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Escaping the Hermit Kingdom

An Analysis of China's policy towards North Korean Refugees

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Mänskliga rättighetsstudier
MRSK30 Vårterminen 2012

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Abstract

This paper deals with the issue of migration between North Korea and China. North Korea does not grant its citizens the legal right to freedom of movement, but famine and poverty has forced many to attempt escape through China, hoping to eventually reach South Korea. Those caught attempting to leave are punished in forced labour prisons, or sometimes executed. Satellite images have revealed North Korea's extensive network of prison camps, known as *kwon-li-so*.

China categorises North Koreans as economic migrants, illegally present, despite a valid fear of persecution. They are not recognized as refugees and China continues to breach the non-refoulement principle, turning them over to the North Korean authorities. Additionally, there is no process in place to determine the status of North Koreans and they are denied contact with UNHCR. Both states have failed to protect this group of people, and fundamental human rights are neglected. In this situation, human rights exist in relation to the state. As outsiders, the North Korean refugees lose their human rights and both states dehumanise them.

Key words: North Korea, China, non-refoulement, refugees, asylum

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Abbreviations

CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
DPRK	Democratic People's Republic of Korea (North Korea)
HRNK	The US Committee for Human Rights in North Korea
ICCPR	International Covenant on Civil and Political Rights
PRC	People's Republic of China
ROK	Republic of Korea (South Korea)
UNHCR	The United Nations High Commissioner for Refugees (The UN refugee agency)

1 Introduction

In September 2004, UNHCR announced that North Koreans in China are “persons of concern”. The UNHCR does not have any access to these North Koreans in China, and despite the risk to their fundamental freedoms and even lives China continues to return them to North Korea.¹ Around 5,000 North Koreans are deported every year by China.² This is a serious breach of the non-refoulement principle under international law. North Korea has a strict policy against freedom of movement and those caught leaving the state are punished and put into political prisons.

Much information on the subject has relied on anecdotal evidence from escapees. For example, Shin Dong-Hyuk, who was born in Camp 14, is the only known person to have escaped from a North Korean prison camp and survived. His first memory is an execution, and in the biographical novel *Escape From Camp 14*, the horrendous memories of the human rights abuses he witnessed are recounted.³ The existence of the political prison camps was brought to attention by the media when satellite images were revealed through Google Earth. Six such camps have been identified, and the satellite imagery is evidence that the political prison camps are being expanded since Kim Jong-un’s reign.⁴

In June 2013 it was reported that North Korea again strengthened its border controls.⁵ Now, in 2013, the UN has taken long awaited action in setting up a committee of inquiry which will investigate the human rights abuses in the nation, and those responsible will hopefully be held accountable.⁶

¹ Cohen, Roberta, *Citizens’ Alliance for North Korean Human Rights*, Seoul, 2010, Legal Grounds for

² United Nations, Committee Against Torture, List of issues to be considered during the examination of the fourth periodic report of China, 9 September 2008, CAT/C/CHN/Q/4, para. 3.

³ Harden, Blaine, *Escape from Camp 14: One Man’s Remarkable Odyssey From North Korea to Freedom in the West*, Mantle, London, 2012.

⁴ Ryall, Julian, ‘North Korea expanding gulags, satellite images show’, *The Telegraph*, 26 February 2013, <<http://www.telegraph.co.uk/news/worldnews/asia/northkorea/9894275/North-Korea-expanding-gulags-satellite-images-show.html>>.

⁵ ‘North Korea escalates border crackdown’, Amnesty International, 21 June 2013, <<http://www.amnesty.org/en/for-media/press-releases/north-korea-escalates-border-crackdown-2013-06-21>>

⁶ ‘North Korea: UN Commission of Inquiry a positive step in addressing crimes against humanity’, Amnesty International, 21 March 2013, <<http://www.amnesty.org/en/for-media/press-releases/north-korea-un-commission-inquiry-positive-step-addressing-crimes-against-h>>.

1.1 Aim: Questions to be answered

1. How does China support its position on the situation of North Korean refugees and its breach of the non-refoulement principle?
2. Is China's argument sufficient to support its position or are there other motives behind the state's actions?
3. Is there any compromise for both parts that can improve the situation of refugees and not destabilise relations between China and North Korea?

1.2 Restrictions

The focus is on the policies of China towards North Korean refugees. China is North Korea's northern border; so many North Koreans attempt to travel through China. While there are other actors involved, China has the biggest influence on their wellbeing in this situation, due to its proximity. Although I will give an overview of the situation in North Korea, the main focus in this paper is what happens to North Koreans who have escaped to China. Essentially, the human rights abuses in North Korea are relevant to the topic of this paper in relation to China's breach of the non-refoulement principle. Although there are multiple issues affecting the relationship between China and North Korea, such as denuclearisation and economic dependency, the focus of this paper is not the political relations. Humanitarian obligations towards a group of people in need of protection is the focus and I will discuss other issues only in relation to how they may affect China's policy towards refugees, but not as an issue on their own.

1.3 Definitions

Asylum

The protection granted to a refugee in a nation where he or she can find either temporary or permanent shelter.⁷

Economic migrant

An economic migrant does not fulfil the requirements for being recognized as a refugee under the Convention Relating to the Status of Refugees (hereafter referred to as the refugee convention), but for reasons relating to employment and livelihood, has chosen

⁷ Plaut, W. Gunther, *Asylum: A Moral Dilemma*, Praeger, Westport, Connecticut, 1995, p. 11.

to immigrate to a state offering more economic opportunities. Usually this term refers to individuals illegally present on a state's territory.

The principle of non-refoulement

Refoulement entails the return of individuals who qualify for refugee status, back to the country where they would suffer punishment or persecution.⁸ Under international law, contracting states are obliged to abide by the principle of non-refoulement. Fear of persecution on account of “race, religion, nationality, membership of a particular social group or political opinion” prohibits refoulement by contracting states.⁹ The principle of non-refoulement is outlined in article 33 of the refugee convention¹⁰ as well as article 3 of the convention against torture.¹¹

Refugee

Some authors on the subject have expressed their discontent towards the standard definition of refugee, arguing that it leaves out many in need of protection. Despite its limitations, “refugee” will be used as defined in the refugee convention for the purpose of this paper, where a refugee is someone:

who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹²

Refugee “sur place”

A refugee “sur place” is an individual whose fear of persecution first arises after leaving the country of origin. Refugee “sur place” applies also to those who become refugees because of circumstances in the home country that occur first when the refugee is abroad preventing him from return or because of his own actions that would result in persecution should he choose to return home.¹³

⁸ Plaut, p. 12.

⁹ Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, Art 33(1).

¹⁰ Refugee Convention, Art 33.

¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Art 3.

¹² Refugee Convention, Art 1(2).

¹³ UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reissued Geneva,

1.4 Method

The focus of this paper is China's actions and policies towards North Korean refugees, and how the state has justified these. I wanted to determine if there was any legitimate reasoning behind China's argument. Therefore, the method that seemed most appropriate to answer the questions was an argument analysis. The main actor in this case is the Chinese government, and so I have analysed the argument supporting their refusal to accept refugees from North Korea. The most clear and detailed source of this argument is found in a document submitted by China to the Committee Against Torture, in response to the concluding observations of the CAT, from 2009.¹⁴

Roy van den Brink-Budgen explains that arguments are meant to persuade us through setting up reasons. These reasons are meant to sway opinion towards a particular position.¹⁵ In order to identify arguments we need to separate the reasons from the conclusion, through considering the function of each.¹⁶ Arguments always have a conclusion; this is what the author is trying to persuade us of. The conclusion of the argument is the point that is being made, and without such a point there is no argument.¹⁷ The relationship between the reasons and conclusion is important. The conclusion is drawn from the reasons and so the reasons must be sufficient support for the conclusion.¹⁸ The arguments given to support the conclusion need to be relevant as well as adequate.¹⁹ So to analyse China's argument, I will need to separate the reasons from the conclusion and determine whether or not the reasons are sufficient to persuade us of the conclusion and whether the argument justifies China's behaviour.

The layout of the paper will be as follows. I will first give an overview of the relevant theoretical perspectives on the subject of asylum specifically relating to non-refoulement and responsibilities towards humanitarian objectives, as well as human rights in relation to the state. I will subsequently give a brief overview of the migration situation between North Korea and China. I will focus on the state policy of North Korea towards

December 2011, HCR/1P/4/ENG/REV. 3, p. 19, para. 94-96.

¹⁴ United Nations, Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention: Comments by the Government of the People's Republic of China concerning the concluding observations and recommendations of the Committee against Torture, 9 December 2009, CAT/C/CHN/CO/4/Add.2, para. 10(d).

¹⁵ Brink-Budgen, Roy van den, *Critical Thinking for Students: learn the skills of critical assessment and effective argument*, 3rd ed., How To Books, Oxford, 2000, p. 10.

¹⁶ Brink-Budgen, p. 11.

¹⁷ Brink-Budgen, pp. 10-11.

¹⁸ Brink-Budgen, p. 19.

¹⁹ Brink-Budgen, pp. 20-21.

emigration, what causes North Korean's to leave home, the risks they face in China, specifically treatment from the Chinese authorities and China's breach of the non-refoulement principle. I will then discuss the legal principles relevant to North Korean refugees and how they fit in under international refugee law. International treaties are the main focus here, but I will also give attention to the Sino-North Korean bilateral treaties and how they conflict with international treaties. In this section I will lastly give attention to the issue of dual-citizenship and how South Korean jurisdiction may affect the situation.

The main focus of this paper will be the Chinese argument defending the policy towards North Korean migrants. I will present the Chinese argument and subsequently go on to analyse it in relation to the conclusion being made. Then I will present academic views on the topic, regarding possible motives and explanations behind China's position on the issue. Finally, I will present my conclusions, drawing parallels between the theoretical perspectives and the situation between the Chinese state and North Korean refugees.

1.5 Material

I have used a variety of different types of sources for the purposes of this paper. Since the emphasis in this paper is on the argument given by the Chinese state in defence of their breach of the non-refoulement principle, an important part of the material is this argument as a source. I have used the argument they provided in their response to the concluding observations of the CAT from 2009. This is the "Consideration of reports submitted by States parties under article 19 of the Convention: Comments by the Government of the People's Republic of China concerning the concluding observations and recommendations of the Committee against Torture (CAT/C/CHN/CO/4)". In paragraph 10(d) we find the argument provided by the People's Republic of China in defence of their return of North Koreans on Chinese territory.²⁰ This is a primary source of China's argument in defence of China's actions.

Other primary sources that I will use are legal documents. International conventions, national constitutions and bilateral treaties will be used to analyse the situation of North Korean refugees. Some of the reports I have used are also primary sources because they are empirical studies presenting the original results. The report *The*

²⁰ Comments by the Government of the People's Republic of China concerning the concluding observations and recommendations of the Committee against Torture, 2009, para. 10(d).

North Korean Refugee Crisis: Human Rights and International Response: Human Rights and International Response by Stephan Haggard and Marcus Noland (2006) is a primary source because it is the result of an empirical study using interview and survey method with a group of North Koreans living illegally in China. This report presents the findings of the study, which is new information. I have used such reports both for background information, as well as for the findings that can be used to determine the status of North Koreans or the legitimacy of China's position. I have used secondary sources, such as NGO reports, news articles, and journal articles to provide empirical information as a basis to understanding the context and to analyse the issue.

Many reports written by NGOs rely on anecdotal evidence and there are some limits on certain sources because of the lack of information. NGOs such as Amnesty International and Human Rights Watch do not have access to North Korean refugees in China and neither does the UNHCR. North Korea is a very secluded nation so information is scarce, and defectors may be reluctant to share information for fears of being exposed. Therefore, while I have relied on journal articles and reports for information, it is important to remember that it is not easy to verify a lot of the facts, and some of the information is inconsistent between sources, such as the number of North Koreans in China.

2 Theory

2.1 W. Gunther Plaut “Asylum: A Moral Dilemma”

W. Gunther Plaut discusses issues surrounding the protection of refugees and the duty of states to provide protection in his book *Asylum: A Moral Dilemma*. He looks at how ethics affects the situation of refugees and focuses on the relationship between moral and legal justice concerning asylum-seekers. Plaut argues that there is a conflict between the interests of states and the needs of refugees, and that legal instruments protecting refugees are weak and mostly favour the states.²¹

Plaut asserts that “in the tension between national and individual rights, the former wins out almost invariably, for the nation possesses power while the individual is reduced to beggary at the gate”.²² This tells us that there is often an asymmetry between the needs of refugees (individuals) and the interest of the state. This view demonstrates the harsh reality as it is; the state controls its borders and so has more power than individuals in need of protection. Asylum-seekers are vulnerable, while the state has control over its borders. Although human rights documents are put in place to protect individuals, this suggests that international migration issues are controlled more by state borders than protection of individual rights.

Plaut argues that moral values imply the need to make sacrifices to help others.²³ But he also points out that accepting refugees is a confirmation that the state of origin does not live up to international standards.²⁴ However, Plaut describes refugee policy as a kind of “all or nothing” propaganda, in that either you save all refugees or none, but that a nation should protect as many refugees as possible.²⁵ Plaut contends that asylum is not a legal right, but is a moral right, and that the only legal right protecting asylum-seekers is the principle of non-refoulement. He points out that non-acceptance of refugees is a violation of non-basic rights; refoulement is a violation of basic rights.²⁶ In his view, a

²¹ Plaut, pp. 3-6.

²² Plaut, p. 6.

²³ Plaut, p. 142.

²⁴ Plaut, p. 140.

²⁵ Plaut, p. 141.

²⁶ Plaut, p. 24-5.

potential host state is not necessarily obliged to open its borders to refugees; this is a matter of the state itself and may take its own considerations into question. Plaut claims that in reality a refugee's only legal right is not to be returned to threatening conditions and that no legal right to asylum truly exists.²⁷

Self-interest of the government and morality of its actions represent two different sides, according to Plaut.²⁸ When it comes to the self-interest of the state and the morality of its actions the former limits the latter.²⁹ Additionally, the rights of individuals do not exist independently of the state, but in relation to the state.³⁰ So, from this view, if rights exist in relation to the state, human rights must be dependent on an individual's belonging to a political unit, the state. However, they often exist with a tension where the rights of the nation and the rights of the individual contradict each other. This creates asymmetry between the two rights-holders. Inevitably, there is a clash between the self-interests of nations and the needs of refugees where most often the rights of the state win out over the rights of the individual.³¹

In his discussion of different viewpoints on borders and migration, Plaut discusses Michael Walzer, a proponent of communitarianism in political theory. Communitarianism emphasizes the value of the community over the rights of individuals. From this view refugee rights are restricted, and the rights of the receiving community to promote its own welfare are emphasized.³² Walzer argues for the right of communities to choose members and for a shared identity. Walzer uses the metaphor of membership in a club to describe the structure of a state and he argues that states have the right to determine membership, using either policies of admission or exclusion.³³ For Walzer, admissions policies should be based on political and economic considerations as well as the character of the host country and political community.³⁴

From this view, states have the right to restrict groups of people from entering their community based on certain standards, and prioritise self-interests over individual rights of migrants and asylum seekers. Migrants are perceived as a threat to the security

²⁷ Plaut, p. 77.

²⁸ Plaut, p. 56.

²⁹ Plaut, p. 58.

³⁰ Plaut, p. 6.

³¹ Plaut, p. 6.

³² Plaut, p. 73-4.

³³ Plaut, p. 74.

³⁴ Plaut, p. 75.

of the host nation, especially refugees. Communitarianism resembles China's perception of North Korean refugees as a threat to regional stability as well as the state's attitude of picking and choosing which nationalities benefit from protection.

2.2 Hannah Arendt "The Perplexities of the Rights of Man"

In Hannah Arendt's book *The Origins of Totalitarianism* she addresses the issue of statelessness, regarding minorities who cannot be defined by nationality. She argues that stateless people have lost their place in society as well as political status. They become not more than the "abstract nakedness of being human and nothing but human".³⁵ They are still human, which implies that human rights are not dependant on human worth but on belonging to a community.³⁶

Historically, rights have been defined as being natural and based on humanity.³⁷ Arendt criticises this viewpoint and argues that rights ultimately exist on the basis that we belong to a society and have a political status and citizenship.³⁸ Stateless people will lose not only their right to a place in society as well as to the protection of the state.³⁹ "They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion".⁴⁰ For Arendt, stateless people lose their meaning to society. The rights they lose were what people thought depended on humanity, but in effect rely on political status. Human rights then according to Arendt, depend on citizenship or some form of political membership in a state.⁴¹

If no state is actually willing to recognize such transnational refugees and give them rights they can claim, they have no political rights in effect. According to Arendt, rights like being legally able to stay in a territory and have legal protection are based on citizenship and national membership because one makes a claim against the state.⁴² Arendt claims that human rights rely on citizenship and belonging to a society.

³⁵ Arendt, Hannah "The Perplexities of the Rights of Man" in *The Origins of Totalitarianism* (1951), New York: Harcourt Brace Jovanovich, New ed. with added prefaces (1973), p. 297.

³⁶ Arendt, p. 295.

³⁷ Arendt, p. 291.

³⁸ Arendt, p. 293.

³⁹ Arendt, pp. 293-4.

⁴⁰ Arendt, p. 296.

⁴¹ Arendt, p. 197.

⁴² Arendt, p. 300.

Additionally, if one does not have that membership, then one has no rights and cannot have any obligations. Arendt wants to show that society's members have rights based on political membership and citizenship but not on humanity.⁴³

2.3 Roman Boed “State of Necessity as a Justification for Internationally Wrongful Conduct”

Roman Boed's analysis of the legal framework surrounding the principle of non-refoulement and rejection of asylum seekers at the border argues that protection of human rights is the responsibility of all members of the community and if that responsibility is not shared, then the humanitarian objectives cannot be met.⁴⁴ In Boed's analysis of the principle of non-refoulement, he examines the “concept of necessity” as a justification for violating international obligations.⁴⁵ States have used necessity as an excuse for border closure when they violate international law.⁴⁶ The concept of necessity is closely linked with that of self-preservation. The idea is the state has a right to preserve itself when its existence is threatened. However, states often use necessity to include essential interests that are not a threat to the state's existence.⁴⁷

Boed uses an example of Rwandan refugees refused entry to Tanzania. In this case, it was claimed that national security and tensions between states were at risk as well as damage to the environment, so it was necessary to close the border to people in need.⁴⁸ There are other examples of states closing borders on such grounds. However, closing the border to people at risk of persecution in their country of origin violates the principle of non-refoulement. When human rights obligations are at risk the use of necessity should be prohibited because then the fundamental principle of refugee protection is disregarded. Overall, Boed argues that it is in the international community's interest to honour non-refoulement and that this outweighs the interest of any single state closing its borders to protect its own essential interests. Necessity should not be

⁴³ Arendt, p. 293.

⁴⁴ Boed, Roman, ‘State of Necessity as a Justification for Internationally Wrongful Conduct’, 3:1 *Yale Human Rights and Development Law Journal* (2000), p. 43.

⁴⁵ Boed, p. 3.

⁴⁶ Boed, p. 2.

⁴⁷ Boed, p. 9-10.

⁴⁸ Boed, p. 2.

used as a justification for border closure to the influx of asylum-seekers.⁴⁹

2.4 The Responsibility to Protect

Under the doctrine of ‘The Responsibility to Protect’, state sovereignty is a responsibility, not a right. Focus is shifted away from sovereignty as control to sovereignty as a responsibility on both an internal and external level. There are three points to viewing sovereignty as a responsibility. Firstly, the state authorities are responsible for protecting the safety and lives of its citizens and promoting their welfare. Secondly, national authorities are internally responsible to its citizens and on an international level to the community of states in the United Nations. Thirdly, the agents of state are responsible and accountable for actions.⁵⁰ The responsibility to protect lies primarily with the state concerned. But when the state does not fulfil this responsibility or is the perpetrator, the responsibility shifts from state to international community.⁵¹

The main elements behind the responsibility to protect are the responsibility to prevent, to react and to rebuild. Concerning a humanitarian crisis, prevention is the most important and the first vital step. States have a responsibility to react in situations of compelling human need. So, states should do what they can in order to protect the human rights of citizens of other states when the need is present. And while the responsibility to protect pertains to humanitarian intervention, we can still see its relevance here. Human security is of utmost importance in the debate of intervention and sovereignty, and the attention is focused on protection and assistance.⁵² Prevention is one of the three elements of the responsibility to protect and should be exhausted before intervention is considered because failure to do so can have huge international consequences.⁵³ North Korea has failed to protect its citizens, and so as a member of the international community China should protect and assist those North Korean nationals found on its territory.

As Boed argued, “the protection of human rights is a responsibility shared by all members of a civilized community and that, without sharing that responsibility, the

⁴⁹ Boed, p. 41.

⁵⁰ International Commission on Intervention and State Sovereignty, *The responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa, 2001, p. 13.

⁵¹ The Responsibility to Protect, p. 17.

⁵² The Responsibility to Protect, p. 17.

⁵³ The Responsibility to Protect, p. 19.

community's humanitarian objectives can hardly be met." The main point of importance here is that sovereignty comes with obligations to the international society. When other states cannot or will not protect their own citizens, it falls under the obligation of the international society. This means making some sacrifices, and in the case of refugees, protecting their human rights because this is an obligation that comes with sovereignty.

3 Background

3.1 North Korean State Policy

The North Korean state ideology, *juche*, was developed by Kim Il-sung and described in a speech given by him in 1967, and became the official state ideology in 1972. *Juche* has been used to justify North Korea's extreme nationalism, hostility to the international community and even self-reliance during periods of famine and economic crisis. *Juche* has “three pillars”, which are: domestic and foreign independence, economic independence and military independence.⁵⁴

Juche relies on political independence from all states, does not tolerate foreign pressure or intervention, and keeps cooperation with socialist nations to a minimum.⁵⁵ In theory, economic self-reliance means that the North Korean state does not trade with any outside actors and relies solely on itself for producing the resources to support the country. Military independence means self-defence and promotes an independent sovereign state, where foreign support is avoided.⁵⁶ In practice however the political ideology led to North Korea being known as the “hermit kingdom” because of the negativity associated with international cooperation.⁵⁷ Leaders of North Korea have long relied on brainwashing as a strategy: the citizens learn to worship the nation and the leaders,⁵⁸ and to despise western states.⁵⁹

3.2 Freedom of Movement and North Korea

The ICCPR states that “everyone shall be free to leave any country including his own”.⁶⁰ North Korea has been a state party to the ICCPR since 1981, despite seeking withdrawal

⁵⁴ Lee, Grace, ‘The Political Philosophy of *Juche*’, 3:1 *Stanford Journal of East Asian Affairs* (2003), p. 105.

⁵⁵ Lee, p. 106.

⁵⁶ Lee, p. 107.

⁵⁷ Lee, p. 106.

⁵⁸ Kim, Mike, *Escaping North Korea: Defiance and Hope in the World's Most Repressive Country*, Rowman & Littlefield Publishers, Lanham MD, US, 2008, pp. 10-13, 16.

⁵⁹ Kim, Mike, pp. 7-8.

⁶⁰ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, (ICCPR), Art 12(2).

in 1997 with no success.⁶¹ The North Korean Constitution guarantees the right to freedom of mobility, however it is criminalised elsewhere. Article 75 of the constitution states “citizens shall have freedom to reside in and travel to any place”.⁶² Although freedom of movement is guaranteed in the constitution, it is criminalized in the Criminal Code. Article 47 of the Criminal Code states that

One who escapes to another country or to the enemy in betrayal of his motherland and people, or who commits treacherous acts towards the motherland such as espionage or treason, shall be punished by at least seven years or more labour re-education. If it is a serious violation, he shall be punished by execution and forfeiture of all property.⁶³

Punishments towards North Koreans caught escaping vary, depending on the reason for crossing the border. There is evidence since 2005 of a harsher policy against border crossers according to Human Rights Watch,⁶⁴ and again in 2013 according to Amnesty International.⁶⁵ Prisoners are subject to severe human rights abuses and Amnesty International describes North Korea’s human rights violations as “grave, systematic and widespread”.⁶⁶

North Koreans suspected of wrong doing against the regime are detained in political forced-labour camps (kwan-li-so) without any legal process or trial. Up to three generations of family members are also detained in these prisons. The punishment usually lasts for a lifetime of isolation and hard labour. Between 150,000 and 200,000 prisoners are detained in deplorable conditions.⁶⁷

3.3 North Korean refugees in China

Famine, poverty and natural disasters have been huge issues facing North Korea. The famine was at its extreme in the 1990s, killing 2-3.5 million people. This has created one

⁶¹ ‘STATUS AS AT: 19-08-2013 05:03:09 EDT Chapter IV Human Rights: International Covenant on Civil and Political Rights’, United Nations Treaty Collection, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#8>

⁶² DPRK’s Socialist Constitution, 2009, Art. (75).

⁶³ Human Rights Watch, *The Invisible Exodus: North Korean’s in The People’s Republic of China*, 14:8 November 2002, p. 21.

⁶⁴ Human Rights Watch, *North Korea: Harsher Policies Against Border-Crossers*, no. 1, March 2007, p. 4.

⁶⁵ ‘North Korea escalates border crackdown’, Amnesty International.

⁶⁶ ‘North Korea: UN Commission of Inquiry a positive step in addressing crimes against humanity’, Amnesty International.

⁶⁷ Hawk, David, Committee for Human Rights in North Korea (HRNK), *The Hidden Gulag: The Lives and Voices of “Those Who are Sent to the Mountains”*, 2nd ed., Washington, D.C., 2012, p. 27.

of the worst food crises.⁶⁸ The state ranks the citizens in a caste system, favouring political followers and disadvantaging those deemed less supportive of the regime. This determines who benefits from food rations and economic aid,⁶⁹ and has resulted in extreme famine and poverty, as well as state-sponsored drug and alcohol dependency.⁷⁰ This method of distributing resources can be seen as a form of political persecution.

Mike Kim argues that there are five reasons North Koreans defect: food shortages, to support family, to find medical help for an illness, interest in the Chinese lifestyle, and religious persecution.⁷¹ Using a sample of about 1300 refugees located in China near the North Korean border, Stephan Haggard and Marcus Noland have identified that 95% of the sample left home for economic reasons, 2% left for political reasons, and 3% for reasons labelled “other”.⁷² However, North Korean migrants may not be willing to give persecution or political dissatisfaction as a reason for leaving home due to fear.⁷³

Eric Yong-Joong Lee has categorised North Korean border-crossings into two groups: short-term visits to obtain money and supplies for relatives, and defections which are long-term permanent leaves due to either economic or political reasons. Since 1997 many North Koreans do not return, remaining illegally in China.⁷⁴ Punishment has become harsher since around 2005, and in the past escapees were arrested and detained for a short period of time before being released.⁷⁵

North Koreans escaping to China are particularly vulnerable to human rights abuses, especially sex trafficking. Sex traffickers specifically target vulnerable escapees, trying to stay under the radar of authorities.⁷⁶ Many children born to North Korean mothers and Chinese fathers do not receive either citizenship. A child born in China is

⁶⁸ Chan, Elim and Schloenhardt, Andreas, ‘North Korean Refugees and International Refugee Law’, 24:2 *International Journal of Refugee Law* (2007), pp. 219-220.

⁶⁹ Haggard, Stephan and Noland, Marcus, Committee for Human Rights in North Korea (HRNK), *The North Korean Refugee Crisis: Human Rights and International Response*, Washington, D.C., 2006, p. 16.

⁷⁰ Kim, Mike, p. 43.

⁷¹ Kim, Mike, pp. 62-6, p. 15.

⁷² Chang, Yoonok, Haggard, Stephan, and Noland, Marcus, ‘Migration Experiences of North Korean Refugees: Survey Evidence from China’ in *Korea Yearbook: Volume 3: Politics, Economy and Society 2009*, Rüdiger Frank, James E. Hoare, Patrick Köllner, and Susan Pares (eds.), Brill Academic Publishers, Boston, 2009, p. 306.

⁷³ Haggard and Noland, *The North Korean Refugee Crisis: Human Rights and International Response*, p. 19.

⁷⁴ Lee, Eric Yong-Joong, ‘National and International Concerns regarding Recent North Korean Escapees’ 13:1 *Journal of International Refugee Law* (2001), pp. 142-143.

⁷⁵ Human Rights Watch, *North Korea: Harsher Policies against Border-Crossers*, pp. 4-5.

⁷⁶ Committee for Human Rights in North Korea, *Lives for Sale: Personal Accounts of Women Fleeing North Korea to China*, Washington, D.C., 2009, p. 7.

entitled to citizenship if one parent is a Chinese citizen. However, many children are not registered because of fears of exposing the mother, and therefore such children do not have access to education. This creates a problem of stateless people of North Korean/Chinese ethnicity.⁷⁷

North Koreans escaping to China often travel to the Yaniban region, where about 2.2 million ethnic Koreans reside legally, since this region is the closest to the border and the easiest society to assimilate into.⁷⁸ According to Stephan Haggard and Marcus Noland, the majority of North Korean migrants originate from northeastern provinces.⁷⁹ It is difficult to say exactly how many North Korean refugees are located in China. HRNK reported that estimates are between 20,000 and 400,000. Hazel Smith argues 50,000 is a reasonable number.⁸⁰

China has been a member of the UNHCR since 1958, and in 1982 it became a party to the refugee convention, without passing national legislation to ratify the treaty and no national refugee process for admission. However, since 1986 all asylum-seekers are allowed to have a review of their status by the local UNHCR representative in Beijing. Those who have political reasons to reside in the country are allowed to do so after this process, or while waiting to be resettled. Despite this, North Koreans are routinely denied any access by the state to UNHCR facilities and UNHCR is not permitted to aid them.⁸¹

⁷⁷ Human Rights Watch, *Denied Status, Denied Education: Children of North Korean Women in China*, 2008, pp. 2-3.

⁷⁸ Smith, Hazel, 'North Koreans in China: Sorting Fact from Fiction', in *Crossing National Borders: Human Migration Issues in Northeast Asia*, Tsuneo Akaha and Anna Vassilieva (eds.), United Nations University Press, Tokyo, 2005, p. 167.

⁷⁹ Haggard, Stephan and Noland, Marcus, *Witness to Transformation: Refugee Insights Into North Korea*, Peterson Institute for International Economics, Washington D.C., 2011, pp. 24-25.

⁸⁰ Smith, p. 171.

⁸¹ Haggard and Noland, *The North Korean Refugee Crisis: Human Rights and International Response*, p. 11.

4 Legal Framework

4.1 International Refugee Law

Article 14 of the Universal Declaration of Human Rights states “everyone has the right to seek and to enjoy in other countries asylum from persecution”.⁸² Everyone has the right to seek asylum, which means that no matter the outcome, they still have right to apply and have their case processed. The only exception to this is if a crime has been committed that is not of political nature. “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”⁸³

According to Guy S. Goodwin-Gill and Jane McAdam, “the term ‘refugee’ is a term of art, that is, a term with a content verifiable according to principles of general international law. In ordinary usage, it has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. The destination is not relevant; the flight is to freedom, to safety. Likewise, the reasons for flight may be many”.⁸⁴ The term “refugee” in international law has a much stricter definition than in everyday use.

Under the Refugee Convention, which was adopted after the Second World War in 1951, the guidelines for protection of refugees and determining their status are laid out. China has been a state party to the refugee convention since 1982.⁸⁵ Originally, the refugee convention only referred to people in need of protection due to events prior to 1951, i.e. victims of WWII. However, the Protocol Relating to the Status of Refugees, enacted in 1967, took away this restriction, making the refugee convention applicable regardless of time and place.⁸⁶ The convention states that the term refugee applies to any person who:

⁸² United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, Art 14(1).

⁸³ Universal Declaration of Human Rights, Art 14(2).

⁸⁴ Goodwin-Gill, Guy S. and McAdam, Jane, *The Refugee in International Law*, 3rd ed., Oxford University Press, Oxford, p. 15.

⁸⁵ Haggard and Noland, *The North Korean Refugee Crisis: Human Rights and International Response*, p. 11.

⁸⁶ Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267, Art. 1: General Provision.

“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.⁸⁷

Plaut argues that the definition of refugee is too restrictive and specific and that these standards were more appropriate for people in need of protection as a result of WWII. Today there are people in need of protection and frequently displaced for reasons that the convention does not cover, such as internal instability or armed conflict. Sadly, international refugee law does not protect those asylum-seekers who cannot prove they fall within its strict definition.⁸⁸ Goodwin-Gil and McAdam argue that the refugee in international law is characterised by the principle of state sovereignty, territorial supremacy and self-preservation, as well as competing humanitarian principles, and that it is an incomplete legal protection because asylum seekers may be denied temporary protection, safe return or compensation.⁸⁹

Regarding the situation of North Korean refugees on Chinese territory, three articles in the refugee convention are of most importance:

Article 31. - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32. - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

⁸⁷ Refugee Convention, Art 1(A)(2).

⁸⁸ Plaut, p. 139.

⁸⁹ Goodwin-Gil and McAdam, p. 50.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33. - Prohibition of expulsion or return ("refoulement")

1. 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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.⁹⁰

From these articles, we understand the following. No refugee should be punished for having entered another state in an irregular or illegal manner, without authorization. This safeguards the right of refugees, as many do not have proper legal documents and also do not have the ability to apply for asylum before travelling. Additionally, a state shall not restrict the movement of refugees unless necessary and refugees shall have a reasonable amount of time, and all the necessary facilities available, to gain their admission. National security is the only situation in which a refugee may be expelled from a state's territory and such a refugee shall have enough time to apply for admission to another state. The principle of non-refoulement, outlined in article 33 of the convention, prohibits a state from returning a refugee to the country where his life and fundamental freedoms are threatened. The only exception to this is if a refugee presents a serious threat to the security of the state.

The principle of non-refoulement means a state may not return an asylum-seeker who fulfils the criteria for protection to the country of origin. According to Goodwin-Gil and McAdam, "the principle of non-refoulement... is the foundation stone

⁹⁰ Refugee Convention, Art 31, 32 and 33.

of international protection”.⁹¹ A country may limit its intake of refugees, but never send the refugee back to the country of origin.

There are no specific regulations for the procedures adopted to determine refugee status in the refugee convention or its protocol, which means that procedures are not uniform throughout contracting states. The UNHCR has outlined some basic requirements that procedures are recommended to satisfy.⁹² Two of the important guidelines are that the applicant for refugee status and protection should be given the necessary facilities to be able apply for protection as well as being allowed to remain in the potential host country during the time which the application is pending.⁹³

4.2 Application to North Koreans

What does this mean for refugees coming from North Korea? Do they fit into the definition of refugee as defined in the refugee convention or are they economic migrants as categorized by China? I will now turn to how the legal provisions described above are relevant to the status of North Koreans.

The majority of the North Koreans who leave their country do so for economic reasons and food shortages. However, returning implies a significant amount of fear because exiting the state without permission is criminalized. This punishment is arbitrary; freedom of movement is a fundamental human right, unless it threatens health or safety. Article 12(2) of the ICCPR states “Everyone shall be free to leave any country, including his own.” Article 12(3) of the same convention states “The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, 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.”⁹⁴

According to the ICC Rome Statute, “persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁹⁵ Additionally, it includes “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious,

⁹¹ Goodwin-Gil, p. 50.

⁹² UNHCR Handbook, pp. 37-8, paras. 189-194.

⁹³ UNHCR Handbook, p. 37, paras. 189(iv) and 189(vii).

⁹⁴ ICCPR, Art 12(2) and 12(3).

⁹⁵ Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90, Art 7(2)(g).

gender...” as a crime against humanity.⁹⁶ North Koreans are severely punished if caught trying to leave the country, and such punishment fits under the definition of persecution. In the definition of refugee as given in the refugee convention, an asylum seeker qualifies for protection if there is a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.

We have seen that North Korea categorizes its citizens on an arbitrary basis (caste system), based on loyalty to the regime and political support. Those who are deemed less loyal are denied or receive very little food and economic resources, and anyone who has attempted to escape the country is viewed as a traitor. Such people are punished based on belonging to this arbitrary political group. Additionally, religion is strictly prohibited and any person who is suspected of following Christianity or to have come into contact with Christian groups in China receives an even harsher punishment on return.⁹⁷ Therefore, we can conclude that North Koreans are persecuted based on political groupings (those deemed not loyal to the regime and also those who have “betrayed” the state by leaving) as well as religion.

One of the recommended requirements for the procedures determining refugee status, outlined by the UNHCR, is that applicants for asylum should have access to the facilities and a representative of UNHCR should it be needed.⁹⁸ The states that are party to the refugee convention are required to cooperate with the UNHCR and allow access to all asylum seekers in order to supervise applications.⁹⁹ Unfortunately, China has not cooperated with the UNHCR with regards to North Korean refugees, allowing no contact between the two. Neither does China have any procedure in place to determine the status of North Koreans.

4.3 Domestic Law: Sino-North Korean bilateral treaties

China has argued that repatriation of North Koreans is not only legal but also their duty to the North Korean state. In agreements signed in 1961 and 1986 the PRC authorities agreed to return North Korean nationals found in its territory back to the DPRK state.¹⁰⁰ The text of article 4 of the 1986 treaty reads:

⁹⁶ Rome Statute, Art 7(1)(h).

⁹⁷ Haggard and Noland, *The North Korean Refugee Crisis: Human Rights and International Response*, p. 44.

⁹⁸ UNHCR Handbook, p. 38, para. 192 (iv).

⁹⁹ Refugee Protocol, Art 2.

¹⁰⁰ Chan and Schloenhardt, p. 224.

ARTICLE 4

Both sides shall mutually cooperate on the work of preventing the illegal border crossing of residents.

Clause 1

In the case of crossing the border without possession of a legal certificate or without passing through screening agencies or the passage places stated on the possessed certificate, [the individual] shall be treated as an illegal border crosser. However, any person of the other side who enters the boundaries of one side due to any kind of calamity or unavoidable factors shall not be considered an illegal border crosser. A person possessing a border-resident pass who comes into a non-border area with the permission of public security and an entry/exit bureau shall not be considered an illegal border crosser.

Clause 2

Regarding individuals who illegally cross the border, depending on the situation a namelist or relevant materials shall be turned over to the other side. However, in case of there being a criminal act after the border is crossed, it shall be handled according to the laws of [the individual's] country, and the other side shall be notified of the situation.¹⁰¹

This tells us that China has agreed to turn the identities of border-crossers caught on its territory over to the North Korean authorities. This together with the legal provisions in the DPRK criminal code means that North Koreans are in danger when on Chinese territory without permission. Article 31 of the refugee convention prohibits contracting states from imposing penalties on refugees for illegal entry or presence on their territory, having come directly from a territory where their life or freedom was threatened.¹⁰² China holds that they have a duty to North Korea having signed the above treaty, although it clearly violates international humanitarian obligations.

4.4 Dual Citizenship and South Korean Law

Article 3 of the Constitution of the Republic of Korea (South Korea) states “the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands”.¹⁰³ Geographically, the Korean peninsula consists of both the North and South Korean states. From this we can infer that South Korea does not recognise North Korea

¹⁰¹ Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Area, Signed in the People’s Republic of China, Between the Democratic People’s Republic of Korea and the People’s Republic of China, 12 August 1986, Art 4.

¹⁰² Refugee Convention, Art 31.

¹⁰³ Constitution of the Republic of Korea, 17 July 1948, Art 3

as an official state and considers North Korea part of its territory. Under article 2 of the constitution, “nationality in the Republic of Korea is prescribed by law”.¹⁰⁴ The Nationality Act of the ROK determines a Korean national to be anyone “whose father or mother is a national of the Republic of Korea at the time of his or her birth”.¹⁰⁵ Chan and Schloenhardt argue that this combination of provisions means that North Koreans are entitled to South Korean citizenship.¹⁰⁶ In article 1(A)(2) of the refugee convention, the term “refugee” is defined. The second half of the definition addresses multiple nationalities as follows:

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on wellfounded fear, he has not availed himself of the protection of one of the countries of which he is a national.¹⁰⁷

Although this means that a person with multiple nationalities, who has not for a valid reason availed himself of the protection of one of those countries, is not a refugee, the situation is more complicated for North Koreans. A person determined to be a North Korean national will be granted South Korean citizenship and although there are some regulations, in practice no North Koreans are denied citizenship. However, being granted South Korean citizenship does not happen until that person is on South Korean territory or gets diplomatic protection from authorities.¹⁰⁸

Because of this, North Koreans cannot avail themselves of the protection of South Korea while in North Korea and in effect they cannot do so before becoming residents in South Korea. Therefore, the possibility of South Korean citizenship for North Koreans is not truly equivalent to having multiple nationalities. It is a potential citizenship and North Koreans cannot avail themselves of the protection from South Korea while in North Korea and not until they reach South Korea, if they do. Therefore, North Koreans should not be excluded from international protection on the basis of multiple nationalities.

¹⁰⁴ ROK Constitution, Art 2.

¹⁰⁵ Republic of Korea Nationality Act, 20 December 1948, Art 2.

¹⁰⁶ Chan and Schloenhardt, pp. 232-233.

¹⁰⁷ Refugee Convention, Art 1(A)(2).

¹⁰⁸ Chan and Schloenhardt, p. 232-233.

5 China's Argument and Analysis

5.1 The Argument provided by the Chinese State

One of the main sources used to identify the Chinese argument comes from the “Response by the Government of China to the Concluding Observations of the Committee against Torture” from 2009. In section (10)(d) we find the following argument given by the Chinese state:

10(d) On the issue of “non-refoulement” of North Koreans who have entered China illegally:

The Chinese public security organs are bound by the Law of the People's Republic of China on Control of the Entry and Exit of Aliens to investigate and process cases involving the illegal entry of aliens, which includes their deportation. In recent years, some North Koreans have illegally entered China for economic reasons. They do not meet the criteria of refugees set in Convention relating to the Status of Refugees and its Protocol. Their illegal entry has violated Chinese law and disrupted the normal order of entry into and exit from China. It is entirely legitimate and necessary for the public security organs to properly handle, in accordance with the relevant laws and regulations, the illegal entry of aliens, including illegal entry by Koreans, in order to safeguard China's national security and maintain its entry and exit order procedures.

As a party to Convention relating to the Status of Refugees and its Protocol, China has always strictly observed the provisions of the Convention and its Protocol and has earnestly fulfilled its obligations under the Convention and the Protocol. The Chinese Government's selfless provision of refuge to more than 300,000 Indo-Chinese refugees for a long time amply demonstrates this statement. The Chinese Government has consistently carefully handled the illegal entry of Koreans in accordance with the domestic law, international law and humanitarian principles. Facts have proved that the Chinese approach is appropriate and effective, and in the interests of all parties.¹⁰⁹

5.2 Argument Analysis

China argues that they are bound by domestic law to process cases of illegal entry of aliens on their territory, which may lead to deportation. They categorise North Koreans

¹⁰⁹ Comments by the Government of the People's Republic of China concerning the concluding observations and recommendations of the Committee against Torture, 2009, para. 10(d).

as illegal immigrants based on economic factors and claim they do not meet the criteria of refugee as set out in the convention. It is argued that illegal entry is in violation of Chinese law and disrupts normal entry and exit. They also claim that it is necessary to handle the entry of aliens, including North Koreans, due to national security and to maintain entry and exit procedures. They argue that they have always observed the refugee convention and fulfilled its obligations, having given protection to refugees of other nationalities. They claim illegal entry of North Koreans has been handled according to both domestic and international legal principles and that the approach is effective and in the interest of all.

China justifies the repatriation of North Koreans by arguing that they are illegal immigrants. In the first part China argues that they are bound by domestic law on the “Control of the Entry and Exit of Aliens” to process cases of illegal entry, which may include deportation. This part of the argument is very broad because of course a state will have laws in place to process illegal entry. This is an objective fact that does not support the repatriation of North Korean nationals. What the laws provide for and if they are in accordance with international standards is of more relevance. This does not further the argument because the conditions of repatriation and what makes it legitimate are not provided. All states put laws in place to deal with immigration and illegal stays and should ensure that the individuals who enter their territory are not a security threat, but this is not a relevant argument for repatriation of those at risk of persecution.

The next part argues that North Koreans do not meet the definition of refugees under the 1951 convention because they are “economic migrants”. This reason is often used by China to justify their actions. Their main argument for justifying the repatriation of North Koreans is that they do not qualify as refugees and are therefore illegal immigrants. Here it is necessary to determine if what they are arguing bears any truth. Goodwin-Gil and McAdam argue that a state may classify a refugee as an economic migrant or illegal immigrant in order to justify a wider freedom of action.¹¹⁰ But are North Koreans actually economic migrants or are they in danger if returned home?

There is some truth that North Koreans are economic migrants, because of the huge famine and poverty facing the nation. However, the method the North Korean state uses to determine who is eligible for resources is a form of persecution, as the caste system ranks citizens according to political support. And even if many do originally leave for economic reasons, it is certain that North Koreans will face severe persecution once

¹¹⁰ Goodwin-Gil and McAdam, p. 50.

returned. They face prolonged periods of time in one of North Korea's labour camps, or even execution. The argument that North Koreans are economic migrants that do not qualify for asylum does not hold and therefore does support the thesis.

Asylum-seekers who are in need of protection should not be punished for entering a state in an irregular manner, and it should not affect their possibility to apply for asylum, according to article 31 of the refugee convention.¹¹¹ Many North Korean migrants could also be described as refugees "*sur place*". This category describes those who became refugees after leaving the country of origin, due to events occurring while outside the country or because of own actions.¹¹² Many North Koreans may have been driven by economic reasons to escape, but since emigration is criminalised by North Korea, they will be persecuted if they return and so can be classed as refugees *sur place*.

This is a confirmative conclusion: China argues that economic migrants are illegal. Since North Koreans are economic migrants, they are illegal immigrants. However, while such a conclusion can be valid, it can never be true if the premise it relies on is not. China uses the word "some" when they argue that North Koreans are economic migrants. They argue that "some" North Koreans come to China for economic reasons and so the stay of North Koreans on the territory is illegal. This is a faulty generalisation and only true with some conditions. Many come to China for economic reasons, but it does not necessarily follow that all do, and it does not exclude other issues, such as persecution. Arguing that North Koreans in China are illegal because some chose to leave for economic reasons is a faulty generalisation, and only true if there are no other factors to account for. This does not take into account those that have faced persecution before and the persecution they will face upon return, so it cannot be a valid or truthful argument.

China goes on to argue that the illegal entry of North Koreans is in violation of the jurisdiction mentioned in the beginning of the argument and that it is therefore legitimate to handle the illegal entry of aliens, including North Koreans, in accordance to such laws. By defining North Koreans as illegal immigrants who have left home for economic reasons and not entitled to protection, they are classing them as aliens. The word "alien" repeatedly comes up in the argument. This is a biased word that does not provide any support but attempts to evoke emotion. The word alien de-humanises the subjects. If North Koreans are not human they cannot have any human rights. Using the

¹¹¹ Refugee Convention, Art 31(1).

¹¹² UNHCR Handbook, p. 19, paras. 94-96.

word alien reinforces the view that North Koreans are not welcome in society and so not entitled to the protection of the state.

China puts forward the view that their actions maintain national security (self-defence) and entry/exit procedures. However, using the self-defence and national security argument is very vague and it is not made clear what it is that would pose a threat to national security. Asylum seekers that pose a threat to security would be those that are criminal and could potentially put the security of other persons at risk. Seeking to improve one's life and to escape persecution is not a valid threat to the society of the host nation. This could be seen as more of an "essential interest" of the state to maintain its sovereignty.

As Roman Boed has argued, states have a right to preserve themselves when existence is threatened. However, states will often include in the right to self-preservation essential interests that do not threaten its existence. But, sovereignty is an obligation not a right to complete control. In this case, the risk of persecution is so great if North Koreans are returned, that it cannot possibly outweigh the perceived threat to national security.

The first half of the argument is essentially a circular argument that does not really provide any justification for the thesis. China is bound by certain domestic laws to process cases of illegal aliens and deportation. North Koreans are economic migrants and therefore illegal, in violation of domestic laws. It is legitimate to handle illegal entry in accordance to laws, and North Koreans have entered illegally so the state should safeguard national security according to those entry/exit procedures. This argument leads back to the beginning, arguing that the state is bound by its domestic laws to process cases of illegal entry. The argument assumes that the domestic law is legitimate and that the entry and exit procedures provided in it safeguard national security. Such a circular argument is not effective in proving its conclusion, and hence, it is fallacious. It relies on a premise that the domestic laws controlling entry and exit are in fact legitimate, and that North Koreans are illegal migrants violating such laws.

According to Roberta Cohen, "several years ago, a senior Chinese diplomat told {her} that his government does not consider North Koreans who cross into China to be refugees. They are like Mexicans, he said, who illegally enter the United States, "economic migrants" seeking to better their lives. When such people illegally enter other countries, they can be deported, he said."¹¹³ This comparison between Mexicans in the

¹¹³ Cohen, Roberta, *Legal Grounds for Protection of North Korean Refugees*.

U.S. and North Koreans in China is used as a justification for actions against North Koreans. However, this is a classic “red herring” argument, attempting to divert attention away from the main issue. An irrelevant example is used as an argument to justify the repatriation of North Koreans, which puts them in danger. It is argued that Mexicans who come to the U.S. for economic reasons are illegal immigrants who may be deported, and so it is legitimate to consider North Koreans as illegal immigrants and deport them. Whether or not Mexicans who enter the U.S. for economic reasons are illegal immigrants that may be deported is not relevant to the situation of North Koreans in China.

Much of the argument given by China is not relevant for what it is attempting to justify. China uses irrelevant examples of issues to support their argument, and says, “as a party to the Convention relating to the Status of Refugees and its Protocol, China has always strictly observed the provisions of the Convention and its Protocol and has earnestly fulfilled its obligations under the Convention and the Protocol. The Chinese Government's selfless provision of refuge to more than 300,000 Indo-Chinese refugees for a long time amply demonstrates this statement.”¹¹⁴ The conclusion that China has always observed its obligations under the convention cannot necessarily be drawn from one example where it was observed.

This is not support for North Koreans being economic migrants illegally on Chinese territory, or that the state has always observed its international legal obligations. This is an example of one case where they did observe international obligations, but the conclusion does not necessarily follow that they have in all instances, another example of faulty generalization. By giving one example of “selfless provision of refuge” the argument attempts to draw us away from the treatment of North Koreans, and to evoke emotion using biased words, such as “selfless” and “earnestly”. The refuge given to Indo-Chinese persons does not support the argument for the deportation of North Koreans because it is not relevant. Neither can the conclusion be drawn from this example that the entry of North Koreans has been handled in accordance to international law and humanitarian principles.

The argument presented by the Chinese state concludes with the sentence “facts have proved that the Chinese approach is appropriate and effective, and in the interest of all parties.” However, nowhere in the argument have they provided any actual facts that

¹¹⁴ Comments by the Government of the People's Republic of China concerning the concluding observations and recommendations of the Committee against Torture, 2009, para. 10(d).

prove this. They have argued that North Koreans have been handled according to domestic laws, which is true, but in no way justifies a breach against international obligations. Such a violation of humanitarian principles will never be in the interest of all parties, and Boed has argued that it is in the international community's interest to observe the principal of non-refoulement, which outweighs the essential interests of any single state closing its borders.

There are many holes in the argument presented by China, and they do not present a valid justification. Examples and generalizations have been supplemented for true facts, and these are irrelevant to the argument. Using emotionally charged words and providing an example of a different situation is an attempt to direct attention away. It is now clear that evidence of their approach being "appropriate and effective" is lacking. Instead, we need to now look at some concerns and issues that may be underlying the Chinese position.

5.3 Underlying Concerns

According to Chan and Schloenhardt, relations with North Korea are important to the Chinese government because they view it as an advantage to have another communist state nearby.¹¹⁵ Samuel S. Kim argues that Sino-North Korean relations are characterized by China's ambitions to maintain domestic and regional stability, but have no further goals. Kim argues that the potential for armed conflict or nuclear standoff is one of the factors affecting Sino-North Korean relations.¹¹⁶ China focuses on maintaining peace and stability, specifically in the Korean peninsula, by cooperating with South Korea, but also by providing economic aid to North Korea in order to promote regime survival.

Kelly M. Greenhill argues that China fears the famine in North Korea will destabilize the nation causing a huge influx of refugees, potentially bringing U.S. troops to the nation. Greenhill argues that China's main worry is a huge North Korean influx and that they want to take all measures to prevent this. China's fear of North Korean

¹¹⁵ Chan and Schloenhardt, p. 240.

¹¹⁶ Kim, Samuel S., 'Sino-North Korean Relations in the Post-Cold War World' in *North Korea: The Politics of Regime Survival*, Yong Whan Kihl and Hong Nack Kim (eds.), M.E. Sharpe, Armonk, N.Y., 2006, p. 183.

migration has given North Korea the ability to bargain on nuclear issues, and these worries mean China is hesitant to put pressure on North Korea.¹¹⁷

China attempts to maintain regional stability and prevent the rise of ethnic Koreans on its territory, maintaining influence over North Korea, through preventing the influx of North Korean refugees into Chinese territory. Kim argues that China's foreign policy with North Korea is based on a principle of preventing future detrimental outcomes and preventing any situations from escalating. China has three basic goals when it comes to international relations: (1) economic development, (2) maintaining peace and preventing threats to its sovereignty, (3) and securing the nation's status as a great power in world politics.¹¹⁸

Despite China's argument that North Korean escapees are economic migrants who are illegally present on the state's territory, there are other concerns. Andrei Lankov has identified two underlying concerns. The first concern he brings up is that officially recognizing North Koreans as refugees would mean that China would have to provide some type of aid to them. The second underlying concern Lankov brings up is on a political level: officially recognizing North Korean migrants as refugees and giving them protection would open up an influx of North Koreans, possibly using China as their intermediate stop before a final destination, South Korea. This would most likely lead to the destabilization of North Korea.¹¹⁹

Lee argues that China taking political considerations into account in regards to North Korean refugees does not respect international obligations. The problem he identifies is China being able to respect the refugee convention and its protocol in relation to its policies towards North Korea. He concludes that in this case, China's duty is to respect the principle of non-refoulement, and that refugees should be able to have a say in determining their place of residence. The only exception he points out is if the North Korean in question is a fugitive of the law, having committed a crime of a non-political nature.¹²⁰ Lee concludes that the North Korean refugee crisis is so difficult to resolve because "each state concerned sometimes maintains an inconsistent political and diplomatic interest in determining the future of the escapees."¹²¹

¹¹⁷ Greenhill, Kelly M., 'North Korean Migrants, Nongovernmental Organizations and Nuclear Weapons' in *Weapons of Mass Migration: Forced Displacement, Coercion and Foreign Policy*, Robert J. Art, Robert Jervis and Stephan M. Walt (eds.), Cornell University Press, Ithaca, N.Y., 2010, pp. 227-229.

¹¹⁸ Kim, Samuel S., pp. 185-186.

¹¹⁹ Lankov, Andrei, 'North Korean Refugees in Northeast China', 44:6 *Asian Survey* (2004), p. 868.

¹²⁰ Lee, p. 150.

¹²¹ Lee, p. 152.

6 Conclusions

In processing cases of asylum, the state ultimately has one main responsibility, outlined in article 33 of the refugee convention. This is to obey the non-refoulement principle. Plaut has argued that there is no true legal right to asylum or to immigrate to a state. But those who do fit the requirements for refugee protection should never under any circumstance be sent back to the country of origin, where their lives or fundamental freedoms will be threatened. Plaut contends that legal instruments are often weak in protecting refugees, and that some issues may be more linked to morality. The potential host state in reality will always have the advantage, maintaining its sovereignty, and often the future for the refugee remains unclear.

In this case, the state is exerting a “right” to sovereignty and the power over control of entry and exit. With every right comes obligations, and it is important to remember that sovereignty is not just a right but also an obligation. If a state is not living up to its obligations, then in effect it is abusing its right to sovereignty. The Responsibility to Protect shifts attention away from sovereignty as control towards it being a responsibility. Sovereignty as a responsibility means that it is the state first and foremost who has responsibility to see to the safety and welfare of its citizens. Failing to do so, then the international community has a responsibility. North Korea has violated its obligations and failed to protect its citizens.

For some states, sovereignty seems to imply total control over who is allowed and who is not allowed past the borders, with the main interests of that state at the forefront. Although the host state may not be able to support a mass influx of refugees, protecting its own interests should be in proportion to the well being of refugees. In this situation, North Korea has not protected its citizens and so responsibility then lies in the international communities hands. China, in not offering protection to North Korean refugees or attempting to relocate them to another place of residence, is denying its responsibility to the international community and asserting its control.

The Chinese government has maintained that North Koreans are not refugees and are economic migrants. But in reality we are aware that North Koreans are not merely economic migrants and that they do face a real fear of persecution should they be returned home. Denying protection to a group of people in need is a violation of

international humanitarian principles. When humanitarian obligations are at risk, denying protection due to security or self-defence should be prohibited. The interest of the international community outweighs the interest of any single state because as Boed has argued it is always more beneficial for the international community to uphold humanitarian objectives than for any one state to deny them. However, as Plaut has discussed, issues regarding potential refugees are closely linked to moral rights and legal instruments are very weak in regards to protecting needs of asylum-seekers. Therefore the state always has the advantage and it is important to consider moral issues as well.

The Chinese state has taken a “communitarian” approach to the issue of North Korean refugees. The main concern of the government is neither the welfare of the individual nor human suffering; it is maintaining and promoting the stability of the society. China’s foreign policy approach to North Korea is based on preventing detrimental outcomes as well as preventing current situations from worsening. China’s goals in international relations, described by Samuel S. Kim, are apparent here because of the state’s focus on sovereignty and its own stability as well as regional stability.

Despite the needs of the North Korean refugees, we have seen that political factors control the situation. The interests of the state are prioritised over humanitarian obligations. Neither state is willing to protect this group of people, but issues of membership and citizenship are blatant here. In a sense, this group of people has become stateless. North Korea does not protect those it has identified as weak regime supporters and within the state they are completely stripped of their humanity and denied of even the most basic rights. China, in referring to them as aliens and not acknowledging their need for protection, dehumanises them and strips them of their human rights.

The situation resembles Arendt’s work on statelessness and human rights, where a group of people who have lost their place in society and political status in effect lose their human rights too. This suggests that human rights are not defined on the basis of being human, but rely on political status. And although North Koreans still have their nationality, this is a group of people identified by the state’s cast system as hostile to the regime. Those who have attempted to leave the state are seen as traitors. This cast system strips those in need of their rights and they become outside of society in their own country. Without either state accepting them, as equal citizen or as refugee in need of protection, they have lost their place in society and are essentially devoid of all human rights.

Similarly to Arendt, Plaut contends that individual rights do not exist independently of the state but in relation to the state. This means that like Arendt, Plaut is also a contender for the view that human rights depend on an individual's membership in society; having a political status. Plaut goes on to argue that such rights exist with a tension because the rights of the individual and self-interest of the state contradict each other. This is exactly what we see here in the case of migration between North Korea and China: those who find themselves as outsiders in society, without political status, do not have the rights they should be entitled to as an individual. However, the rights a person should be entitled to and the self-interest of the state contradict each other, and since the state has more power, it limits individual rights creating an asymmetry.

Nationality should not be the determining factor in this issue; it should be whether or not an individual is in need of protection. Not legally recognizing the North Koreans and denying them refugee protection makes them outsiders in a society where they are vulnerable to human rights abuses. Sovereignty is a responsibility, not a right. China has concerns about how not cooperating with North Korea on this issue will destabilise the region. However, the responsibility to protect has been neglected by both states. Chan and Schloenhardt have discussed a solution to this problem. China could offer North Koreans some form of temporary protection instead of explicitly recognizing them as refugees. In this way, they would not permanently be protecting North Koreans but eventually transferring them to another state that can offer them protection, probably South Korea.¹²²

Ultimately, China has control over the situation. Without any access for groups such as the UNHCR it remains difficult to help North Koreans refugees. China maintains its position, and for the world's most populated state, they may never have an interest in protecting North Korean refugees, opening up the door to a potentially massive migration influx. That is why it is important to find some kind of temporary solution or compromise, because everyone should be able to experience such a basic right as protection from the state. In maintaining control over its borders, the state also maintains control over individual rights, and "in the tension between national and individual rights, the former wins out almost invariably, for the nation possesses power while the individual is reduced to beggary at the gate".¹²³

¹²² Chan and Schloenhardt, p. 240.

¹²³ Plaut, p. 6.

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