

More than an Ignorant Bystander: Chinese Accountability and the Repatriation of North Korean Defectors

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When it comes to human rights abuses, North Korea is in a category of its own. Since 2003, the General Assembly of the United Nations has annually adopted a resolution to condemn the country's record. However, it was not until 2013 that the UN's Human Rights Council created a Commission of Inquiry to investigate the State's human rights violations. In their 400-page report, the Commission reached two conclusions: first, that North Korea has infringed on its people's rights on a scale and gravity without parallel in the contemporary world; and second, that it has not acted alone, but with the assistance of China. For the first time, China's forced repatriation of North Korean defectors was placed under an international spotlight. This paper explores the possibility that China will be held accountable for North Korea's human rights abuses, especially in light of International Human Rights Law and International Refugee Law.

Keywords: Human Rights, China, Korea, Defectors, Non-refoulement

I. INTRODUCTION

"I ran toward the center of the river... The ice, I'm sure, groaned beneath my weight, but my ears were filled with the sound of my heartbeat. Just let me make it, I thought. Just let me get there and I will be able to live for the first time in so long."¹

1. Joseph Kim and Stephan Talty, *Under The Same Sky: From Starvation In North Korea To Salvation In America* (Houghton Mifflin Harcourt Publishing Company 2015).

This passage is from the story of Joseph Kim, one of the thousands of defectors who have fled North Korea in search of a new life.² Defectors like Kim leave their country because it is one of the world's most oppressive regimes, where life is defined by extreme fear of political persecution, long-term hunger and discrimination. Because it is impossible to cross the heavily armed Demilitarized Zone, they must risk being shot to death while crossing rivers on the dangerous path to China.³

Despite their suffering, the defectors do not receive a warm welcome in China. Under Chinese policy, they are regarded, not as refugees, but as illegal border-crossers.⁴ Hence, instead of providing protection, the Chinese police are instructed to forcibly repatriate them to North Korea, where upon return they will be subjected to charges and reprisals up to and including torture and execution.⁵ Due to political sensitivities, the Chinese Government never provides information on the total number of repatriated North Koreans. Estimates can only be drawn from data collected by other governmental and non-governmental organizations (NGOs). At the beginning of 2000, the number of North Korean defectors repatriated from China reached upwards of 15,000 within a single month.⁶ From 2002, the number steadily dwindled to around 2,000 per month, with a further drop seen between 2004 to 2009.⁷ Nonetheless, the sharp fall in numbers should not be taken as a positive indication of policy change, but rather a result of

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2. North Korea, a country officially known as the Democratic Republic of North Korea.
 3. China, a country officially known as the People's Republic of China.
 4. Roberta Cohen, "China's Repatriation Of North Korean Refugees" (Brookings, 2017) <<http://www.brookings.edu/testimonies/chinas-repatriation-of-north-korean-refugees/>>, p. 1.
 5. Morse Tan, "North Korea, International Law And The Dual Crises" (Taylor and Francis 2015), pp. 52-62.
 6. Suh Jae Jean, Eui Chul Choi, Woo Young Lee, Lim Soon-Hee and Kim Su-Am, "White Paper On Human Rights In North Korea" (KINU 2002) <<http://www.dbpia.co.kr/Issue/VOIS00067531>>, pp. 1-15.
 7. United Refugees, "U.S. Committee For Refugees And Immigrants World Refugee Survey 2007 – China" (Refworld, 2007) <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&skip=0&publisher=USCRI>>.

tightened border control.⁸

To avoid forcible repatriation, North Korean defectors become helpless and easily manipulated subjects while hiding in China.⁹ In particular, women are often subjected to human trafficking and marriage enslavement.¹⁰ As a result, the North Korean human rights crisis passes on to the next generation. According to figures reported by a leading NGO, there are roughly 30,000 stateless children born to North Korean mothers in China. These children are stateless in the sense that they are not recognized by either North Korea or China. They are deprived of their basic rights because their births cannot be registered without exposing their mothers to the risk of refoulement.¹¹

After more than a decade of ignorance, in 2013, the United Nations Human Rights Council (OHCHR) finally established a Commission of Inquiry (COI) to investigate the situation inside North Korea.¹² Although China's repatriation policy was not initially included in its mandate, the role of the Chinese state became evident once the Commission began their work.¹³ In its report, the COI highlighted China's forcible return of tens of thousands of North Koreans, almost all of

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8. Financial Times, "Escape Route From North Korea Grows Ever More Perilous" (2017) <<https://www.ft.com/content/8e0ba354-5229-11e7-bfb8-997009366969>>.
 9. Jeanyoung Jeannie Cho, "Systemizing The Fate Of The Stateless North Korean Migrant: A Legal Guide To Preventing The Automatic Repatriation Of North Korean Migrants In China," (2013) *Fordham International Law Journal*. <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2326&context=ilj>>, p. 206.
 10. Committee On The Elimination Of Discrimination Against Women, *Concluding Comments Of The Committee On The Elimination Of Discrimination Against Women: China* (United Nations Committee 2006), paras. 33-34.
 11. The Guardian, "30,000 North Korean Children Living In Limbo In China" (2017) <<https://www.theguardian.com/world/2016/feb/05/north-koreas-stateless-children>>.
 12. The United Nations General Assembly, Twenty-fifth session 7 February 2014 "Report Of The Detailed Findings Of The Commission Of Inquiry On Human Rights In The Democratic People's Republic Of Korea" (7 February 2014) UN Doc A/HRC/25/CRP.1 <http://www.ohchr.org/Documents/HRBodies/HR-Council/CoIDPRK/Report/A.HRC.25.CRP.1_ENG.doc>, para 1. (COI Report).
 13. Cohen, "China's Repatriation Of North Korean Refugees" (n 4), p. 5.

them subjected to acts of torture, sexual violence, and arbitrary detention.¹⁴ In a letter appended to the report, Chairman Kirby warned China that its officials could be “*aiding and abetting crimes against humanity*.”¹⁵ Nevertheless, China’s Ambassador to the United Nations, Mr. Wu Haitao, responded that China would continue to handle the issues of North Korean citizens in accordance with its domestic law, international law, and humanitarian principles, on the premise of safeguarding state sovereignty, while bearing in mind the stability of the Korean Peninsula.¹⁶ His statement reflects the truth that the problem of North Korean human rights abuses is not merely a moral topic, but one that must be balanced with political reality. And yet, there is also a fundamental legal aspect that lawyers and academics must address.

As such, this paper aims to fill an existing gap by scrutinizing the accountability of China for forcibly repatriating North Korean defectors. Part I introduces the problems caused by the Chinese repatriation policy. Part II challenges China’s justifications and rationales, and examines whether a non-refoulement obligation can be established under The Convention Relating to the Status of Refugees (Refugee Convention) or The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”). Part III explores potential pathways to ensure the full accountability of China, provided that a breach of obligation can be proven. Part IV considers from a personal perspective the extent to which the law can resolve the North Korean problem.

14. ‘COI Report’ (n 12), para. 1114.

15. The United Nations General Assembly, Twenty-fifth session 7 February 2014 “Report Of The Commission Of Inquiry On Human Rights In The Democratic People’s Republic Of Korea” (7 February 2014) UN Doc A/HRC/25/63 <<http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiry-onHRinDPRK.aspx>>, pp. 26-36. (COI Summary Report).

16. *Ibid.*

II. OBLIGATIONS

In response to the COI's accusation, China has defended its policy on the following grounds: (i) bilateral treaty obligations between China and North Korea must be upheld; (ii) North Korean defectors are not refugees but economic migrants; and (iii) repatriated defectors have not faced torture. The validity of these arguments are analyzed below.

A. *Bilateral Treaty Obligations*

Chinese officials have, on various occasions, stated that China does not run afoul of international law by repatriating North Korean defectors due to the existence of bilateral treaties between the two States.¹⁷ The first such treaty, signed in secret in the 1960s, requires China to return any illegal border-crossers to North Korea as criminals.¹⁸ This one-sided treaty in 1964 became a two-sided Mutual Cooperation Protocol.¹⁹ Other than a mutual obligation to maintain border control, the Protocol demands that parties exchange information on individual defectors.²⁰ This collaboration further expanded in 1986, and the Mutual Cooperation Protocol remains valid today.²¹ These three bilateral treaties form the basis for the repatriation policy. They are based on a fundamental principle of International Law: *pacta sunt servanda* codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT), which translates as, "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*" In other words, promises must be kept.

17. Cho, "Systemizing The Fate Of The Stateless North Korean Migrant: A Legal Guide To Preventing The Automatic Repatriation Of North Korean Migrants In China" (n 9), p. 217.

18. Escaped Criminals Reciprocal Extradition Treaty.

19. Protocol between the PRC Ministry of Public Security and the DPRK Social Safety Ministry for Mutual Cooperation in Safeguarding National Security and Social Order in Border Areas.

20. Tan, North Korea, International Law And The Dual Crises (n 5), p. 120.

21. Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas.

However, an exception to the general rule applies if the treaty in question is found to be in conflict with a peremptory norm under International Law. This principle is stated in Article 53 of the VCLT. The concept of a peremptory norm, also known as *jus cogens*, refers to fundamental principles that have been accepted by the international community as a whole and from which no derogation is permitted.²² By applying this principle to the present situation, an exceptional circumstance will arise if China owes a non-refoulement obligation against North Korean defectors as alleged by the COI.

Although the customary status of the principle of non-refoulement has already been well-acknowledged, its *jus cogen* status remains open to debate.²³ Two requirements must be satisfied for a norm to be qualified as a *jus cogen*. First, it must be accepted by the international community as a whole; second, it must be a norm where no derogation is permitted. The second of these is relatively easy to satisfy with regard to North Korea, as a reference can be made to the comments of the Executive Committee of the United Nations High Commissioners for Refugees (UNHCR). In 1996, the UNHCR concluded that “*the principle of non-refoulement is not subject to derogation*,” thus indicating an unambiguous and complete fulfillment of the requirement.²⁴

By comparison, the first requirement is harder to satisfy, since the object concerned is the “international community as a whole.” Professor Jean Allain has devoted great effort to gathering information about Latin American practices to support his argument that the principle in question achieves *jus cogen* status. For example, he cited the 1984 Cartagena Declaration on Refugees that explicitly mentions that “*the principle of non-refoulement...observed as a rule of jus cogens*.” Nonetheless,

22. Rafael Nieto-Navia, “International Peremptory Norms (Jus Cogens) and International Humanitarian Law” (Kluwer Law International 2003) <www.dphu.org/uploads/attachements/books/books_4008_0.pdf>, p. 10.

23. Guy S Goodwin-Gill and Jane McAdam, *The Refugee In International Law* (Oxford University Press 2007).

24. Executive Committee of the High Commissioner’s Programme, “General Conclusion On International Protection No. 79” (The UN Refugee Agency 1996) <<http://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html>>.

without challenging the overall validity of his argument, the author must point out that a legally non-binding Declaration signed by ten regional States can hardly be deemed to represent the international, or even the regional, community's view of a norm.²⁵ Therefore, it is no surprise that the *jus cogen* status of the non-refoulement principle has been tested by the Canadian Supreme Court in the Suresh case.²⁶ The Court held that the applicant must be deported despite the risk of him being tortured. Whilst the Court agreed that the prohibition against torture was a well-established peremptory norm, it refused to comment on the legal status of the principle of non-refoulement.²⁷ From the Court's perspective, the *jus cogens* status of the prohibition of torture did not automatically grant the non-refoulement principle the same status, even if the latter was invoked on the same grounds.

The conservative approach taken by the Court is debatable.²⁸ After all, the Court could not justify the distinction between its absolute prohibition of torture and its non-absolute prohibition of deportation to torture. With the benefit of hindsight, the author would like to argue that, by relying on refutations drawn by the decision, this counter-proves that the principle of non-refoulement had already acquired a *jus cogen* status due to the general acceptance it had received. Such an argument is confirmed by the European Court of Human Rights' (ECtHR) decision in the Saadi case, in which the judges expressly declared, "*Since protection against the treatment prohibited by Article 3 is absolute...there can be no derogation from that rule.*"²⁹

Even if the *jus cogen* status of the non-refoulement principle cannot be established, China may still owe the non-refoulement obligation

25. Jean Allain, "The Jus Cogens Nature Of Non-Refoulement" (2001) 13 *International Journal of Refugee Law* <<https://doi.org/10.1093/ijrl/13.4.533>>, pp. 539-540.

26. *Suresh v Canada* (Minister of Citizenship and Immigration) [2002] Supreme Court of Canada, 1 S.C.R. 3.

27. *Ibid*, para. 61.

28. David Jenkins, "Rethinking Suresh: Refoulement to Torture Under Canada's Charter of Rights and Freedoms," (2009) p. 147.

29. *Saadi v. Italy* [2008] European Court of Human Rights, Appl. No. 37201/06, para 120.

against North Korean defectors under established Refugee or Human Rights Law. The obligation is derived from Article 14 of the Universal Declaration of Human Rights, which protects a person's right to seek asylum. The protection granted to the asylum seeker, however, must be interpreted consistently with a State's sovereign right to determine refugee status; thus does the principle of non-refoulement emerge. Today, this principle's relevance varies by context.³⁰ In the case of China and North Korean refugees, the two relevant grounds are Article 33 of the Refugee Convention and Article 3(1) of the Torture Convention, because both Conventions are ratified by China and have been used by the State as rationales to argue against the establishment of its obligation. The following section examines the strength of China's arguments.

B. Non-refoulement Obligation under Refugee Convention

Article 33 of the Refugee Convention reads, "*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*" To balance State interests and human rights, only people who qualify as 'refugees' are entitled to the non-refoulement protection. On various occasions, China has reiterated its view that it is not contravening this obligation because North Koreans are economic migrants.³¹ In response, the author would like to raise the following points.

Argument 1: Not every North Korean defector is an economic migrant

Based on the UNHCR Handbook on the Determination of Refugee

30. Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope And Content Of The Principle Of Non-Refoulement: Opinion," *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) <<http://www.unhcr.org/419c75ce4.pdf>>, p. 90. (Lauterpacht and Bethlehem).

31. COI Summary Report (n 15), pp. 26-36.

Status (UNHCR Handbook), China is correct in a sense: economic migrants should be distinguished from other refugees, because the former do not qualify for protection under the Convention. An economic migrant is defined as a person who “voluntarily leaves his country in order to take up residence elsewhere”; whereas under Article 1A (2) a refugee refers to someone who is ‘forced’ to move “owing to a well-founded fear of being persecuted.” From China’s perspective, since the Great Famine had already ended, one must assume that all North Koreans who defect do so for economic reasons.³² However, according to data collected by the Korea Institute for National Unification (KINU), among the 4,000 North Korean interviewees who had entered China by 2004, only half had done so for economic reasons.³³ In other words, nearly half of the North Korean defectors who made their way to China left North Korea based on non-economic considerations. Nevertheless, China’s sweeping classification has effectively excluded them from the reach of the Convention.³⁴

Indeed, the critical line between economic migrants and refugees is sometimes blurred and difficult to draw. Hence, the Executive Committee further clarifies in its Handbook that if an economic measure ultimately drives an individual to flee his nation as a result of direct discrimination based on “racial, religious or political aims or intentions directed against a particular group,” then the individual should be regarded as a refugee rather than an economic migrant.³⁵ In North Korea, its Government practice of official discrimination is unique.³⁶ All citizens are divid-

32. UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,” (Geneva, January 1992), UN Doc HCR/IP/4/Eng/REV.1 <<http://www.unhcr.org/4d93528a9.pdf>>, pp. 62-64. (‘UNHCR Handbook’).

33. Lee Keum-Soon, Choi Eui-Chul, Lim Soon-Hee and Kim Soo-Am. White Paper on Human Rights in North Korea, (KINU 2005) <<https://www.amazon.com/White-Paper-Human-Rights-North/dp/8984790109>>, p. 335.

34. Cho, “Systemizing The Fate Of The Stateless North Korean Migrant: A Legal Guide To Preventing The Automatic Repatriation Of North Korean Migrants In China,” (n 9), p. 204.

35. UNHCR Handbook (n 32), para 63.

36. COI Summary Report (n 15), para. 8.

ed into three broad classes with 51 smaller sub-groups. This social structure is known as “Songbun”; under it, each person is ranked on the bases of his gender, race, religious and political opinions.³⁷ With rare exceptions, state-sponsored discrimination will impact and even define a person’s socioeconomic status. For example, those born as members of the “hostile class” will probably be forced to work as hard laborers, simply because jobs are allocated according to the Songbun system. Based on NGO estimates, at least one-third of the total population of North Korea performs slave labor.³⁸ These people should be classified as refugees based on the UNHCR’s definitions, even though their defections might initially be economically driven.

Argument 2: Defector can be a refugee without official recognition

The fact that not all North Korean defectors are economic migrants does not mean that they are automatically entitled to the non-refoulement protection. As stated above, in order to be eligible for protection, a North Korean defector must demonstrate that he is a refugee. However, the question of who deserves the title “refugee” is a far more complicated question than it appears to be, and is the source of much confusion. In both of their papers, academics Daniel Chang Park and Jane Haeun Lee have argued that the Refugee Convention is an ineffective way to secure North Koreans’ rights, because the determination of refugee status remains within China’s sovereignty.³⁹

37. COI Report (n 12), para. 271.

38. Robert Collins, “Marked For Life: SONGBUN, North Korea’s Social Classification System,” (The Committee for Human Rights in North Korea 2012) <https://www.hrnk.org/uploads/pdfs/HRNK_Songbun_Web.pdf>.

39. Jane Haeun Lee, “The Human Rights Context Of North Korean Movement To China: Rights, Law, And Diplomacy” (Undergraduate, The University of Texas at Austin 2016), p. 81. “Specifically, if China refuses to accept NKEC by considering NKEC as illegal immigrants or economic migrants, then Refugee Convention and refugee law are ineffective.” Daniel Chang Park, “The State Responsibility of China for the North Korean Refugees” (Postgraduate, University of Oslo 2008), p. 11. “It is hard to apply North Koreans to protect them because China as a contracting party can decide whether to confer on North Koreans refugee status or not.”

It is true that, under Article 2 of the Charter of the United Nations, China has a legitimate right as a matter of domestic law to decide whether to grant a defector refugee status. But though Park & Lee's argument is partially valid, the author stresses that their interpretation represents a fundamental misunderstanding as to the meaning of "refugee" contained in the Convention. By its text, the concept does not only cover individuals who are formally recognized as refugees, but also those who are not. This is why Article 1A (2) refers to a "*well-founded fear of being persecuted*" without referring to official recognition.⁴⁰ To clarify the uncertainty, the Executive Committee once again reminds us that refugee status is a purely "declarative" matter. A person does not become a refugee because of recognition, but is recognized because he is a refugee.⁴¹ To sum up, the status of a refugee under current International Law is completely independent of his status under national law. Therefore, a defector becomes a refugee once he can satisfy the Article 1A (2) criteria, and thus China automatically owes him a non-refoulement obligation regardless whether the state officially admits this status.

Argument 3: North Korean defectors should be qualified as refugees

Being a contracting party to the Refugee Convention and its Protocol, China has a duty to comply with the obligation of non-refoulement. This obligation is particularly important to North Korea defectors because, other than China, none of the countries commonly used in transit — including Burma, Mongolia, Laos, Thailand and Vietnam — are signatories of the Convention.⁴² To be eligible for the protection, a North Korean defector must prove that he is a "refugee" based on the four criteria set out in Article 1A (2).

40. Lauterpacht and Bethlehem (n 30), p. 116.

41. UNHCR Handbook (n 32), para. 28.

42. Emma Chanlett-Avery, "North Korean Refugees In China And Human Rights Issues: International Response And U.S. Policy Options" (Congressional Research Service 2007) <<https://fas.org/sgp/crs/row/RL34189.pdf>>, pp. 2-3.

(a) Well-founded fear of persecution

To qualify as a refugee, a defector must demonstrate a “*well-founded fear of being persecuted*.” Unfortunately, a definition of persecution cannot be found under the Convention. The legal uncertainty is problematic because states like China use this as a reason to reject refugee claims, even for those backed by strong legal claims.⁴³ To end on a positive note, it is generally agreed that a threat to a person’s life or freedom on the five grounds listed in Article 1A (2) qualify as persecution.⁴⁴ Therefore a defector is most likely to succeed in his claim by relying on the ground of torture because it is undoubtedly a serious human rights violation.

However, persecution alone is insufficient to qualify a North Korean defector as a refugee. The defector also bears a burden of proof with regard to a “*well-founded fear*.”⁴⁵ While fear is a subjective criteria, the requirement that it be “*well-founded*” is an objective one.⁴⁶ In the U.S. case of *Aguilera-Cota*, the court decided that the subjective requirement could be easily satisfied by the applicant’s testimony alone.⁴⁷ However, to make sure that fear is not irrational, it needs to be complemented with an objective requirement making it ‘*well-founded*’.⁴⁸ An assessment of the objective basis of fear can again be based on testimony. This is confirmed by the *Bolanos-Hernandez* case, where the court commented, “*the objective facts are established through the credible and persuasive testimony of the applicant does not make those fears less objective.*”⁴⁹ Yet, it is cautioned

43. David Weissbrodt and Isabel Hortreiter, “The Principle Of Non-Refoulement: Article 3 Of The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment In Comparison With The Non-Refoulement Provisions Of Other International Human Rights Treaties” (1999) 5 *Buffalo Human Rights Law Review* <http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1366&context=faculty_articles>, p. 21. (“Weissbrodt and Hortreiter”).

44. Park, “The State Responsibility of China for the North Korean Refugees” (n 43), p. 50.

45. *Ibid.*, p. 43.

46. Weissbrodt and Hortreiter (n 43), p. 20.

47. *Aguilera-Cota v U.S. Immigration and Naturalization Service* [1990] United States of Court of Appeals, 914 F. 2d 1375.1381

48. Weissbrodt and Isabel Hortreiter (n 43), p. 20.

49. *Bolanos-Hernandez v. U.S. Immigration and Naturalization Service* [1984] United

that the flexible approach adopted by U.S. courts may not apply in the present circumstance, since China is clearly not bound by their legal precedents.

(b) Relevant grounds of persecution

The Refugee Convention demands that the persecution must arise from one of the five grounds listed in Article 1A (2). This requirement is closely linked to the fundamental principle of non-discrimination stated in the UN Charter and other International Human Rights Treaties.⁵⁰

(i) Race – “Race” is listed as a ground of persecution that can qualify a person as a refugee. According to Professor Gill, the meaning of ‘race’ should be interpreted broadly by referring to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to cover all forms of discrimination that are based not just on race, but also color, descent, and national or ethnic origin.⁵¹ In North Korea, the regime places a strong emphasis on maintaining a “pure Korean race.”⁵² In order to do so, nearly all pregnant repatriated women are subject to forced abortion.⁵³ The sexual violence amounts to torture and crimes against humanity.⁵⁴ In one hearing session, a witness recalled North Korean officials pledging to “*exterminate mixed-race people*.”⁵⁵ The author argues that the brutal treatment of children conceived to Chinese fathers may amount to genocide.

(ii) Religion – Religious persecution is common in North Korea. In particular, the COI confirms that Christians are targeted victims of

States of Court of Appeals, 767 F.2d 1277, 1285

50. See Article 1, 13(1)(v) a 55(c), 76(c) of the UN Charter. See also Article 2(1) of the ICCPR.

51. Ibid.

52. COI Report (n 12), para. 369.

53. Ibid, para. 1107.

54. Ibid, para. 1105.

55. Ibid, para. 426.

persecution.⁵⁶ Since religious discrimination is state-sponsored, Christians living in North Korea often find themselves in a marginalized position and classified as members of the lowest class under the Songbun system. Their social status as members of an abused social group should also qualify them as victims of persecution.

(iii) Particular social group – The above situation illustrates that the “particular social group” ground often overlaps with other bases of persecution, such as religion.⁵⁷ Professor Gill believes the ground is broader than the others, and thus “*potentially capable of expansion in favor of a variety of different classes susceptible to persecution.*”⁵⁸ Nonetheless, North Korean defectors are reminded that this ground, like the ground of religion, must be used with caution, because in a normal situation mere membership in a particular social group is insufficient to establish a refugee claim.⁵⁹

(iv) Nationality – According to the UNHCR, the concept of nationality should not be limited to the idea of “citizenship” only.⁶⁰ To clarify the ambiguity, nationality persecution is said to comprise antagonistic attitudes and actions against a national minority.⁶¹ In North Korea, one typical example is the ethnic Japanese. At the end of WWII, having to choose between the South and the North, nearly half of the 2.4 million Koreans who then resided in Japan chose to move to the North due to its “Paradise on Earth” program.⁶² In terms of composition, many of the migrants were originally from the South; around 7,000 held Japanese citizenship.⁶³ This phenomenon crystallized the blurred and impractical distinction drawn between “race” and “nationality” under the Refugee

56. Ibid, para. 1095.

57. UNHCR Handbook (n 32), para. 77.

58. Weissbrodt and Hortreiter (n 43), p. 23.

59. UNHCR Handbook (n 32), para. 77.

60. Ibid, para. 74.

61. Ibid, para. 76.

62. COI Report (n 12), para. 916.

63. Ibid, para. 917.

Convention. While the returnees were expecting a “Paradise” as portrayed by the North Korean government, it did not take them long to realize it was a lie. These voluntary returnees, together with the 100 Japanese believed to be forcibly abducted by North Korea officials, were victims of the discriminatory system, as they were deemed suspicious of political crimes.⁶⁴ Both experts and defectors testimonies’ confirm that Koreans with a Japanese-tie are at higher risk of being detained in political labor camps compared to “pure-Koreans.”⁶⁵

(v) Political opinion – Due to the totalitarian nature of the North Korean regime, the COI devotes a section in its report to the possibility of bringing a case of political genocide against the Government. Regrettably, it is unlikely such a claim will stick, since political opinion alone does not fit the definition of genocide under International Law as the intent to destroy “*a national, ethnical, racial or religious group.*”⁶⁶

(c) Outside the country of nationality or not having a nationality

To qualify as a refugee, one must be outside the country of his own nationality.⁶⁷ This threshold is fulfilled by North Korean defectors hiding in China. However, difficulties may arise regarding the possession of nationality, as most of them are not expected to have a passport. In that case, the UNHCR advises that all factual elements of an applicant should be taken into account while weighing his credibility.⁶⁸

(d) Unable or unwilling to be protected by that country

The last requirement demands proof that a person is unable or unwilling to be protected by his own country. The unavailability of judicial justice is easy to prove by virtue of a lack of an independent judicial system in North Korea.⁶⁹ Although unwillingness is a subjec-

64. Ibid, para. 920.

65. Ibid, para. 925.

66. Ibid, paras. 1157-1158.

67. UNHCR Handbook (n 32), para. 88.

68. Ibid, para. 93.

69. COI Report (n 12), para. 793.

tive test, the UNHCR is happy to accept a case if the unwillingness is based on an objective and well-founded fear.⁷⁰

Argument 4: The possibility of North Koreans being Refugees *sur place*

Given the many hurdles that the Refugee Convention has set, a North Korean defector may not qualify as a refugee at the moment he escapes his country. However, he is reminded that he can still become a refugee at a later stage by claiming the status of refugee *sur place*.⁷¹ A person can become a refugee *sur place* “as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence.”⁷² Therefore, even if a North Korean defector fails to satisfy his claim because of his flawless background, he can still be a refugee *sur place* if he later comes into contact with activist groups, or expresses his political views publicly in a third country. Indeed, recent years have seen a rising trend in high-ranking North Koreans seeking asylum. For instance, Thae Yong-ho, North Korea’s former deputy ambassador to the UK, defected in 2016.⁷³ Jong Yol-ri, an 18-year old student with an elite background, also sought asylum in 2017.⁷⁴ Because of the publicity that these defections have drawn worldwide, it is reasonable to expect that they would be subject to inhuman treatments if repatriated.⁷⁵

70. UNHCR Handbook (n 32), para. 100.

71. *Ibid*, para. 94.

72. *Ibid*, para. 96.

73. BBC, “People Will Rise Against N Korean Regime, Says Defector” (2017) <<http://www.bbc.com/news/world-asia-38741078>>.

74. South China Morning Post, “North Korean Maths Whizz’S Long Taxi Ride To Freedom” (2017) <<http://www.scmp.com/news/china/diplomacy-defence/article/2074200/n-korea-maths-whizzes-long-hong-kong-ride-freedom>>.

75. David R Hawk, *The Hidden Gulag* (US Committee for Human Rights in North Korea 2012), p. 115.

Argument 5: China's obligation of non-refoulement

Once a North Korean defector meets the criteria under Article 1A (2) and is recognized as a refugee, he will be eligible for protections guaranteed by the Refugee Convention to which China is bound. These protections include an obligation of non-refoulement which has the effect of prohibiting China from returning a refugee by virtue of Article 33 (1). The question of whether this obligation has been breached is discussed below.

Argument 6: The invalidity of the conventional exceptions

However, China may rely on certain exceptions to limit its non-refoulement obligation. First of all, China may reject the granting of refugee status by relying on Article 1F of the Refugee Convention. According to Article 1F, a person does not deserve of refugee status if he has committed: (a) a war crime or crime against peace or humanity; (b) a serious non-political crime; or (c) an act contrary to the purposes and principles of the UN. In the present case, grounds (a) and (c) are unlikely to be invoked by China. Regarding scenario (b), before developing its claim, China must first demonstrate that the suspect has been subjected to due process of law in North Korea, since this procedural safeguard is explicitly required by the UNHCR.⁷⁶ Nevertheless, by cross-referencing the COI report, the Commission repeatedly confirms that many of North Koreans are subject to detention and imprisonment without due process.⁷⁷ Hence, China's argument does not hold up.

A more specific limitation China may invoke is Article 33(2). This provides that a refugee cannot benefit from the previous provision if *"there are reasonable grounds for regarding [him] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."* Put simply, the two exceptions can be summarized as "a threat

76. UNHCR Handbook (n 32), para. 154.

77. COI Report (n 12), paras. 844, 1033. See Prosecutor v. Kordić & Čerkez [2001] International Tribunal for the Former Yugoslavia, Case IT-95-14/2, para. 302.

to national security” and “a danger to community interest.” The community interest ground is similar to the Article 1F limitation. However, in this provision, the focus is placed on the danger a person poses to the community, rather than the seriousness of the crime. Regarding national security, this has previously been cited by Mr. Wu as grounds to justify the repatriation policy, although an explanation of how North Korean refugees effect China’s national security has not been provided.⁷⁸ Nevertheless, the author understands that national security remains a politically sensitive topic that she does not intend to comment on further. However, this is not to say that China can continue its repatriation policy simply by throwing up national security as an excuse. Under the UNHCR’s guidelines, only “very serious” danger can justify a refoulement. By applying the proportionality test, a danger will only be serious enough if the threats it poses to China outweighs the risk of persecution a defector faces upon his return.⁷⁹ Although the outcome of each case is within a State’s sovereign rights to decide, China must bear in mind that refoulement is always the last resort.⁸⁰

C. Non-refoulement Obligation under Torture Convention

Beyond the first legal basis illustrated above, a non-refoulement can also arise out of the Torture Convention which China ratified in 1988. Article 3(1) reads, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

Significant differences can be observed by comparing the two bases. First, any person can be protected under the Torture Convention whereas only refugees are eligible for protection under the Refugee Convention. Second, the protection granted by the Torture Convention is broader in that it covers torture of all kinds, i.e. it does not require the torture to be caused by an exhaustive list of reasons, which is how

78. COI Summary Report (n 15), pp. 26-36.

79. *Silver & Others v United Kingdom* [1981] European Convention on Human Rights, 3 EHRR 475.

80. *Lauterpacht and Bethlehem* (n 30), pp 138-140.

the Refugee Convention operates. Nevertheless, the approach taken by the Torture Convention can also be considered restrictive, as it is designed to protect victims of torture only.⁸¹ The difficulty in determining the minimum level of gravity which inhuman treatment must reach in order to qualify as torture has been used by China as an argument to reject its non-refoulement obligation. In response, the author would like to stress the following points.

Argument 1: Repeated repatriations do not disprove the possibility of torture

In his correspondence with the COI, Mr. Wu contends that repatriated DPRK citizens from China do not face torture. Based on his line of reasoning, the fact that many defectors have repeatedly crossed the border disproves the Commission's allegation that defectors have been tortured by the Government upon their return.⁸² Before commenting on its legal validity, this argument is without any logical foundation. Based on common sense, the concept of torture does not necessarily imply an irrecoverable harm that effectively prevents a person from fleeing his country. Instead, according to an NGO's study, around 35% of refugees to the U.S. have been previously subjected to torture.⁸³ The fact that many North Koreans have risked their lives again and again is nothing but strong proof of how desperate they are to leave their country. It does not mean that they have not been tortured. It means life in North Korea may itself be a form of torture.

Argument 2: The existence of torture

To establish a non-refoulement obligation under Article 3 of the Torture Convention, there must be substantial grounds for believing that a North Korean defector would be subjected to torture. Therefore,

81. Weissbrodt and Hortreiter (n 43), p. 8.

82. COI summary Report (n 15), Annex II.

83. "FAQ – Center For Survivors Of Torture (CST) – AACI" (Cst.aaci.org, 2017) <<http://cst.aaci.org/faq/>>.

the meaning of torture must be clarified. To break down the definition set out in Article 1, there are three elements that must be shown in order to qualify a claim of torture. First, an individual must have been subjected to pain or suffering that reaches a “severe” level. Second, the harm must be done for certain purposes, such as to obtain information or a confession, or simply for punishment. Third, it must be carried out by, or with the consent of, a public official or someone acting in a formal capacity.⁸⁴ Although the thresholds are high, the treatments of millions of North Korean defectors should not fall short of these standards.

Based on the findings of the COI, torture is a common feature of North Korea’s interrogation process.⁸⁵ Although such treatment is prohibited under the law, in practice it has often been employed by officials to obtain a confession.⁸⁶ In one of the Commission’s public sharing sessions, Mr. Kim Song-ju recalled being detained in a “cave” with 40 other prisoners after he was repatriated from China. The cave was approximately 80 centimeters high, and his hands were tied up by the police, from which he hung for three consecutive days. This form of punishment, which is known as “pigeon torture” creates enduring and excruciating pain, since the positioning effectively prevents a person from standing or sitting.⁸⁷ Besides pigeon torture, North Korean defectors have also been subjected to other forms of inhuman treatments including “scale,” “airplane” and “motorcycle” tortures that are equally brutal.⁸⁸ As mentioned above, both the COI and NGO reports conclude that all forms of torture, ranging from deprivation of food, water and sleep, prolonged fixed positioning and physical confinement, are used as means to collect information or to obtain confessions, regardless of their truthfulness.⁸⁹ The fact that all of these methods are conducted with official consent, whether given explicitly or implicitly,

84. Weissbrodt and Hortreiter (n 43), pp. 10-11.

85. COI Report (n 12), para 840.

86. *Ibid.* Article 253 of the DPRK Criminal Code criminalizes torture and other illegal means of interrogation.

87. *Ibid.* para 715.

88. *Ibid.* para 717.

89. *Ibid.* para 1105.

must constitute acts of torture under the International Law.⁹⁰

The only problem that may arise in regards to the application of the Torture Convention lies in the last sentence of Article 1(1). It states that torture “does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.” By relying on this, China may raise a defense that the North Koreans defectors do not face torture because those treatments are direct consequences flowing from the crime of escaping the country. Although such argument may appear to be sensible, in reality the written penalty for illegal border crossing, based on the revised Penal Code in 2004, is five years or more of correctional labor or, at the maximum, a life or death sentence.⁹¹ In other words, the “severe beatings, deliberate starvation and other means of torture,” for instance, the rape, forced abortion and infanticide stretch far beyond the black and white legal instruments even at the national level. It is worth noticing that when it comes to the lawfulness of sanctions, the Torture Convention concerns both the local and the international levels. Put simply, any sanctions found to have a tortuous nature cannot be legalized, since these actions are by law a *de facto* violation of *jus cogens*.⁹²

Argument 3: Substantial grounds for believing that the North Korean defectors would be in danger of being subjected to torture

Similar to the “well-founded fear” test, for a non-refoulement to arise under the Torture Convention, both subjective and objective tests must first be passed. The subjective requirement requires a sincere belief that the applicant will be subjected to torture; however, unlike the Refugee grounds, this genuine belief must be held by the Committee against Torture rather than the applicant himself.⁹³ This principle is demonstrated in the case *Ismail Alan v Switzerland*, under which the Committee

90. *Ibid*, para 707.

91. Kyu Chang Lee, “Protection Of North Korean Defectors In China And The Convention Against Torture” (2008) 6 *Regent Journal*, p. 152.

92. *ex parte Pinochet Ugarte* [1999] UK House of Lords, 2 W.L.R. 827

93. Weissbrodt and Hortreiter (n 43), pp. 10-11.

concluded that the question of whether there were subjective grounds for believing that the victim would be in danger of torture was one that the Committee must answer.⁹⁴ However, such subjective belief must be based on objective grounds.⁹⁵ In regards to the objective test, Article 3(2) suggests that “*all relevant considerations, including... the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights*” must be taken into consideration. This particular emphasis on the human rights conditions of the recipient country of an applicant adds extra merits to the use of Torture Convention as a cause of action given the “*systematic, widespread and grave violations of human rights*” situations in the North Korea.⁹⁶

In some cases, the Committee has even considered the fact of whether the recipient country was a party to the Torture Convention while making its objective assessment. For instance in the case *Tahir Hussain Khan v Canada*, the Committee decided not to return Khan to Pakistan because it was found that Pakistan had yet to ratify the Torture Convention. For this reason, the Committee was of the view that a refoulement might not only subject Khan to torture, but effectively prevent him from seeking international protection.⁹⁷ Therefore, by analogy, the same decision should be reached by the Committee in a case involving a North Korean defector to China, since North Korea is likewise not a party to the Convention. In the same case, the Committee also considered the issue of standard of proof that an applicant must reach to show there are “substantial grounds” that he would personally be subjected to torture. The Committee considered that “*even if there could be some doubts about the facts as adduced by the author, it must ensure that his security is not endangered.*”⁹⁸ Such a generous view is not an exceptional, but is the general approach the Committee has applied to

94. *Ismail Alan v. Switzerland* [1996] Committee Against Torture, U.N. Doc. CAT/C/16/D/21/1995.

95. Weissbrodt and Hortreiter (n 43), p. 13.

96. COI Report (n 12), para 690.

97. *Tahir Hussain Khan v. Canada*, [1995] The Committee Against Torture, U.N. Doc. A/50/44, para 46.

98. *Ibid*, para 12.3.

cases where the victims are suspected of having been tortured.⁹⁹ Although previous torture alone cannot guarantee a definite invocation of non-refoulement obligation, the Committee is of the view that “complete accuracy is seldom to be expected by victims of torture,” and the obligation should arise as long as the inconsistency is not material and thus raise doubts about the overall validity of the applicant’s claim.¹⁰⁰ While critics may challenge the overall-lenieny of the Committee’s approach, they should be reminded that the initial and ultimate purpose of the Torture Convention is to “prevent” rather than to “redress” torture.¹⁰¹ This explains the rationale behind its low threshold when comparing to the Refugee Convention.

D. Other international obligations associated with China’s repatriation policy

Although the non-refoulement obligation should form the primary cause of action against China, there are other legal obligations that China has failed to comply with regards to the North Koreans who are currently hiding in China. Since no official data are available, the estimates of the North Korean population in China vary greatly.¹⁰² Regardless of the number, these are real lives that need to be protected by the Law.

1. Women

Apart from the millions of North Koreans who are captured in detention centers, North Korean women often constitute the majority

99. *Pauline Muzonzo Paku Kisoki v Sweden* [1996] The Committee Against Torture, U.N. Doc. CAT/C/16/D/41/1996

100. *Ibid.*

101. *Alan v. Switzerland* (n 94) , para 115.

102. Andrei Lankov, “North Korean Refugees in Northeast China,” University of California Press, *Asian Survey* Vol.44, (2004), p. 860. China alleges that there are approximately 10,000. Some NGOs put the number as high as 300,000, while others generally set the range between 100,000 to 150,000.

of the hidden population.¹⁰³ Among them, 80% of women who enter China fall prey to human traffickers, a phenomenon that constitutes a violation under The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).¹⁰⁴ Under Article 6, China is obliged to suppress trafficking and prostitution activities in all forms and to protect the basic rights of women. Although China may argue that “appropriate measures,” including legislation, have been put into place, the author contends that its refoulement policy has in effect rendered women without protection because of their fear of repatriation.¹⁰⁵

2. Children

There are an estimated 30,000 half-North Korean children in China. They are born to North Korean mothers residing in China without legal permits. They are effectively stateless, because they cannot register the births of their children without exposing themselves to the risk of repatriation.¹⁰⁶ The difficulty these stateless children face by virtue of China’s policy should be regarded as a violation of Article 7 of the Convention on the Rights of the Child (CRC) which China ratified in 1992 and which guarantees every child a right to nationality. As a direct result of their inability to complete family registration, these North Korean children are deprived of their basic rights to education and health under Article 29 and 24. As experts from NGOs have commented, the fear of being detected, seized and repatriated puts these children in an extremely vulnerable position. The author concludes that the policy pursued by China is not made in the best interests of these children.

103. COI Report (n 12), para 460.

104. Tan, “North Korea, International Law And The Dual Crises,” (n 5) p. 53. China has ratified the Convention in 1980.

105. Article 240 of China’s Criminal Code prohibits trafficking of ladies or youngsters. Article 358 prohibited prostitution, with a maximum of 5-10 sentences. See also COI Report (n 12), para 458.

106. COI Report (n 12), para 472.

III. ACCOUNTABILITY

Pursuant to International Law, there are two ways to hold China accountable for its breach of its non-refoulement obligation against the innocent North Korean defectors. One way is by proving a breach of its non-refoulement obligation under a primary rule through the Refugee Convention or the Torture Convention; the other way is by relying on the secondary rule of State Responsibility, i.e. Article 16 of The Draft Articles on the Responsibility of States for Internationally Wrongful Act (“Drafted Articles”) that governs a state’s complicity liability. It refers to a state’s responsibility for aids or assistance that have been given to another state for the commission of internationally wrongful acts.¹⁰⁷ The close relationship between the principle of non-refoulement and complicity is a subject of the legal scholarship of Samuel Shepson.¹⁰⁸

A. Non-refoulement and complicity

The principle of non-refoulement has a long history and is well established in the areas of Refugee and Human Rights Law. On the other hand, Article 16 of the Drafted Articles is a secondary rule grounded on international customs that can only develop derivative responsibility.¹⁰⁹ Due to their legal natures, academics including Shepson and Aust have previously classified the principle of non-refoulement as a rule *lex specialis*, as distinguished from Article 16 which is a rule *lex generalis*.¹¹⁰ As such, Shepson argues that by virtue of Article 55 of the Drafted Articles, the principle of non-refoulement protected under the Conventions must prevail over Article 16. This principle is known as *lex specialis derogat legi generali*, meaning that special

107. Marina Aksenova, *Complicity in International Criminal Law* (Hart Publishing 2016), p. 169.

108. Samuel Shepson, “Jurisdiction In Complicity Cases: Rendition And Refoulement In Domestic And International Courts” 53 *Columbia Journal of Transnational Law*.

109. Samuel Shepson (n 108), p. 712.

110. Samuel Shepson (n 108), p. 713. Helmut Aust (n 117), p. 397.

laws repeal general laws.

There are two other technical reasons why the primary rule should apply. First, non-refoulement obligations share a lower *scienter* threshold than Article 16. Under Article 33 of the Refugee Convention, China is banned from returning a North Korean as long as his or her life or freedom is threatened by repatriation. Article 3 of the Torture Convention prohibits China from *refouler* if there are substantial grounds for believing that a North Korean would be subjected to torture. Although the test of non-refoulement varies between the two Conventions, none of them demands an intent or actual knowledge as the Drafted Articles do. Under Article 16(a), China can only be responsible for complicity if aid or assistance is given to North Korea with knowledge of the circumstances of the internationally wrongful act, combined with a view to facilitating the commission of the internationally wrongful act.¹¹¹ Hence, holding China accountable for its refoulement of North Korean defectors is a much harder task under Article 16 because it requires not just a state's possession of actual knowledge and malicious intent, but also a definite outcome. These higher hurdles under the complicity framework are difficult to overcome, and hence work against the interests of the victims.¹¹²

Second, the responsibility of China under Article 16 is dependent upon the responsibility of North Korea for internationally wrongful acts. Article 16(b) states clearly that for an assisting state to be responsible for complicity, the act must be internationally wrongful on the part of the state committing the act. In other words, the assisted State is also bound by the obligation in question.¹¹³ This fundamental principle of state's consent has deep roots under Article 34 and 35 of the VCLT.¹¹⁴ Nevertheless, the possibility of consent being granted by a hermit

111. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 16, p. 66, para (4)&(5).

112. Samuel Shepson (n 108), p. 714.

113. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 16 (n 111), p. 65, para (6).

114. Vladyslav Lanovoy, *Complicity And Its Limits In The Law Of International Responsibility* (Hart 2016), p. 104.

country like North Korea is unrealistic. It is not a surprise that the DPRK is not a party to the Refugee or Torture Conventions.¹¹⁵ Interestingly, according to research conducted by Weissbrodt, North Korea is not among the few remaining countries unbound to the principle.¹¹⁶ Indeed, North Korea ratified the ICCPR in 1981.¹¹⁷ Consequently, North Korea remains bound by the Convention and its implied principle of non-refoulement under Article 7. The provision provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Despite the fact that the Human Rights Committee has issued very few decisions, this bar seems to have been cleared in the present context.¹¹⁸ Nonetheless the obstacles do not prevent Shepson from concluding, “[I]n some situations, the existence of the non-refoulement provisions in treaties makes determining a State’s complicity in the violation of another State of international law unnecessary.”¹¹⁹

Given the overall validity of Shepson’s arguments, the author largely agrees with him that, in most cases, raising a claim under the conventional non-refoulement basis is a more sensible option than holding a State liable for complicity under Article 16. As far as the defectors’ rights are concerned, the special rule of non-refoulement developed under Article 33 of the Refugee Convention and Article 3 of Torture Convention should be relied upon because of their lower legal

115. UNHCR, United Nations High Commissioner for Refugees, UNHCR, United Nations High Commissioner for Refugees, <<http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>. > United Nations Treaty Collection, 9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, < https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en>.

116. Lauterpacht and Bethlehem (n 30), p. 2.

117. Although in 1997 the State had notified the UN of its intention to withdraw from the Convention, its alleged withdrawal was invalid because an official withdrawal would require an approval from all Member States, which did not happen.

118. In the case *Torres v. Finland*, the applicant built his claim on the possibility of being subjected to torture but was held to be inadmissible due to insufficient evidence. *Torres v. Finland* [1990], The Committee Against Torture, U.N. Doc. A/45/40 (1990).

119. Samuel Shepson (n 108), p. 713.

threshold thus higher chance of success when compared to Article 16. Therefore, the following will focus on the accountability of China for its breach of the non-refoulement principle under its treaty obligations. By virtue of the language of each conventional obligation, the author submits that they should be regarded as the “weaker” form of the special rule, with its specification limited to several points, as opposed to the “strong” forms of *lex specialis*, which are typically self-contained.¹²⁰ In other words, the relevant Drafted Articles will be applied if the treaties are silent on the relevant points.

B. Breach

Breaches of international obligations are discussed in Chapter III of the Drafted Articles.¹²¹ The word “discussed” is used because the question of whether there is a breach is not resolved by the Drafted Articles. A breach of an international obligation is always a matter for the primary rules to decide, and the secondary rules of responsibility only have an ancillary role regarding this.

Under Article 33(1) of the Refugee Convention: *“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”* In comparison, the terms of this provision is almost identical to Article 3(1) of the Torture Convention under which provides that, *“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that*

120. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 (n 111), p.140, Article 55, para (5).

121. *Ibid*, para (2). See Crawford James, *The International Law Commissions Articles on State Responsibility: introduction, text and commentaries*, (Cambridge University Press 2002), p. 16. As Crawford explains “the law relating to the content and the duration of substantive State obligations is as determined by primary rules. The law of State responsibility as articulated in the Draft Articles provides the framework - those rules, denominated “secondary,” which indicate the consequences of a breach of an applicable primary obligation.”

he would be in danger of being subjected to torture."¹²²

Thence the two legal bases can be read together while examining the breach of obligation.

As proven above, China owes North Koreans a number of obligations, especially non-refoulement, which is of primary concern. Because of its forcible reparatory policy, some academics have concluded, "*China has continually breached its international obligations under the Refugee Convention*" and that, "*China violates the Torture Convention each time it repatriates North Korean refugee.*"¹²³ To a very large extent, the author agrees with such comments. Nevertheless, it is believed that further elaboration is needed to make sure that defector suffering is not over-generalized.

To begin with, it must be clarified that the non-refoulement obligation in effect is comprised of three obligations: first and second, the prohibitions of non-expulsion and non-refoulement under both Conventions; and third, the prevention of non-extraction included under Article 3(1) of the Torture Convention. Among all of the three obligations, the duty of non-expulsion should be the least common cause of action because the term expulsion only applies to asylum seekers who enter a contracting country lawfully.¹²⁴ Thus, as far as North Korean defectors are concerned, most of them will not raise an action based on these grounds. Given the "virtual travel-ban" imposed by the North Korean government, it is impossible for them to cross the border without breaking the law.¹²⁵ In the present context, the only relevant case is that of a teenage defector who sought asylum at the South Korean consulate during his stay in Hong Kong for the Mathematical Olympiad in July 2016. He had successfully reached South Korea after an 80-day

122. Weissbrodt and Hortreiter (n 43), p. 25.

123. Tan, *North Korea, International Law And The Dual Crises* (n 5), p. 132.

124. Lauterpacht and Bethlehem (n 30), p. 101.

125. COI Report (n 12), para 380. The Commission finds that DPRK citizens are subject to restrictions on foreign travel that in practice amount to a virtual travel ban on ordinary citizens, which is enforced through extreme violence and harsh punishment.

stay inside the consulate.¹²⁶ As a national delegate, the teenager was one of the few North Koreans who legally entered a foreign territory. Hence, Hong Kong could be at risk of violating its obligation under Article 3(1) of the Torture Convention if the proper procedural safeguards were not observed in the handling of the teenager's case.¹²⁷

As opposed to expulsion, the notion of refoulement applies to people who enter a country illegally.¹²⁸ Likewise, in an ECtHR case, the court's ruling confirms that the return of an applicant to India constituted a violation of Article 3 of the ECHR because of his subjection to torture — regardless of his legal or illegal entry to the UK. Article 3 of the ECHR is content-wise equivalent to Article 3 of Torture Convention and the judgment was built upon the landmark *Soering v UK* case, although in that case the applicant had by then entered the UK legally.¹²⁹ Unlike Article 33 of the Refugee Convention, the non-refoulement obligation under the Torture Convention is an absolute one. Therefore, by implementing its standardized policy of forced repatriation of North Koreans without assessment, China is in breach of its non-refoulement obligation under the Torture Convention. In Tomuschat's words, China, just like European countries during the 1990s, has become an accomplice to the crime of torture, because the danger that defectors will be subjected to torture upon their forced return to North Korea has been well-established.¹³⁰ The

126. South China Morning Post, "Teenage defector's disappearance set off alarm bells among North Korean student delegation to Hong Kong math contest" (2016) at <http://www.scmp.com/news/hong-kong/law-crime/article/1995900/top-south-korean-diplomat-keeps-mum-status-north-korean>.

127. Both the UK and the PRC governments did not extend the Refugee Convention to Hong Kong. However, Hong Kong remains a party to the Torture Convention based on declaration made by the Secretary General in 1997. See "Refugee and Non-Refoulement Law in Hong Kong: The Introduction of the Unified Screening Mechanism" at <http://www.hk-lawyer.org/content/refugee-and-non-refoulement-law-hong-kong-introduction-unified-screening-mechanism>.

128. Weissbrodt and Hortreiter (n 43), p. 57.

129. Article 3 of the ECHR: No one shall be subjected to torture or to inhuman or degrading treatment or punishment. See *Chahal v. United Kingdom* [1997] European Convention on Human Rights, 23 EHRR 413.

130. Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2014).

COI's findings suggest that Chinese officials who are tasked with enforcing the refoulement are generally fully aware of the torturous actions awaiting repatriated North Koreans. In certain circumstances, "*officials even seemed to show sympathy towards captured DPRK citizens, but had to comply with the repatriation policy nonetheless.*"¹³¹ This is particularly true in cases where pregnant women are caught and held in detention centers. One witness testified to seeing a guard suggest to a pregnant woman that she should have an abortion in China rather than after her repatriation to North Korea.¹³² The sympathy coming from a number of individual persons, however, does not release China from its breaches of obligations.

While it is not yet the case, it is worth noticing that a difficult challenge may arise in unusual situations where North Korean refugees are interdicted on the high seas. As information gathered by the COI indicates, clandestine escape networks have been developed following the closing of the Mongolia route under Chinese pressure. Thereafter, North Koreans usually travel through China to Myanmar or Laos on a train, after which they take the seaway from Thailand to South Korea.¹³³ Under the 1967 UN Convention on the Law of the Sea III, Article 87 confirms the freedom of the high seas is open to all nations. But Article 88 also makes it clear that the areas "*shall be reserved for peaceful purposes.*" Since China ratified the Convention in 1996, it has the effect of preventing it from stopping and searching for North Korean defectors on the high seas. However, given the legal uncertainty resulting from the South China Sea arbitration, including but not limited to its decision but jurisdiction, until now no academic has located and defined the scope of "the high sea" in Asia.¹³⁴ However, in

131. COI Report (n 12), para 440.

132. COI Report (n 12), para 440.

133. COI Report (n 12), para 393.

134. Conflict and Diplomacy on the High Seas at <https://projects.voanews.com/south-china-sea/>. An Arbitration before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on Law of the Sea between the Republic of the Philippines and the People's Republic of China, Decided on 12 July 2016, the tribunal ruled in favor of Philippines and held that China had no right based on the nine-dash line map. China has refused to participate in the arbitration and subsequently issued a public statement rejecting the ruling as

the future, any consideration of action taken by China to intercept boats carrying North Koreans on the high sea must cite the case of *The Haitian Centre for Human Rights v U.S.* as a warning to China that its actions would constitute a violation of his non-refoulement obligation. The Haitian case concerned the U.S. practice of forcible repatriation of vessels carrying Haitians floating on the high sea as a result of political upheavals in the region.¹³⁵ In its judgment, the Inter-American Commission on Human Rights confirmed the fundamental principle that Article 33's protection under the Refugee Convention should be applied without geographical limitation. The same should apply in the context of China with no exception.¹³⁶

Under Article 3 of the Torture Convention, extradition is one of the prohibited grounds in case a person is at risk of torture. Its intention is to "cover all measures by which a person is physically transferred to another State."¹³⁷ In other words, it is a wide net designed to catch all fish. In the famous *Soering* case, the ECtHR discussed the test of extradition in the following terms: "the question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture."¹³⁸ By applying the same principle, the Committee commented in the *Chitat Ng v Canada* case that a decision to extradite Mr. Ng to the U.S. where he would face a potential death penalty for murder charges would be a breach of Article 7 of the ICCPR.¹³⁹ Likewise, China's obligation under the Torture Convention is also found to be in conflict with its responsibility of extradition under bilateral treaties with

"null" and reiterated that it would ignore the decision.

135. *Weissbrodt and Hortreiter* (n 43) p. 58.

136. *The Haitian Centre for Human Rights v. United States* [1997] Inter-American Court of Human Rights, C.H.R. 51/95, OEA/ser.L/V./II.95 doc. 7 rev, at para 550.

137. *Guy S Goodwin-Gill and Jane McAdam* (n 25), pp. 126-127.

138. *Soering v. United Kingdom* [1989] European Convention on Human Rights, 98 ILR 270, at para. 88.

139. Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, extract quoted at para. 207 above [Convention] Article 7 of the ICCPR "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

North Korea. Regarding this legal dilemma, Professor John Dugard and Judge Christine Wyngaert suggest in their book that bilateral extradition commitments must be “trumped” in favor of human rights principles, since a “two-tier system of legal obligations that recognizes the higher status of multilateral human rights norms arising from notions of *jus cogens*, and the superiority of multilateral human rights conventions that form part of the *ordre public* of the international community.”¹⁴⁰ As noted by Weissbrodt, the Swiss Scholar Walter Kälin has advanced an alternative line of argument, based on his reading of Articles 55, 56, and 103 of the UN Charter, which he believes declare the supremacy of the UN obligations in times of conflict and the fundamental duty of member states to take action in co-operation with the organization to promote the “universal respect for, and observance of, human rights and fundamental freedoms for all.” Regardless of which argument one finds more legally sound, the conclusion is the same: the obligation of non-refoulement must prevail.

C. Attribution

In the context of the North Korea human rights crisis, the obligation of non-refoulement demands that China not refoul North Korean defectors. Therefore, its practice of automatic refoulement of North Korean defectors is a breach, and the conduct of any North Korean official who falls within the definition of state organs under Article 4 of the Drafted Articles should also be attributable to China.

Given the similarity between Article 4(1) and the Torture Convention, a positive finding on China’s attribution is by no means without ambiguity. Under Article 1 of the Torture Convention, torture is defined as an intentional infliction of severe pain “at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.” As such, the link between torture and attribution is inevitable because an act or omission can only qualify as a crime of “torture” if it possesses a governmental element.

Based on the COI’s findings, Chinese officials are involved in

140. John Dugard & Christine Van den Wyngaert, “Reconciling Extradition with Human Rights,” *The American Journal of International Law* (1998).

every stage of the repatriation policy. In public hearings, countless defectors have testified to being seized by Chinese officials when they were identified as North Koreans but could not provide any valid travel documents. Some witnesses suggested targeted operations had been organized by Chinese security agencies to apprehend defectors from the North. In 2013, a “wanted notice” was published by the Yanbian police unit.¹⁴¹ According to the publication, Chinese citizens were encouraged to provide information about North Korean defectors.¹⁴² Alternatively, those who were found to be harboring North Korean defectors were to be blacklisted and punished.¹⁴³ Without doubt, the police crackdown is attributable to the State because the police exercise the executive function of the Chinese government as set out in Article 4(1). This principle is confirmed in the *Salvador Commercial Company* case, in which the Commission held, “a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.”¹⁴⁴ The fact that Yanbian is an Autonomous Prefecture of China does not prevent China from being accountable. The case of *Heirs of the Duc de Guise* upheld the long-recognized principle that Article 4(1) should be applied in the same manner regardless of the structure of a state: “For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the law of the Italian Republic.”¹⁴⁵

After being arrested, North Korean defectors are normally subjected to detention ranging from several days to months. The Commission

141. For a full translated version, see <http://www.northkoreanrefugees.com/NKF-CM-China-Reward-for-NK-Refugees.pdf>.

142. See *China Briefing, A Complete Guide to China’s Minimum Wage Levels by Province, City, and District* at <http://www.china-briefing.com/news/2013/01/28/a-complete-guide-to-chinas-minimum-wage-levels-by-province-city-and-district.html>.

143. COI Report (n 12), para 436.

144. *Rosa Gelbtrunk and Salvador Commercial Company (El Salvador & USA)* 12 UNRIAA 459.

145. *Palumbo Case—Decision No. 120, UNRIAA, VOLUME XIV*, pp. 251-261, para. 161 (1951).

believes that these detainees are only handed over to the North Korean government when they have reached a “sufficient number.”¹⁴⁶ Unfortunately, there is no further elaboration as to the definition of “sufficient.” More specific information has been helpfully provided by the activist Mike Kim, who went undercover as a taekwondo student to train under two North Korean masters during his time living in the China-North Korea border region in 2003. According to Kim, there were around 500 detention facilities, with the Tumen center being one of the largest. The Tumen center alone returned an average of 40 North Koreans per week, out of a total estimated number of weekly repatriations of between 200 to 300.¹⁴⁷ Although the treatment of North Koreans in China was generally agreed to be better than in North Korea, there are occasional reports of sexual and physical violence in Chinese detention facilities. The experiences of rape, beatings and unethical body searches performed by guards in the detention centers were attributed to China under Articles 4 and 6.¹⁴⁸

Additional information gathered by the COI also indicates that Chinese officials provide information about individual defectors to North Korea officials during the repatriation process. This information covers their personal details, their apprehension locations and their contacts in China. Based on testimony shared by a former North Korean border security guard, the documentation exchanged between the two sides mainly concerns the repatriated’s marital status and religious orientation, since these are the two determining factors that decide their fates back in North Korea. The same witness also suggests it is a common practice for Chinese officials to stamp different color chops on the documentation to distinguish those defectors who have an intention to reach South Korea from those who do not. Such practices are consistent with the above-mentioned Protocol 1986 signed between the two States, Article 5 of which obligates both sides to provide the other with information

146. COI Report (n 12), para 439.

147. Mike Kim, “Escaping North Korea: Defiance and Hope in the World’s Most Repressive Country,” p. 72.

148. COI Report (n 12), para 438.

collected from the repatriated defectors.¹⁴⁹

D. Legal Consequences

After establishing China's obligations, breaches, and clarifying its attribution of responsibility, the question on every North Korean defector's mind remains: What legal consequences, if any, will China face under international law?

No international body has been established by the UN to supervise the implementation of the Refugee Convention. Hence, in case of dispute, the only option available is founded under Article 38, under which state parties are allowed to refer their case to the International Court of Justice (ICJ). However, the Court only concerns the interpretation of the Convention and, more importantly, its exercising of jurisdiction is completely dependent upon state consent. The Handbook prepared by the ICJ states clearly, "*Jurisdiction of the Court is based on the consent of the States to which it is open.*" Such consent can be expressed through unilateral declaration, treaties, and special agreements — none of which are applicable in the case of China and North Korean refugees.¹⁵⁰ From the author's perspective, it is extremely unlikely, if not impossible, that either China or North Korea will consent to the Court's settling of the defector's issue, since both are partly liable for breaches of International Law. In addition, unlike the operation of the Torture Convention, this particular Convention does not feature an individual complaint procedure. The absence of judicial access granted to an individual, together with the lack of supervisory power of the UNHCR in China due to China's policy of impeding its access to North Korean defectors, effectively results in a hopeless reality for the victims.¹⁵¹

Under the Torture Convention, the Committee against Torture has

149. COI Report (n 12), paras 448-451.

150. Swiss Federal Department of Foreign Affairs FDFA, Handbook on accepting the jurisdiction of the International Court of Justice Model clauses and templates (Bern, 2014), p. 6.

151. Weissbrodt and Hortreiter (n 43), p. 27.

the power to handle applications lodged by individuals. Under Article 22, the state to which the victim belongs must expressly declare its consent in order for the Committee to consider the application. As such, once again, it is practically impossible for a North Korean to get access to the independent body. Although the convention states that an exception may apply if the victim can demonstrate that domestic remedies are not available, it is highly doubtful that a North Korean defector could satisfy this requirement without exposing himself to the risk of persecution from the Chinese or North Korean Government. Most important, even if his case were successfully brought to the Committee's attention, he is reminded that under the current system, any comment given by the Committee is legally non-binding. In other words, its opinions are attempts at mere moral persuasion.¹⁵²

Under the Law of State Responsibility, Article 1 states clearly that *"every internationally wrongful act of a State entails the international responsibility of that State."* Building upon that, in the case of Barcelona Traction before the ICJ, the court drew the distinction between an obligation between two states and obligations towards "the international community as a whole" for the latter is derived "from the principles and rules concerning the basic rights of the human person." By applying this to the principle of non-refoulement, which arguably has acquired the status of a peremptory norm in which no derogation is permitted, every state in the world is, in theory, entitled to demand China's compliance with non-refoulement, or even to take active remedial actions designed to cease its wrongdoing and to make reparations.¹⁵³ Nevertheless, in practice, no state has as of yet brought any such action.

IV. CONCLUSION

To conclude, China has violated its non-refoulement obligation by forcibly returning North Koreans to conditions of extreme danger.

152. Weissbrodt and Hortreiter (n 43), p. 17.

153. Case Concerning Barcelona Traction, Light, and Power Company, Ltd [1970] ICJ 1.

Looking ahead, the fundamental question remains before the international community: how can justice be upheld if legal remedies are unavailable to the victims of some of the most serious human rights violations in the 20th century?

As mentioned above, this paper is dedicated to the author's grandfather, who fled China for freedom during the outbreak of the Cultural Revolution. Growing up listening to his story, the author can hardly imagine what his life would have been like had he been born in China during a time of unrest. As Elie Wiesel once said "*[W]e must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented.*" May we all speak up and end the silence, so that one day, the voices of the North Koreans can be heard. May freedom and peace flourish in this land.

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