should not forcibly repatriate North Korean defectors when there are substantial grounds to believe that they would be in danger of being subjected to torture.

Third, the elements of torture under Article 1 of the CAT are: (1) characteristic, (2) subject, (3) object, and (4) intent and purpose of the act. It also exempts pain and suffering “arising only from, inherent in or incidental to lawful sanctions.”²⁰⁷ The evidence provided by the human rights resolutions of the UNCHR²⁰⁸ and the General Assembly,²⁰⁹ testimonies of North Korean defectors,²¹⁰ White Paper on Human Rights in North Korea published by Korea Institute for National Unification,²¹¹ and the reports on North Korea by Amnesty International²¹² establish that the elements of characteristic, subject, and object of the act are satisfied and that the “lawful sanctions” exception does not apply. On the other hand, it is difficult to affirm whether the repatriated North Korean defectors are being subjected to serious physical or mental torture by the North Korean government with intent and purpose. In this respect, Article 3 of the CAT has limitations as well as potential for being a legal basis for prohibiting the forcible repatriation of North Korean defectors.

The South Korean government should adopt the individual complaint procedure and the inter-state complaint procedure under the CAT. The individual and the inter-state complaint procedure should be

²⁰⁴ CAT, *supra* note 10, art. 3(1).

²⁰⁵ *Id.*

²⁰⁶ *See supra* note 72.

²⁰⁷ CAT, *supra* note 10, art. 1(1).

²⁰⁸ *See supra* text accompanying note 106.

²⁰⁹ *See supra* text accompanying note 110.

²¹⁰ *See supra* text accompanying notes 131-33.

²¹¹ *White Paper 2005, supra* note 1.

²¹² *See supra* text accompanying notes 112-13.

adopted as soon as possible, not only for the legal protection of South Korean citizens and aliens residing in South Korea, but also for North Korean defectors in China.²¹³ In order for the Committee Against Torture to deal with the issue of forcible repatriation of North Korean defectors, China must adopt the individual or the inter-state complaint procedure.

One way for the South Korean government to protect North Korean defectors is to request China to adopt these procedures and use them to discuss the issue of forcibly repatriated North Korean defectors in China, even though it is not likely that China would adopt them just because South Korea asks them to do so. It would be unreasonable, however, for South Korea to ask China to adopt these procedures without adopting them first. Article 9(1) of the Act on the Advancement of the South-North Relations provides that resolving the humanitarian issues due to the division of the Korean peninsula and improving human rights are governmental duties.²¹⁴ Finally, this article aspires to stimulate further discussions on prohibiting the forcible repatriation of North Korean defectors based on Article 3 of the CAT.

²¹³ South Korea should accept the inter-state communication procedure and the individual communication procedure. See Kyeongsu Jeong, *Gomunbangjihyeob-yag mich geu seontaeg-uijeongseo gwanlyeon ju-yojaengjeom bunseog* [Implementation of Communication Procedures Under the Convention Against Torture and Related Problems], in GOMUNBANGJIHYEOP-YAG MICH GEU SEONTAEG-UIJEONGSEO GWANLYEON JU-YOJAENGJEOM BUNSEOG [ANALYSIS OF MAIN ISSUES RELATING TO THE CONVENTION AGAINST TORTURE AND THE OPTIONAL PROTOCOL TO CAT] 119, 155-56 (National Human Rights Commission of Korea 2005) (S. Korea). On December 8, 2003, the National Human Rights Commission of Korea recommended to the Prime Minister, the Minister of Foreign Affairs, and the Minister of Justice to publish the UN Human Rights Committee resolution in an official government publication according to the individual communication procedure, and to establish special legislation for the implementation of the resolution, and to make a declaration of acceptance of Article 21 and 22 of the CAT. See National Human Rights Committee of Korea, *NHCRK Advised the Ratification of the Optional Protocol*, http://www.humanrights.go.kr/english/download.jsp?board_id=Press%20Releases&filename=torture.doc (last visited Oct. 28, 2007) (S. Korea) (referring to National Human Rights Committee of Korea, *Yu-en-ingwonhyeob-yag gae-intongbojedottealeun gugnaegujeolchamalyeon teugbyeolbeobhejeong mich gomunbangjihyeob-yag jesssjo-wa jesssjo-e daehan sulagseon-eongwongo* [Recommendation to Establish Special Legislation for the Domestic Remedy Procedure Conforming to the Individual Communication Procedure Specified in UN Convention on Human Rights and to Accede the Convention's Articles 21 and 22], May 4, 2000).

²¹⁴ NAMBUGGWANGYEBALJEON-E GWANHAN BEOBLYUL [ACT ON THE ADVANCEMENT OF THE SOUTH-NORTH RELATIONS] art. 9(1), Law No. 7763 (2005) (S. Korea).