NON-REFOULEMENT UNDER THREAT: THE CASE AGAINST CHINA

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NON-REFOULEMENT UNDER THREAT:
THE CASE AGAINST CHINA

Dr. Paul Hanley*

INTRODUCTION

No human being is illegal.

-Elie Wiesel1

While international attention is currently focused on the migration crisis in Europe, another long-standing migration crisis continues to unfold in China, where thousands of North Koreans are repatriated back to the Democratic People’s Republic of North Korea (DPRK) in violation of international law. Due to North Korea’s recent nuclear tests and its deplorable record of human rights abuses, the global community’s condemnation of North Korea is resounding.2 The United Nations (UN) Security Council convened on December 10, 2015—Human Rights Day—to discuss human rights in the DPRK as a formal agenda item.3 Many human rights advocates are particularly concerned with the Chinese practice of forcibly returning North Koreans to the DPRK to face

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imprisonment, torture, and death. Furthermore, chronic food shortages have afflicted North Korea since the early 1990s, which has forced tens of thousands of people to flee into China. China classifies “all North Koreans in China as illegal ‘economic migrants’ and routinely repatriates them” back to North Korea. However, China’s belief that North Koreans flee the DPRK for economic reasons, rather than political reasons, does not take into consideration the DPRK’s political caste system, which guides the distribution of public goods and the extreme persecution defectors face upon repatriation. For example, a 2014 report issued by The Commission of Inquiry on Human Rights in the DPRK found those who manage to escape the DPRK were:

[T]argeted as part of the DPRK’s systematic and widespread attack against populations considered to pose a threat to the political system and leadership of the DPRK, because the system of isolation, information control, and indoctrination imposed by the DPRK stands and falls with its ability to isolate the population from contact with the outside world.

There are countless cases of Chinese authorities repatriating North Koreans back to the DPRK, including transferring North

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4 Fontaine, supra note 2.
9 See Robert Park, Robert Park: North Korean Refugees face
Koreans from other countries, such as Vietnam, back to China for repatriation to the DPRK. For example, in October of 2015, Vietnamese authorities apprehended nine North Koreans traveling from Northeastern China during a random check on a bus near the Chinese border. The North Koreans were subsequently returned to China; Human Rights Watch reported there was “no indication the nine were given the opportunity in Vietnam to lodge asylum claims.” The fate of these people is unknown, but based on Chinese policy and practice, they were most likely returned to North Korea to face punishment for the “crime” of defection.

There have been thousands of repatriations since the 1990s. The high number of repatriations is largely due to the official Chinese policy of repatriating North Korean defectors. In 1986, “China signed a border security agreement with North Korea, the ‘Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order and the Border Areas’ in which China agreed to apprehend and automatically deport defectors to North Korea.” Amnesty International reported “China regularly returns North Koreans back to their country of origin without giving them the opportunity to make a claim for asylum and without making an objective and informed decision that the North Koreans would be protected against serious human rights abuses in North Korea.” These repatriations violate international law,

slaughter when China repatriates them, THE MERCURY NEWS (Feb. 28, 2012, 10:06 AM), http://www.mercurynews.com/ci_20065029 (estimating that China repatriates approximately 5,000 refugees to the DPRK every year).

11 Id.
12 Id.
13 See Park, supra note 9.
16 Kumar, supra note 5. See also Charny, supra note 5 (discussing China distinguishing North Koreans from other refugees in order to placate
including a number of treaties adopted by China: namely, the Convention Relating to the Status of Refugees (CRSR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW).\textsuperscript{17}

Part I of this paper provides an overview of the current human rights conditions in North Korea, which necessitates its citizens to flee across the border into China. Part II analyzes the various human rights treaties that bind China to refrain from deporting refugees to North Korea. Part III of this paper concludes with a number of recommended actions China must take in order to fulfill its international obligations.

I. BACKGROUND

In terms of human rights, North Korea is, by all accounts, truly hell on earth. In 2014, the U.N. Commission of Inquiry on Human Rights in the DPRK presented evidence of widespread and systematic abuse by North Korean authorities, including: “[E]xtermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, [and] persecution on political, religious, racial and gender grounds . . . .”\textsuperscript{18} The Commission also reported the scale and nature of these violations “do[] not have any parallel in the contemporary world.”\textsuperscript{19} North Koreans are subject to restrictions of their basic civil and political freedoms including freedom of speech, thought, expression, assembly, movement, and religion.\textsuperscript{20} Most of North Korea’s population is also denied access to food and medical care.\textsuperscript{21}

\footnotesize
\begin{itemize}
\item \textsuperscript{17} See Kumar, \textit{supra} note 5.
\item \textsuperscript{19} Fontaine, \textit{supra} note 2.
\item \textsuperscript{20} See Charny, \textit{supra} note 5, at 79–80.
\item \textsuperscript{21} See id.
\end{itemize}
According to the U.N., these human rights violations amount to crimes against humanity, defined by the International Criminal Court as any enumerated act (such as murder, torture and enslavement), “when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.”

Surveys of North Korean defectors report the primary motivation for North Koreans to leave their country is survival. Other defectors testified that their motivation for defecting was political. For example, a twenty-eight-year-old woman said one reason she left was because her family was part of the “hostile class,” the lowest and least privileged of the three strata in the North Korean political caste system. In another case, a forty-four-year-old woman said her parents were considered suspect by the regime because her father, a businessman, had defected to South Korea and her mother had studied abroad. As a result of her parents’ actions, her background was deemed “suspect” and because she did not want to pass this stigma to her children, she decided to leave for China. China regards all North Koreans entering the country as “economic migrants.” China ignores what precipitates North Korean migration into its territory, thereby minimizing the level of suffering, deprivation, and extreme circumstances caused by North Korea’s discriminatory caste system. China also fails to acknowledge the punishment defectors face when they are returned to North Korea due to China’s classification of North Koreans as economic migrants.

North Korea deems citizens who flee the country without official permission to be traitors. Article 47 of the 1987 North

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23 Charny, supra note 5, at 79.
24 Id. at 80.
25 See id. at 80 (the other two classes are loyal/core and wavering).
26 See infra note 73.
27 See id.
28 See Bai, supra note 7, at 102.
29 See Charny, supra note 5, at 80.
30 Bai, supra note 7, at 105.
31 See Enos & Klingner, supra note 14.
Korean Criminal Code states:

A citizen of the Republic who defects to a foreign country or to the enemy in betrayal of the country and the people . . . shall be committed to a reform institution for not less than seven years. In cases where the person commits an extremely grave concern, he or she shall be given the death penalty . . .”

Article 117 provides: “A person who crosses a frontier of the Republic without permission shall be committed to a reform institution for up to three years” in a political prison camp. Therefore, a North Korean who leaves the country with the intent of defecting may receive a minimum of seven years in prison (unless, of course, they make contact with a South Korean non-governmental organization or Christian groups, the penalty for which could be death), whereas merely crossing the Chinese border in search of food or work carries a minimum three-year term. These North Korean laws are in clear violation of international law and the reason why North Koreans are indeed refugees under the CRSR.

The motivation behind North Korea’s governmental restrictions is to impose total control over the population; the regime deems lack of control over its populace as a threat to its power. The 2014 Commission of Inquiry on Human Rights in the DPRK report found that:

[P]ersons who flee the DPRK are targeted as

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32 See Kumar, supra note 5.
33 See id. See also Fontaine, supra note 2 (“Amnesty International reported on the testimony of former detainees at the Yodok political prison camp, stating that ‘prisoners are forced to work in conditions approaching slavery and are frequently subjected to torture and other cruel, inhuman, or degrading treatment. All those interviewed had witnessed public executions.’”).
34 See Kumar, supra note 5.
part of the DPRK’s systematic and widespread attack against populations considered to pose a threat to the political system and leadership of the DPRK, because the system of isolation, information control, and indoctrination imposed by the DPRK stands and falls with its ability to isolate the population from contact with the outside world.\textsuperscript{36}

Reports have surfaced that the persecution of defectors and their families has worsened since Kim Jong-un succeeded Kim Jong-II, as evidenced by the government imposing stricter anti-defection measures.\textsuperscript{37} As a result, to cross the border, river-crossing guides need to pay larger bribes to border guards along the Chinese border.\textsuperscript{38} To deter this behavior, the government issued an order in Hoeryeong City of North Hamgyoung Province, stating border guards who accept bribes from river-crossing guides will not be penalized if they self-report accepting the bribe and provide information about the defector.\textsuperscript{39} There are even reports of North Korean authorities crossing the border to abduct refugees and bring them back to North Korea.\textsuperscript{40} The increase in the number of whistle-blowing brokers, including border guards, has made defecting from North Korea more dangerous.\textsuperscript{41} Even if a North Korean manages to escape, once they cross the North Korean border, they are in constant danger of forced return.\textsuperscript{42}

\textsuperscript{36} \textit{China: Don’t Return Nine North Korean Refugees, supra} note 6.


\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id. See generally Charny, supra} note 5, at 80 (stating that a significant number of defectors came from the North Hamgyong province, one of the poorest provinces in the country. The government of North Korea deliberately cut this province off from national and international food distribution to preserve food resources).

\textsuperscript{40} \textit{Kumar, supra} note 5.

\textsuperscript{41} \textit{See CHO ET. AL., supra} note 37, at 465.

\textsuperscript{42} Václav Havel, Kjell Magne Bondevik & Elie Wiesel, \textit{Failure to Protect: A Call for the UN Security Council to Act in North Korea} 59 (Oct 30, 2006), http://www.responsibilitytoprotect.org/files/NorthKorea%20report%20offi
North Korean defectors are not given the status of “refugees” by neighboring countries despite overwhelming evidence of the threat of imprisonment, torture, and even death upon their return to the DPRK.\textsuperscript{43} The major violator in this regard is China. In order to maintain good relations with North Korea and to deter future migration, China regularly returns North Koreans found within its borders.\textsuperscript{44} Recognizing the seriousness of the situation, the United Nations Commission of Inquiry Report made a number of recommendations and called upon China to take the following actions:

(1) Stop forcible repatriations of North Koreans “unless the treatment there, as verified by international human rights monitors markedly improves;”

(2) Cease providing information about North Koreans in China to North Korean security agents, and take steps to prevent their carrying out abductions from Chinese territory;

(3) “Caution” its officials that their conduct concerning forced repatriations “could amount to the aiding and abetting crimes against humanity;”

(4) Extend asylum and other means of protection to North Koreans, recognize that they are refugees or refugees \textit{sur place[,] and give them “free access to diplomatic and consular representations of any state that may be willing to extend nationality or other forms of protection to them;”

(5) Provide North Korean victims of trafficking in China with the right to stay in the country and access legal protection and basic services, such as medical treatment,

\textsuperscript{43} See \textit{China: Don’t Return Nine North Korean Refugees}, supra note 6.

\textsuperscript{44} Havel, Bondevik & Wiesel, \textit{supra} note 42, at 60.
education[,] and employment opportunities;

(6) Regularize the status of North Korean women and men who marry or have a child with a Chinese citizen and ensure that such children are registered at birth, and given Chinese nationality and access to education and health care; and

(7) Raise with the Supreme Leader of the DPRK and other high-level North Korean authorities abductions from Chinese soil, infanticide of children entitled to Chinese nationality, and forced abortions imposed on repatriated women impregnated by Chinese men.45

To date, China continues these forced returns, which are in direct violation of international law and prohibited by a number of treaties adopted by China.46

II. GOVERNING INTERNATIONAL LAW

A. CONVENTION RELATING TO THE STATUS OF REFUGEES

The Convention Relating to the Status of Refugees (CRSR), adopted by China in 1982, defines “refugee” as an individual who:

. . . [O]wing 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

46 Id. at 69.
or, owing to such fear, is unwilling to return to
it.\textsuperscript{47}

CRSR Article 33(1) contains a prohibition against the repatriation of refugees: “No Contracting State shall expel or return (‘refoul’er’) 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.”\textsuperscript{48} International law, therefore, prohibits the 
forcible return, either directly or indirectly, of any defector to North 
Korea if they have a well-founded fear they will face persecution on 
the basis of being a member of any of the protected classes listed 
above. For the defectors from North Korea, the categories of 
protection that are most likely applicable are religion, political 
opinion, and/or member of a particular social group.

North Korea’s repression of political and religious freedom is 
well documented.\textsuperscript{49} In 2015, Human Rights Watch stated in its 
annual report that “[p]olitical and civil rights are nonexistent since 
the government quashes all forms of disfavored expression and 
opinion and totally prohibits any organized political opposition, 
independent media, free trade unions, or civil society 
organizations.”\textsuperscript{50} According to Open Doors, a nonprofit organization 
that documents the persecution of Christians worldwide, North 
Korea is the “world's most restrictive nation in which to practice 
Christianity.”\textsuperscript{51} The CEO of Open Doors

\textsuperscript{47} Convention Relating to the Status of Refugees, art. 1(A)(2), Apr.  
22, 1954, 189 U.N.T.S.

\textsuperscript{48} See id. at art. 33(1).

\textsuperscript{49} See, e.g., Fontaine, supra note 2 (“There is no independent 
media, no civil society, no freedom of religion.”).

\textsuperscript{50} World Report 2015: North Korea, HUMAN RIGHTS WATCH 
korea.

\textsuperscript{51} See Christopher Snyder, Report: North Korea Worst for 
Christian Persecution, FOX NEWS WORLD (Jan. 8, 2014), 
http://www.foxnews.com/world/2014/01/08/report-north-korea-worst-for-
christian-persecution.html (reporting that North Korea has been ranked as 
the most repressive country for Christians for the last twelve years); see 
also North Korea: End Persecution of Christians after Reports US Tourist 
Detained, AMNESTY INTERNATIONAL (Jun. 6, 2014), 
https://www.amnesty.org/en/latest/news/2014/06/north-korea-end-
describes the treatment of Christians in North Korea as “absolutely inhumane.”

Defectors who are returned to North Korea face “[h]arsher penalties . . . [if they are] known to have met with foreigners or converted to Christianity with the intention of becoming missionaries themselves inside North Korea.” Repatriated North Koreans who are discovered to have been in contact with Christian groups are “scrutinized, tortured[,] and imprisoned.” For example, one defector reported that “for meeting with foreigners a person could be sentenced to death. If someone gets caught with Bibles he or she will be sentenced to death.”

With regard to the third category, social groups, the CRSR does not define the meaning of “member of particular social group.” The United Nations High Commissioner for Refugees (UNHCR), however, provides guidance on the matter. According to UNHCR Guidelines, there is no “closed list” within the meaning of CRSR’s Article 1A(2) of those who could be classified as being a “member of a particular social group.” There is also no specific list of social groups included in the language of the Convention or in its ratifying history. According to the UNHCR, the term “membership of a particular social group” should be read in an “evolutionary manner,” adaptable to developing international human rights norms. The Guidelines stipulate that “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are

persecution-christians-after-reports-us-tourist-detained/ (describing North Korea’s persecution of Christians and Amnesty International’s demanding the release of an American who was arrested for leaving a bible at his hotel).

52 Snyder, supra note 52.
53 See Charny, supra note 5, at 89.
54 Enos & Klingner, supra note 14.
55 Charny, supra note 5, at 89.
56 See generally U.N. High Comm’r for Refugees, Guidelines on International Protection No. 2 (May 7, 2002) (this document discusses “membership of a particular social group” within the context of Article 1A(2) of the 1951 CRSR and/or its 1967 Protocol relating to the Status of Refugees.).
57 Id. at pt. I(3).
58 Id.
59 Id.
perceived as a group by society.”

The Guidelines further provide: “The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience[,] or the exercise of one’s human rights.”

According to Human Rights Watch, North Korea’s Ministry of People’s Security declared in 2010 that defection from the DPRK would now constitute a crime of “treachery against the nation, punishable by death.” Immediately upon repatriation, individuals suspected of defecting are subject to brutality. The 2014 Commission of Inquiry on Human Rights in the DPRK found that “almost all of the repatriated people are subjected to inhumane acts . . . [, such as] torture, sexual violence and inhumane conditions of detention” during the search and initial interrogation phase. The report further stated that this appears to be based on standard procedure. According to Human Rights Watch, most of the people who repatriated from China ultimately face “incarceration and mistreatment in political prison camps (or kwalniso), operated by the State Security Ministry.” The conditions of the camps are deplorable, “characterized by systematic abuses and often deadly conditions, including meager rations that lead to near-starvation, virtually no medical care, lack of proper housing . . . sexual assault and torture by guards, and executions.” Not surprisingly, “death rates in these camps are reportedly extremely high.”

China disregards the persecution that defectors face upon return and does not recognize North Korean defectors as refugees; instead, China classifies them as “economic migrants” who are not protected by the CRSR. In March 2004, China’s Foreign Minister Li Zhaoxing spoke regarding North Koreans who crossed the

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60 Id. at pt. II(B)(11).
61 Id.
63 Id.
64 Id.; see also Bai, supra at note 7, at 105 (North Koreans risk punishment if they repatriate to North Korea).
66 See id.
67 See id.
68 See id.
69 Enos & Klingner, supra note 14.
Chinese border, stating “[they] are not refugees, but they are illegal immigrants.” China’s position, however, is untenable because North Korea controls the distribution of public goods, criminalizes the act of leaving the DPRK without permission, and metes out harsh treatment to those repatriated from China. Thus, North Korean defectors are refugees, and China should classify these individuals as such under the CRSR and not as economic migrants or illegal immigrants.

1. NORTH KOREA’S POLITICAL CASTE SYSTEM

North Korean society is divided into three political classes: (1) loyal/core; (2) wavering; and (3) hostile, based on a perceived loyalty to the regime. The class status is assigned to each family for life and passes from generation to generation. A 2012 report published by the Committee for Human Rights in North Korea analyzed the North Korean political caste system, known as songbun. For example, “[d]escendants of those who fought Japanese colonial rule, those who fought in the Korean War, and peasants and laborers belong to the loyal [or core] class.” Additionally, “[f]amilies of artisans, small shopkeepers, traders and intellectuals educated under Japanese rule comprise the wavering class.” The lowest class, hostile, includes relatives of Japanese collaborators, those who opposed Kim Il-sung, families of businessmen, religious leaders, landlords, and those who have fled.

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70 See Bai, supra note 7, at 105 (“China often compares North Koreans who flee to China to illegal immigrants from Mexico who cross the border into the United States in search of jobs and better opportunities.”).
71 Id. note 5, at 95.
72 Id. at 91–92 (the hostile class consists of 27% of the population, with more than 50 sub-categories). See also Bai, supra note 7, at 106 (arguing that even if the primary motivation for fleeing North Korea is economic, North Korea’s economic policies amount to political persecution).
73 See Charny, supra note 5, at 92 (this classification of all citizens was originally conducted in 1947).
74 Id.; see also Bai, supra note 7, at 106.
75 See Bai, supra note 7, at 106.
76 Id.
77 Id.
North Korea.\textsuperscript{78}

The authorities allocate access to food, healthcare, housing, education, and employment on the basis of which class a particular citizen or family belongs.\textsuperscript{79} The Public Distribution System favors the loyal class and discriminates against the hostile and wavering classes.\textsuperscript{80} Citizens who are members of the hostile class are last to receive entitlements, if they receive any at all.\textsuperscript{81} This has a devastating impact on the wavering and hostile classes, condemning generations to lives of misery. For example, the authorities deny those belonging to lower songbun classes any education beyond secondary school, which stunts career advancement and thus “relegate[s] them to poor food security, housing, and medical care for the rest of their lives.”\textsuperscript{82} The effect on the hostile class has been catastrophic when the North Korean comprehensive welfare scheme collapsed in the 1990s.\textsuperscript{83} The discriminatory manner of the allocation of public goods means that North Korea’s political system persecutes an entire class of individuals, approximately 27\% of the population.\textsuperscript{84} According to Joel Charny, an expert on North Korean affairs, “there is no meaningful way to separate economic deprivation from political persecution.”\textsuperscript{85} Additionally, a 2005 survey conducted by Yoonuk Chang found that the vast majority of North Korean refugees are from the wavering and hostile classes.\textsuperscript{86}

As to the Chinese assertion that North Koreans crossing into China are merely “economic migrants,” akin to Mexicans crossing into the United States, there are vast differences between the two situations.\textsuperscript{87} Mexican people, who cross the border illegally into the United States, do so for economic reasons. Moreover, the act of leaving Mexico is neither a violation of Mexican law nor do Mexican authorities punish these migrants upon their return. On

\begin{flushleft}
\textsuperscript{78} Id. \\
\textsuperscript{79} Id. \\
\textsuperscript{80} Id. \\
\textsuperscript{81} Id. \\
\textsuperscript{82} See Charny, supra note 5, at 92. \\
\textsuperscript{83} Bai, supra note 7, at 106. \\
\textsuperscript{84} Id. \\
\textsuperscript{85} Id. \\
\textsuperscript{86} See Bai, supra note 7, at 106. \\
\textsuperscript{87} See Bai, supra note 7.
\end{flushleft}
the other hand, North Koreans flee the DPRK to avoid political persecution; they are deemed traitors upon defection and face imprisonment, torture, and even death by North Korean authorities upon their return. Thus, one cannot say the North Koreans who flee to China to escape North Korea’s unjust political caste system are economic migrants like those entering the U.S. from Mexico.  

Chinese law provides that foreigners applying for refugee status during the screening period may temporarily stay in Chinese territory by provisional identity cards signed and issued by public security bodies. Despite applying this law to other groups within its territory, China has not applied this law to North Koreans found within its borders. It has defended this practice, stating: “Chinese public security and border guard authorities have seized some DPRK citizens who have repeatedly entered China illegally,” asserting that China must defend its “national sovereignty and fundamental interests, bearing in mind the stability of the Korean Peninsula.” China’s position prioritizes stability on the Korean Peninsula over its obligations under refugee and other human rights law. Essentially, Beijing is afraid that if it were to comply with international law and grant North Koreans refugee status in China, more North Koreans would flee and destabilize the North Korean regime. A destabilized North Korea could collapse, leading to a unified Korea, which would threaten China’s prestige in the

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88 Charny, supra note 5, at 92.  
89 Cohen, supra note 45, at 70 (citing Chinese Law).  
90 Id. at 71-72 (“Toward most other refugee populations, China’s policy is markedly different. The Chinese government for example has cooperated with UNHCR in the resettlement in China of ethnic Han Chinese or ethnic minorities from Vietnam and Laos, residing there since the Vietnam War, and it is currently considering granting citizenship to them and their children. China also has allowed UNHCR access to asylum seekers from Pakistan, Iraq, Somalia and Eritrea”) (citing Wu Haitao, “With North Koreans, however, China has insisted that the UN not make the issue of forced repatriations ‘a refugee one’ and ‘internationalize it’ and has regularly repeated what is now its well-worn mantra: North Koreans who cross illegally ‘do it for economic reasons . . . they are not refugees.’”).  
91 Id.  
92 See id.  
93 See id.
region.94

2. PERSECUTION UPON REPATRIATION

The second reason that China should recognize North Korean defectors as refugees is due to the certain persecution they face when they return to North Korea, since defection is a crime against the state.95 However, under CRSR, there is no requirement that an individual suffer persecution prior to leaving their home country; rather, there is only a requirement that they left on account of a well-founded fear or that their departure was a violation of law.96 Moreover, an individual who was not a refugee when he left his country may, in fact, become a refugee at a later date.97 They are refugees sur place, one whose need for protection arises after departing their home country, and thus, should receive the same protection as any person protected under the CRSR.98

North Koreans who are repatriated from China are held in detention centers near the border where they are questioned about their reasons for leaving the country and whom they were in contact with while within China.99 If North Korean authorities discover that defectors had political reasons for leaving or were in contact with Christian missionaries or South Korean NGOs, then they are often confined in North Korea’s gulag where life consists

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94 See id. (describing the Chinese concern as a “domino theory” that “refugee flows will lead to unrest inside the DPRK, followed by collapse and reunification under South Korea’s leadership, and the expansion of US political and military influence on the Peninsula”).
95 See Bai, supra note 7, at 107.
96 Cohen, supra note 45, at 69.
97 See id.
98 See id. See also Bai, supra note 7, at 107 (citing pt. 92(b) of Chapter 2 of the UNHCR Guidelines: “The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee sur place”).
99 Bai, supra note 7, at 107 (Human Rights Watch reported in 2014 there was systematic abuse of detainees at these centers).
of a daily grind of beatings, torture, and starvation. 100 Defectors who left for economic reasons typically receive a sentence of at least three to six months in a labor training camp where conditions may be slightly better than the political prison camps but where prisoners are still subject to beatings and malnourishment. 101 Moreover, North Korean women who are found to be pregnant by Chinese men are often forced to have an abortion or have their infant killed upon birth. 102

Given that North Koreans who leave the country without permission face certain harsh punishment upon return, they are considered refugees sur place, individuals who become refugees as a result of fleeing the DPRK. 103 Accordingly, China should afford North Koreans found within its territory all the protections provided by the CRSR.

B. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The principle of non-refoulement is also enshrined in the United Nations’s Convention Against Torture (CAT). Article 3 provides: “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.” 104 The Committee Against Torture, which is the body that monitors implementation of CAT, called upon China in 2008 to

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100 See id.
101 See id.
102 See id.
104 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”).
comply with Article 3 of the Convention. Additionally, the Committee requested China establish a screening process for North Koreans and examine whether those individuals would face the risk of torture upon their return to the DPRK. It also called on China to provide access to the UNHCR and to adopt legislation incorporating China’s obligations under the torture convention concerning deportations.

Based on the testimony of prior North Korean defectors, each defector who is forcibly returned by China is at grave risk of torture both during the detention and interrogation stage, as well as when they are sent to prison. Former prison guard, Ahn Myong Chul, who fled to China in 1994, testified to the inhumane conditions of North Korea’s prison camps. Chul described witnessing daily beatings of prisoners with iron rods, rapes, forced abortions, the murder of prisoners (including children), and the existence of mass graves near the camps.

There is overwhelming evidence that all repatriated North Koreans are in danger of being subjected to torture upon their return to the DPRK. Since all returnees to North Korea run a substantial risk of being tortured, even if one accepts China’s position that the primary motivation for leaving North Korea is economic, this is irrelevant for analysis under CAT—Article 3 does

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105 Cohen, supra note 45, at 62.
106 See id.
107 See id.
108 See, e.g., Bai, supra note 7, at 107.
110 See id. (Ahn testified: “Sometimes I used to drink alcohol together and chat together with the people in the division of torture, and when the officer in the division is in a good mood, the prisoners will be treated mildly. And when he had an argument with his wife at home, then the torture will be severe. And I heard many times that eyeballs were taken out by beating. And I saw that by beating the person, the muscle was damaged and the bone was exposed, outside, and they put salt on the wounded part.”).
not require that individuals run a substantial risk of torture prior to leaving their home country.\footnote{111} To the contrary, the only relevant factor is whether there are substantial grounds for believing one is in danger of being tortured upon return to one’s country of origin.\footnote{112} China must fulfill its obligations under CAT by establishing a screening process to determine whether there are substantial grounds for believing an individual will be subject to torture upon repatriation. China must either cease forcible returns and provide refuge for North Koreans within their territory or facilitate travel to a third country such as South Korea.

\textit{C. Convention on the Elimination of All Forms of Discrimination Against Women}

The Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW), ratified by China in 1980, has been described as an “international bill of rights for women.”\footnote{113} Article I defines discrimination against women as:

\begin{quote}
[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.\footnote{114}
\end{quote}

CEDAW also mandates State Parties “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs[,] and practices which constitute discrimination against women.”\footnote{115} It also requires State Parties to

\footnotesize
\begin{itemize}
\item \footnote{111}{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, \textit{supra} note 104, at art. 3(2).}
\item \footnote{112}{\textit{Id.} at art. 3(1).}
\item \footnote{113}{See e.g., Convention for the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.}
\item \footnote{114}{\textit{Id.}}
\item \footnote{115}{See id. at art. 2(f) (mandating State Parties: “To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs[,] and practices which constitute discrimination against women.”).}
\end{itemize}
take measures to protect women from sexual exploitation, including sex trafficking.\textsuperscript{116}

Sixty to seventy percent of all North Korean refugees in China are women, many of whom become victims of sex trafficking.\textsuperscript{117} The Committee on the Elimination of Discrimination against Women, recognizing the significance of the problem, called on China in 2006 “to review the situation of North Korean women refugees and asylum seekers’ and ‘ensure that they do not become victims of trafficking and marriage enslavement because of their status as illegal aliens.’”\textsuperscript{118} There are many reports of sexual slavery of North Korean women in China.\textsuperscript{119} Sex traffickers travel to North Korea to seek out attractive young women to offer them false employment opportunities, only to then force them into prostitution or marriage after they enter China.\textsuperscript{120} North Korean women who cross the border on their own are also entrapped by traffickers, abducted or lured in with false promises of employment.\textsuperscript{121} Furthermore, there are reports of Chinese border guards or police pretending to arrest North Korean women for illegally crossing the border only to sell them to human traffickers or to Chinese men looking for brides.\textsuperscript{122} Once in the traffickers’ grasp, the women suffer both physical and psychological abuse; often the women are beaten, locked up, and repeatedly raped.\textsuperscript{123} Moreover, some are forced to work in the sex industry as karaoke bar hostesses or prostitutes in brothels.\textsuperscript{124} The majority, however,

\textsuperscript{116} See id. at art. 6 (requiring State Parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”).
\textsuperscript{117} See Park, supra note 9 (estimating that 70 to 80 percent of North Korean women fall victim to sex trafficking); see also Bai, supra note 7, at 108.
\textsuperscript{118} Cohen, supra note 45, at 63.
\textsuperscript{119} Bai, supra note 7, at 108.
\textsuperscript{120} See id.
\textsuperscript{121} See id.
\textsuperscript{122} See id.
\textsuperscript{123} See id.
are sold as wives to Chinese men for anywhere from $500 to $1,000.125

In addition to the widespread instances of sexual slavery, there are numerous reports that babies of repatriated North Korean women are killed through forced abortions and infanticide for being part Chinese.126 Defectors and even former guards report “instances of racially motivated forced abortion or infanticide occurring between 1998 and 2004 at five different kinds of detention and labor training facilities operated by two different police forces” and “[cases of] 273 forced abortions, mostly in police and detention facilities in North Hamgyong Province and North Pyongan Province, on women repatriated from China up through 2010.”127 One of the most horrific accounts is from a 66-year-old grandmother who was detained in the Provincial Detention Center in South Sinuiju in January 2000.128 She helped deliver seven babies from returned defectors who were killed soon after birth by being buried alive.129 A doctor explained the killings were justified because North Korea was suffering food shortages and, therefore, “the country should not have to feed the children of foreign fathers.”130

China’s failure to take appropriate measures to protect North Korean women within its territory from sexual exploitation is in direct violation of its obligations under CEDAW. To fulfill its commitment under CEDAW, China should immediately follow the 2006 recommendation of CEDAW’s Committee and comply with

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125 See Bai, supra note 7 at 108.
126 See Park, supra note 9 (citing 2012 reports by the Committee for Human Rights in North Korea (HRNK) in and Data Base Center for North Korean Human Rights White Paper).
127 Cohen, supra note 45, at 64.
128 See Charny, supra note 5, at 91.
129 Id.
130 Id.
Article 2(f) by enacting laws to protect women from sexual exploitation. Additionally, China is in violation of the CRSR, CAT, and CEDAW for repatriating pregnant North Korean women and allowing North Korea to continue its practice of forced abortions. China should honor these commitments by ceasing further reparations.

**D. CONVENTION ON THE RIGHTS OF THE CHILD**

The Convention for the Rights of the Child, adopted by China in 1992, recognizes that children are particularly vulnerable and in need of special protection under the law. It protects a child’s civil and political rights, as well as their economic, social, and cultural rights. Article 2 of the CRC provides:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth[.] or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family.

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131 Convention for the Elimination of all Forms of Discrimination Against Women, supra note 113, at art 2(f).
132 Id. at art. 12; see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), supra note 104, at art. 16; see also Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 33.
133 Convention for the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (“the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”).
134 Id.
Article 3 of the CRC sets forth that the “best interests of the child” shall be the guiding standard when dealing with children within a State’s jurisdiction, stating that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

North Korean children are also among the thousands who risk their lives to cross the Chinese border. These children are mostly boys aged ten or older, some of whom have lost one or more parent(s) or have parents who are incapable of caring for them. These children often become beggars in markets, train stations, airports, and karaoke bars throughout China. Some take refuge in shelters established by missionary or humanitarian groups, but many end up homeless, victims of exploitation, and suffer serious psychological trauma. Under these appalling conditions, these children are deprived of their right to housing, clothing, healthcare, and education. They are often “the first to be rounded up in periodic crackdowns and returned to North Korea.” Upon their forced return, children are put in prison with their families as punishment for their parents’ “crimes.”

International child advocacy groups have criticized China’s practice with regard to North Korean child migrants. For example, when reviewing China’s compliance with the Convention on the Rights of the Child, the Committee for the Rights of the Child called on the Chinese government in 2005 and in 2013 to ensure that no unaccompanied child from North Korea be returned to a country “where there is substantial grounds for believing that

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135 Id. at art. 2(1).
136 Id. at art. 3(1).
137 See Havel, Bondevik & Wiesel, supra note 42, at 60–61.
138 Id. at 60.
139 Id. at 61.
140 Id. at 60–61 (many child beggars reported they had been confined, beaten and sexually abused).
141 Id.
142 Id. at 61.
143 Id. at 91.
144 See Cohen, supra note 45, at 62.
there is a real risk of irreparable harm to the child.”

Despite the Committee’s call for Chinese compliance with its obligations under the CRC, China has taken no action to protect North Korean migrant children to date.

III. CONCLUSION

China forcibly returns more than 5,000 North Korean refugees every year. Tens of thousands have been imprisoned, tortured, and killed as a direct consequence of China's illegal policy of forced repatriations of North Korean defectors. Further, China’s assertion that North Koreans who cross its borders do so for merely economic reasons fails to take into consideration North Korea’s political caste system, which widens the unequal distribution of food, shelter, education, and employment for generations. This system is used by the regime as an instrument of persecution and control, thus distinguishing North Koreans in China as refugees, not merely migrants seeking a better life. Moreover, because Pyongyang deems every citizen who defects to have committed the crime of treason, punishable by incarceration in one of North Korea’s notorious prison camps upon return, North Koreans in China are refugees sur place, and thus, should be protected from refoulement under the CRSR.

In accordance with the customary norm of non-refoulement and its specific prohibition under the CRSR and CAT, as well as China’s obligations to women under CEDAW and to children under the CRC, China should immediately cease forcible returns of North Koreans back to the DPRK who are subject to serious human rights abuses for leaving the country without authorization.

In order to determine whether a particular claimant has a well-

\[\begin{align*}
145 & \text{Id.} \\
146 & \text{See id. at 60.} \\
147 & \text{See Park, supra note 9.} \\
148 & \text{See id.} \\
149 & \text{See Charny, supra note 5, at 30.} \\
150 & \text{See generally Cohen, supra note 45, at 59 (challenging the claim that North Koreans entering China are economic migrants).} \\
151 & \text{See id. at 7.} \\
152 & \text{See Kumar, supra note 5.}
\end{align*}\]
founded fear of persecution, North Korean “asylum-seekers should have access to a fair, satisfactory, and individual refugee status determination procedure.” As it has done with other refugees within its territory, China should lift restrictions on the UNHCR and grant it access to the border areas with North Korea. Asylum-seekers from North Korea should be allowed access to the UNHCR in order for their claims for protection to be independently and impartially assessed. To facilitate its compliance with its international obligations, China must rescind its border security agreement with North Korea, which currently denies asylum-seekers and refugees access to a fair assessment of their claims and ultimately protection from refoulement.

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153 See id.
154 See id.
155 See id.
156 See id.