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International Obligations Undertaken by the Republic of Korea with Regards to Mass Migration Events

David Lee Mundy*

〈국문초록〉

대규모로 이주하는 난민들은 이주와 관련된 다양한 협약의 서명국이 국제적 차원에서 반드시 인정해야하는 권리를 가지며 서명국들은 이러한 권리를 지켜줄 의무가 있다. 그러나 이러한 의무는 위험을 피하여 온 이민자와 국민들을 고려하는 양심적인 서명국들에게 어려움을 주고 있다. 따라서 이주, 특히 대규모 이주는 단순히 국제적 의무의 이행으로 해결되는 문제가 아니다. 여러 국익과 국제적 의무를 고려하며 다양한 방안들을 고려해야한다. 이 글은 이주와 관련하여 한국이 이행하고 있는 국제적 의무를 조사하며 특히 대규모로 한국에 이주하는 상황들을 살펴본다. 구체적으로 2018년도에 예멘 난민 이주를 통해 한국의 대규모 이주에 대한 준비성을 살펴본다. 또한 이 글은 세계적인 유행병과 같은 이런 특수한 상황에 직면했을 때 서명국들의 의무에 대한 예외에 대해서도 다룬다.

주제어 : 이민, 난민법, 난민의 국제적 영향, 대규모 난민, 비엔나 협약

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Ⅰ. Introduction

Certainly, the experts recognize that the Republic of Korea must prepare for a mass migration event.[1] One might wonder why we are looking at

* David Lee Mundy, Handong International Law School (Pohang, Republic of Korea). Email: david@mundy.kr. Professor Mundy would like to thank students Hojin Joung and Anna Jang for their contributions

1) Seonuk Park, "International Legal Review on Enhancement of Management Schemes for Dealing with Mass Migration," Gachon Law Review Vol. 13 No. 1, Gachon University Law Research Institute, 2020, pp.147~182 [박선욱, "대규모 난민이주 관리를 위한 국제법적 방안",「가천법학」제13권 제1호, 가천대학교 법학연구소, 2020, 147-182면.].

mass migrant events when the world has been so overturned by Covid-19. Certainly, Covid-19 has had a stark impact on global migration and movement of persons.[2] Yet, if past is prologue, and if the experience of the United States is any indicator, mass movements of persons remain a concern, are already in progress,[3] or, in the Republic of Korea's case, are on the horizon.

The Republic of Korea experienced a mass migration event in 2018,[4] when a diaspora of refugees from war-ravaged Yemen descended en masse on the vacation island of Jeju. The sudden arrival of nearly a thousand Yemenis seeking refugee status set off anti-immigrant protests in South Korea.[5] 714,875 people signed a petition calling for the abolition of the Refugee Act; the abolition or reform of the Permission to Apply for Refugees under the Jeju Illegal Refugee Application; and even a withdrawal from the 1951 Refugee Convention.[6] The "Yemeni Refugee Crisis"[7] as may be colloquially called, highlighted ongoing concerns about Korea's ability to

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2) Meghan Benton et al., COVID-19 and the State of Global Mobility in 2020, International Organization for Migration, 2021.

3) In fiscal year 2021, the number of border crossings at the U.S. southern border, legal and surreptitious, are at record highs. According to the New York Times, "Migrants were encountered 1.7 million times in the last 12 months, the highest number of illegal crossings recorded since at least 1960." Eileen Sullivan & Miriam Jordan, Illegal Border Crossings, Driven by Pandemic and Natural Disasters, Soar to Record High U.S. Department of Transportation, Border Crossing Entry Data, New York Times, Oct. 22, 2021, https://www.nytimes.com/2021/10/22/us/politics/border-crossings-immigration-record-high.html. Data regarding border crossings may be viewed at the following official government websites: https://explore.dot.gov/views/BorderCrossingData/Monthly?:isGuestRedirectFromVizportal=y&:embed=y (last visited September 19, 2021); U.S. Customs and Border Protection (CBP), Southwest Land Border Encounters, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last modified September 15, 2021).

4) The Republic of Korea. For ease of reference for the English-speaking audience, the authors will refer to the Republic of Korea as "South Korea" or as "Korea."

5) Sujean Park, "500 Yemeni Refugees in Jeju to Be Driven by Anti-Muslim Sentiment," Hankyoreh (June 21, 2018), http://www.hani.co.kr/arti/society/rights/849580.html#sidxbd8d9e789a9ba 72983d49dd87b29525 [한겨레, "제주도에 온 예멘 난민 500명, 무슬림 혐오에 내몰리다(2018. 6. 21)"].

6) Blue House, Online Petition Board, "Petition for the Termination of the Refugee Act, Visa-free Entry, and Refugee Application due to the Problem of Illegal Refugee Applications on Jeju Island," (July 13, 2018), https://www1.president.go.kr/petitions/269548.

7) In Korea this event was referred to as Jeju Refugee Incident [제주 난민 사태].

handle an influx of refugees and about Korea's ability to process refugees in a manner consistent with its obligation under international norms including the nascent Global Convention on Refugees.

When it comes to migration, on the international plane (plane meaning the sphere of public international law) conventions obligations as well as reality on the ground can create a complex picture. Issues of refugee choice must be considered as well as the interests of the state.[8] One should understand the root causes of refugee migration while bearing in mind the various solutions on the table such as durable solutions through resettlement, integration, and repatriation as well as deterrence solutions through border controls, refugee camps, or development programs.[9] These must all be viewed through the prism of a state's obligations under international law.

One must also consider the interplay between state sovereignty and a state's concomitant obligations undertaken on the international plane. For surely if a state is sovereign then it must also be bound by its commitments. For example, none would seriously deny that the Republic of Korea's control of its borders is an aspect of its territorial sovereignty, which in many ways is absolute.[10] It follows then, that Korea has the right to police its borders and to allow or to prevent persons from entering whether as individuals, groups, or en masse. Nevertheless, there are certain self-imposed limitations on state sovereignty. Korea has undertaken certain obligations toward migrants under international law by acceding to a "patchwork" of conventions and treaties. These international instruments address migration as it relates to human rights as well as economic, political, social, and labor rights. It may surprise the lay reader to learn that there is no one, controlling treaty or convention on global migration. Recently, states have taken tentative steps toward creating a unifying

8) Park, supra note 1.
9) Ibid.
10) Vincent Chetail, International Migration Law, Oxford University Press, 2019, p.6. "From this international perspective, no one today can contest that territorial sovereignty is relative and not absolute."

policy via “soft law” such as the Global Compact on Safe, Orderly and Regular Migration to which the Republic of Korea is a signatory.[11] Even then, as we will discuss in the conclusion, basic principles of contract law that form the basis of the international law under the Vienna Convention on the Law of Treaties nowhere call on a state to honor its obligations under each and every circumstance, for example, processing each individual applicant under pandemic conditions.

The scope of this article is necessarily limited to a survey of Korea’s convention obligations in regards to mass migration events. Certainly, internally within Korea there is an ongoing debate as to the efficacy of the domestic Refugee Act of Korea which was enacted in 2013, and partially amended in 2016. We hope to address the structural and legal capacity of the Republic of Korea concerning mass migration events in a subsequent article. The question of whether Korea’s domestic law, its enabling legislation in fulfilment of its treaty obligations, is complete is a necessarily complex question that warrants its own, fulsome analysis.

This article merely seeks to explore the obligations of the Republic of Korea under international law when it comes to mass migration events such as the Yemeni Refugee Crisis. Part II will discuss the individual and group’s right to depart a country, the right to be admitted into a country vel non, and the right to freedom of movement once lawfully within a territory. Meanwhile, Part III will focus on the impact of principles of non-refoulement and family reunification for those seeking humanitarian relief. Part IV will cover protections when it comes to detention or removal. Part V will discuss the rights that attach once an individual is lawfully or irregularly present. Finally, Part VI will conclude with an observation on the Vienna Convention as well as a modest recommendation to allow limited family reunification for humanitarian visa holders.

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11) G.A. Res. 73/195, U.N. GAOR, 73rd Sess., U.N. Doc. A/RES/73/195 (January 11, 2019) https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_73_195.pdf (also known as the Marrakech Compact on Migration).

Ⅱ. Right to Depart, Right to Freedom of Movement, Right to Admission

When considering people on the move from the perspective of a receiving state like the Republic of Korea, it may sound strange to begin with the subject of a right to departure. However, owing to the fact that individuals have the right to depart from a country and coupled with issues of refugee choice, there is an increasingly viewed corollary between the well-recognized right to depart and a nascent right to choose.

Moreover, if people on the move are allowed to be lawfully present in a territory, there exists a qualified obligation or to allow them freedom of movement and perhaps--in addition to their right to depart--a right to return. To address these issues, we must look at Korea's state obligations under a number of international legal instruments.

1. Right to Depart

First, Korea is a signatory to the Universal Declaration of Human Rights (UDHR). Article 13 the UDHR recognizes a "right to leave any country, including his own, and to return to his country."[12] Moreover, the New York Declaration for Refugees and Migrants in 2016 also included a right to depart.[13]

According to international law experts, "[M]ore importantly, the right to leave implies a twofold obligation for the state: a negative obligation not to impede departure from its territory and a positive obligation to issue travel documents."[14] Hence, any restrictions on departure should follow the "principle of proportionality," meaning that, to achieve its aims, the state

12) G.A. Res. 217 (III) A, Universal Declaration of Human Rights (December 10, 1948), https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (last visited September 19, 2021).

13) G.A. Res. 71/1, New York Declaration for Refugees and Migrants (September 13, 2016) A/71/L.1, para. 42, https://www.iom.int/sites/default/files/our_work/ODG/GCM/NY_Declaration.pdf.

14) Chetail, supra note 10, p. 81.

will only take the action it needs to and no more.

According to the European Court of Human Rights, "'The restriction may be justified in a given case only if there are clear indications of a genuine public interest which outweigh the individual's right to freedom of movement."[15] That court has, more often than not, shot down attempts by state actors to restrict the right to depart.[16]

As to the right to depart, the UN has noted, "Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus, travelling abroad is covered as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee."[17]

Hence, as regards the management of people on the move, "[T]he right to leave one's own country remains significant in international human rights law. It has potential, and its requirements could usefully be mainstreamed into existing attempts to manage international migration more effectively."[18]

Hence, what of refugee choice? Do refugees have a right to choose their destination? Some argue that such a right is intimated but is not explicitly contained in the international instruments. Could this mean in the future that international norms could force a sovereign state to accept the choice of a migrant to accept that migrant's choice as to her chosen destination? At present this is unclear; however, we have seen the outlines of this nascent policy in the European Union's pressure on Hungary and Poland to comply with their mutual agreements and obligations to accept refugees.[19]

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15) Hajibeyli v Azerbaijan, (App. 16528/05), 10 July 2008, para. 63.

16) Chetail, supra note 10, p. 84 et seq.

17) UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9 (November 2, 1999), available at: https://www.refworld.org/docid/45139c394.html.

18) C. Harvey & R.P. Barnidge, Human Rights, Free Movement, and the Right to Leave in International Law, International Journal of Refugee Law, 2007, p. 20.

19) E.g., Will Kirby, "EU Ultimatum: Brussels Tells Poland & Hungary to 'Accept More Migrants or Leave the Bloc'," The Express (April 4, 2017), https://www.express.co.uk/news/world/787554/eu-poland-hungary-accept-more-migrants

Meanwhile at the international level there is a push to create international bodies that would govern global migration.[20] Following the New York Declaration, the UN went on to create a Global Compact for Safe, Orderly and Regular Migration.[21]

2. Right to Freedom of Movement

Korea is a signatory to the UDHR, Article 13 the UDHR recognizes "a right to freedom of movement and residence within the borders of each State." Korea is also a signatory to the International Convention On Civil And Political Rights (ICCPR),[22] Article 12 of which indicates "[e]veryone lawfully within the territory of a State shall" have a the right to liberty of movement and choice of residence within the territory, subject only to restrictions as provided by law that "are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." Hence, freedom of movement within a territory is limited to those lawfully present.[23]

Because a right to freedom of movement inside the country applies to someone lawfully present within a country's borders, in the event of a mass migration event, states ought to consider whether to allow individuals to enter the country or whether to protect refugees in safe third countries or to have applicants await processing in a safe, adjacent country.

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20) Nayla Rush, "The Global Compact on Refugees: A New Model for International Lawmaking," Center for Immigration Studies (October 26, 2018), https://cis.org/Rush/Global-Compact-Refugees-New-Model-International-Lawmaking.

21) Marrakech Compact, G.A. Res. 73/195, supra note 11.

22) International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (Dec 16, 1966), https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf.

23) UN Human Rights Committee, General Comment, supra note 17.

3. Right to Admission

At present, while there may well be a customary international norm regarding the right to depart, there is not a concomitant obligation of admission to another country.

This point is well stated by Professor Chetail:

> Departure has been divorced from admission to constitute a distinctive norm primarily addressed to the states of origin and reinforced by the right to return. Human rights law recognizes the right to leave any country at one side of the migration continuum, and the right to return to one's own country at the other extreme. In between the two, there is no explicit right of admission into another country. This intentional omission plainly signals that, at its current stage of development, public international law does not guarantee a general freedom of movement.[24]

Chetail continues:

> The resulting distinction between emigration and immigration represents the core conundrum of international migration law. The right to emigrate has been endorsed and restated as an internationally protected right on its own in numerous treaties, declarations, and constitutional enactments to become a norm of customary international law. By contrast, immigration is primarily— but not exclusively— left to the domestic legislation of each state, which may accordingly vary from one country to another. Despite the practical meddling between the two, departure and admission have been conceived and recognized by international law as two distinct legal spheres governed by their respective set of legal norms and responsibilities. The duty holder of the right to leave is the state of departure, whereas admission remains the responsibility of the state of destination. However, this enduring disjuncture between emigration and immigration does not entail that international law has no say over the admission of migrants.[25]

In short, at present, it is Korean domestic law that determines admission;

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24) Chetail, supra note 10, p. 91.
25) Ibid, p. 92.

however, once a person has been admitted, under treaty obligations that person may be entitled to freedom of movement, freedom to depart, and possibly freedom to return.

Recall that ICCPR Article 12(4) says, "No one shall be arbitrarily deprived of the right to enter his own country." This designation "his own country" may be interpreted to mean not only the country of one's citizenship but also a country to which one has close and strong ties: such as long-term or permanent residents as well as stateless persons. According to the UN Human Rights Committee, "The scope of 'his own country' is broader than the concept 'country of his nationality.' It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien."[26] Hence, while this right is limited for non-nationals it may be argued that it protects the rights acquired by one lawfully present such as a permanent resident or one on a humanitarian visa (including refugees) including the right to remain.

4. Impact on Korean Law and Policy

Korea does allow persons given humanitarian protection the right to depart and to return. If refugee visa holders have applied for and received a Refugee Travel Document, they are exempt from seeking a re-entry permit.[27] It is possible for them even to visit their own country--the one where they will allegedly be persecuted--if they do not fall under Article 22 of the Refugee Act.[28] Holders of humanitarian visas, on the other hand,

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26) UN Human Rights Committee, General Comment, supra note 17.

27) Korean Ministry of Justice, Refugee Status Determination Procedures in Korea: Handbook for Recognized Refugees, Humanitarian Status Holders, and Refugee Status Applicants, 2015, p. 6.

28) Refugee Act of the Republic of Korea; available at: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=43622&lang=ENG. Article 22 says if one voluntarily goes back to one's own country and if based on the facts the Korean government sees that such person is being protected by that country, then one's refugee status may be revoked.

need to affirmatively apply for a re-entry permit to come back into Korea after travelling abroad. They can even visit their home country; the Korean government may look at such fact when considering whether to renew the G-1 visa with the primary consideration being whether there remains a threat to that person.[29)]

As for persons lawfully present, Korea must allow them freedom of movement. Freedom of movement was particularly an issue during the Yemeni Refugee Crisis in 2018 as the refugee applicants, although lawfully present due to visa-free travel, were not allowed to leave Jeju until they were granted a certain status.[30)]

Ⅲ. Principles of Non-refoulement and Family Reunification

Most people on the move who are involved in mass migration events are presumed not to have appropriate paperwork such as a visa allowing them entry. After all, they are fleeing danger or natural or economic disaster and are thus reliant on receiving humanitarian relief.

Korea does allow people to apply for humanitarian relief both inside Korea and at the border. Although refugee status is typically granted as a matter of discretion and not a matter of right, Korea has limited its sovereignty in that if a person qualifies for refugee status under the Refugee Act and if that person is not disqualified under Article 19 of said act, they will be granted refugee status.[31)] Korea's obligations toward

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29) Korean Ministry of Justice response to Freedom of Information Act request, on file with author.

30) Jeju Immigration Office, White Paper About Yemen Refugees 2018 [2018 제주 예멘 난민 백서]. Perhaps a reason for preventing movement was a concern that the applicants might disappear as illegal immigrants and perhaps concerns among the Korean public about Arabic people coming into Korea with regards to security (such as terrorism).

31) In Korea, an applicant for Refugee status must meet the statutory guidelines and must not fall under Article 19 of the Refugee Act (Restrictions on Recognition of Refugee Status) or Article 22 (Cancellation, etc. of Decision to Recognize Refugee Status). However, provided the provisions for the grant of refugee status are met and

refugees arise because Korea is a party[32] to the 1951 UN Refugee Convention and its 1967 Protocol.[33] Yet, because the Convention is not self-executing, each member state must pass legislation in keeping with its obligations under the Convention.[34] Korea finally enacted enabling legislation in 2012,[35] making Korea the first country in Asia to have done so.[36]

If an individual does not qualify for refugee status, they may yet qualify for a limited humanitarian-based visa.[37] A humanitarian visa will allow a holder to remain in Korea while the dangerous situation continues. It does

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provided the applicant does not fall under Article 19 or 22, the grant of refugee status is not discretionary in Korea, meaning if a person qualifies and is not disqualified, the government may not nevertheless refuse as is the case in America and elsewhere.

32) Korea became a party on 3 December 1992. Il Lee et al., Legal Support Manual for Refugee Cases, Seoul Bar Association, 2018, p. 4 [난민사건 법률지원 매뉴얼].

33) Human Rights Watch, World Report 2018 - South Korea, REFWORLD (January 18, 2018), https://www.refworld.org/docid/5a61ee294.html.

34) Stephen H. Legomsky & David B. Thronson, Immigration and Refugee Law and Policy, 7th ed. Foundation Press, 2018, p. 1163. We will take the liberty of substituting Korea for the United States in the following text: "When the [Korea] ratified the 1967 Protocol, it became derivatively bound by the 1951 Convention. Thus, international law obligates the [Republic of Korea] to respect all the refugee rights that the Convention recognizes. But how the [Republic of Korea] internally allocates the responsibility for implementing those international legal obligations is a matter of domestic [Korean] law. Domestic [Korean] law, in turn, distinguishes those international agreements that are "self-executing" from those that are not. A self-executing agreement is one that creates binding internal law without the need for any subsequent implementing legislation. A treaty that is not self-executing still creates binding international legal obligations for all the states parties, but those obligations will not be enforceable in [Korean] courts until [the Korean legislature] enacts the necessary implementing legislation. Even then, the resulting legal obligations normally flow from that statute, not from the treaty."

35) The term "refugee" means a foreigner who is unable or does not desire to receive protection from the nation of his/her nationality in well-grounded fear that he/she is likely to be persecuted based on race, religion, nationality, the status of a member of a specific social group, or political opinion or a stateless foreigner who is unable or does not desire to return to the nation in which he/she resided before entering the Republic of Korea in such fear. See Refugee Act of the Republic of Korea Art. 2 Par. 1.

36) Ho-joon Huh, "South Korea First Asian Country to Enact Refugee Legislation," Hankyoreh (June 20, 2018), https://english.hani.co.kr/arti/englishedition/e_ international/ 849911.html. See also, Seongsoo Kim, "One Year after the Korean Refugee Act," REFLAW (January 7, 2015), http://www.reflaw.org/one-year-after-the- korean-refugee-act/.

37) Refugee Status Determination Procedures in Korea, supra note 27.

not allow an automatic right to work or to travel but holders can apply for permission to do so. Unlike a refugee visa, a humanitarian visa does not allow for family reunification or a pathway to citizenship.[38] As we shall see below, the refugee visa and the humanitarian visa are intended to satisfy Korea's obligations under the principle of non-refoulement.

As the foregoing section concluded, there is no clear-cut right of entry under international law as it presently stands. Nevertheless, there are at least two subordinate principles: (1) the principle of non-refoulement and (2) family reunification. As we shall see, it may be argued that under customary international norms, a state like Korea may be prohibited from refusing admission when it would violate the principle of non-refoulement or of family reunification.

First, as to the principle of non-refoulement, this principle is enshrined in many human rights documents: for example, under refugee law it is embedded in Article 33 of the Refugee Convention[39] to which Korea is a signatory and under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[40]

At its heart, the principle of non-refoulement says that a state cannot send someone back to a place where they would be subject to torture, persecution, or other serious human rights abuse. The commitment to the principle of

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38) Ibid.

39) Convention Relating to the Status of Refugees (adopted July 28, 1951, entered into force April 22, 1954), amended by the Protocol Relating to the Status of Refugees (adopted January 31, 1967, entered into force October 4, 1967) 606 UNTS 267 (Refugee Convention) Art 33(1).

40) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with Art. 27(1). Korea ratified the Convention against Torture (CAT) on January 9, 1995, and it came into effect on February 8, 1995; yet, Korea has not ratified the Optional Protocol to the Convention. UN Treaty Body Database, Ratification Status for Republic of Korea, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=47&Lang=EN (last visited Sept. 16, 2021). Moreover, domestic law, including the Constitution, outlaws the act of torture. Asian Human Rights Commission, Torture in South Korea, http://www.humanrights.asia/tortures/torture-in-south-korea/ (last visited September 19, 2021).

non-refoulement was reiterated in both the 2016 New York Declaration for Refugees and Migrants and the 2017 Global Compact for Safe, Orderly, and Regular Migration and the Global Compact on Refugees.[41]

Second, as to the principle of family reunification--this principle is, unfortunately, on a bit shakier ground. There is wide disagreement as to whether this is, in fact, a norm of customary law. Let us examine the logic from both sides.

Under various conventions, states have a duty to protect the right of family life and to prohibit unlawful or arbitrary interference with family life. The logic, then, goes as follows: "A right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance. This right is entrenched in universal and regional human rights instruments and international humanitarian law, and it applies to all human beings, regardless of their status. It therefore also applies in the refugee context. A small minority of participants, while recognizing the importance of family, did not refer to family unity as a right but as a principle."[42]

The right to family unity[43] is derived from, *inter alia,* UDHR Article 16,[44] ICCPR Articles 17 and 23,[45] as well as the International Covenant on Economic, Social, and Cultural Rights Article 10,[46] and many other regional

41) UN General Assembly, "New York Declaration for Refugees and Migrants," (October 3, 2016) A/RES/71/1, paras 24, 58, and 67, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf; Global Compact for Safe, Orderly and Regular Migration (July 13, 2018), para 37, https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf; and UN General Assembly, "Report of the United Nations High Commissioner for Refugees- Part II, Global Compact on Refugees," (August 2, 2018, reissued September 12, 2018) UN Doc A/73/12, para 5.

42) Erika Feller et al., Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003, p. 604.

43) See, Frances Nicholson, "Legal and Protection Policy Research Series: The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied," UN High Commissioner for Refugees (UNHCR) (January 2018) PPLA/2018/01, https://www.unhcr.org/5a8c40ba1.pdf.

44) UDHR, supra note 12.

45) ICCPR, supra note 22.

46) G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966),

and international charters and conventions that recognize the family unit.[47] None of these, however, mention a "right of family reunification" directly. For example, even the Refugee Convention does not mention family reunification. Nevertheless, "The obligation to respect the right of refugees to family unity is a basic human right which applies irrespective of whether or not a country is a party to the 1951 Convention."[48] Hence, it is argued, states should take measures to maintain the unity of the family and to reunite family members. Refusal to allow reunification could be considered interference with the right to family life (i.e. ICCPR Article 17) as would unlawful deportation or expulsion.[49]

In the refugee context, and frankly in many countries in general, family migration is the only means of permanent immigration. Experts also say that countries should also be concerned regarding preventing the separation of families and especially of unaccompanied children.[50]

Although the term "family" has not been defined in international law, each case would be a question of fact determined on a case by case basis and documentation requests should be "realistic."[51] According to Professor Chetail, "family reunification is a positive obligation deriving from the right to respect for family life. . . . Assuming family reunification as an implicit – albeit integral– component of the right to respect for family life has a quite significant impact on the plane of general international law, for the right to respect for family life is conventionally regarded as a customary norm of international law."[52]

Reuniting spouses and minor children of documented migrants is proposed as a *de minimis* norm for customary international law, especially as to the minor children, given the wide-adoption of the Convention on the

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993 U.N.T.S. 3, entered into force Jan. 3, 1976, p. 3.

47) See, e.g., Organization of American States (OAS), "American Convention on Human Rights, 'Pact of San Jose, Costa Rica,'" (November 22, 1969), https://www.refworld.org/docid/3ae6b36510.html.

48) Feller et al., supra note 42, p. 605.

49) Ibid.

50) Ibid, pp. 606-607.

51) Ibid.

52) Chetail, supra note 10, p. 126.

Rights of the Child and the best interest of the child standard. CRC Article 10(1) says, "In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family."

Chetail acknowledges: "[B]esides the particular case of children, there is no general duty of family reunification under customary international law. In other words, the emergence of a customary norm is not yet sanctioned by a widespread *opinio juris* when the interest of the child is not at stake. The relevant state practice is also much less uniform with regard to other dependent relatives or unmarried partners without children. The Global Compact for Migration is however promoting a slightly broader understanding: while most references to family unity are made with respect to children, the Compact underlines as well the need to 'facilitate access to procedures for family reunification for migrants at all skills levels through appropriate measures that promote the realization of the right to family life and the best interests of the child'. This should notably be achieved 'by reviewing and revising applicable requirements, such as on income, language proficiency, length of stay, work authorization, and access to social security and services'."[53]

In the Republic of Korea, family reunification became an issue with the Yemeni Refugee Crisis as the vast majority of applicants for refugee status received instead a limited humanitarian visa. The refugee visa permits family reunification for a spouse and minor children.[54] The invited family members are also recognized as refugees as well.[55] However, unlike

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53) Chetail, supra note 10 p. 131.

54) Yeongheon Kim, Two Yemeni Journalists, First Recognition of Refugee Status, Hankookilbo (December 14, 2018), https://www.hankookilbo.com/News/Read/ 201812141600047130 [한국일보, "예멘 언론인 2명, 첫 난민 지위 인정(2018.12.14)"].

55) Ibid.

refugee status, no family reunification is allowed for humanitarian visa holders.[56] Regarding family reunification, one Yemeni humanitarian visa holder, Nasr Alyaremi, who worked at a Yemeni restaurant in Jeju, mentioned, “My wife is in Yemen and I really want to live with her in South Korea, where is a safe country, but now it is impossible because the Korean government did not allow me to bring her in this country.”[57]

The difficulty is that the average length of exile in such cases is more than ten years![58] Should a humanitarian visa holder from Yemen be separated from his or her family for a decade? Is it reasonable?

As we have shown, while there may as yet be no recognition of a right to family reunification as a norm of customary international law, there may nevertheless be a moral obligation. States should carefully consider such obligations to persons in deciding whether to allow them to enter or remain on a lawful status. However, once it does allow them to be lawfully present, the state ought to carefully consider both its legal, convention, obligations as well as its moral obligations. For example, Korea might consider allowing those on humanitarian status to reunite in Korea with their immediate family (partner and young, unmarried children).

Ⅳ. Procedural Safeguards: Detention and Removal

In a mass migration event, the issue of properly housing and providing for the persons involved becomes paramount as do considerations about detaining such persons, and separation of families and children, while processing takes place.

For example, customary international law prohibits arbitrary detention (including immigrant detention) as well as detention on arrival or during

56) Beodle Kang, Yemeni "Humanitarian Visa"...What's Different from Refugee Status?, JTBC (October 17, 2018), http://news.jtbc.joins.com/article/article.aspx? news_id=NB11711825. [JTBC, “예멘인 ‘인도적 체류’ … 난민과 다른 점? 관리는 어떻게?(2018.10.17)”].

57) Ibid.

58) Alexander Betts & Paul Collier, Refuge: Rethinking Refugee Policy in a Changing World, Oxford University Press, 2017, p. 1.

processing. The detention of undocumented immigrants, sometimes called illegal immigrants, is not necessarily arbitrary,[59] but the UN urges states to avoid unnecessary or long detentions and to come up with alternatives where available. Likewise, the detention of asylum seekers is not per se arbitrary.[60]

The Global Compact for Safe, Orderly, and Regular Migration, objective 13, paragraph 29 identifies three key practices:

(1) detention must be in accordance with and authorized by law; (2) any deprivation of liberty must be reasonable, necessary, and proportionate (i.e., automatic detention for irregular entry or stay is considered arbitrary and alternatives must be sought especially for children); and (3) a right to challenge the detention in court.[61]

In addition to the right against arbitrary detention. Detainees have a right of access to consular services.[62] There are also prohibitions on inhumane and degrading treatment of detainees.

Meanwhile, aside from detention—migrants have rights with regards to removal. Article 13 of the ICCPR states: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

This norm may extend to *collective* expulsions of undocumented non-immigrants (based in part on the principle of non-discrimination). Many states have ratified conventions prohibiting collective expulsions. Courts have agreed.[63] Moreover, the Global Compact for Safe, Orderly and Regular Migration in paragraphs 24(a) and 37 indicates each migrant is

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59) Saadi v the United Kingdom, (App. 13229/03), 29 January 2008, para. 64.
60) A v Australia, (Communication No 560/1993), UN Doc CCPR/C/59/D/560/1993, 30 April 1997, para. 9.3.
61) Marrakech Compact, supra note 11.
62) Vienna Convention on Consular Relations (1963) Art. 36.
63) Andric v Sweden, (App. 45917/99), 23 February 1999, para. 1.

entitled to *individual* proceedings on expulsion on a case-by-case basis. Moreover, the prohibition against collective expulsion has been held to extend to interdiction of vessels on the high seas as well as to any act of driving someone away from a state's border.[64] There is a right to procedure for every person *as an individual,* even in cases of mass influx.[65]

However, although there perhaps must be some procedure, the level of such procedure is less clear. According to the Human Rights Committee and the European Court of Human Rights, "the right to a fair trial does not apply to decisions on entry, stay, and expulsion of aliens on the disputable ground that they do not concern the determination of civil rights or criminal obligations under the meaning."[66] Moreover, a right to review such decisions is not recognized in international law. Nevertheless, the Global Convention on Migration urges states to "commit . . . to guarantee due process, individual assessment and effective remedy." As we will see below, based on the Covid-19 pandemic the United Status utilized Title 42 to return migrants immediately without a hearing because to detain them and give a hearing would itself present a health risk.

Finally, there is under international law, the prohibition of torture or inhuman or degrading treatment or punishment. Hence, forced removal or refusal of admission may at times be degrading or inhuman—for example, due to a medical condition or repeated removal to a country that refuses to take someone. Refusal based on race is also discrimination and not allowed. The right to life may apply to persons at sea or crossing deserts. "More generally," says Professor Chetail, "due respect for the right to life requires that coercive measures to carry out forced removals of undocumented migrants be used as a last resort and be strictly proportionate to the resistance of the returnees." The violation of which may lead to punishment of perpetrators and remuneration for family members.[67]

These provisions present a conundrum for a sovereign state like Korea.

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64) Hirsi Jamaa and Others v Italy, (App. 27765/09), 23 February 2012, paras. 169-180.
65) Khlaifia and Others v Italy, (App. 16483/12), 15 December 2016, para. 241.
66) Chetail, supra note 10, p. 141.
67) Chetail, supra note 10, p. 143.

It seems difficult to stop mass migration events because such might be deemed "collective expulsion." Also the state is allegedly limited as to detaining such persons. It seems that states are encouraged to release such migrants, allowing them to freely travel and dwell anywhere they choose, and *hope* they show up at their court dates, dates that may be delayed by years and backlogs. Meanwhile, such persons may be allowed to work and allowed family reunification. The tangled web of international law in this area is truly a challenge for a state that is conscientious both toward its own citizens and toward migrants fleeing danger.

Ⅴ. The Right to Sojourn

If, based on a mass migration event, Korea were to choose to admit an alien into the country or even if the alien were to enter surreptitiously; after that, legally, a plethora of international rights and norms obtain. Most notably: non-discrimination and equality under the law. Put another way, "While a *jus communicationis,* in the sense that a State is obliged to admit aliens, does not exist under customary international law, the rules on the treatment of aliens apply irrespective of any formal act of admission. In other words, the mere presence of the alien within the jurisdiction of another State is considered to give rise to an international situation which entails obligations and rights of the States concerned."[68]

Protections afforded to citizens and non-citizens are largely attributable to the international human rights regime. Human rights law breaks down the barriers between citizens and non-citizens. UDHR Article 2 says, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . ."[69] Member states may not treat people differently based on

68) International Law Commission (ILC), Third Report on the Content, Forms and Degrees of International Responsibility (Part Two of the Draft Articles), by Mr. Willem Riphagen, Special Rapporteur, U.N. Doc. A/CN.4/354 Corr.1 Add. 1 & 2, 1982, para. 48.

these specific grounds.

In addition, UDHR Article 7 enshrines equality before the law: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[70] However, it is true that states do discriminate by making lawful differences in treatment. "Indeed, the prohibition of discrimination does not include (and preclude) all differences of treatment. According to the prevailing understanding of discrimination, a difference of treatment is not discriminatory when three cumulative conditions are fulfilled: the differentiation is reasonable, objective, and proportionate to achieve a legitimate aim."[71]

There is a debate as to whether the principle of non-discrimination rises to the level of *jus cogens*. That debate is more settled as to the specific issue of racial discrimination. If the rule of any country violates the principles of racial discrimination, those rules or actions would be void. The international community would then trigger three duties among the international community, "a duty of non-assistance in maintaining the situation created by the breach, a duty of non-recognition of the lawfulness of such a situation, and a duty of cooperation to bring to an end, through lawful means, the breach of the peremptory norm."[72]

Interestingly, Article 2 of the UDHR if read carefully, prohibitions against discrimination in the UDHR refer to "national origin," meaning that naturalized citizens should not be discriminated against by those born in the country. However, the UDHR does not mention non-nationals at all—though it does refer to "other status" which might include immigrant status.

In addition, the International Convention on the Elimination of All Forms

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69) UDHR, supra note 12.

70) Ibid.

71) Chetail, supra note 10, p. 148; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, 2001, p. 113.

72) Chetail, supra note 10, p. 151.

of Racial Discrimination (ICERD), Article 1(2) explicitly says, "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." Efforts have been made to soften the interpretation of this article. For example, the UN Committee on the Elimination of Racial Discrimination notes, "Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law." And, "'[u]nder the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim."[73]

As for Economic and Social rights, ICCPR Article 2(1) says: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Despite having almost exactly the same language as UDHR regarding "national origin," nevertheless the Human Rights Commission has interpreted ICCPR Article 2(1) as applying "'to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. . . . Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens." [74]

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73) UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation XXX on Discrimination Against Non-Citizens, U.N. Doc. HRI/GEN/1/Rev.7/Add.1, October 1, 2002, paras. 3- 4.

74) UN Human Rights Committee, CCPR General Comment No 15: The Position of Aliens under the Covenant, (April 11, 1986) paras. 1 - 2, available at: https://www.refworld.org/docid/45139acfc.html.

Perhaps that reading is based, in part, on the specific language in ICCPR Articles 12(1) and 13, which limit those rights—rights to move freely and to due process in cases of expulsion—to those who are "lawfully present." (A negative reading would say: only two clauses limit rights to those lawfully present, therefore the rest have no such limitation.) Still, it is a strange and strained reading to apply ICCPR to undocumented non-immigrants (so-called "illegal aliens"). This gap ought to be addressed or clarified in future international instruments.

Nevertheless, the HRC says that the following rights apply to non-nationals (one wonders whether they mean to limit these to those lawfully present considering that they include the right to freedom of movement without noting that such is limited to those who are lawfully present):

Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as

minors. In those cases where aliens constitute a minority within the meaning of Article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant."[75]

Rights reserved to citizens include the right to vote and to participate in elections. It is unclear what human rights norms apply to undocumented noncitizens. The claim by international law experts is that human rights norms apply regardless of one's immigrant status as has been noted in the recent "soft law" resolutions and declarations.

In addition, a state may look to its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). While ICESCR rights are not contingent upon nationality or immigration status: yet, Article 2(3), states "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to nonnationals." Indonesia explained this item was included as a response toward non-nationals as regards colonialism[76] (perhaps cynically justifying discrimination against ethnic Chinese).

Once a person is admitted into a state or steals into a state surreptitiously, multiple rights and obligations attach, including but not limited to medical care and primary education among others. Other rights also apply to migrants regardless of legal status including the prohibition on degrading and inhuman treatment. Moreover, the International Labor Organization has stated that all labor human rights apply to all migrant workers regardless of immigrant status;[77] whereas, certain welfare

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75) Ibid, para.7.

76) U.N. GAOR, 25th Sess., 1185th mtg. U.N. Doc. A/C.3/SR.1185, 1962, para. 37.

77) International Labour Conference, Report VI: Toward a Fair Deal for Migrant Workers in the Global Economy, 92nd Session, 2004, para. 229, https://www.ilo.org/public/

insurances, such as employment or social security benefits, are subject to restriction based on immigrant status.

Due to the vagaries in the above quoted international documents, it is difficult to argue for *jus cogens* in light of the actual language of the ICCPR, ICESCR, and ICERD. Nevertheless, "although states remain anxious with regard to economic and social rights, there is a growing consensus to guarantee undocumented migrants equal access to a minimum core set of rights."[78]

Thus, in the face of a mass migrant event, a state party must carefully consider whether it is willing or, indeed, whether it has the capacity to provide the above mentioned rights to those who come under its protection and it must account for its Convention obligations both to those migrants present lawfully and those present without documentation.

Ⅵ. Conclusion

Korea has sovereignty over its territory which includes the power to allow or to deny admission of migrants. However, as demonstrated above, Korea's sovereignty has been limited by accession to international instruments, those that are binding such as the Refugee Convention and also to a lesser extent by soft law compacts like the more recent Global Compact on Migration. However, as indicated, the fact that a State has a recognized obligation does not necessarily mean that it is always able or willing to fulfil that obligation. An example of this when it comes to a mass migration event was seen in the Yemeni Refugee Crisis when, although the people on the move from Yemen were lawfully within the territory of the Republic of Korea having travelled on the visa-free system allowed by Jeju Island, having applied for refugee status, they were not allowed to move freely within Korea until those applications were

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english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf.

78) Chetail, supra note 10, p. 160.

processed. Certainly, legal distinctions can be made, such as the fact that Jeju is an autonomous governing region capable of administering its own visa system, which is where the trouble began since Jeju neglected to account for the changing situation in Yemen. Perhaps one can say that the applicants were allowed to travel within that region but not to other regions. Nevertheless, the decision to keep the applicants in Jeju did raise concerns.

However, we would like to soften that perspective. Under the Vienna Convention on the Law of Treaties says under Article 26, *"Pacta sunt servanda* – Every treaty in force is binding upon the parties to it and must be performed by them in good faith." [79]Hence, it appears that a state must always abide by its agreements no matter what. However, the Latin quote is derived from Pufendorf who was citing to Cicero; however, Pufendorf did not quote the phrase in its entirety. Tully wrote, "Pacta et promise semperne servanda sunt, quae nec vi nec dolo malo, ut praetors solent, facta sint."[80] Thus, Tully says promises should be kept "except where" and then goes on to give a detailed explanation of when promises ought not to be kept. So perhaps we ought to quote another phrase from Pufendorf, one ought to "temper pity with prudence."[81] Although under international law it is possible that Korea ought to have let the Yemeni applicants move freely, yet as a matter of practicality and for other reasons, such a decision may have been justified. In fact, when it comes to mass migrant events, the United States is at present not giving individual adjudications as perhaps is necessary due to the Covid-19 pandemic and is, under what is known as Title 42,[82] returning people immediately to the

79) Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

80) Cicero, De Officiis [On Duties] 3.24.92-95.

81) Samuel Pufendorf, Of the Law of Nature and Nations, Book III, Chapter III, Part X, p. 198 Oxford (2d ed. 1710), available at: http://lawlibrary.wm.edu/wythepedia/library/PufendorfOfTheLawOfNatureAndNations1710.pdf.

82) Under 42 U.S.C. §§ 265 & 268 (2019). The Centers for Disease Control and Prevention (CDC) issued an order on March 2020 which can also be found in the Federal Register. https://www.cdc.gov/coronavirus/2019-ncov/order-suspending-introduction-certain-persons.html; Control of Communicable Diseases, 85 Fed. Reg. 16,559 (March 24, 2020) (to be codified at 42 C.F.R. pt. 71), https://www.govinfo.gov/content/pkg

country of last transit.

Nevertheless, having admitted the Yemeni applicants by way of humanitarian visas, it does seem unfortunate that such a status does not allow for family reunification, particularly for immediate family members. Although such a duty is not explicitly incumbent upon the Republic of Korea, as a moral obligation perhaps it ought to be honored.

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[Abstract]

International Obligations Undertaken by the Republic of Korea with Regards to Mass Migration Events

David Lee Mundy*

People on the move involved in mass migration events have rights on the international plane that must be recognized particularly by state signatories to the various conventions that govern migration. Yet providing for these obligations, and the duration of such obligations, constitute a challenge for a state that is conscientious both toward those already within its borders and toward migrants fleeing danger. This paper surveys the landscape of the international obligations undertaken by the Republic of Korea as to people on the move, particularly as it relates to individuals involved in mass migration events. The paper also touches upon exceptions to obligations when faced with unusual circumstances such as a pandemic situation.

Keywords : Migration, Refugee Law, Global Compact on Migration, Mass Migration, Vienna Convention on the Law of Treaties

* David Lee Mundy, Handong International Law School (Pohang, Republic of Korea). Email: david@mundy.kr. Professor Mundy would like to thank students Hojin Joung and Anna Jang for their contributions.