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Essay: The National Human Rights Commission of Korea, and North Korean Human Rights:
A Law and Policy Analysis

Keywords: North Korea; Human Rights; National Human Rights Commission of Korea; Non-Intervention; Human Rights Documentation

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The National Human Rights Commission of Korea, and North Korean Human Rights: A Law and Policy Analysis

Abstract: This essay analyzes the appropriate role of the National Human Rights Commission of Korea in addressing North Korean human rights issues. It first addresses the legal question of whether the commission is permitted to document and raise awareness of North Korean human rights as a matter of both international law as well as domestic legal authorization. Then, the essay more broadly analyzes whether the commission is an appropriate body to engage North Korean human rights from a policy perspective, especially when compared with other potential loci for dealing with North Korean rights issues. It concludes that there is no legal barrier to the commission documenting and raising awareness of North Korean human rights, and, in certain respects, it is well suited to do so, although doing so would present certain dangers.

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I. Introduction

South Koreans are peculiarly affected by the dire human rights situation in North Korea. They oftentimes feel great sympathy for their ethnic brethren in the North, but attempts to address human rights practices in the North are complicated by security concerns as well as the widespread desire for closer relations and eventual unification. Over the past two decades, this has led to controversy regarding how the South Korean government should respond to North Korean human rights abuses. Much of this controversy has recently centered on the appropriate role of the National Human Rights Commission of Korea (NHRCK). In part, this is a byproduct of the continuing debate over the passage of a North Korean Human Rights Act. In some of the draft Acts proposed in recent years, the NHRCK would play a major role in documenting and publicizing North Korean abuses. In part, it is a result of increasing NHRCK activities on North Korean issues. Absent alternative legislative action in the area, the NHRCK has stepped forward of its own accord to assume a greater role in addressing North Korean human rights, primarily through its May 2011 establishment of the North Korea Human Rights Documentation Center and Archives.

This essay will analyze the appropriate role of the NHRCK in addressing North Korean human rights issues. After some brief background on human rights in North Korea and the South Korean response, the essay will first address whether the NHRCK is legally permitted to engage in this North Korea-focused activity. This section of the essay will look at both potential international law prohibitions as well as questions of authorization under South Korea's domestic legal framework. Then, the essay will more broadly analyze whether the NHRCK is an appropriate body to engage with North Korean human rights from a policy perspective. This

section will review other potential loci for dealing with North Korean rights issues before looking at the relative advantages and potential drawbacks of the NHRCK.

II. Human Rights in North Korea

Over the past two decades, it has become abundantly clear that North Korea is the site of extraordinarily persistent and grave human rights abuses. As the U.N. High Commissioner of Human Rights, Navi Pillay, recently stated, “the deplorable human rights situation in DPRK ... has no parallel anywhere else in the world.”¹ Political freedoms are non-existent, and even mild criticism of the regime or its leadership can lead to imprisonment. Freedom of religion is also minimal, with Christians frequently being persecuted (an estimated 50,000 to 70,000 are currently held in prison camps).² The state places heavy restrictions on freedom of movement within the country and prohibits unauthorized departures from the country. In addition, the North Korean criminal justice system is considered to be extremely harsh and lacking independence. Executions are authorized for a variety of ill-defined crimes, and observers have reported the existence of numerous public executions in recent years.³ Perhaps the signature evil of the North Korean regime is its system of six prison camps, where an estimated 200,000 individuals are confined in extraordinarily brutal conditions.⁴

North Korea’s poor human rights record is not confined to the sphere of civil and political rights. In the realm of economic and social rights too, the population suffers severe deprivations. International attention in this respect is usually focused on the right to food. While conditions have improved since the great famine of the mid-late 1990s, periodic shortages still occur, with chronic malnutrition in many areas of the countryside.⁵ This dismal situation results in part from government mismanagement of the economy and a military-first policy that directs an inordinate proportion of the country’s resources to the armed forces.⁶ Thousands of North Koreans have escaped the desperate conditions of their home country, braving extreme dangers to reach China and eventually the safety of South Korea or other asylum countries.

¹ Press Release, United Nations Office of the High Commissioner for Human Rights, Pillay Urges More Attention to Human Rights Abuses in North Korea: Calls for International Inquiry (January 14, 2013), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12923&LangID=E> (last visited July 3, 2013).

² Boris Kondoch, *The Responsibility to Protect and Northeast Asia: The Case of North Korea*, 24 KOREAN J. OF DEF. ANALYSIS 433, 439 (2012).

³ Morse Tan, *A State of Rightlessness: The Egregious Case of North Korea*, 80 MISS. L. J. 681, 703-04 (2010).

⁴ Press Release, Amnesty International, Images Reveal Scale of North Korean Political Prison Camps (May 3, 2011), available at <http://www.amnesty.org/en/news-and-updates/images-reveal-scale-north-korean-political-prison-camps-2011-05-03> (last visited July 3, 2013).

⁵ Diana Park, *Surviving Food Insecurity in North Korea*, 11 GEO. J. INT’L AFF. 133 (2010-2011).

⁶ Jason Strother, *Defectors Link North Korea’s Weapons Program to Food Shortage*, DEUTSCHE WELLE, Apr. 13, 2012, available at <http://www.dw.de/defectors-link-north-koreas-weapons-program-to-food-shortage/a-15880910> (last visited July 3, 2013).

While North Korea's human rights abuses have been the subject of horror all over the world, they have had a particularly strong effect in South Korea, where complex sentiments of kinship and unity with the North Korean people mix with feelings of enmity against the Kim regime. Although most South Koreans strongly oppose the brutal human rights abuses of the North Korean government, there has been no unanimity on a response to those violations. On the contrary, there has for many years been a fairly rigid partisan divide on the question of what South Korea should say or do in response. Conservative politicians have generally favored harshly criticizing the North Korean human rights record. Some would argue that the conservative criticism has been principled, but others would claim that it is instrumental, with the aim of weakening and delegitimizing an 'enemy' state. Progressive leaders, on the other hand, for many years refrained from broaching North Korean human rights issues, because they believe that criticizing North Korea on human rights matters would needlessly antagonize the North's leadership and make it more difficult to engage in cooperative activities that would eventually lead to unification.⁷ As will be detailed below, the NHRCK has since its establishment struggled to establish a role for itself in dealing with North Korean human rights abuses that are difficult to ignore but politically sensitive.

III. Response from the National Human Rights Commission of Korea

The National Human Rights Commission of Korea was set up in 2001 with a mandate to "ensure the protection of the inviolable and fundamental human rights of all individuals and the promotion of the standards of human rights."⁸ The NHRCK undertakes many types of tasks, including most notably the investigation of complaints of human rights violations and issuance of recommendations on the human rights implications of legislation and policies.⁹ The scope of the NHRCK's mandate is relatively wide. According to its statute, 'human rights' are defined as "any rights and freedoms, including human dignity and worth, guaranteed by the Constitution and Acts of the Republic of Korea, recognized by international human rights treaties entered into and ratified by the Republic of Korea, or protected under international customary law."¹⁰ In addition, the scope of its jurisdiction explicitly covers foreign residents, when they are located in

⁷ See Hyo-Je Cho, *Two Concepts of Human Rights in Contemporary Korea*, in CONTEMPORARY SOUTH KOREAN SOCIETY: A CRITICAL PERSPECTIVE 96, 102 (Hee Yeon Cho et al. eds., 2012). To a certain extent, however, this reluctance eroded in the latter part of the Roh Moo Hyun presidency; in 2004 and 2005, Korean ambassador to the U.N. Choi Hyeok expressed his concern over human rights conditions in the North, and in 2006 South Korea voted for the first time in favor of the U.N. General Assembly's annual resolution condemning human rights abuses in the North. Keum-Soon Lee, *South Korea's Policy toward North Korea and North Korea's Human Rights* 419, International Symposium on Human Rights in North Korea, Seoul, Korea (November 30, 2006) (on file with author).

⁸ National Human Rights Commission Act of Republic of Korea - Act No. 6481, May 24, 2001 (NHRCK Act), art. 1.

⁹ NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, MANDATE AND JURISDICTION, at http://www.humanrights.go.kr/english/about_nhrck/mandate_01.jsp (last visited July 3, 2013).

¹⁰ NHRCK Act, *supra* note 8, art. 2(1).

the Republic of Korea, and Korean nationals wherever they may be.¹¹ Perhaps the most significant attribute of the NHRCK is its independence from government control. As is the case with other national human rights institutions around Asia, the commission independently addresses those matters that fall within its purview.¹²

From its earliest years, the NHRCK has naturally faced the question of whether it should actively address North Korean human rights, and, if so, how. During the first five years of its operation, a small policy group within the NHRCK researched North Korean rights issues and there were annual conferences on the subject.¹³ However, at that time, the NHRCK almost never expressed its opinion on issues related to North Korea. Perhaps its most high profile North Korea-related action in its early years was an April 2004 recommendation that the government enact a law to investigate the damages suffered by families of South Korean abductees to North Korea, and consider the payment of compensation to victims.¹⁴ Other similar opinions regarding abductees and their families were issued in 2006 and 2008.¹⁵

In December 2006, the NHRCK made its first public step towards greater involvement with issues of North Korean rights when it released a policy statement on North Korea that recommended that the South Korean government “develop solidarity and vitalize cooperation with the international community in order to gain concrete improvements regarding North Korean human rights.”¹⁶ It also recommended that the government “pursue diplomatic efforts as a top priority, particularly with national authorities of countries where North Korean defectors are situated, in order to resolve the problem of forced repatriation”.¹⁷ While this clearly indicated a trend toward greater involvement, the NHRCK ensured that its recommendations were aimed at the South Korean government. It did not directly engage with North Korea (or China) and explicitly noted that North Korean human rights issues could not be part of its investigation mandate because of constitutional concerns.¹⁸

After the December 2006 statement, the NHRCK became more active in issuing recommendations on some of the more sensitive aspects of North Korean human rights. In 2007, an official NHRCK delegation traveled to Mongolia, China, and Thailand in order to better grasp

¹¹ *Id.* at art. 4.

¹² *Id.* at art. 3

¹³ Hyok-chol Kwon, *South Korea and Human Rights in North Korea*, HANKYOREH 21 (April 24, 2003).

¹⁴ NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, 2012 COMPILATION OF HR VIOLATIONS 412-13 (2012).

¹⁵ *Id.*

¹⁶ NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, BASIC POSITION ON NORTH KOREAN HUMAN RIGHTS (Dec. 11, 2006).

¹⁷ *Id.*

¹⁸ *Id.*

the conditions faced by North Korean escapees in those countries.¹⁹ In August 2008, it issued a recommendation to the Ministry of Foreign Affairs and Trade to intensify diplomatic efforts with the Chinese government aimed at ending the repatriation of North Korean defectors.²⁰ In September 2008, a recommendation was issued that humanitarian food aid to North Korea be undertaken independently of political concerns.²¹ In 2008, organizational structures were first established to deal specifically with North Korean issues: an Inter-Governmental Agency Consultative Council (formed at NHRCK's initiative), an Experts' Forum on North Korean Human Rights, and a Special Committee on North Korean Human Rights.²²

A more forceful engagement with North Korean human rights issues did not occur until Lee Myung Bak appointed Hyun Byung-chul to be the commission's new chairman in July 2009. Hyun was perceived as more conservative than his predecessors and has consistently expressed his desire to more actively address North Korean rights issues.²³ In addition, President Lee clearly conveyed his desire at that time that the NHRCK concentrate more on North Korean violations (although the propriety of such guidance is questionable given the NHRCK's independence from government control).²⁴ This was followed in December 2010 by an NHRCK recommendation urging passage of a form of the North Korean Human Rights Act that would statutorily ensure the role of the NHRCK in documenting North Korean human rights. In late 2011, the NHRCK then submitted a more comprehensive policy recommendation to the South Korean government on North Korean human rights, encompassing both the rights of North Koreans in North Korea as well as the rights of North Korean escapees and issues related to prisoners of war, abductees, and separated families.²⁵

While the North Korean Human Rights Act has not yet passed, on March 15, 2011, the NHRCK independently inaugurated the North Korea Human Rights Documentation Center &

¹⁹ Press Release, National Human Rights Commission of Korea, Official Visit to Understand the Situation of North Korean Human Rights (March 27, 2008), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited July 3, 2013).

²⁰ NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, NORTH KOREAN HUMAN RIGHTS 5 (2012).

²¹ *Id.*

²² *Id.* at 6.

²³ Yong Jae Mok, *NK Human Rights Among Top Priorities*, DAILYNK, June 21, 2011, available at <http://www.dailynk.com/english/read.php?catId=nk02500&num=7855> (last visited July 3, 2013). At one point Hyun went so far as to apologize for the previous passivity of the NHRCK with respect to North Korean rights issues. *Human Rights Commissioner Apologizes to N. Korean Defectors*, CHOSUN ILBO, May 12, 2011, available at http://english.chosun.com/site/data/html_dir/2011/05/12/2011051200970.html (last visited July 3, 2013).

²⁴ Jeong-ju Na, *Seoul Toughens Stance on N. Korean Rights*, KOREA TIMES, July 20, 2009, available at http://www.koreatimes.co.kr/www/news/nation/2012/04/113_48791.html (last visited July 3, 2013).

²⁵ Press Release, National Human Rights Commission of Korea, NHRCK Submitted the National Policy Recommendation on North Korean Human Rights (December 7, 2011), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited July 3, 2013).

Archives. This center, which was ostensibly modeled after West Germany's Salzgitter Center to record East German human rights violations, has been engaged in recording North Korean human rights violations, pursuant to complaints made by both victims (largely North Korean defectors settled in South Korea) and non-profit groups active in the field.²⁶ The materials received by the center are intended to educate the public about human rights conditions in North Korea, inform governmental policy, and "provide grounds for the punishment of the violators of international laws and to warn them of punishment, consequently suppressing human rights infringements."²⁷ The establishment of this center was controversial within the South Korean government. There was no explicit statutory authorization for the NHRC to establish this center, and there were immediate objections from officials in the Ministry of Unification and Ministry of Justice who felt that their agencies were better suited to lead on North Korean human rights documentation.²⁸

IV. Legal Analysis

The NHRCK's shift in focus towards a greater emphasis on North Korean human rights has been controversial for a number of reasons. One criticism from some commentators has been that it would be a violation of international law for the South Korean government to actively address human rights violations in North Korea or would exceed the NHRCK's mandate under Korean domestic law.²⁹ This section will analyze whether either of these is the case.

A. International Law

Historically, international law has placed limits on the degree to which one sovereign state can interfere with the internal affairs of another sovereign state. This general norm of non-interference is contained both in customary international law and has often been characterized as implicit in Articles 2.4 and 2.7 of the United Nations Charter.³⁰ It is also reflected in numerous non-binding declarations adopted by the U.N. General Assembly, perhaps the most notable being the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, and the

²⁶ Si-soo Park, *Archive on NK Rights Marks First 100 Days*, KOREA TIMES, June 21, 2011, available at http://www.koreatimes.co.kr/www/news/nation/2011/06/117_89350.html (last visited July 3, 2013).

²⁷ NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, 2012 COMPILATION OF NORTH KOREAN HUMAN RIGHTS VIOLATIONS, preface (2012).

²⁸ Jong Eun Lee, *Bukingweongirokbojonso Yuchi Nohgo Ilbu Beommubu Ingweoneui Shingyeongjeon* [Tension Between MOJ and NHRC Over North Korean Human Rights Archive], DONGA ILBO, March 16, 2011, available at <http://news.donga.com/3/all/20110316/35604651/1> (last visited July 3, 2013).

²⁹ Jang-Hie Lee, *Understanding North Korean Human Rights Issues in the Aspect of International Law*, in NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, 2005 COMPILATION OF NORTH KOREAN HUMAN RIGHTS VIOLATIONS 70 (2005).

³⁰ Müge Kinacıoğlu, *The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate*, PERCEPTIONS 15, 38 (Summer 2005).

Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.³¹

In order to ascertain whether the NHRCK's work on North Korean human rights actually violates these broad non-interference duties, it is necessary to analyze, first, whether the NHRCK's actions can be attributed to the Republic of Korea; second, whether the relationship between North and South Korea constitutes an international relationship governed by international law; third, whether the general non-interference principle encompasses the type of human rights actions being undertaken by the NHRCK; and fourth, whether there are any specific non-interference legal norms that could bind South Korea in the absence of a generally applicable prohibition.

The first element of the analysis is relatively clear-cut. While independence has often been repeated as an important attribute of national human rights commissions, this should not disguise the fact that such commissions are evidently instruments of the state. Commissioners are state employees, and the NHRCK's budget is regulated by the Ministry of Planning and Budget, and the Ministry of Public Administration and Security.³² In 2009, the Constitutional Court confirmed the NHRCK's status as a state organ.³³ As noted in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the "conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State."³⁴ While one can debate the terminology of whether or not the NHRCK should be called a 'governmental' body, there is no doubt that it is an organ of the state, whose actions should therefore entail state responsibility.

Given that the NHRCK's actions can be attributed to the state, the next question is whether the relationship between South Korea and North Korea is 'international' and therefore regulated by international law. At the level of domestic law, the Korean Constitution is quite clear that the South Korean state encompasses the entire Korean peninsula.³⁵ In addition, the 1991 Basic Agreement on Reconciliation, Non-aggression, and Exchanges and Cooperation

³¹ See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8028 (Dec. 17, 1970); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

³² ASIAN NGOS NETWORK ON NATIONAL INSTITUTIONS, 2008 REPORT ON THE PERFORMANCE AND ESTABLISHMENT OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN ASIA 16 (2008), available at http://archive.forum-asia.org/in_the_news/pdfs/ANNI2008web.pdf (last visited July 3, 2013).

³³ Constitutional Court [Const. Ct.], 2009 Hun-Ra6, Oct. 28, 2010, (22-2 KCCR, 1) (S. Kor.).

³⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission, UN Doc. A/56/10 (2001), art. 4.1.

³⁵ Constitution of the Republic of Korea, adopted 17 July 1948 (last amended 1987), art. 3 ("[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands").

characterizes inter-Korean relations as “not being a relationship as between states,” but instead “a special one constituted temporarily in the process of unification.”³⁶ This “special” relationship sometimes takes on quasi-international law attributes for practical reasons; for example, the four inter-Korean economic cooperation agreements signed in December 2000 were eventually forwarded to the National Assembly for its consent as if they were treaties.³⁷ The South Korean government continues to maintain, however, that the relationship between North and South Korea is not like a relationship between states.³⁸ This consistent insistence means that, at the domestic level, South Korean actions toward the North are, at least in theory, considered to be covered by domestic law, rather than international law.

However, it is equally clear that international law as a system is not controlled by characterizations made in the South Korean Constitution, and that an internationally wrongful act can therefore not be excused by the fact that it was not ‘international’ under a state’s domestic laws.³⁹ Therefore, the pertinent question is whether both North and South Korea are separate states, and therefore separate subjects of international law. Here, the answer is an uncontroversial “yes.” International lawyers have developed two main ways of assessing statehood: the constitutive approach, which bases statehood upon recognition by other members of the international community, and the (dominant) declaratory approach, which bases statehood on the fulfillment of certain objective criteria.⁴⁰ If one takes the constitutive approach, it is indisputable that North Korea has achieved sufficient recognition to be considered an international subject, given its membership in the United Nations and recognition as a sovereign by all states save South Korea and Japan. If one uses the declaratory approach, then a cursory glance is all that is needed to show that North Korea possesses a permanent population, a defined territory (the existence of border disputes being irrelevant for this purpose), a government, and the capacity to enter into relations with the other states, thus fulfilling the classic ‘declaratory’ criteria for statehood outlined in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.⁴¹

Next is the question of whether the general non-interference principle encompasses a prohibition on the type of North Korea-related human rights work undertaken by the NHRCK,

³⁶ Basic Agreement on Reconciliation, Non-Aggression, and Exchanges and Cooperation, preamble (1991).

³⁷ Seong-Ho Jhe, *Four Major Agreements on Inter-Korean Cooperation and Legal Measures for their Implementation*, 5 J. KOREAN L. 126, 131 (2005).

³⁸ *Id.* at 132.

³⁹ See Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission, UN Doc. A/56/10 (2001), art. 3; 1969 Vienna Convention on the Law of Treaties, art. 27, 1155 UNTS 331.

⁴⁰ See MARTIN DIXON, INTERNATIONAL LAW 127-28 (2007).

⁴¹ Convention on Rights and Duties of States, 1933, art. 1, LNTS, vol. 165, 19. While neither North Korea nor South Korea is party to this convention, the criteria for statehood contained therein are often cited as the traditional requirements of the ‘declarative’ theory of statehood. DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 24 (2002).

specifically the accepting and recording of complaints of North Korean human rights violations. North Korean governmental representatives have claimed that this is the case, although they do not couch their non-interference objections in explicitly legal terms.⁴² In fact, prior to 1945, human rights were – at least according to some commentators – considered to be part of the internal affairs of a sovereign nation.⁴³ However, this changed with the United Nations Charter and the post-World War II development of international human rights law. Today, human rights are generally accepted as being of more than just a domestic matter that can be hidden behind a shield of sovereignty.⁴⁴

There are, of course, limits to the extent of interference that is legitimate based on human rights abuses. There is much debate, for example, regarding the legality of military intervention to prevent a government from engaging in massive human rights abuses, and the majority view is probably still that the use of force in such circumstances is illegal absent Security Council authorization.⁴⁵ It is also sometimes noted that human rights cannot be used as an excuse to exert pressure on other states or create disorder among states.⁴⁶ However, it is now accepted that documenting and publicizing human rights abuses, as the NHRCK has been engaged in, is permissible and indeed common at the United Nations and foreign capitals around the world.⁴⁷

As the preceding analysis demonstrates, the NHRCK's North Korea-related work would not violate the general international law principle of non-interference. However, it is also worth asking whether there are any specific non-interference norms binding South Korea's actions towards North Korea. In fact, in the 1972 South-North Joint Communiqué, South and North Korea each declared their intention to “cultivate an atmosphere of mutual trust between North

⁴² Many states accused of human right violations, including North Korea, contend that such accusations constitute interference with their internal affairs. DAVID HAWK, PURSUING PEACE WHILE ADVANCING RIGHTS: THE UNTRIED APPROACH TO NORTH KOREA 59 (2010).

⁴³ Heewon Han, *Newly Arising Issues on the Limitation of Intervention Law and Refugees under the North Korean Human Rights Act of 2004*, 1 ATOMS FOR PEACE: AN INT'L JOURNAL 355, 362 (2007).

⁴⁴ Danilo Türk, *Reflections on Human Rights, Sovereignty of States, and the Principle of Non-Intervention*, in HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN 758 (Morten Bergsmo ed., 2003).

⁴⁵ See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 710-12 (6th ed., 2003); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EURO. J. INT'L L. 23, 23-30 (1999).

⁴⁶ Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

⁴⁷ See, e.g., Maziar Jamnejad & Michael Wood, *Current Legal Developments – The Principle of Non-intervention*, 22 LEIDEN J. INT'L L. 345, 376 (2009) (“what should be (and largely is) uncontested is that states and international organizations are entitled to criticize the human rights situation in other countries”).

and South by refraining from vilifying the other side.”⁴⁸ This was echoed by the 2007 Declaration on the Advancement of South-North Korean Relations, Peace and Prosperity, which states that “[t]he South and the North have agreed not to interfere in the internal affairs of the other”⁴⁹ and that “[t]he South and the North have agreed not to antagonize each other.”⁵⁰ Thus, the anti-vilification language of the 1972 Joint Communiqué clearly goes beyond what general international law requires, reflecting North Korea’s particular sensitivities on this matter. It is not clear, however, whether such clauses would cover the type of human rights statements that have emanated from the NHRCK; such would be a matter of interpretation. More importantly, however, the joint declarations can in no way be seen as binding treaty provisions under international law. Fundamentally, international law accepts as treaties all agreements between states that are governed by international law.⁵¹ Yet it is clear that the joint declarations between the North and South were not intended to be governed by international law. First, neither side recognizes the other as a sovereign; second, they are not characterized as treaties by the parties or ratified by the South Korean parliament; and, third, the relevant parties have explicitly underlined their non-international law nature.⁵²

B. Domestic Law

While there is no international law obstacle to the NHRCK documenting complaints relating to human rights violations in North Korea and publicizing abuses, that does not mean that they are authorized to do so under South Korea’s domestic legal framework. Under South Korea’s domestic system, the powers of the NHRCK are established in the National Human Rights Commission Act. Regarding the Act’s scope of application, Article 4 states that the Act “shall apply to all citizens of the Republic of Korea and all foreigners residing therein.”⁵³ As an initial matter, it is therefore necessary to establish whether North Koreans are in fact “citizens of the Republic of Korea.”

This seemingly absurd question is in fact a source of some debate. As mentioned, the South Korean Constitution considers the territory of the Republic of Korea to consist of the entire Korean peninsula.⁵⁴ Meanwhile, South Korea’s Nationality Act specifies that a “person whose father or mother is a national of the Republic of Korea at the time of a person’s

⁴⁸ July 4th North-South Joint Statement (July 4, 1972), art. 1.

⁴⁹ Declaration on the Advancement of South-North Korean Relations, Peace and Prosperity (October 4, 2007), art. 2.

⁵⁰ *Id.* art. 3.

⁵¹ Vienna Convention on the Law of Treaties, *supra* note 39, at art. 1(a).

⁵² According to former Unification Minister Hyun In-taek, “the accords are political declarations entailing basic directions of the inter-Korean relations. They are not documents that have received parliamentary ratification,” Sang-ho Song, *Hyun Downplays Inter-Korean Declarations*, KOREA HERALD, Mar. 30, 2010, available at <http://nwww.koreaherald.com/view.php?ud=20090217000057> (last visited July 3, 2013).

⁵³ NHRCK Act, *supra* note 8, at art. 4.

⁵⁴ Constitution of the Republic of Korea, *supra* note 35, at art. 3.

birth...shall be a national of the Republic of Korea at birth”⁵⁵ Thus, both scholars and courts have accepted that, in principle, provided an individual born in North Korea is not descended from two foreign (non-North or South Korean) parents, he or she should be considered – from birth – to be a South Korean national.⁵⁶ This being the case, Article 4 of the NHRCK Act must be interpreted to apply to North Koreans.

While the general scope of the NHRCK Act would apply to North Koreans, it is important to note that this general applicability may not apply to the NHRCK’s duty of “investigation and remedy with respect to human rights violations.”⁵⁷ This is because petitions alleging human rights violations can only be investigated and remedied if human rights “guaranteed in Articles 10 through 22 of the Constitution are violated by the performance of duties (excluding the legislation of the National Assembly and the trial of a court or the Constitutional Court) of state organs, local governments or detention or protective facilities.”⁵⁸ The reference to “state organs, local governments or detention or protective facilities” has normally been interpreted to refer to organs of the South Korean state (although the language does leave some room for interpretation as to whether North Korean government organs should also be considered “state organs”).

While it may not therefore be permissible for the NHRCK to investigate and remedy complaints regarding North Korean human rights, it is worth stressing that such actions have not been undertaken by the NHRCK so far. In fact, these actions would be relatively unrealistic given the difficulty of investigating discreet violations in North Korea and the impossibility of obtaining an individualized remedy from the North Korean government. To date, the NHRCK has essentially been involved in documentation and awareness-raising activities, which can comfortably be situated within the NHRCK’s other mandated duties, namely to survey human rights conditions,⁵⁹ raise public awareness of human rights,⁶⁰ and undertake other measures necessary to protect and improve human rights.⁶¹ These activities are not limited to rights abuses by state bodies, and, in fact, the NHRCK has engaged in a significant amount of work on rights abuses by non-state actors, and especially by corporations.⁶²

⁵⁵ Nationality Act, Act no. 16 (Dec. 20, 1948), art. 2.

⁵⁶ See, e.g., Chulwoo Lee, *South Korea: The Transformation of Citizenship and the State-Nation Nexus*, 40 J. CONTEMPORARY ASIA 230, 232 (2010); *Nationality Act Case*, 12-2 KCCR 167, 97Hun-Ka12 [Kor Const Ct] (31 Aug 2000).

⁵⁷ NHRCK Act, *supra* note 8, at art. 19(2).

⁵⁸ *Id.* at art. 30(1). This restriction does not apply to the investigation of “discriminatory acts.” *Id.* at art. 30(2).

⁵⁹ *Id.* at art. 19(4).

⁶⁰ *Id.* at art. 19(5).

⁶¹ *Id.* at art. 19(10).

⁶² See, e.g., Press Release, National Human Rights Commission of Korea, NHRCK Held a Joint Seminar on Business Management Integrated with Human Rights (July 6, 2011), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited July 3, 2013); Press

V. Institutional Analysis

Although it would be legal for the NHRCK to record North Korean human rights violations, that does not necessarily mean that it would be wise for it to do so. In general, national human rights commissions in other countries have avoided addressing human rights abuses beyond their borders. For example, in the Universal Periodic Reviews at the United Nations Human Rights Council, national human rights commissions often comment on the human rights record in their own state, but they refrain from speaking out in discussions of other states (even though they are permitted to do so).⁶³ The only significant exception to this rule elsewhere is cases where the home state or a home state national has committed a human rights violation outside the state's borders.⁶⁴ In addition, there are certainly alternative institutional loci within South Korea which could alternatively play the leading role in recording North Korean human rights violations and raising public awareness of said violations. The next section will briefly discuss these other alternatives, and the following section will analyze the attributes the NHRCK can bring to the table when compared with these other bodies.

A. Other Institutional Possibilities

Realistically, there are three other divisions of the South Korean government that could plausibly take the lead role in recording and raising awareness of North Korean human rights: the Ministry of Unification (MOU); the Ministry of Justice (MOJ), and the National Intelligence Service (NIS). Each of these could in turn act either directly or through a subsidiary foundation. These possibilities will be discussed in turn.

As regards North Korean human rights the most widely discussed agency alternative to the NHRCK is the MOU. The MOU generally takes the lead in inter-Korean negotiations, and has previously been involved in compiling records of North Korean human rights abuses through the Korean Institute for National Unification. The MOU would bring certain advantages to North Korean human rights documentation tasks. Most notably, it has experience in human rights work through the Center for North Korean Human Rights Studies, which was created by the Korean

Release, National Human Rights Commission of Korea, NHRCK Publishes Resources for Broadcasting & Corporate Human Rights Education (September 20, 2007), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited July 3, 2013); Press Release, National Human Rights Commission of Korea, NHRCK Co-hosts International Conference on Corporate Social Responsibility (September 28, 2007), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited July 3, 2013).

⁶³ Chris Sidoti, *National Human Rights Institutions and the International Human Rights System*, in HUMAN RIGHTS, STATE COMPLIANCE AND SOCIAL CHANGE 115 (Ryan Goodman & Thomas Pegram eds. 2012).

⁶⁴ For example, the NHRCK investigated a complaint of sexual harassment of a Korean national by another Korean national at a Korean-run NGO in Cambodia, eventually recommending that the victim receive a then record high damage award (30,000,000 won) and that the NGO develop sexual harassment guidelines. Press release, National Human Rights Commission of Korea, Highest Amount of Damages Awarded in Cambodian Sexual Harassment Case (October 15, 2007) (on file with author).

Institute for National Unification (KINU) in December 1994. KINU is the major government-sponsored think tank on North Korean issues, and is affiliated with the MOU. Since 1996, the Center for North Korean Human Rights Studies has produced annual White Papers on human rights in North Korea, compiled in large part with the assistance of the non-profit Database Center for North Korean Human Rights. The MOU also has certain disadvantages. Human rights are not central to MOU's mandate, and it has a reputation of not wanting to strongly address rights, presumably out of a worry that doing so would complicate negotiations on inter-Korean cooperation and eventual unification.⁶⁵

The MOJ is another alternative that has been frequently discussed for dealing with North Korean human rights. MOJ has experience with human rights issues through its Human Rights Bureau, which contains four separate divisions: the Human Rights Policy Division, the Human Rights Support Division, the Human Rights Investigation Division, and the Women and Children's Policy Team.⁶⁶ Among other tasks, the Human Rights Investigation Division monitors and investigates possible human rights violation in the course of law enforcement activities and performs inspections of detention facilities. The skill set involved in these activities could presumably be used to document complaints regarding North Korean human rights. At least arguably, the Supreme Prosecutors Office (SPO) under MOJ could also undertake investigations, but the SPO has no direct expertise in human rights issues, has long been heavily criticized for its politically biased prosecutions, and is seen by much of the public as a bastion of conservative political power.⁶⁷

The last government body that is worth mentioning is the NIS. It may seem absurd on first glance for the NIS to take on this role, as the NIS previously had a distinctly anti-human rights reputation (and still does among some today).⁶⁸ However, the NIS naturally has the best access to intelligence about events actually taking place in North Korea. NIS is also the lead agency in interviewing North Korean escapees who make it to the South, giving it an opportunity to inquire about human rights abuses and receive complaints. On the other hand, NIS is poorly suited for playing the public role that would be necessary to raise awareness about North Korean

⁶⁵ See, e.g., Yun Tae Kim, *No North Korean Human Rights Department Within the Unification Ministry*, DAILY NK, March 10, 2008, available at <http://www.dailynk.com/english/read.php?cataId=nk03600&num=3363> (last visited July 3, 2013) ("Perhaps it is wiser to have the Ministry of Unification withdraw from North Korean human rights issues. The past decade shows that officials of the ministry cannot help improve the North Korean human rights situation with their mistaken notion that it is better off not to provoke North Korea by addressing its human rights abuses").

⁶⁶ Ministry of Justice, Human Rights Bureau, at www.moj.go.kr/HP/ENG/eng_03/eng_3080.jsp (last visited July 3, 2013).

⁶⁷ Min-uck Chung, *Park Vow to Abolish Prosecution's Power Center*, KOREA TIMES, December 2, 2012, available at http://www.koreatimes.co.kr/www/news/nation/2012/12/608_125973.html (last visited July 3, 2013).

⁶⁸ Won-je Son, *Marking 50th Year, NIS Powers Swell Under Lee*, HANKYOREH, June 10, 2011, available at http://english.hani.co.kr/arti/english_edition/e_national/482157.html (last visited July 3, 2013).

human rights issues due to its emphasis on secrecy, the suspicion with which it is viewed by segments of the Korean populace, and the fact that human rights promotion and protection are not generally part of its mandate.

B. Advantages and Disadvantages of the NHRCK

When compared with the other plausible institutional loci for addressing North Korean human rights, the NHRCK possesses certain important advantages. Perhaps its greatest advantage is its considerable experience in accepting human rights complaints and in human rights promotion. From its founding in 2001 until December 31, 2011, it received a total of 58,672 human rights complaints, along with 137,308 counseling cases and 201,468 civic petitions or inquiries.⁶⁹ While there are fundamental differences between the process of dealing with human rights complaints from South Korea and those that took place in North Korea, the NHRCK's twelve years of experience in the area of human rights protection should provide it with institutional knowledge that would also assist in dealing with North Korean violations. While other agencies such as MOJ and MOU have some experience dealing with rights, none of them has the same level of expertise.

Another area where the NHRCK stands out is in its level of independence from political control. Unlike government agencies, national human rights commissions are in principle not supposed to take instructions from the government, and, while this is not always the case in practice, at least until recently the NHRCK received good marks in this regard.⁷⁰ In fact, there have been many instances of the NHRCK taking positions contrary to the desires of the administration in power. For example, during the recent Lee Myung Bak administration, the NHRCK called for an end to the National Security Act. In previous progressive administrations, the NHRCK also publicly clashed with the sitting government, perhaps most notably by stating its opposition to South Korea's involvement in the Iraq War and asserting that its commissioners did not have to follow government travel restrictions.⁷¹ Unfortunately, however, many observers claim that this autonomy was eroded during the Lee Myung Bak administration, and it is as yet uncertain how the commission will fare under a Park Geun Hye administration.⁷² Given the strong partisan divide over North Korean human rights issues, this independence from political control is probably beneficial to establishing the credibility of any findings on North Korean rights issues. It may also arguably provide the ancillary benefit of allowing the South Korean

⁶⁹ NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, 2011 ANNUAL REPORT 69 (2012), available at <http://www.humanrights.go.kr/english/publications/publications01.jsp> (last visited July 3, 2013).

⁷⁰ According to a 2008 analysis, the NHRCK was one of only two national human rights institutions in Asia to enjoy a "fair amount of independence and autonomy from government interference." ASIAN NGOS NETWORK ON NATIONAL INSTITUTIONS, *supra* note 32, at 15.

⁷¹ *Human Rights Commission in Crisis*, HANKYOREH, November 22, 2011, available at http://english.hani.co.kr/arti/english_edition/e_editorial/506563.html (last visited July 3, 2013).

⁷² *Id.*; Moon-young Lee, *Amnesty International Reports Curtailed Human Rights under Lee Administration*, HANKYOREH, May 13, 2011, available at http://english.hani.co.kr/arti/english_edition/e_national/477819.html (last visited July 3, 2013).

leaders to plausibly deny responsibility for any findings that would upset the North Korean regime, in order to avoid retaliation.

A final advantage of the NHRCK would be the greater credibility of its findings in the eyes of the public, both inside and outside of Korea. In part, this credibility would be a product of the commission's independence from government control, but, beyond that, it would also be assisted by the fact that the NHRCK has a membership that is pluralistic by both law and custom. The commission is statutorily required to include at least four women.⁷³ In recent years, it has also included a Buddhist priest, and a mix of lawyers, academics, and activists. On the international level, the NHRCK's credibility is supported by its A-grade accreditation from the International Coordinating Committee of National Instruments for the Promotion and Protection of Human Rights, which indicates compliance with the U.N.-endorsed Paris Principles relating to the status of national institutions.

One potential danger of using the NHRCK to address North Korean human rights would be the possibility that the NHRCK's core competency of protecting and promoting South Korean human rights could suffer from a greater emphasis on North Korean affairs. Additional funds spent on North Korean issues means less money for protecting and promoting South Korean human rights, and additional staff working on North Korean issues could mean less manpower for domestic South Korean projects. Of course, the government could increase the overall budget to reflect the expanded mandate, but the recent conservative Lee Myung Bak administration in fact took the opposite tack, cutting the NHRCK budget and staff considerably at the same time that it was increasing work on North Korean issues.⁷⁴ Any decreased emphasis on South Korean rights by the NHRCK would certainly be a very negative outcome, not only due to the great potential of the NHRCK to improve the many human rights problems in the South, but also because neglecting South Korean issues would decrease the organization's credibility when promoting North Korean rights.

Another potential danger of NHRCK involvement in North Korean affairs would be the potential of North Korean issues leading to political interference in the NHRCK's independence. North Korean issues are among the most sensitive matters that the South Korean government deals with and fundamentally affect the country's security outlook, economic growth, as well as its core ideological concerns. Thus, there is always the possibility that the government may at some point instruct the NHRCK to focus its attention on a particular human rights issue, or to ignore some other potential issue, in order to further the greater public interest in stability or security. Such interference would be disastrous to the NHRCK's domestic and international reputation and should be avoided.

⁷³ NHRCK Act, *supra* note 8, at art. 5(5).

⁷⁴ Korea House for International Solidarity, *Republic of Korea: Endless Despair*, in ANNI REPORT ON THE PERFORMANCE AND ESTABLISHMENT OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN ASIA 172 (Asian NGO Network on National Human Rights Institutions, 2012); Doo Sik Kim, *Lee Myung Bak Jeongbuhaeui Kukgaingweoneuiwonhae Uigeinga Kihwoeinga?* [The National Human Rights Commission Under MB Government, How to Turn Crisis into Opportunity?], 39 KOR. J. L. & SOC. 49 (2010).

Both of these dangers can be avoided, however, by a presidential administration that is willing to value human rights in both North and South Korea, as well as respect the independence of the NHRCK. It is too early to know whether that will be the case with the incoming Park Geun Hye administration, but one can predict that she will at a minimum show more respect for the NHRCK than did Lee Myung Bak, who even before taking office had expressed a desire to end the commission's independence.⁷⁵ If the Park administration is in fact willing to support the NHRCK and avoid improper meddling, then there is no reason why it should not play a prominent role in documenting and raising awareness of North Korean human rights abuses.

VI. Conclusion

As the foregoing analysis shows, there is no barrier in either international law or domestic South Korean law to the NHRCK's documenting and raising awareness of North Korean human rights issues. The policy question of whether the NHRCK is the most sensible part of the Korean government to be engaging in these tasks is a more difficult question. The NHRCK certainly shows some comparative advantages in relation to other agencies that could possibly engage in these tasks. For example, its institutional independence can be seen as a benefit because it reduces the likelihood of over-politicization (a particular danger in North Korea-related issues) and allows for the credible denial of responsibility by political leaders who might want to negotiate with North Korean representatives regarding other issues without being seen as guilty of insulting the dignity of the North Korean state through their human rights work. The NHRCK has also developed a comparative expertise in the work of human rights monitoring and the application of international human rights standards, and is generally viewed as a highly credible institution.

On the other hand, by concentrating on North Korean issues, the NHRCK could potentially lose focus from its primary goal of promoting and protecting human rights in South Korea, and its engagement in such a critical policy area could eventually put the commission's independence at risk. These potential dangers could be avoided by a conscientious administration that raises the NHRCK's budget and staffing to reflect its new responsibilities, and respects the commission's independence. Overall, the potential drawbacks are outweighed by the advantages that the NHRCK brings to the table.

It should be stressed, however, that this analysis has focused on documentation and awareness-raising activities, which are among the most important ways in which the South Korean government has chosen to address North Korean human rights. They are not, however, the only tools in the South Korean government's arsenal. United Nations condemnation and investigation of North Korean human rights is increasingly important, and South Korea has the potential to help formulate a concerted global response, whether vocally or simply by providing behind the scenes leadership. This would evidently be part of the Ministry of Foreign Affairs and Trade's competency, where the NHRCK can play only a very limited role. MOJ, also, may have a future role in prosecuting human rights abusers, something that NHRCK is not equipped to do.

⁷⁵ See AMNESTY INTERNATIONAL, SOUTH KOREA'S HUMAN RIGHTS COMMISSION UNDER THREAT (Jan. 23, 2008), available at <http://www.amnesty.org.au/news/comments/8373/> (last visited July 3, 2013).

Although different agencies may have important roles in addressing North Korean human rights issues, this analysis has demonstrated that the role of the NHRCK is potentially valuable when it comes to documentation and awareness-raising, and that, as long as certain precautions are taken, legal and policy objections to its work are misguided.