

THE STATE RESPONSIBILITY OF CHINA FOR THE NORTH KOREAN REFUGEES



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LIST OF ABBREVIATIONS

- ICCPR: International Covenant on Civil and Political Rights
- UDHR: Universal Declaration of Human Rights
- UNHCR: United Nations High Commissions for Refugees
- EXCOM: Executive Committee as United Nations High Commissioner for
Refugee
- CAT or Convention Against Torture: Convention Against Torture and
Other Cruel Inhuman or Degrading Treatment or Punishment
- CDAW: Convention on the Elimination of All Forms of Discrimination
Against women
- ILC: International Law Commission's draft articles on Responsibility
of States for International Wrong Acts
- PDS: Public Distribution System
- WFP: World Food Program
- NGOs: Non-Governmental Organizations
- GDP: Gross Domestic Product

TABLE OF CONTENTS

1 INTRODUCTION	
1.1 PREAMBLE	1
1.2 FLIGHT TO CHINA DUE TO SERIOUS HUMAN RIGHTS ABUSES MARKED BY FORCIBLE REPATRIATION	2
1.3 STATE RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW AND THE PRINCIPLE OF NON-REFOULEMENT AS PEREMPTORY NORM	6
1.4 PERSISTENCE OF STATE SOVEREIGNTY AND CHINA'S DUTY IN 'DUE DILIGENCE' FOR PROTECTING NORTH KOREANS	8
2 FORCIBLE REPATRIATION AGAINST THE PRINCIPLE OF <i>NON-REFOULEMENT</i>	
2.1 THE PRINCIPLE OF <i>NON-REFOULEMENT</i>	11
2.2 THE STATUS OF NORTH KOREAN REFUGEES IN CHINA	13
2.2.1 THE SCOPE OF NORTH KOREAN REFUGEES IN CHINA	
(a) LOCATION	
(b) NUMBERS OF NORTH KOREAN REFUGEES	
(c) GENDER STATISTICS	
2.2.2 NORTH KOREANS' HUMAN RIGHTS SITUATION IN CHINA	
(a) DEPRIVATION OF THE RIGHT TO WORK	
(b) NORTH KOREAN WOMEN AND SEXUAL VIOLENCE	

- (c) NORTH KOREAN CHILDREN IN FAMILY SEPARATION AND VAGRANCY
- (d) THE PREVALENCE OF DISTRESS

2.3 FORCIBLE REPATRIATION AGAINST THE PRINCIPLE OF *NON-REFOULEMENT* 19

- 2.3.1 ARREST AND DETENTION**
- 2.3.2 DETENTION OF HUMANITARIAN WORKERS**
- 2.3.3 FORCIBLE REPATRIATION**

2.4 EXCEPTIONS TO THE PRINCIPLE OF *NON-REFOULEMENT* 22

- 2.4.1 THE 1951 REFUGEE CONVENTION**
- 2.4.2 THE CONVENTION AGAINST TORTURE**
- 2.4.3 THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS**

3 THE STATE RESPONSIBILITY OF CHINA FOR THE NORTH KOREAN REFUGEES

- 3.1 CHINA'S DUTY OF PROTECTION AGAINST REFOULEMENT 26**
- 3.2 STATE RESPONSIBILITY IN GENERAL 27**
- 3.3 BREACH OF AN INTERNATIONAL OBLIGATION 28**
- 3.4 ATTRIBUTION OF OBLIGATION TO CHINA 32**
- 3.5 LEGAL CONSEQUENCES OF VIOLATION OF INTERNATIONAL LAW 33**

4 THE ELIGIBILITY FOR REFUGEE STATUS

4.1 THE ELIGIBILITY FOR REFUGEE STATUS	35
4.2 HUMAN RIGHTS SITUATION IN NORTH KOREA AS BACKGROUND FACTS	
4.2.1 UNREALISTIC SOCIAL CONTROL BASED ON PUBLIC DISTRIBUTION	
4.2.2 SEVERE FAMINE	
4.2.3 THE DENIAL OF FUNDAMENTAL HUMAN RIGHTS	
4.2.4 SOCIAL DISCRIMINATION AND COLLECTIVE RESPONSIBILITY	
4.2.5 NO RULE OF LAW	
4.2.6 THE DENIAL OF THE RIGHT TO TRAVEL AND FREEDOM OF RESIDENCE	
4.3 PROSECUTION VERSUS PERSECUTION	42
4.4 'WELL-FOUNDED FEAR' OF PERSECUTION	45
4.5 THE MEMBER OF PARTICULAR SOCIAL GROUP, RELIGIOUS AND POLITICAL OPINIONS	47
4.5.1 THE MEMBER OF PARTICULAR SOCIAL GROUP	
4.5.2 RELIGIOUS AND POLITICAL OPINIONS	
4.6 THE POSSIBILITY OF ACCEPTANCE AS REFUGEE UNDER THE 1951 REFUGEE CONVENTION	50
4.7 THE POSSIBILITY OF PROTECTION AS REFUGEE SUR-PLACE	51
4.8 WHETHER OR NOT CHINA SHOULD ALLOW NORTH KOREANS TO ENTER AND PROVIDE PROTECTION	52
5 CONCLUSION (SEARCH FOR REASONABLE SOLUTION)	
5.1 RECOGNIZE NORTH KOREANS AS REFUGEES AND PROVIDE PROTECTION	

5.2 GRANT ACCESS TO UNHCR	56
5.3 PROTECT WOMEN AND CHILDREN	57
5.4 RESETTLEMENT	58
5.5 INTERNATIONAL BURDEN SHARING	60

REFERENCES

TREATIES/ STATUTES/ RESOLUTIONS	62
LIST OF JUDGEMENTS/ DECISIONS	64
SECONDARY LITERATURE	66

APPENDIX

APPENDIX A: MAP OF NORTH KOREA AND NORTHEAST CHINA	A
APPENDIX B: LETTER FROM CHINESE MINISTRY OF FOREIGN AFFAIRS TO FOREIGN EMBASSIES, MAY 31, 2002	B
APPENDIX C: SITUATION OF HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA-HUMAN RIGHTS RESOLUTION 2005/1	C-F
APPENDIX D: LETTER FROM LFNKR-'CHINA RAISES BOUNTY ON NK REFUGEES 1600%'	G
APPENDIX E: UNHCR REVISED GUIDELINES APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS	H-O

1 Introduction

1.1 Preamble

Article 14 of Universal Declaration of Human Rights (UDHR) states that “*Everyone has the right to seek and to enjoy in other country asylum from persecution*”.

The North Korean refugee crisis merits significant international attention because these people are the most vulnerable group and the silent victims in our international community of the last few decades.

It is a question of State sovereignty as to whether China¹ recognizes North Koreans as refugees or not and provides them with humanitarian relief. China argues that North Koreans are not refugees, forcibly repatriates them and blocks United Nations High Commissions for Refugees (UNHCR) and humanitarian workers’ access to protect them.

China is a respectable permanent member of the United Nations Security Council and the Executive committee as its High Commissioner for refugees (EXCOM). China is a party of the 1951 Refugee Convention and its 1967 Protocol. China has also ratified the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) which prohibits any repatriation where persons are in danger of being subjected to torture. In addition, China has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). As indicated by Chinese legislation system, once these international treaties are affirmed, it has a binding effect on the Chinese law and, in the event of conflicts, international law prevails over the national law.

¹ The term of ‘China’ refers ‘People’s Republic of China (PRC)’.

The aim of this thesis is to explore the duties of China as a pertaining the *non-refoulement* and human rights standards according to the theory of state responsibility. It will also endeavour to discuss the North Koreans' human rights situation and their refugee eligibility in a bid to support North Koreans' refugee claims and protect them from forcible repatriation.

The methodology of work includes various international, regional and domestic instruments such as treaties, judicial decisions, books, resolutions, journals, reports, comments, opinions and articles. I will also have recourse to the 1951 Refugee Convention, UDHR, CAT, ICCPR and International Law Commissions' draft articles on Responsibility of States for Internationally Wrongful Acts (ILC) for discussing about the theory of *non-refoulement* and State responsibility. This work will also make extensive reference to the Charter of the United Nations and Vienna Convention on the law of Treaties for interpreting various legal provisions.

1.2 Flight to China due to serious human rights abuses marked by forcible repatriation

According to the Ministry of Unification of the Republic of Korea (South Korea), a secret agreement regarding illegal immigrant repatriation was signed between China and North Korea² in 1961. In August of 1986, China entered into another bilateral agreement with North Korea by which it co-operated to return North Koreans who crossed border. It is entitled '*Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas*'.³ Article of 4 of this Mutual Cooperation Protocol states that the contracting States must:

“...cooperate on the work of prevention the illegal border crossing residents...”.

² The term of 'North Korea' refers 'the Democratic People's of Korea (DPRK)'.

³ North Korean Refugee Crisis: Human Rights and International Response, Edited by Stephan Haggard & Marcus Noland, U.S. Committee for Human Rights in North Korea, 2006 pp.40. See also White Paper on Human Rights in North Korea Edited by Korean Institute for National Unification, Seoul 1998.

In addition, China's Jilin Province has a local law that imposes the obligation to return of North Koreans who enter illegally.⁴

For a number of years, however, China has informally tolerated the presence of North Koreans. Nonetheless, in 1999 it began to forcibly return large numbers of them, claiming that they were not refugees but '*illegal migrants*'.⁵ The United States Committee for Refugees and Immigrations reported that China had repatriated at least 5000 North Koreans by 2004 through defining the North Koreans as falling outside of the protection of the 1951 Refugee Convention.⁶

It is hard to find the exact reason for the flight of the North Koreans to seek asylum in China because of the lack of sources and because the situation of North Korea which is known as being the most veiled nation in the international community. However, NGOs and International scholars have listed starvation and fundamental human rights abuses as the reasons.⁷ The North Koreans have suffered severe food shortages due to natural disasters since the mid-1990s and have been oppressed and deprived of their right to life by a corrupted unrealistic government. Regarding North Koreans' human rights situation will be explained more in Chapter 4.

Human Rights Watch and the United States Congress also reported that hundreds of thousands of North Koreans had desperately crossed the border to China to find the basic right to life from which they had been deprived by their government. However, the North Koreans in China often become victims of human trafficking, human rights abuses and

⁴ Ibid pp.40

⁵ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd Edition), 2007 pp.231

⁶ US Committee for Refugee and Immigrations, *World Refugee Survey – China* (2005)

⁷ *The invisible Exodus: North Koreans in the People's Republic of China*, Edited by Human Rights Watch (2002) pp.2. See also U.S. CRS Report for Congress-North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Opinions (September 26, 2007) pp.6.

sexual violence. Most of them are struggling with a deep fear that the Chinese authorities will catch them for repatriation to North Korea.⁸

An analysis of current information provided by the UNHCR concludes that many North Koreans may well be considered refugees.⁹ The High Commissioner has thus argued that the plight of North Koreans who leave their country illegally remains a serious concern in China. The UNHCR has been making efforts to obtain access to them for a number of years, but it has consistently been denied by the Chinese authorities.

A serious event under international law is that armed Chinese authorities entered the Japanese consulate located in Shenyang without its permission in May 2002 and forcibly removed five North Korean asylum seekers who had been sheltered within the compound and repatriated them to the North Korea.^{10 11} As indicated by the international law, this is a violation of the 1964 Vienna Convention on Diplomatic Relations. Article 22 of this Convention which provides that:

*“The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.”*¹²

⁸ The Invisible Exodus, supra pp.9-18 and U.S. CRS Report, supra pp.4-12

⁹ The UNHCR High Commissioner’s Statement during the EXCOM session, 29 September 2003

¹⁰ See Kate Jastrain & Marilyn Achiron & UNHCR, Refugee Protection: A Guide to International Refugee Law (UNHCR 2001); ‘Asylum-seeker’ is a general term for a person who has not yet received a decision on his/her claim for refugee status. It could refer to someone who has not yet submitted an application or someone who is waiting for an answer. Not every asylum-seeker will ultimately be recognized as a refugee, but many will. Until the claim is examined fairly, the asylum-seeker is entitled to not be returned, according to the principle of non-refoulement, and to benefit from humanitarian standards of treatment.

¹¹ See Elim Chan & Andreas schloenhardt, North Korean Refugees and International Refugee Law, International Journal of Refugee Law, 2007 pp.238. Since 2002, NGOs and Humanitarian organizations assisted North Koreans to slip into embassy and consular compounds and other foreign building to request asylum and some of them successfully entered to leave and proceeded to South Korea.

¹² China ratified this Convention on 25 November 1975.

The 1963 Convention on Consular Relations affirms the inviolability of a mission or consular premise by the host country as well.¹³ Based on these legal instruments, China should not slip into foreign diplomatic premises without any permission. The State of the foreign premise where the asylum seeker is asking protection has a responsibility not to return the asylum seeker to the origin country or territory where he/she will be persecuted.¹⁴

Vice versa, China has reacted to this by placing heavy security around foreign diplomatic compounds and applying more security measures at the border between China and North Korea. Chinese authorities have stepped up their house raids in search of North Koreans and even offer bounties to Chinese citizens who can disclose the whereabouts of North Korean refugees.¹⁵

The Chinese Ministry of Foreign Affairs issued a letter to foreign embassies and demanded that:

“According to the principle of international law that embassies and consulates has no right of asylum, the Chinese side also wishes embassies concerned to render cooperation and inform the Consular. Department of Chinese Ministry of Foreign Affairs in case the illegal intruders were found, and hand over the intruders to the Chinese public security organs.

¹³ China ratified this Convention on 2 July 1979. Article 31 (1) (2) of the Convention on Consular Relations stated that “Consular premises shall be inviolable to the extent provided in this Article. The Authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.”

¹⁴ Elim Chan & Andreas Schloenhardt, *supra* pp.238

¹⁵ Amnesty International 2002, and 2003 Report. See also Appendix D, corresponds with LFNKR-the NK Refugee Japanese NGO, China Raises Bounty on North Korean Refugees 1600%(from 500 Yuan up to 8000 Yuan(around 1,150 US Dollars)) and this amount is equivalent to the average annual income in China.

*The above-mentioned principle is also applicable in dealing with the intruders into foreign consulate institutions”.*¹⁶

1.3 State responsibility under general international law and the principle of *non-refoulement* as ‘*peremptory norm*’

State responsibility is a fundamental principal of international law, arising out of the nature of the international legal system, the doctrines of state sovereignty and equality of states.¹⁷

It is not based upon national law but is governed by international law.¹⁸

State responsibility may occur directly from acts and omissions of government officials and agents, or indirectly where the domestic legal and administrative systems fail to guarantee the observance of international standards whether the obligation to observe those standards rests on treaty, custom, or some other basis.¹⁹

In the *Barcelona Traction case*²⁰, the International Court of Justice drew the distinction between obligations of a State arising towards ‘*another State*’ and obligations towards ‘*the international community as a whole*’. The court described ‘*community obligation*’ as: “*Such obligation derive, for example, in contemporary international law, from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination*”.

¹⁶ Appendix B

¹⁷ Malcolm N. Shaw, *International Law* (5th Edition), Cambridge (2003) pp.694

¹⁸ art.3 of the International Law Commission’s draft articles on Responsibility of States for Internationally Wrongful Acts on August 2001

¹⁹ Ian Brownlie, *Principle of Public International Law* (5th Edition) Oxford, 1998 pp.435-448

²⁰ See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ reports 1970 para.3-51. It is one of the popular cases in international law because it demonstrates how the concept of diplomatic protection under international law can apply equally to corporations as to individuals and also expanded the notion of obligations in the international law.

The meaning of ‘*community obligation*’ is considered the same as ‘*peremptory norm*’ which was accepted by the International Law of Commission and was reflected in Article 50 of the final draft on the Law of Treaties of 1966, which described that:

“*A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*”.²¹

Article 53 of the Vienna Convention on the Law of Treaties provides:

“*A peremptory norm of general international law is defined as ‘a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’*”.

The principle of *non-refoulement* prescribes, broadly, that no refugee²² should be repatriated to any country where he/she is likely to face persecution, other ill-treatment, or torture. This principle is a part of customary international law and is even considered a ‘*peremptory norm*’.²³ It has found expression in various international instruments adopted at the universal levels and is even generally accepted by States that are not party to the 1951 Refugee Convention.²⁴

By the late 1980s, the Executive Committee (EXCOM) of the UNHCR concluded that ‘*all States*’ were bound to refrain from *refoulement* on the basis that such acts were ‘*contrary to*

²¹ Draft Articles on the law of treaties, Report of the of the International Law Commission on the work of its Eighteenth Session, 4 May-19 July 1966, Official Records of the general Assembly, 21st Session, supplement No.9 (A/6309/Rev.1).

²² The use of term ‘Refugee’ does not mean that these persons meet the legal standard for being Refugees under the 1951 Refugee Convention.

²³ Guy S. Goodwin-Gill and Jane McAdam, *supra* pp.201-229

²⁴ Kate Jastrain& Marilyn Achiron& UNHCR, *supra* pp.7 See also the UNHCR High Commissioner’s Statement at EXCOM on 29 Sep. 2003. The High Commissioner stated that: “the principle of non-refoulement must be respected above all”.

fundamental prohibitions against these practices'. In 1996, the EXCOM members concluded that *non-refoulement* had acquired the level of '*peremptory norm*' when they determined that the '*principle of non-refoulement is not subject to derogation*'.²⁵

Further, the principle of *non-refoulement* as a peremptory norm is to be found in state practice, which has been discussed in Latin America on the basis of the 1984 Cartagena Declaration. One of its conclusions was that:

"The principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens".²⁶

Numerous international scholars and publicists have considered the principle of *non-refoulement* as a '*peremptory norm*'.²⁷

1.4 Persistence of State Sovereignty and China's duty of '*due diligence*' in protecting North Koreans

Paragraph 1 Article 2 of the Charter of the United Nations recognizes the '*sovereign equality of all its members*'.²⁸ The International Court of Justice stated that the whole of international law rests upon the fundamental principle of state sovereignty which prohibits intervention bearing on matters in which each state is permitted to decide freely.²⁹

Every State has a sovereign right to grant refugee status to the people who have fled from their country of origin to its territory. It is an exclusively peaceful and humanitarian act and no other State may oppose its legitimacy under international law.

²⁵ Jean Allain, *Insisting on the Jus Cogen Nature of Non-refoulement: The Refugee Convention at fifty*, 2003 pp.85.

²⁶ 1984 Cartagena Declaration on Refugees, Part III Para.5

²⁷ *Ibid* pp.85

²⁸ It states that "The Organization is based on the principle of the sovereign equality of all its Members".

²⁹ Nicaragua case (Nicaragua v. United States), ICJ Judgement (Merits), 27 June 1986.

However, it remains the duty of the States to protect individuals and under international law this duty includes preventing individuals living on its territory from endangering the safety of another State. If a State grants refugee status to a persecuted foreigner, this duty becomes of special importance.³⁰ This is derived from the theory of '*due diligence*'. The term of '*due diligence*' has been quoted repeatedly in treaties and judicial decisions concerning state responsibility.

According to the UN Declaration on Violence against Women, the State has a duty to prevent and punish acts of violence against women by State or private persons.³¹ The Inter American Convention on the Prevention, Punishment and Eradication of Violence Against Women also applies the '*due diligence*' standard to prevent violence against women.³² In *Velasquez Rodriguez v. Honduras case*³³, it was found that the State is responsible for the acts of a private person when the State fail to exercise '*due diligence*' to prevent the violation or respond to it.

The EXCOM has acknowledged the '*due diligence*' standard in reference to the duty of a refugee receiving States to protect refugees.³⁴ Even if a refugee receiving the State's duty of protection is limited by the capacity of State, the State should determine in good faith as what is possible and reasonable.

Once a States' duty of '*due diligence*' arises, the refugee receiving State is free to choose the methods by which it will meet its obligation under international law. This means that State responsibility will not arise as long as a refugee receiving State provides reasonably sufficient action for the refugee claimant. However, international law expressly requires

³⁰ L. Oppenheim, Oppenheim's International law (5th edition 1938), vol.I pp.539-540

³¹ art.4 (C) It states that "Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether these acts are perpetrated by the state or by private person".

³² art.7 (C)

³³ Velasquez Rodriguez case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No.4 (1988)

³⁴ Draft resolution, the Executive Committee of the United Nations High Commissioner for Refugees, para.3, EC/SCP/26, Annex 2 (1983)

that a refugee receiving State shall not impose penalties, on account of their illegal entry or presence, on refugees who have arrived directly from a territory where their life or freedom was threatened.³⁵

China is a State party to the 1951 Refugee Convention and its 1967 Protocol.³⁶ China is a member of the EXCOM of the United Nations High Commissioner for Refugees as well. Under these established international laws and the principle of State sovereignty which has been previously discussed *supra*, China has the right to decide whether to grant North Koreans to enter its territory under refugee status. Nevertheless, North Koreans arriving in Chinese jurisdiction, at the borders or in the territory of China, should be treated humanely and be provided the proper methods of protection such as individual assessment, due process procedures, but should not be repatriated to their origin country where they will be persecuted.

Once North Koreans are on its territory, China should stop forcible repatriation particularly against individuals facing threats of ill treatment in North Korea.

³⁵ art.31 of the 1951 Refugee Convention

³⁶ China ratified the 1951 Refugee Convention on 24 September 1982 and the 1967 Additional Protocol on 25 September 1982.

2 Forcible repatriation against the principle of *Non-refoulement*

2.1 The principle of *non-refoulement*

Article 14 of the Universal Declaration of Human Rights declares the right of everyone to seek asylum from persecution. Furthermore, the fundamental principle of *non-refoulement* requires that persons fleeing from persecution must be provided with an opportunity to seek refugee status, those in fear of torture may not be returned to their home country and protection must be provided against inhuman and degrading treatment. This is a core principle of international law.³⁷ This principle is known as a customary international law and even as a peremptory norm. It is binding to the States irrespective of whether or not this State ratified the 1951 Refugee Convention and its 1967 Protocol.

Article 33 of the 1951 Refugee Convention provides as follows:

“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”.

The 1951 Refugee Convention and its 1967 Protocol were both ratified by China creates significant obligations to protect North Korean refugees on its territory. Nonetheless, Article 33 of this provides the theory of *non-refoulement* on the Convention level.³⁸

It is hard to apply North Koreans to protect them because China as a contracting party can decide whether to confer on North Koreans refugee status or not. China is still categorizing all North Koreans as illegal migrants and harshly puts them on the list of repatriation. In addition, China does not follow its obligation with the UNHCR regional office. Article 2 of the Refugee Protocol Relating to the States of 1967 states as follows:

³⁷ Jari Pirjola, Shadows in paradise-exploring non-refoulement as an open concept, International Journal of Refugee Law, December 2008. pp.1

³⁸ Guy S. Goodwin-Gill and Jane McAdam, supra pp.208

“Co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations that may succeed it, in the exercise of its functions”.

The same principle can be found in the UN Convention Against Torture and other Cruel Inhuman, or Degrading Treatment or Punishment (Convention Against Torture).

Paragraph 1 of Article 3 of Convention Against Torture states as:

“No State Party shall expel, return 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”.

It guarantees that individuals have the right not to be forcibly returned to countries where they would be in danger of being subjected to torture. Article 1 of this Convention defines the meaning of torture as any act by which severe suffering whether physical or mental is intentionally inflicted on a person. China signed this Convention in 1986 and ratified it in 1988, but it has two reservations. China does not recognize Article 20 and 30 Paragraph 1.³⁹

This Convention has more substantial grounds than the 1951 Refugee Convention for determination and providing protection to North Koreans because it prevents the repatriation of individuals who could be subjected to torture, yet the applicant has to prove that there is a risk of being tortured after repatriation and it requires higher degree of persecution compared to the 1951 Refugee Convention.

Similarly, Article 7 of ICCPR provides that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.

It is not limited to refugees and is binding to the States parties regardless of whether or not they are a party to the 1951 Refugee Convention and its 1967 Protocol.

³⁹ See The North Korean Refugee Crisis, supra pp.47. China does not recognize the competence of the UN Committee against Torture to investigate and respond to allegations of torture in a party's territory (as provided for in Article 20), and China does not consider itself bound by the provision concerning arbitration or referral to the International Court of Justice (Para.1 of Article 30).

The UN Human Rights Committee has interpreted this Article 7 to incorporate the principle of *non-refoulement* and provided that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon returning to another country by way of their extradition, expulsion or *refoulement*.⁴⁰

Non-refoulement is also embodied in regional instruments such as the Article II (3) of the 1969 OAU Convention, the Article 22(8) of the 1969 American Convention on Human Rights and the Article 12(3) of the 1981 African Charter of Human and Peoples' Rights. In 1977, the EXCOM noted and reaffirmed that:

*“The fundamental importance of the observance of the principle of non-refoulement-both at the border and within the territory of a State-of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees”.*⁴¹

2.2 The Status of North Korean refugees⁴² in China

2.2.1 The scope of North Korean refugees in China

There is no official survey or reliable statistics for the North Koreans because China considered North Koreans to be criminals and or illegal migrants. Most North Koreans hide in rural areas and women live with local Chinese men in silence.

In 1998-1999, the South Korean NGO, Good Friends surveyed the scope of North Korean refugees in China. Other NGOs and scholars added a partial survey which they based on the Good Friends' survey.

⁴⁰ See UN Human Rights Committee, General Comment No.20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art.7) (1992) para.9.

⁴¹ See UNHCR Executive Committee Conclusion No.6 (1977). It was suggested by UK Court of Appeal in *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport* (2004) QB 811 para.44.

⁴² The use of term 'Refugee' does not mean that these persons meet the legal standard for being refugees under the 1951 Refugee Convention.

(a) Location

The majority of North Korean refugees live in Jilin province located in the north-east part of China because it borders North Korea. It is also home to two million Korean-Chinese or Chinese citizens of Korean descent, and Korean is widely spoken there. Many ethnic Koreans who live in China also have relatives in North Korea. Some of people who live near the border are engaged in small business trade between North Korea and China. Nonetheless, this borderline has been deteriorated and heavily controlled after 1990 because hundreds of thousands North Koreans had used this border to escape from their home country.⁴³

(b) Numbers of North Korean refugees

It is hard to estimate refugee numbers because the most North Koreans are in hiding and some of them only stayed in China for the short term. It also can be due to the fact that official survey statistics do not exist. The Good Friends'⁴⁴ survey, mentioned above, states that between November 1998 and April 1999, when the famine was at its peak, there were between 143,000 and 195,000 refugees in north-east China. The South Korean press puts the figure around 300,000 refugees.⁴⁵ The U.S. State Department estimated the figure to be in the range of between 30,000 to 125,000. The UNHCR also uses between 30,000 and 50,000 as a working figure, but it has not been given access to the country to conduct a systemic survey.⁴⁶

(c) Gender statistics

⁴³ Appendix A, the map of North Korea and Northeast China

⁴⁴ Good Friend is a Non Governmental Organization (NGO) based on Seoul South Korea. It is well known as helping North Korean Refugees and did such prominent research work.

⁴⁵ Andrei Lankov, North Korean Refugees in Northeast China, Asian Survey Vol.44, University of California Press (November/December 2004) pp.860.

⁴⁶ United States CRS Report for Congress, North Korean Refugees in China and Human Rights Issues (Sep. 26, 2007), pp.4

The statistics regarding North Korean women and their situation come primarily from the Good Friends' survey in 1998 and unfortunately, there is no other reliable survey other than this for providing gender information. According to this survey in 1998, women formed 51.9% of refugees and the majority of them lived with Chinese men.⁴⁷ This ratio has increased in a few years. According to the Amnesty International Report 2007, the 75% of refugees formed by women, however this figure is not based on reliable statistics.⁴⁸

2.2.2 North Koreans' human rights situation in China

(a) Deprivation of the right to work

Some local Chinese households regard North Koreans as being the same as slaves. They provide shelter and force North Koreans to take on a heavy work load that is low-paid or unpaid. They are able to take advantage of the North Koreans because they know that North Koreans are considered to be criminals and subjected to repatriation by Chinese authorities and thus exploit them.

One of the legal instruments binding on China is the 1951 Refugee Convention and its 1967 Protocol. Article 17 of the 1951 Refugee Convention provides that States shall accord to a refugee the right to work as accorded to other aliens. However, China does not publically consider North Koreans as refugees under this Convention and has repatriated them constantly.

Article 2 of the ICCPR is also ensured '*right to work*' without any discrimination, but it is only a signatory meaning because China has not ratified it yet.⁴⁹ The treaty does not have any binding effect without State ratification as a contracting party.

(b) North Korean women and sexual violence⁵⁰

⁴⁷ Ibid pp.860

⁴⁸ Amnesty International Report 2007-North Korea, CRS Report adopted this at supra pp.4.

⁴⁹ China just signed the ICCPR on 5th of October 1998

⁵⁰ The term of 'sexual violence' is used to cover all forms of sexual threat, assault, interference and exploitation, including 'statutory rape' and molestation without physical harm or penetration.

The sexual exploitation of North Korean women includes a wide range of situations. In cases of trafficking, women could be forced into marriage or the sex trade. Testimonies from trafficked women indicate that many of them remain because they feel helpless and powerless to change their situation even though some women have tried to escape from exploitative situations.⁵¹

With regard to sexual exploitation, Article 6 of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵² provides as follows that:
“State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”.
It also notes in the preamble that refugee women are especially vulnerable to violence.

North Korean women are often targeted by organized gangsters. Human hunters and traffickers have kidnapped North Korean women and sold them to Chinese men or to the sexual industry. They provide North Korean women to local Chinese men who live in rural areas. The price range for the women varies and depends on age. Single and young North Koreans were sold for roughly 3000-5000 Yuan (US \$400-600).⁵³ Some North Korean women allow a third party to sell them as brides to Chinese men because they are desperate to survive. These arranged marriages are organized by brokers.

Nonetheless, living with a local Chinese man does not guarantee a North Korean woman's status. They are still illegal migrants even though they have entered into marriage with local Chinese man, have lived with him for several years and had a child. They are physically and sexually abused by their spouses. They are beaten, abused and treated like a sexual toy. As indicated by Human Rights Watch, there are many sexual abuse cases of

⁵¹ Conference summary records, 7th Conference of New Approaches North Korea on North Korean Human Rights & Refugees (2006, Bergen Norway) pp.69.

⁵² China has ratified this convention on 1980.

⁵³ Andrei Lankov, *supra* pp.86l. See also North Korean Refugee Crisis, *supra* pp.23 Table-10.

North Korean women who were adducted in order to be sold to Chinese by organized gangsters.⁵⁴

(c) North Korean Children in family separation and vagrancy

Children are the future hope of our international community, and it is a common understanding of every States to promote and protect the rights of the child. As stated in Article 22 of the Convention on the Rights of the Child⁵⁵:

“States Parties shall take appropriate measures to ensure that a Child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties”.

It also has to be pointed out that Children are particularly vulnerable to sexual abuses by human traffickers, smugglers, security officers and border guards.⁵⁶ China has an obligation to protect the North Korean child from all forms of sexual exploitation and sexual abuse as indicated by Article 34 of the Convention on the Rights of Child.

There is no reliable report regarding the situation of North Korean children in China, but the NGO, Good Friends described a part of the story. One example, it is the tragedy of a family that crossed the border together and was separated. The father was repatriated, the mother was sold into prostitute and the children wandered in the street. They stayed and begged in markets, train stations in towns that were close to border. If they were lucky then

⁵⁴ The Invisible Exodus, supra pp.13

⁵⁵ China signed this Convention on 29 August 1990 and ratified on 2 March 1992.

⁵⁶ UNHCR, Sexual Violence Against Refugees: Guidelines on Prevention and Response, Geneva 1995.

they found shelter and were supported from people who were willing to take them to a third country for freedom.⁵⁷

(d) The Prevalence of distress⁵⁸

Distress is a psychological response to an event with death or injury threatening that entails a sense of re-experiencing the trauma and the intrusion of memories of feelings, a pattern of avoidance, a numbing of responsiveness, or reduced involvement in the external world, a persistent state of physiological arousal, reflected by such problems as difficulty sleeping, startle responses and angry outbursts.⁵⁹

Sexual exploitation may bring about intergenerational effects on mental health, particularly where a woman's self-hatred and lack of self-esteem is strengthened by an unintended pregnancy. If the mother gives birth, she may suffer from post-partum depression and consequently abuse or mistreat the child, who may in turn experience their own feelings of mistrust and lack of self-worth.⁶⁰

North Korean women and girls, especially, have suffered severe trauma because each one has the terrible pressure of repatriation, forced non-paid work, isolation, sexual abuse and hostility in China. As reported by the United States Human Rights Committee, depression and grief is common reactions to North Korean women and it is related to feeling down, sad, hopeless and despairing.⁶¹

⁵⁷ Good-Friends, Report on Daily and Human Rights of North Korean Food Refugees in China (June 1999), pp.28-30.

⁵⁸ It is too much details, but it has to be pointed out to understand North Korean women's situation in China

⁵⁹ Royce Bernstein, Sex for food in a Refugee Economy: Human Rights implications and Accountability, Georgetown Immigration law, journal 14. Geo. Immigr. L.J. (1997) pp.1007-1009

⁶⁰ Ibid pp.1007

⁶¹ The North Korean Refugee Crisis, supra, pp24-25

As stated in the UNHCR's Sexual Violence Guidelines, China on whose territory the sexual violence and exploitation has occurred is responsible for taking diligent remedial measures, including conducting a thorough investigations into the crime, identifying and prosecuting those responsible persons, and protecting victims from reprisals.⁶²

2.3 Forcible repatriation against the principle of *non-refoulement*

2.3.1 Arrest and detention

When Chinese authorities arrest North Koreans, they first hold them at a detention facility. China has several border detention centres due to North Korean refugees. Sexual, physical abuse and torture occur in the detention centres.⁶³ These days China intensively searches and finds hidden North Koreans and brutally takes them to detention centres.⁶⁴

After receiving these detainees from Chinese authorities, the North Korean security agency interrogates the detainees to distinguish persons who have committed political crimes from those who merely crossed the border searching for food. Border crossing without any permission is considered a politically sensitive crime. In particular, women with a previous record of crossing the border or who have married a Chinese man or who are pregnant face harsh penalties. Contact with South Koreans, foreign missionaries or humanitarian workers are regarded as a serious crime and the persons who commit this crime are sent to a political labour camp. In extreme cases, they face public execution.⁶⁵

2.3.2 Detention of humanitarian workers

⁶² UNHCR Sexual Violence Against Refugee, supra para. 9

⁶³ Conference summary records, 7th Conference of New Approaches North Korea on North Korean Human Rights & Refugees (2006 Bergen Norway) pp.70.

⁶⁴ The Invisible Exodus, supra pp.16

⁶⁵ Good-Friends and Amnesty International press release on May 6 2008, supra.

There are an increasing number of reports that China has detained many humanitarian workers who were helping North Koreans.⁶⁶ Because they assisted North Koreans, they were arrested, detained, maltreated and expelled. Some of them were accused of espionage by the Chinese authorities.

In one instance in 2002, a group of foreign and Chinese nationals stood trial for ‘*people smuggling*’ in Jilin province in China. The group included a South Korean pastor, a Korean-American, four North Korean citizens, and 12 Chinese nationals. All these individuals had allegedly been involved in staging the escapes of North Koreans.⁶⁷ In May 2003, South Korean citizen Choi Young-Hun was sentenced to five years in prison for his role in assisting North Koreans in China.⁶⁸ Chinese authorities also detained American citizen Phillip J. Buck on May 9, 2005 for assisting North Koreans in China.⁶⁹

2.3.3 Forcible repatriation

The UN Special *Rapporteur* stated as follows that:

*“The former (illegal immigrants) implies that they can be sent back to their country of origin, while the latter (refugees) are protected by the principle of non-refoulement. I submit that a key test is whether they are protected by their country of origin. If they are not, this should open the door to international protection and legitimize their classification as refugee. Even if some countries are not ready to classify them openly as refugee, these persons should at least be treated as persons in need of international protection, and basic international law principles, such as non-refoulement, should be applied”.*⁷⁰

⁶⁶ Shim Jae-Yun, Over 100 Korean Missionaries Detained in China in The Korea Times (June 20, 2002)

⁶⁷ Andrei Lankov, supra pp.870 See also U.S. House of Representative Hearing, supra pp.74.

⁶⁸ The United Nations Working Group on Arbitrary Detention ruled Choi’s deprivation of liberty as arbitrary. UNWGAD, Opinion No. 20/2005 (People’s Republic of China), 11 June 2004

⁶⁹ US Congressional-Executive Commission on China, 2005 Annual Report pp.113-115

⁷⁰ See Elim Chan & Andreas Schloenhardt, supra pp.222. They quoted it from UN Special Rapporteur: Mr. Vitit Muntarbhorn’s statement.

China does not consider North Koreans as refugees under the 1951 Refugee Convention and forcibly repatriates them to horrible place where they routinely face imprisonment, torture and sometimes execution. By 2004, China had repatriated at least 5,000 North Koreans, and was reported as permitting North Korean security forces periodically to enter China to abduct refugees.⁷¹

According to one North Korean's testimony who escaped to China, he alleged that:

*"I had seen almost four hundred North Koreans repatriated from China during my stay in Musan".*⁷²

The 2004 World Refugee Survey also stated that China has forcibly returned as many as 200 North Koreans per week amounting to an estimated 7,800 forced deportations during 2003.⁷³

As already discussed, there are constant reports about how North Koreans were mistreated, tortured and executed when they were repatriated by Chinese Officials.

Here is more evidence from the prison camp survivor:

*"In the gulags there are many persecutions....I have witnessed people losing their eyes....And also I have seen people lose their arms and legs because they were beaten so hard".*⁷⁴

Another witness, a former North Korean prison guard and refugee in China, stated before the United States House of Representatives:

"The accused are severely beaten, tortured, and threatened to obtain their confessions. A place where a human is not treated as human and yet worse than animals is the North

⁷¹ Guy S. Goodwin-Gill and Jane McAdam, *supra* pp.232

⁷² *The Invisible Exodus*, *supra* frontpage

⁷³ See Testimony to The Subcommittee on Asia and the Pacific, U.S. House of Representatives, Committee on International Relations (April 28 2005) pp.6.

⁷⁴ See Statement of Kim Tae-Jin, North Korea Prison Camp survivor and former refugee in China. There are more evidences from the testimony of North Korea specialist and prison camp survivors before U.S. House Representative Hearing, *supra* pp.100.

*Korea's Political Prison Camp. 'Living Hell' would be a right description for those prisoners".*⁷⁵

As mentioned above, Article 14 of UDHR provides the right to seek and enjoy asylum from persecution and Article 7 of ICCPR prohibited repatriation to where persons would be exposed inhuman and degrading treatment. Article 3 of Convention Against Torture prevents acts of torture and imposed an obligation to a contracting party that it should not return persons to their origin country where they would be in danger of being subjected to torture.

It is perfectly clear that China has a right to exercise its measurement of State sovereignty for protecting its national security and borderline. However, it should be balanced with China's obligation under international law. International Law strongly prohibits repatriating persons who likely to face torture or cruel, inhumane or degrading treatment upon returning to another country.

2.4 Exceptions to the principle of *non-refoulement*

2.4.1 The 1951 Refugee Convention

The 1951 Convention refugee definition is not an absolute guarantee of protection because the principle of *non-refoulement* in Article 33 of this Convention is subjected to exceptions such as '*public order*' and '*National security*'. Article 33(2) of the 1951 Refugee Convention expressly provides that the benefit of *non-refoulement* may not be claimed by a refugee for whom there are reasonable grounds regarding them as a danger to the security of the country or who has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of that country. In such situations, the danger to the country must be very serious. Furthermore, it has to be a rational connection between the removal of the refugee and the elimination of the danger. *Refoulement* should

⁷⁵ See Statement of Choi Dong-Chul, Former North Korean Prison Guard and Refugee in China, U.S. House Representative Hearing, supra pp.101-104.

be last possible resort to eliminate the danger, and the danger to the country of refugee has to outweigh the risk to the refugee upon *refoulement*.⁷⁶

The exceptions to *non-refoulement* are framed in terms of the individual, and whether he/she may be considered a security risk is necessarily left very much to the judgement of the State authorities.⁷⁷

A Chinese Foreign Ministry official stated on the behalf of their practice to prevent North Koreans from entering foreign compounds that:

“Such asylum bids not only harm the security of those embassies and interfere with their normal function, but also pose a challenge to the Chinese Law and interfere with security and stability in China”.⁷⁸

Unfortunately, the concept of national security remains undefined under international law. However, it should be interpreted in good faith. Article 31(1) of the Vienna Convention on the Law of Treaties describes that:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose”.

China must demonstrate ‘*reasonable grounds*’ for believing that North Koreans are a danger to China’s security by adducing evidence of a future risk. As mentioned above, only a very serious danger to national security should justify *refoulement*.⁷⁹

In *the case of Suresh*⁸⁰, the Supreme Court of Canada concluded that international law generally rejects deportation to torture, even where national security interests are at stake. This case also discussed that individualized decisions should be made in keeping with due

⁷⁶ Silver & Others v United Kingdom, European Commission of Human Rights (1981) 3 EHRR 475 11 October 1980

⁷⁷ Guy S. Goodwin-Gill and Jane McAdam, *supra* pp.235

⁷⁸ Harvey Stockwin, China Escalates Hardline on Refugees, Times of India, June 15, 2002

⁷⁹ Sir Eilhu Lauterpacht & Daniel Bethlehem, The Scope and Content of the principle of Non-refoulement: Opinion, notes 169

⁸⁰ See *Suresh v Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada, (200) SCC1, 11 Jan. 222.

process standards by a competent authority with appropriate expertise in refugee and criminal law. In *A v. Minister for Immigration and Multicultural Affairs*⁸¹, it was held that the principle statement of exclusion in article 33(2) is that the individual constitutes a danger to the community or to national security, not that he/she has been convicted of a particularly serious crime.

China as a contracting party in the 1951 Refugee Convention has an obligation to interpret Article 33(2) in good faith as indicated by its purpose. The threat to ‘*national security*’ as exception to *non-refoulement* obligation has to be interpreted restrictively and with full respect to the principle of proportionality discussed *supra*. China also has an obligation to establish fair and efficient asylum procedures derive from the right to seek and enjoy asylum.

North Korean refugees have to be identified in need of international protection, but China does categorizing North Koreans as criminals and considered them to harmful to Chinese national security without any individual assessment and identification procedure.

2.4.2 The Convention Against Torture

The Convention Against Torture guarantees the principle of *non-refoulement* as absolute right granted to any persons in danger of being subjected to torture. It applies to persons who have entered a country illegally as well as lawfully. In the case of *Mutombo v. Switzerland*⁸², the Committee Against Torture has concluded that the principle of *non-refoulement* under Article 3 of Torture Convention applies not only direct expulsion, *refoulement* and/or extradition but also to indirect transfer to a third country.

In spite of that, the applicant must prove ‘*substantial grounds for believing*’ that persons would be in danger of being subjected to torture. ‘*Substantial grounds for believing*’

⁸¹ *A v. Minister for Immigration and Multicultural Affairs* (1999) FCA 227, para.4.

⁸² *Mutombo v Switzerland*, Committee Against Torture, Communication No.13/1993, UN Doc.A/49/44 at 45 (1994)

requires both that subjectively the applicant faces the danger of torture and objectively the belief must be based on substantial grounds. In the case of *Ismail Alan v. Switzerland*⁸³, the Committee Against Torture can decide whether there are substantial grounds for believing that the applicant would be in danger of being subjected to torture upon return. The applicant must establish ‘*substantial grounds for believing*’ by credible, direct and specific evidence. But, it does not require complete accuracy from the applicant’s testimony. In *Khan v. Canada*⁸⁴, the Committee also noted as follows that:

“*Even if there could be some doubt the facts as adduced by the applicant, it must ensure that his security is not endangered*”.

2.4.3 The International Covenant on Civil and Political Rights (ICCPR)

Like Article 3 of Convention Against Torture, Article 7 of ICCPR is also an absolute provision. Article 4(2) of ICCPR forbids derogation even in times of public emergencies. However, United Nation Human Rights Committee has issued very few decisions on the principle of *non-refoulement* under this provision. In a number of cases applicants have claimed that their extradition to countries where they faced capital punishment or would be a risk of torture constituted a violation of Article 7.⁸⁵ In addition, it is not required the exhaustion of domestic remedies if those ones are unreasonably prolonged. However, the decision of Human Rights Committee based on this provision is not legally binding.

⁸³ *Ismail Alan v Switzerland*, Committee Against Torture, Communication No.21/1995, UN Doc. CAT/C/16/D/21/1995 (1996)

⁸⁴ *Tahir Hussain Khan v Canada*, Committee against Torture, Communication No.15/1994, UN Doc.A/50/44 (1995)

⁸⁵ David Weissbrodt & Isabel Hortreiter, *The Principle of Non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties*, Buffalo Human Rights Law Review Vol.5, 1999 pp.43.

3 The State Responsibility of China for the North Korean Refugees

3.1 China's duty of protection against *refoulement*

According to Article 2 of Charter of the United Nations⁸⁶, China must refrain, in its international relations, from any manner inconsistent with the purposes of the United Nations to maintain international peace and security. Obviously, it is a serious breach of International law if China consistently repatriates North Koreans. Because, international law strongly prohibits forcibly *refoules* persons where they face persecution, torture and/or inhuman treatment whether or not they are qualified as refugees. It is generally recognized by State practice, international scholars and publicists as '*peremptory norm*'. There is no derogation admissible not only at the international but also at the national level.

International law sets a binding obligation to China that it should abstain from sending North Koreans into their home country of alleged persecution, and has to provide some sort of procedure to protect North Koreans against *refoulement*. Article 40 of International Law Commission states as follows that:

"...a State of an obligation arising under a peremptory norm of general international law...a breach of such an obligation is serious if it involves a gross or systematic failure by responsible State to fulfil the obligation".

This obligation intends to protect the most basic human values.⁸⁷ The term '*serious*' signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach. It is not intended to suggest that any violation of this obligation is not serious or is somehow excusable.⁸⁸

China's duty to protect North Koreans arises as soon as the individual or group flee from North Korea for relevant reasons and come within the Chinese jurisdiction regardless of

⁸⁶ art.2 para.4

⁸⁷ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001 pp.112

⁸⁸ Ibid pp.113

whether the refugee status has been formally determined or not. China is never entitled to immunity from any act that contravenes this duty of protection, regardless of where or against whom that act was perpetrated.

3.2 State responsibility in general

The essential characteristics of State responsibility hinge upon certain basic factors: firstly, the existence of an international legal obligation; secondly, there has to have occurred an act or omission which violates that obligation and which is imputable to the state responsible; and finally, that loss or damages have resulted from the unlawful act or omission.⁸⁹

Article 1 of the ILC Draft Articles on State Responsibility reiterates the general rule, widely supported by practice⁹⁰, that every internationally wrongful act of a state entails responsibility. Article 2 provides that there is an internationally wrongful act of a state when the conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of the state.⁹¹

The violation of a State obligation could be considered as a lawful act under its domestic law, but its characterization as an act of intentionally wrong is governed by international law and thus is not affected by the characterization of the same acts as lawful by domestic law.⁹² Article 12 stipulates that there is a breach of an international obligation when an act

⁸⁹ Malcolm N. Shaw, *supra* pp.696

⁹⁰ ILC Commentary 2001, pp.63.

⁹¹ art. 2 of International Law Commission's (ILC) draft articles on Responsibility of States for Internationally Wrongful Acts on August 10, 2001.

⁹² See *Ibid* art.3. It states that "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character.⁹³

The *Spanish Zone of Morocco case*⁹⁴ provides that:

“It is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question in not met”.

The Permanent Court of International Justice mentioned in the *Chorzow Factory case*⁹⁵ that:

“It is a principle of international law and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation”.

The State responsibility also occurs from violation of ‘*community obligation*’ considered as ‘*peremptory norm*’ under international law.⁹⁶ It aims to protect such fundamental values as peace, human rights, or self-determination of peoples or an obligation *erga omnes contractantes* that is laid down in a multilateral treaty safeguarding those fundamental values.⁹⁷ Furthermore, States that take action to invoke this responsibility pursue a community interest, for they act on behalf of the international community or of the plurality of States parties to the multilateral treaty. All States are entitled to demand the compliance with the obligation that has been infringed and could take a host of remedial actions designed to impel the delinquent State to cease its wrongdoing or to make reparation.⁹⁸

3.3 Breach of an international obligation

⁹³ Ibid art.12

⁹⁴ The Spanish Zone of Morocco claims, 2 RIAA, p.615 (1923): 2 AD, p.157 and p.641

⁹⁵ The Chorzow Factory case (Germany v. Poland), PCIJ, Series A, No.17, 1928.

⁹⁶ See Ibid art.40 para.1. It states that “This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.”

⁹⁷ Antonio Cassese, International Law (Second Edition) 2005, pp.262.

⁹⁸ Ibid pp.263

State responsibility occurs when the act of a State is a breach of international obligation under the general international law or *lex specialis* pursuant to Article 55 of the ILC Draft articles.⁹⁹ It means that the special rules of international law will prevail if any inconsistency arises between ILC Draft articles and the special rules of international law on the matter of state responsibility. Further, Article 56 preserves the rules of international customary law and also other rules of international law.¹⁰⁰ The breach of an international obligation does not always need to have damages to the States. It may happen in a form of written rules such as a treaty or other form of non-written rules of international law such as customary law, general principles of international law or unilateral act.¹⁰¹

As discussed *supra*, under the international law, China has an obligation to protect North Koreans and should stop repatriating them to where they will be persecuted. Nonetheless, China does not consider North Koreans as refugees and does not provide any protection to them. China treated North Koreans as criminals and/or illegal migrants pursuant to domestic law and the bilateral extradition treaty between China and North Korean government. However, in the event of a discrepancy between the international treaty (multilateral treaty such as human rights treaties) and domestic Chinese law, bilateral treaty, the international treaty takes precedence unless China entered a reservation upon ratifying or acceding to it.¹⁰²

⁹⁹ See Ibid art.55. It states that “these articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”.

¹⁰⁰ See Ibid art.56. It states that “the applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles”.

¹⁰¹ Prasit Aekaputra, International Humanitarian law and State responsibility in 21st century, ISIL year book of international humanitarian and refugee law (New Delhi 2003), vol.3 pp.96-105.

¹⁰² See more details in United Nations-International Human Rights Instruments, HRI/CORE/Add.21/Rev.2, para.51 & 53, June11 2001. In para.52: between International treaty and domestic law, para.53: between international human rights agreements and domestic law.

It is arguable that China has complied with international law and has sufficiently considered the situation of North Koreans under international law, national law and humanitarian principles.

China's Foreign Affairs's spokesmen commented as follows that:

*“It is true that there are some North Korea citizens who have made illegal entry into China along the China-North Korea border in recent years. However, they are not refugees either from the perspective of international law or judging the reason why they crossed the border. China has handled this question in accordance with international practice and the relevant laws of China, while taking into account humanitarianism and peace and stability of the Korean Peninsula”.*¹⁰³

China's core document, filed at United Nations described that, once China has approved an international treaty, it is binding under Chinese law and China must honour the corresponding obligation.¹⁰⁴

As already discussed in Chapter 1, it is also a basic principle of international law that States have a *'due diligence'* duty to implement their treaty obligations in good faith.¹⁰⁵ This duty is breached if a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeating the object and purpose of a treaty.¹⁰⁶ In the *Nuclear Tests case*¹⁰⁷, good faith is regarded as one of the basic principles governing the creation and performance of legal obligations. In the *Norwegian Loans case*¹⁰⁸, it was also considered as general principle of international law.

¹⁰³ See Ministry of Foreign Affairs of the People's Republic of China, Spokesperson's Comment on the Reported Turning Over of Seven DPRK Illegal Immigrants by Russia (Dec. 1, 2000), took from Stanford Journal of International Law 2004 supra pp.149-150.

¹⁰⁴ United Nations-International Human Rights Instruments, supra para.51

¹⁰⁵ art.26, 31 of 1969 Vienna Convention on the Law of Treaties

¹⁰⁶ Guy S. Goodwin and Jane McAdam, supra pp.387.

¹⁰⁷ Nuclear Tests case (Australia v France), ICJ Reports, (1974), 253, 268, para.46

¹⁰⁸ Certain Norwegian Loans, ICJ Reports, (1957), para.53.

In the event of applying international law, China simply categorized North Koreans as criminal and/or illegal migrants without any individual assessment. Even though China has ratified the 1951 Refugee Convention and the Convention Against Torture, it does not follow it. Nevertheless, those international instruments have a binding effect on the Chinese law enforcement and the judicial organs, and those Conventions could be invoked before the Chinese courts in practice as well.¹⁰⁹ Indicated by Article 33 of the 1951 Refugee Convention and Article 3 of Convention Against Torture, it is prohibited to repatriate anyone to a territory where he/she likely will be tortured, but China constantly repatriates North Koreans even though a lot of evidence has showed North Koreans are being tortured brutally after repatriation to their home country.

It was fully discussed on the North Koreans human rights situation in China. China also has violated its responsibilities under Article 6 of Convention on the CEDAW¹¹⁰ and Article 22, 34 and 35 of the Convention on the Rights of the Child,¹¹¹ because of China failure's to protect North Korean women and children from severe human rights abuses. Other applicable Articles are Article 2 (1) of the ICCPR¹¹² and the 1949 Convention on the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others.¹¹³ Nevertheless, they do not have a binding effect on China because of the lack of ratification.

¹⁰⁹ See more details at United Nations: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Summary record of the 419th Meeting of the U.N. Committee Against Torture: China and Poland.

¹¹⁰ See art.6. It states that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”.

¹¹¹ See art.34 and 35. It states that “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse...”, “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”.

¹¹² art.2 para.1

¹¹³ art.6

Article 32 of Chinese Constitution provides the right of asylum, but it does not have any national implementation system for granting refugee status.¹¹⁴ China allowed Indo-Chinese refugees and Burmese in as refugees on Humanitarian grounds, but China does not want to extend this principle to North Koreans asylum seekers. Instead, China arrests and repatriates North Koreans without conferring on them any opportunity to seek asylum.

3.4 Attribution of obligation to China

In general practice, State responsibility for the breach of an international obligation arises when a wrongful act is attributable to the State. Article 4 of the ILC articles provides that the conduct of any state organ shall be considered an act of the state concerned under international law where the organ exercised legislative, executive, judicial or any other function, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.

The form of attribution could vary according to the nature of the wrongful act. An example of State responsibility is described by the *Nicaragua case*.¹¹⁵ The International Court of Justice found in this case that agent' acts which included the laying of mines in Nicaraguan internal or territorial waters and the certain attacks on Nicaraguan ports, oil installations and a naval base were imputable to the United States.

Another example of State responsibility is the *Corfu Channel case*,¹¹⁶ where Albania was held responsible for the consequences of mine-laying in its territorial waters on the basis of knowledge possessed by that State as to the presence of such mines.

¹¹⁴ See art.32. It states that “the People’s Republic of China protects the lawful rights and interests of foreigners within Chinese territory; foreigners on Chinese territory must abide by the laws of People’s Republic of China. The People’s Republic of China may grant asylum to foreigners who request it for political reasons”.

¹¹⁵ Nicaragua case, supra para.14

¹¹⁶ The Corfu channel case (United Kingdom v. Albania), ICJ Decision 9 April 1949

The fact that the harm caused by State action may be inflicted outside the territory of the actor, or in an area identified by municipal law as an international zone, in no way diminishes the responsibility of the State.¹¹⁷

Under general principles of international law, China's State responsibility could occur directly where the domestic legal and administrative systems fail to enforce or guarantee the observance of international standards.¹¹⁸

As discussed above, China does not comply with international standards in order to protect North Koreans, not even the provisions of the 1951 Refugee Convention, Convention Against Torture and several human rights instruments that have binding effect on China.

3.5 Legal consequences of violation of international law

In general the legal consequences of States for a breach of an international obligation are that they are normally under the obligation to cease that act, if it is continuous and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.¹¹⁹

However, in the breach of '*community obligation*', the legal consequences of the wrongful act no longer consist merely of a '*bilateral relation*' between the responsible State and the State victim of the wrongful act, but of a '*community relation*' between the wrongdoer and all other States because it concerns a fundamental value which is owed to all the other members of the international community such as peace, human rights, self-determination of peoples, the principle of *non-refoulement*.¹²⁰ In addition, other States are under the obligation not to recognize as lawful the situation created by the breach, not to render aid or assistance to the responsible State in maintaining the situation so created, and to co-operate as far as possible to bring the breach to an end.¹²¹

¹¹⁷ Guy S. Goodwin-Gill and Jane McAdam, *supra* pp.244

¹¹⁸ Ian Brownlie, *supra* pp.431-444

¹¹⁹ *Ibid* art.30

¹²⁰ Antonio Cassese, *supra* pp.272-273

¹²¹ *Ibid* 40 & 41

Consistent with this idea, all States could bring a claim for invoking the State responsibility of China, demand cessation and request assurance of non-repetition.¹²² If China has not taken immediate action to protect North Koreans, all States have the right to bring this matter to a competent international body such as the United Nations. If an international body does not act fairly or its action has not resulted in protection for North Koreans in China, all States then have rights to take peaceful countermeasures under international law.¹²³ However, before taking countermeasures, the claimant States should offer to negotiate with the responsible State as well as to propose other means of peacefully settling the dispute such as mediation and conciliation, if appropriate, or arbitral or judicial settlement and to duly notify the responsible State of their intention to resort to countermeasures.¹²⁴

It is possible that the United Nations Security Council could consider North Korean's situation in China as a violation of community obligation that amount to a breach of peace and it may decide which measures to use to find a solution in accordance with Article 41 of the Charter of the United Nations. Nonetheless, it seems unrealistic as long as China sits on one of permanent members of the United Nations Security Council.

¹²² Ibid 43

¹²³ Ibid the whole of Chapter II

¹²⁴ Antonio Cassese, *supra* pp.275

4 The eligibility for Refugee Status

4.1 The eligibility of Refugee Status

The 1951 Refugee Convention recognizes a person as a refugee if he/she; *“owing to a 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/her nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of that country”*.¹²⁵

China repeatedly declares that North Koreans are ‘*economic migrants*’ and categorizes their actions as ‘*illegal cross border*’ and then returns them according to the bilateral extradition agreement between China and North Korean government.¹²⁶ Without any individual identification procedures, China insists that no North Koreans have any qualification for refugee status under the 1951 Refugee Convention and its 1967 Protocol.

As discussed *supra*, there are various reasons for North Koreans fleeing from their home country. Some of North Koreans fled to China for the fear of political persecution and human rights abuses and are eligible for refugee status under the 1951 Refugee Convention. Some of them just cross the border in searching for food and may not return to North Korea due to their illegal departure which is regarded as criminal in North Korea. This is called refugee sur-place and may be protected by the UNHCR mandate in its practice.¹²⁷

¹²⁵ art.1A (2)

¹²⁶ The North Korean Refugee Crisis, *supra* pp.40

¹²⁷ See UN Commission on Human Rights, Resolution 2004/13 on the Situation of Human Rights in the Democratic People’s Republic of Korea. Muntarhorn identified two main categories of North Korean refugees such as Conventional refugee and Mandate refugee when he stated before the UN Commission on Human Rights as Special Rapporteur in 2004.

The following discussion talks about the common arguments made under the 1951 Refugee Convention and its 1967 Protocol in order to determine whether the North Koreans can be said to have refugee status. However, the human rights situation in North Korea has to be explained before discussing the eligibility of refugee status.

4.2 Human Rights situation in North Korea as background facts

4.2.1 Unrealistic social control based on public distribution system

After decolonization from Japan in 1949 and through the Korean Civil War from 1950-1953, the North Korean regime imposed on its citizens to the self-reliance propaganda known as '*Juche*' and tied the whole nation to the Public Distribution System (PDS).

The '*Juche*' idea is the official state ideology of North Korea. It could be translated to taking an '*independent stand*' in politics, the military and the economy without the assistance of neighbouring countries.¹²⁸ However, North Korea had received economic assistance from the former Soviet Union until 1991 and China has also been giving support. Recently, the North Korean regime received large supplies of heavy fuel oil and technical assistance from neighbouring countries after six party talks.

The North Korea regime has used the PDS to protect its power and oppress citizens who are not faithful to the regime. The PDS is a very extensive system because approximately two-thirds of the 23.7 million of population depends on it for their lives. Access to this system including food supplies, domestic agricultural production, imports, and aid is determined by person's social status. The distribution is mainly given to government and ruling party officials, important military units, and urban populations, in particular, residents of the capital Pyongyang, as a priority. Before the out-break of the famine, the PDS reportedly provided food supplies of over 700 grams per person-per day, but it has been cut to 250 grams per day, and continued decreasing until it was actually halted.

¹²⁸ On-line Wikipedia <http://en.wikipedia.org/wiki/juche> It explains '*Juche*' ideology as political propaganda same as Stalinism.

Food can be a strong weapon of political repression when it is closely tied to the political order. The North Koreans' fundamental rights to life have been threatened because of food control.¹²⁹

4.2.2 Severe famine

The North Korean regime has controlled and distributed its production based on communist Market theory. However, this planned economic system has transitioned into an unrealistic and corrupt project. It led to the shortage of supply, formed the Black Market and relied on neighbouring countries' assistance during the last few decades. It is also estimated that 15 to 30 percent of North Korea's GDP is used to support the military and to develop weapons even though its citizens are struggling with the food shortage.¹³⁰ Following these sequences, the disastrous floods had stricken the country in the mid-1990s. This has driven the North Korea's economic system into paralysis and pushed North Koreans into severe famine resulting in an estimated two million people (ten percent of the nation's population) having died of starvation and disease. Ironically, the North Korea regime used the enormous standing military strength and internal security as a solution to prevent the starving nation from descending into chaos.¹³¹

In December 1995, the Food and Agriculture Organization (FAO) reported that 2.1 million children and 500,000 pregnant women faced immediate starvation, and millions more could face the same the situation.¹³² The World Food Program (WFP) reported that it had helped

¹²⁹ Food price in the market is extremely high and amounts to 85% of North Koreans salary. Many North Koreans still were threat to their life because of starvation. See also CRS Report for Congress: North Korean Refugees in China and Human Rights Issues (September 26, 2007). See also World Food Program (WFP) Annual Report 2003-North Korea pp.25.

¹³⁰ Lee Young-Sun & Yoon Deok-Ryong, *The Sturcture of North Korea's Economy: Changes and Effects, A New International Framework for North Korea*, American Enterprise Institute, 2005 pp.52.

¹³¹ Benjamin Nederland, *Quandary on the Yalu: International law, politics, and China's North Korean Refugee Crisis*, *Stanford Journal of International law* (2004), pp.146.

¹³² Marcus Noland & Sherman Robinson & Tao Wang, *Famine in North Korea: Cause and Cures*, Institute for International Economics, 2002 pp.4.

to feed 5.8 million desperately poor and hungry North Koreans in 2003.¹³³ According to the United States Committee for Human Rights in North Korea, a third of the population was seriously exposed to malnutrition.¹³⁴ As indicated by WFP and UNICEF's survey, one-third of mothers with young children were malnourished and 37 percent of children under age 6 were stunted. Such malnourished children are much more likely to die as a result of common childhood diseases.¹³⁵

Due to severe food shortage, many North Koreans have been foraging for alternative food supplies such as roots, grasses, tree bark and stalks, all of which are poor in nutritional value and led to serious digestive problems. Children and the elderly, in particular, were the most vulnerable group in this situation.¹³⁶

4.2.3 The Denial of Fundamental Human Rights

The North Korean government has ratified to the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Nevertheless, it routinely and egregiously violates nearly all international human rights standards.¹³⁷

The Universal Declaration of Human Rights fully pointed out that everyone has the right to freedom of opinion and expression and the right to freedom of assembly.¹³⁸ The International Covenant on Civil and Political Rights (ICCPR) expands these freedoms with the rights of freedom of thoughts, guarantees the right to hold opinions without interference

¹³³ Ibid Report 2003.

¹³⁴ North Korean Refugee Crisis, supra pp.28

¹³⁵ Stephan Haggard & Marcus Noland, Hunger and Human Rights: The politics of Famine in North Korea, US Committee for Human Rights in North Korea, 2005 pp.30.

¹³⁶ Conference summary records, supra pp.68-69

¹³⁷ See UN Treaty body Database. North Korean government signed both treaties on 14 September 1981 and entry into force on 14 December 1981.

¹³⁸ See art.18 to 20

and the right to peaceful assembly and association.¹³⁹ Article 67 of North Korean Constitution also ensures these rights.¹⁴⁰

However, these fundamental rights do not exist in practice. There is no dissent or criticisms toward the Mr. Kim Jong-il regime and no organizations exists other than those created by the Government. Most North Koreans have limited access to media sources. Only selected people can access to Internet.¹⁴¹

There is no freedom of religion in practice even though it is protected at the Constitutional level in North Korea.¹⁴² Religious worship has been repressed except in Government supported Churches or Temples. It was pointed out as a serious issue by the United Nation Human Rights Commission as well.¹⁴³

4.2.4 Social discrimination and Collective responsibility

Article 7 of the Universal Declaration of Human Rights states that all people are equal before the law and have the right to be protected by the law without any type of discrimination. The ICCPR reaffirms that all persons are equal before the courts and the law and are entitled equal protection without any discrimination.¹⁴⁴ The North Korean Constitution also recognizes the right to equality in all sectors of social life of the nation.¹⁴⁵

¹³⁹ art.9,12,18 to 22

¹⁴⁰ See Constitution Finder.

www.korea-np.co.jp/pk/062nd_issue/98092413.htm. “North Korea(DPRK)’s Socialist Constitution” which is issued on September 5, 1998 by Supreme People’s Assemble and is implemented on same date.

¹⁴¹ U.S. Department of State, 2007 Country Reports on Human Rights practices-North Korea. It released on March 11, 2008.

¹⁴² Constitution Finder supra art.68

¹⁴³ Appendix C

¹⁴⁴ art.14 and 26

¹⁴⁵ Constitution finder, supra art.65

However, there is no right to equality in practice. Social discrimination and collective responsibility based on family background is common. NGOs' Line has criticized this social discrimination and oppression.¹⁴⁶

Family background is a measure used to determine an individual's social level, education, occupation and marriage. The North Korean regime divides its citizens into three classes, 'core' (28%), 'basic' (45%), 'complex' (27%) and 51 sub-classes based on their loyalty, social level and family background. The citizens who belong to the 'complex class' were assigned to dangerous or heavy-duty labour, blocked from school admissions and party membership, classified as being subject to surveillance and persecution and were controlled by forcible relocation. It is very rare for those persons in this classification to reclassify.¹⁴⁷

Collective responsibility is also a prevalent punishment in North Korea. For example, when a person commits political crimes, his parents, siblings and other relatives are punished regardless of their individual innocence or guilt.

4.2.5 No rule of law

North Korea's criminal code is structured on the basis of political and social considerations. It distinguishes political crimes from ordinary ones and hands down different levels of punishment.¹⁴⁸ Crossing the border without permission was considered as a serious political crime, but the North Korean government revised its criminal code in 2004 and reduced penalties for those leaving the country for non-political reasons, such as economic migrants.¹⁴⁹

¹⁴⁶ Amnesty International Report 2007-North Korea. It released on May 23, 2007.

¹⁴⁷ White Paper on Human Rights in North Korea 2007, Table II-8 supra pp.152

¹⁴⁸ David Hawk, *The Hidden Gulag: Exposing North Korea's Prison Camps*, US Committee for Human Rights in North Korea, 2001 pp.123.

¹⁴⁹ *Failure to protect: A call for the UN Security Council to Act in North Korea*, Commissioned by Vaclav Havel & Kjell Magne Bondevik & Elie Wiese, US Committee for Human Rights in North Korea, 2006 pp.43-45.

As a State party to the ICCPR, the North Korean regime should undertake to respect and ensure all individuals enjoy the rights recognized in the present Covenant. It should take the necessary steps to adopt such laws to give effect to these rights which were ensured by the Covenant.¹⁵⁰ The North Korean regime, however, doesn't have a fair due process system in practice, and its citizens are arbitrarily imprisoned, tortured and executed. Public executions are common.¹⁵¹

There are approximately 150,000 to 200,000 people in the concentration camp as political prisoners. It is reported that those people are extremely mistreated and are unable to survive under such terrible conditions.¹⁵² As indicated by the testimony of An Myong-chol, an ex-guard at a political prisoners' camp in North Korea, there are special secret prison camps using prisoners for testing a variety of chemicals, and in biological and industrial experiments.¹⁵³

The UN Human Right Commission is also concerned about continuing reports of systemic, widespread and grave violations of human rights in North Korea.¹⁵⁴

4.2.6 The denial of the right to travel and Freedom of residence

The freedom of movement and residence is ensured in Article 13 of the Universal Declaration of Human Rights. It provides as follows that:

“Everyone has the right to freedom of movement... to leave any country... and to return to his or her country.”

¹⁵⁰ art.2(1),(2)

¹⁵¹ Good-Friends, South Korean NGO, Press release on March 6, 2008 and recited by Amnesty International, Press release on March 6, 2008. According two NGO' reports, a North Korean official reportedly said that 13 women and two men were shot dead in town of Onseong for a warning to people.

¹⁵² David Hawk, supra pp.25

¹⁵³ Kim Yong-Sam & An Myong-Chol, Political Prisoners' Camps in North Korea, Centre for the Advancement of North Korean Human Rights (1995), pp.29-45.

¹⁵⁴ Appendix C

It is a right for a person to determine where he/she chooses to live, to be able to relocate without interruption and not to be relocated against persons' will. The ICCPR in Article 12 reaffirms and protects it as a fundamental right.¹⁵⁵

Nonetheless, the North Korean regime does not recognize these rights. It assigns housing to its citizens according to their social status and forcibly relocates citizens who are criminals, defectors and persons who have made political complaints with their family to secluded places in rural areas. People expelled to the rural area are isolated from the local citizens as they are subjected to surveillance. Individuals who change residence without permission would face extreme restrictions in social activities including finding jobs and having access to food distribution.¹⁵⁶

Recently, the North Korean regime revised its Constitution and allowed its citizens the freedom of residence and travel due to the fact that its economy had collapsed, worsened food shortages and due to the international community's criticism.¹⁵⁷ However, significant constraints are still imposed. For instance, North Koreans need a '*travel permit*' even for travelling domestically. It is strictly controlled and the number of travel permits is limited.¹⁵⁸

The North Korean regime harshly controls its citizen's foreign travel as well. The only country citizens are permitted to travel to is China. In order to get a '*foreign travel permit*', it is required to pay a large amount of money as an application fee and wait for three to ten years to receive a permit. It is given as a single permit and has to be re-apply for every time. It is difficult for ordinary citizens to get a '*foreign travel permit*'.¹⁵⁹

¹⁵⁵ White Paper on Human Rights in North Korea 2007, supra pp.170-171

¹⁵⁶ Ibid pp.171-175

¹⁵⁷ Constitution finder, supra art.75

¹⁵⁸ Ibid pp.176-177

¹⁵⁹ Ibid pp.178

4.3 Prosecution versus Persecution

In order to be eligible for refugee status, a person must have a ‘*well-founded fear of being persecuted*’ based on at least one of the five conventional grounds under the 1951 Refugee Convention. However, the 1951 Refugee Convention and its 1967 Protocol does not have a definition of persecution. The UNHCR Handbook in paragraph 51 acknowledges that there is no universally accepted definition of persecution.¹⁶⁰ It thus could be discerned from Article 33 of the 1951 Refugee Convention that infliction of physical and or mental harm, a threat to life or freedom, including threats of physical harm may constitute persecution.

In *Sangha v. INS*,¹⁶¹ the United States Court of Appeal for the 9th Circuit also held that the infliction of suffering or harm upon those who differ in any way, such as race, religion or political opinion, constitutes persecution can be regarded as offensive. The UNHCR Handbook further provides in Paragraph 53 that threats directed against an asylum applicant if taken cumulatively may amount to persecution.¹⁶²

¹⁶⁰ UNHCR Handbook in Para.51 states that “there is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights--for the same reasons--would also constitute persecution”.

¹⁶¹ *Sangha v INS* 103 F 3d 1482 1487 (9th Cir. 1997), United States Court of Appeals for the 9th Circuit See also *Shoafera case, Nigizi Shoafera v INS Respondent, No. 98-70565* (9th Cir.2000).

¹⁶² UNHCR Handbook in para.53 states that “an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”. Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context”.

Article 117 of the North Korean criminal code provides as follows that:

“One who crosses the border without permission shall be punished by a sentence of three years or less labour re-education”

Article 47 mentions 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”.¹⁶³

The criminal code is applied leniently to North Koreans who crossed into China in search of food. However, an indefinite term in a re-education camp that can lead to execution is imposed on persons who engaged in the following repeated crossings, contacting South Koreans or foreign missionaries or humanitarian aid workers, contacting journalists, marriage & pregnancy or other evidence of sexual liaison in China, prolonged residence in China, efforts to gain asylum in South Korea or other third countries, having committed a crime in North Korea before departure for China.¹⁶⁴ The penalty also applies irrespective of their motives for leaving the country.

As mentioned above, North Korean regime revised its criminal code and it has led to a reduction in the penalties and provides for pardons for those who left the country for non-political or non religious reasons.¹⁶⁵ Nevertheless, it does not function in practice.

Article 6 of the ICCPR enshrines the fundamental right to life and no one should be arbitrarily deprived of his or her life. The North Korean regime can not derogate from its obligation to protect this inherent right to life even in a situation of emergency, but North Koreans are still struggling with severe human rights abuses, suffering famine, malnutrition,

¹⁶³ The Invisible Exodus, supra pp.20-21

¹⁶⁴ Ibid pp.21-22

¹⁶⁵ See Muntarbhorn, UN Human Rights Committee, Concluding Observations and Recommendations of the Human Rights Committee: Democratic People’s Republic of Korea UN Doc CCPR/ CO/ 72/PRC (2001), para.4.

starvation and disease. Depriving the right to life of people and continuously threatening to its enjoyment, could amount to persecution.

The UN Human Rights Committee noted regarding North Korea's situation:

*“Given the State party’s obligation, under Article 6 of the Covenant, to protect the life of its citizens and to take measures to reduce infant mortality and increase life expectancy, the Committee remains seriously concerned about the lack of measures by the State party to deal with the food and nutrition situation in the Democratic People’s Republic of Korea and the lack of measures to address, in cooperation with the international community, the causes and consequences of the drought and other disasters which seriously affected the country’s population in the 1990’s”.*¹⁶⁶

4.4 ‘Well-founded Fear’ of Persecution

It is significant to point out that the mere fact of persecution is not enough to warrant the granting of refugee status. For the asylum seeker to be eligible for refugee status under the present circumstances, he/she should carry the burden of proof on a preponderance of probability that he/she has a well founded fear of persecution on account of either one of the enumerated statutory grounds under the 1951 Refugee Convention.

A well-founded fear of persecution requires a ‘*subjectively genuine*’ and ‘*objectively reasonable*’ fear of persecution. The subjective component requires that the asylum seeker has a genuine concern that he/she will be persecuted. In the case of *Aguilera-Cota v. INS*,¹⁶⁷ the United States Court of Appeal stated that it may be satisfied by the asylum seeker’s testimony that he/she genuinely fears persecution.

¹⁶⁶ Ibid para.12

¹⁶⁷ *Aguilera-Cota v INS*. United States Court of Appeal for the 9th Circuit, 914 F. 2d 1375.1381 (9th Cir, 1990)

As discussed *supra*, the North Korean criminal code considers repatriated North Koreans as serious criminals and put them into the political labour camps. A former labour camp guard said of the conditions of the camps:

“Life in the political prison camp is worse than death”, “We can not imagine how harsh the living conditions are”, “there are so many miserable stories. People pick undigested beans out of the dung of oxen to eat. They compete to take the clothes off of dead bodies to wear. It is not a human world”.¹⁶⁸

The objective component requires that the asylum seeker establish a reasonable fear of persecution by credible, direct and specific evidence. The authority for this proposition is found in the case of *Alla K. Pitcherskaia v. INS*.¹⁶⁹ In this case the Applicant had been at the receiving end of relentless harassment which in itself amounts to persecution. On that basis alone she was thus found to subjectively and objectively have a well-grounded fear of future persecution. It was held in the United States Court of Appeals case of *Rutilio Lopez-Soto v. John Ashcroft*¹⁷⁰ that the existence of past persecution creates a rebuttal presumption of future persecution.

The following special report on the situation of human rights in North Korea is very relevant in assessing ‘*well-founded fear*’. The Special *Rapporteur* stated that:¹⁷¹

- Torture and other cruel, inhuman or degrading treatment or punishment, public executions, extrajudicial and arbitrary detention, the absence of due process and the rule of law, imposition of the death penalty for political reasons, the existence of a large number of prison camps and the extensive use of forced labour are common in North Korea.

¹⁶⁸ See *The Invisible Exodus*, *supra* pp.24-28. It is a testimony from former labour camp guard Mr. Lee K.

¹⁶⁹ *Pitcherskaia v INS*, No. 95-70887, The United States Court of Appeals of the 9th Circuit, 118 F 3rd. 641, June 24, 1997

¹⁷⁰ *Rutilio Lopez-Soto Petitioner v John Ashcroft Attorney general Respondent*, No. 03-1331, United States Court of Appeals for the 4th Circuit

¹⁷¹ Appendix C

- Sanctions have imposed on its citizens who have been repatriated from abroad. In instances, treating their departure as treason leading to punishments of internment, torture, inhuman or degrading treatment or the death penalty.
- The fundamental rights are all-pervasive and severe restrictions such as the freedoms of thought, conscience, religion, opinion and expression, peaceful assembly and association and on access of every person who wished to move freely within the country and travel abroad.
- There is a serious violation of women's rights. For examples, the trafficking of women for prostitution or forced marriage, ethnically motivated forced abortions, including by labour-inducing injection or natural delivery, as well as infanticide of children of repatriated mothers in police detention centres and labour-training camps.

The UN Human Rights Special *Repporteur* also strongly urged that the North Korea regime immediately put an end to the systemic, widespread and grave violations of human rights mentioned *supra*.¹⁷²

There is no doubt that North Koreans in China have already been subject to persecution or serious harm or to direct threats of such persecution or such harm. It is a convincing indication of North Korean's well founded fear of persecution or real risk of suffering serious harm.

4.5 The member of particular social group, religious and political opinions

As asylum seeker to be eligible for protection as a refugee, he/she needs not only to establish the fact of persecution but that the persecution in question is on account of her/his membership to a statutorily protected group. This principle has been confirmed in a chain

¹⁷² Appendix C

of cases including the cases of *In re Fauzia Kasinga* supra and *Benard Lukwago v. John Ashcroft*¹⁷³ among others.

The 1951 Refugee Convention identifies five relevant grounds of persecution, all of which, in varying degrees, have been correspondingly developed in the field of non-discrimination.¹⁷⁴ Among the five relevant grounds, ‘*member of particular social group, political opinions and religion*’ could be applied to determine the status of North Koreans as refugees.¹⁷⁵

4.5.1 The membership of particular social group

The United States Board of Immigration Appeals, in its 1985 opinion in *the matter of Acosta*¹⁷⁶ determined that a social group is defined by common characteristics that members of the group cannot change, and should not be required to change because such characteristics are identical to their individual identities. Article 10 of the EU Directive on Minimum Standards for Protection as a refugee provide that a group shall be considered to form a particular social group where members of that group share an innate characteristic, or a common background that cannot be changed among others.¹⁷⁷

A member of a particular group could be considered as more vulnerable to harsh treatment after returning to North Korea because of his/her social classification. It was previously discussed that the North Korean regime divides its citizens into three classes and this class status is transferred from generation to generation. The citizens who belongs to ‘*complex*

¹⁷³ *Bernard Lukwago a/k/a Melvin Haft, Petitioner v. John Ashcroft*, No. 02-1812, US Court of Appeals of the 3rd Circuit.

¹⁷⁴ Guy S. Goodwin-Gill and Jane McAdam, supra pp.70

¹⁷⁵ art.1.A (2)

¹⁷⁶ *Roxana Pereda-Acosta, petitioner v. Immigration & Neutralization Service, Respondent*, No.97-9508, U.S. Court of Appeals for the 10th Circuit.

¹⁷⁷ See art.10 para.1 (d) of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

class' were assigned to dangerous or heavy-duty labour, blocked and suppressed from school admissions and party membership, classified as subject to surveillance and persecution and control by forcible relocation.

The UNHCR recognizes that the membership of social group as a particular group who may be persecuted because there is no confidence in the group's loyalty to the government or because the political outlook, antecedents or economic activity of their members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.¹⁷⁸

4.5.2 Religious and political opinion

Pursuant to Article 19 of the UDHR:

“Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

Article 67 of the North Korean Constitution describes political rights and Article 68 mentions the freedom of religion. Nonetheless, these political and religious rights do not function in practice. There is no dissent or criticisms allowed toward the North Korean regime even the regime deprives its citizens of fundamental rights which are included in their constitutional law and are known as political, civil and religious rights.

The North Korean regime oppresses people who oppose it through political concentration camp, collective responsibility and social discrimination.¹⁷⁹ The regime has also persecuted and severely restricted religious freedom, including organized religious activity except those officially recognized and linked to government. Genuine religious freedom does not exist in North Korea.¹⁸⁰

¹⁷⁸ UNHCR Handbook para.78

¹⁷⁹ Appendix C

¹⁸⁰ U.S. Department of State, International Religious Freedom Report 2007-North Korea

Therefore, persons who will be persecuted upon return to North Korea because of his/her religious and political opinion should be considered as membership to a statutorily protected group under the 1951 Refugee Convention.

4.6 The possibility of acceptance as refugee under the 1951 Refugee Convention

It is fully submitted that North Koreans in China qualify for refugee status under the 1951 Refugee Convention because they will be persecuted after repatriation as discussed *supra*.

It is no arguable that China as a contracting party has the right to decide whether to recognize North Koreans as refugees because the 1951 Refugee Convention does not mention this refugee identification procedure by itself. China insists that all North Koreans fail to qualify as refugees under the 1951 Refugee Convention because they primarily leave their country of origin to search food, not for fear of persecution. China has treated North Koreans as criminals and/or illegal migrants without any individual assessment, determining proper identification and/or applying appropriate procedures.

China alleged that there is no obligation to protect North Koreans under international law. Nevertheless, all available sources mentioned above reported that North Koreans who are forcibly repatriated to their origin country have faced severely harsh treatment, such as torture, imprisonment and execution. It has been fully proved *supra* that North Korean's fear of persecution is more than well founded.¹⁸¹

Indicated by Article 3 of the 1951 Refugee Convention, China has an obligation to apply the Convention to all refugees without discrimination as to race, religion or country of origins. Under similar circumstances, China has received and extended effective protection

¹⁸¹ See Guy S. Goodwin-Gill and Jane McAdam, *supra* pp.58. It described that persons can certainly have a well-founded fear of an event happening when there is a less than 50% chance of the occurrence taking place.

to more than 280,000 Indo-Chinese refugees.¹⁸² There are also up to 300,000 people from Vietnam who came during the Vietnam civil war in 1979 and the Kachin Burmese has been allowed in as refugees.

4.7 The possibility of protection as refugee sur-place

North Koreans may receive the protection of the UNHCR under its mandate, given by the United Nations. It is an important factor that a person can not return to his/her country of origin because of persecution and it is not necessarily affected by the reasons of departure which were argued by China.¹⁸³ It does not require that he/she could only become a refugee through an involuntary action by the 1951 Refugee Convention and its 1967 Additional Protocol as well.¹⁸⁴

The UNHCR has to decide whether to extend refugee protection to North Koreans under a variety of situations. Though China maintains that North Koreans are not entitled to refugee protection, this is not binding on the UNHCR.¹⁸⁵ China also agreed to cooperate with the UNHCR to facilitate its supervisory function under the bilateral agreement.

¹⁸² Mr. Guangya the vice Foreign Minister of the People's Republic China stated it at the Ministerial Meeting of States parties to the 1951 Convention Relating to the status of Refugee on December 12, 2001.

¹⁸³ See UNHCR Hand book, para.94. It provides that "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 decide to ask for recognition of his refuge 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'"

¹⁸⁴ See UNHCR Hand book, para.96. It states that "A person may become a refugee 'sur place' as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be those authorities."

¹⁸⁵ UNHCR Handbook, para.14, 15, 16.

However, the UNHCR fails to identify any North Korean as refugees even though the UN Special *Rapporteur* has defined all North Koreans who fled to China as refugees or refugee sur place, and human rights NGOs have urged that North Koreans in China have to be provided protection.¹⁸⁶ For example, the 2002 Statistical Yearbook of the UNHCR, mentioned 304 North Korean refugees sought the help of the UNHCR and it assisted only one. This publication also counted 272 North Korean asylum applicants, and reported that UNHCR helped none.¹⁸⁷

4.8 Whether or not China should allow North Koreans to enter and provide protection

As already discussed, China is a State party to the 1951 Refugee Convention and its 1967 Protocol to accord certain standards of treatment to refugees, and to ensure to them certain rights. It is significant to point out that China needs to undertake to implement these standards of treatment in good faith.

China has a legitimate interest in controlling illegal migration, and a right to do so through proper border measures. However, it should not hinder the access both to refugee status determination procedures and to asylum from persecution. If China does this towards North Koreans, it is in breach of international obligations.

Article 31 of the 1951 Refugee Convention provides that:

“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

¹⁸⁶ See Dr. Nadia Milanova, Lack of International Protection for North Korean Refugees, Human Rights Without Frontiers Int. (2005). She discourses that the newly appointed UN High Commissioner for Refugees, Mr. Antonio Guterres avoided to refer to North Korean defectors as refugees or asylum seekers during 56th annual EXCOM session 2005.

¹⁸⁷ Table 3&7 of UNHCR Statistical Yearbook 2002

threatened in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence". It applies to North Koreans whether they have come directly from their home country, or from any other territory in which their lives or freedom were threatened, provided they show good cause for such entry or presence. Article 31 thus includes threats to life or freedom as possible reasons for illegal entry or presence.¹⁸⁸ Furthermore, having a well-founded fear of persecution is generally recognized in itself as a sufficient good cause.¹⁸⁹ The meaning of '*illegal entry or presence*' would include arriving through the use of false documents, the use of other deception, clandestine entry such as a stowaway, and entry into state territory with the assistance of smugglers or traffickers.¹⁹⁰ The principle of immunity from penalties for refugees entering or presence without authorization is confirmed in the national legislation, case law, states practice, the 1951 Refugee Convention and even human rights instruments.¹⁹¹

In the *Amur v. France case*,¹⁹² the European Court of Human Rights (ECHR) expressly took Article 31 of the 1951 Refugee Convention and stated in its opinion that States have the undeniable sovereign right to control aliens' entry into and residence in their territory.

¹⁸⁸ See Guy S. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection-A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultation (October 2001) para.25.

¹⁸⁹ Guy S. Goodwin-Gill and Jane McAdam, *supra* pp.265

¹⁹⁰ Guy S. Goodwin-Gill, *supra* para.34

¹⁹¹ See Guy S. Goodwin-Gill, *supra* para.36, 38, 39, 41, 52. In instances, National legislation: United Kingdom, Immigration and Asylum Act 1999 Section 31 and United States, 8 Code of Federal Regulation part 270. Case law: *Alimas Khaboka v. Secretary of State for the Home Department* (1993) IMM AR 484, United Kingdom-the Court of Appeal, while finding for the secretary of State in regard to the appellant's includes an asylum seeker whose application has not limitations laid down in article 31 of the 1951 Refugee Convention. State practice: Draft report by the Lawyers committee for Human Rights. Preliminary Review of States' Procedures and Practices relating to Detention of Asylum Seekers, 20 September 2001

¹⁹² European Court of Human Rights (ECHR), *Amur v France*, No. 17/1995/523/609, 1996

Nonetheless, this right must be exercised in accordance with the provision of European Convention and must not deprive asylum seekers of the protection afforded by this.

In its decision in *A v. Australia*¹⁹³ in 1997, the Human Rights Committee describe that illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lacking of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.

It is supported by the EXCOM, which insisted that asylum seekers should not be penalized to any unfavourable treatment solely on the ground of their presence which is considered unlawful in the receiving country.¹⁹⁴

The EXCOM also made another clear decision that:

*“intercepted asylum seekers should not become liable to criminal prosecution under the ‘Protocol against the Smuggling of Migrants by Land, Sea and Air’ for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met”.*¹⁹⁵

It is also essential that North Koreans be identified in order to provide them any proper protection.¹⁹⁶ The UNHCR Handbook clearly states that refugees have to be identified in order to implement the provisions of the 1951 Refugee Convention and its 1967 Additional Protocol.¹⁹⁷ In 1983, with regard to procedures, the EXCOM recommended that the asylum applicant should be given a complete personal interview by a fully qualified official when States determine refugee status or the grant of asylum. But China has categorized

¹⁹³ *A v Australia*, Human Rights Committee, No.560/1993, 3 April 1997

¹⁹⁴ UNHCR EXCOM Conclusion No.22 (1981)

¹⁹⁵ *Ibid* No.97 (2003)

¹⁹⁶ UNHCR Handbook para.189

¹⁹⁷ UNHCR Handbook para.189

North Koreans as criminals and/or illegal migrant without using any individual identification procedures.

It is repeatedly pointed out that the obligation China has towards North Koreans who are on its territory or who are subject to its jurisdiction is one of the consequences of sovereignty. Nonetheless, China continue to routinely detain and repatriate North Koreans on an arbitrary basis without giving them adequate access to the UNHCR and to fair procedures for timely reviewing of their detention status.

China has to cooperate with the UNHCR and other humanitarian workers to resolve North Korean refugee issues in respect of the human rights of the individuals involved. North Koreans should not be penalised solely by reason of illegal entry. If China continuously refuses to provide for the operation of the asylum process, including procedural guarantees of due process to North Koreans, it is a breach of the basic refugee protection under international law.

The UNHCR Guidelines on the Detention of Asylum Seekers also affirmed Article 31 of the 1951 Refugee Convention as a general principle in regards to the treatment to be accorded to minors, other vulnerable groups, and women, and to the conditions of detention, which should be humane and with respect shown to the inherent dignity of the person.¹⁹⁸

¹⁹⁸ Appendix E, UNHCR Revised Guidelines on the Detention of Asylum-Seekers, February 1999, Guideline 6-8. See also Guys S. Goodwin-Gill, *supra* para.130

5 Conclusion (Search for reasonable solution)

5.1 Recognize North Koreans as refugee and provide protection

It has been fully discussed *supra* that many North Koreans could be recognized as refugee under the 1951 Refugee Convention and its 1967 Protocol. But China has persistently claimed that North Koreans who cross the border illegally are economic migrants and thus not entitled to refugee protection. As previously discussed, this claim does not have legal basis and is even contrary to international law. China should uphold its international obligations through interpreting and applying international law reasonably in good faith and should stop categorizing the whole of North Koreans as criminals and/or illegal migrants.

China also does not provide any protection against *refoulement* even though it has an obligation to do so as a State party to the 1951 Refugee Convention and Convention Against Torture. It was convincingly pointed out *supra* that North Koreans were arbitrarily imprisoned and tortured upon returning to their origin country. China should provide protection to North Koreans on its territory and should not repatriate them as it has received and extended effective protection to massive numbers of Indo-Chinese refugees.

China has also an obligation to respect the ‘*inviolability of diplomatic property*’ under international law. China cannot legitimately slip into foreign premises to repatriate North Koreans and/or arrange for heavy security guards to prevent North Koreans from entry to foreign compounds to seek protection.

5.2 Grant access to UNHCR

It is obvious that the UNHCR has a significant role to play in protecting North Koreans. According to Article 3 paragraph 5 of the 1995 agreement between the UNHCR and China, the UNHCR personnel have ‘*unimpeded access*’ to North Koreans inside Chinese borders

to be able to determine their refugee status and/or their need for any assistance. In order to carry out its mandate to protect North Koreans, the UNHCR should hire and/or call on experienced humanitarian workers to investigate and provide humanitarian assistance. The UNHCR was also ensured '*this unimpeded access to refugees*' through the resolution.¹⁹⁹ Another benefit for allowing unhindered access of the UNHCR to North Koreans in China is that it could reduce the number of North Koreans entering foreign missions and compounds to claim refugee status.

Nevertheless, China has blocked the UNHCR access to North Korean asylum seekers consistently. China has an anxiety that '*this unimpeded access*' will lead to a mass exodus from North Korea and cause a collapse of the North Korea regime. For instance, the 2004 World Refugee Survey indicates that China has denied the UNHCR access to more than 100,000 North Koreans.²⁰⁰

If China has consistently denied the UNHCR access to North Koreans, it is essential that the UNHCR regional office in China should initiate arbitration proceeding to invoke its mandate towards North Koreans. However, the UNHCR is not asserting those arbitration rights against the government of China even though it is UNHCR's responsibility to protect North Korean refugees.

5.3 Protect women and children

China has concrete and clear obligations to protect women and children against violence, whether committed by state agents or by non-state actors. If China does not prevent acts of violence against women, does not investigate such acts when they occur and prosecute and punish perpetrators, and provide relief to North Korean women and children, it is violation of numerous international human rights instruments which prohibit human trafficking in connection with sexual slavery or exploitation.

¹⁹⁹ United Nations Security Council Resolution, S/RES/1019, 9 Nov. 1995 at operative para.2

²⁰⁰ 2004 World Refugee Survey, supra Table 10

China should ensure the rights in Article 2 of International Convention on Civil and Political Rights are provided to all individuals within its territory and subject to its jurisdiction. This general rule must be guaranteed without discrimination between Citizens and aliens.²⁰¹

Article 24 of the International Covenant on Civil and Political Rights also recognizes the right of every child, without any discrimination, to receive his family, society and the State protection required by his status as a minor. This Covenant requires that Children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth.²⁰²

It also has to be pointed out that China should grant National registry numbers (known as '*hou kou*' no.) as a way of providing humanitarian relief to North Korean women who have been trafficked into forced marriage and to North Korean Children who have lost their family and resort to vagrancy on the streets. It is discrimination and against international law that children who are born of North Korean and Chinese parents do not get any benefit from the government such as access to education and the medical system.

5.4 Resettlement

China has actively tried to block North Koreans from reaching the foreign embassies of potential resettlement countries such as the United States and South Korea, and refused to allow diplomatic missions to establish facilities to assess eligibility for resettlement. However, if China does not afford and/or is unwilling to provide refugee protection, it should assist North Koreans to reach potential resettlement countries to get any protection according to international law.

²⁰¹ Office of the High Commissioner for Human Rights, General Comment No.15: The position of aliens under the Covenant, 11/04/86.

²⁰² Ibid No.17: Rights of the child (Art. 24), 07/04/89

It seems obvious that South Korea (Republic of Korea) is the most suitable country for the resettlement of North Koreans because they are entitled to get citizenship under Article 3 of the Constitution of South Korea²⁰³ and provisions in the Protection of North Korean Residents and Support of their Settlement Act.²⁰⁴ In the past, South Korea has admitted approximately 3,800 North Korean refugees for domestic resettlement between 1994 and 2003.²⁰⁵ Amnesty International reported in 2004 that over 5,000 North Koreans had successfully reached and been granted South Korean citizenship. North Koreans who resettle in South Korea could receive subsidies such as public housing, job training, living expenses over two years and employment insurance.

However, there is some discrimination that exists because of their lack of education, lack of occupational skills and their accent.²⁰⁶ Due to the South Korean government's changing policy, budget limitations and growing reluctance to accept North Koreans, some North Koreans residing in South Korea would prefer to resettle in Western countries these days.

United States is also suitable country for the resettlement. For example, North Korean Human Rights Act in Section 302 explicitly states that North Korean asylum seekers are not to be disadvantaged or disqualified from eligibility in United States because of their South Korean citizenship.²⁰⁷ Section 303 of the Act describes North Korean refugees as a 'Priority 2' group, thus enabling to them to make a direct application without UNHCR's referral.

Nonetheless, it does not function effectively because many North Koreans are unable to access this program. In practice, United States consular officials can not get in contact with North Korean refugees in China. It seems that, in order to make this program work, China

²⁰³ It states that the territory of South Korea is defined as the whole Korean peninsula and its contiguous islands. Based on this, North Koreans are entitled to get the protection from South Korean government in theoretically. But, it applies differently in practice.

²⁰⁴ It stipulates the procedure for invoking protection. See South Korean law number 6474, Partial revision on May 24, 2001.

²⁰⁵ North Korean Human Rights Act, H.R. 4011 section3 para.23 (2004).

²⁰⁶ The Invisible Exodus, supra pp.31-32

²⁰⁷ Ibid section 302(a)

has to co-operate with the United States consular officers to access to North Korean refugees for initial interviewing and/or to give them permission to exile to a third country. In addition, North Koreans with humanitarian workers' assistance could manage to reach the third countries such as Thailand and Cambodia. United States consular staffs in Southeast Asian countries should be on the lookout for North Korean refugees and be ready to assist them for resettlement.

5.5 International burden sharing

As discussed *supra*, the North Korean refugee crisis merits significant international attention because they have been the most vulnerable group and silent victims in our international community during the last few decades. Their government does not have the ability to protect its citizens. There is also limited ability to seek a durable solution between neighbouring countries such as China, Russia and Mongolia because their reaction is still unfavourable for protecting North Korean refugees even though much of the criticism has been aimed at them.

However, without neighbouring countries' assistance, it is hard to provide the protection required. The international community should share the burden of responsibility and play a role in protecting North Koreans. It is essential for international community to work with those neighbouring countries through negotiation and/or give them intensive assistance as needed. As a minimum, North Koreans need to get at least temporary protection from those neighbouring countries.

On the other hand, the international community has to impose on China the obligation to co-operate with the UNHCR regional office and other humanitarian organizations. It would be of considerable help if international lawyers were to assist China to adapt asylum law and implement provisions at the nation level.

Additional support for the North Korean refugees can include advocacy at the international level, and more effective protection by establishing refugee camps and/or facilities in the

North-East part of China or Mongolia. The later idea will require more financial assistance as well as political support from our international community.

References

Treaties/ Statutes/ Resolutions

International

- ✚ Charter of the United Nations, signed on 26 June 1945, entry into force 24 October 1945
- ✚ Universal Declaration of Human Rights, adopted by General Assembly Resolution 217A(III) of 10th of December 1948
- ✚ International Covenant on Civil and Political Rights (ICCPR), adopted by UN General Assembly Resolution 2200/A(XXI) of December 1966, entry into force 3 January 1976
- ✚ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by UN General Assembly Resolution 2200A(XXI) of December 1966, entry into force 3 January 1976
- ✚ Vienna Convention on Diplomatic Relations, signed on 18 April 1961, entry into force 24 April 1964
- ✚ Vienna Convention on Consular Relations, signed on 24 April 1963, entry into force 19 March 1967
- ✚ Vienna Convention on the Law of Treaties, signed on 23 May 1969, entry into force 27 January 1980
- ✚ Convention Relating to the Status of Refugees, signed on 28 July 1951, entry into force 22 April 1954
- ✚ Protocol Relating to the Status of Refugees, signed on 31 January 1967, entry into force 4 October 1967
- ✚ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed on 10 December 1984, entry into force 26 June 1987

- ✚ Convention on the Rights of the Child, signed 20 November 1989, entry into force 2 September 1990
- ✚ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), signed 18 December 1979, entry into force 3 September 1981
- ✚ UN Declaration on the Elimination of Violence against Women, adopted by General Assembly 48/104 of 20 December 1993
- ✚ International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts, signed 10 August 2001
- ✚ Human Rights Resolution: Situation of Human Rights in the Democratic People's Republic of Korea, Office of the High Commission for Human Rights – Resolution 2004/13
- ✚ United Nations Security Council Resolution, S/RES/1019.9 Nov. 1995
- ✚ Draft resolution, the Executive Committee of the United Nations High Commissioner for Refugee 1983

Regional/ Domestic

- ✚ The Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
- ✚ Cartagena Declaration on Refugees, adopted at Cartagena, Colombia from 19-22 November 1984
- ✚ OAU Convention: Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and government at its sixth ordinary session 10 September 1969, entry into force 20 June 1974
- ✚ American Convention on Human Rights, signed 22 November 1969, entry into force 18 July 1978
- ✚ African Charter of Human and People's Right, adopted 27 June 1981, entry into force 21 October 1986

- ✚ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, adopted by 6 September 1994
- ✚ United Kingdom-Immigration and Asylum Act, 1999 Chapter 33
- ✚ United States-Title 8 of Code of Federal Regulations (8 CFR)
- ✚ Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas, signed by Democratic People's Republic of Korea Ministry of State Security and People's Republic of China Ministry of Public Security on 12 August 1986
- ✚ Constitution of the People's Republic of China, adopted 4 December 1982
- ✚ Constitution of the Republic of Korea, adopted 17 July 1948, last revised in 1987
- ✚ Democratic People's Republic of Korea's Constitution (North Korea), issued & implemented on 5 September 1998
- ✚ Democratic People's Republic of Korea's Criminal Law, enacted 1950, last revised on 29 April 2004
- ✚ North Korean Human Rights Act, signed into U.S. law on 18 October 2004
- ✚ North Korean Settlement Act, South Korean law number 6474, partly revised 24 May 2001

List of Judgements/Decisions

International

- ✚ Belgium v Spain, Barcelona Traction case, ICJ Reports 1970
- ✚ Nicaragua v United States, Nicaragua case, ICJ Judgements (merits) 27 June 1981
- ✚ Germany v Poland, Chorzow Factory case, PCIJ Series A No.17, 1928
- ✚ Australia v France, Nuclear Tests case, ICJ Reports (1974) 253, 268
- ✚ France v Norway, Certain Norwegian loans case, ICJ Reports 1957
- ✚ United Kingdom v Albania, the Corfu Channel case, ICJ Decision 9 April 1949
- ✚ A v Australia, the Human Rights Committee, No.560/1993, 3 April 1997

- ✚ Mutombo v Switzerland, Committee Against Torture, Communication No.13/1993, UN Doc.A/49/44 (1994)
- ✚ Ismail Alan v Switzerland, Committee Against Torture, Communication No.21/1995, UN Doc.CAT/C/16/D/21/1995 (1996)
- ✚ Tahir Hussain Khan v Canada, Committee Against Torture, Communication No.15/1994, UN Doc.A/50/44 (1995)

Regional/ Domestic

- ✚ Velasquez Rodriguez v Honduras, Velasquez Rodriguez case, Judgement of July 29 1998, Inter-Am Ct. H.R. (Ser. C) No.4
- ✚ Ammur v France, European Court of Human Rights (ECHR), No.17/1995/523/609, 1996
- ✚ Silver& Others v United Kingdom, European Commission of Human Rights (1981) 3 EHRR 475 11 October 1980
- ✚ Sangha v INS, 103 F 3d 1482 1487 (9th Cir. 1997), U.S. Court of Appeals for the 9th Circuit
- ✚ Nigizi Shoafera v INS Respondent, No. 98-70565 (9th Cir. 2000)
- ✚ Aguilera-Cota v INS, 914 F.2d 1375. 1381 (9th Cir. 1990)
- ✚ Pitchersckia v INS, No. 95-70887, 118F 3rd. 641 (9th Cir. 1997)
- ✚ Rutilio Lopez-Soto Petitioner v John Ashcroft Attorney general Respondent, No. 03-1331. U.S. Court of Appeals for the 4th Circuit
- ✚ Bernard Lukwago a/k/a Melvin Haft, petitioner v John Ashcroft, No. 02-1812, U.S. Court of Appeals of the 3rd Circuit
- ✚ Roxanna Pereda-Acosta, Petitioner v Immigration & Neutralization Service, Respondent, No.99-9508, U.S. Court of Appeals for the 10th Circuit
- ✚ Alimas Khaboka v Secretary of State for the Home Department (1993) IMM AR 484, United Kingdom the Court of Appeal
- ✚ A v Minister for Immigration and Multicultural Affairs (1999) FCA 227
- ✚ The Spanish Zone of Morocco Claims, 2 RIAA, P.615 (1923)

- ✚ Suresh v Canada (Minister of Citizenship and Immigration), Supreme Court of Canada, (200) SCC1, 11 Jan.222

Secondary Literature

Books

- ✚ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*. 3rd edition. Oxford, (Oxford University Press) 2007
- ✚ Ian Brownlie, *Principle of Public International Law*. 5th edition. Oxford, (Oxford University Press) 1998
- ✚ Antonio Cassese, *International Law*. 2nd edition. Oxford, (Oxford University Press) 2005
- ✚ Malcolm N. Shaw, *International Law*. 5th edition. Cambridge, (Cambridge University Press) 2003
- ✚ L.Oppenheim, *Oppenheim's International Law*. 5th edition. London, (Longmans) 1938
- ✚ Kate Jastrain & Marilyn Achiron UNHCR, *Refugee Protection: A Guide to International Refugee Law*. UNHCR 2001
- ✚ Kim Yong-Sam & An Myong-Chol, *Political Prisoners' Camps in North Korea*. Seoul, Centre for the Advancement of North Korean Human Rights 1995
- ✚ Jea Allain, *Insisting on the Jus Cogen Nature of Non-refoulement*. In: the Refugee Convention at fifty. Lanham, (Lexington books) 2003
- ✚ Prasit Aekaputra, *International Humanitarian law and State responsibility in 21st century*. In: ISIL year book of international humanitarian and refugee law. Vol.3 New Delhi, (ISIL) 2003

Journals/ Reports/ Surveys

- ✚ Elim Chan & Andreas schloenhardt, *North Korean Refugees and International Refugee law*, International Journal of Refugee Law 2007
- ✚ Lee Young-Sun & Yoon Deok-Ryong, *The structure of North Korea's Economy: Changes and Effects, A New International Framework for North Korea*, American Enterprise Institute 2005
- ✚ Benjamin Nederland, *Quandry on the Yalu: International law, Politics, and China's North Korean Refugee Crisis*, Stanford Journal of International Law 2004
- ✚ Marcus Noland & Sherman Robinson & Tao Wang, *Famine in North Korea: Cause and Cures*, Institute for International Economics 2002
- ✚ Royce Benstein, *Sex for food in a Refugee Economy: Human Rights implications and Accountability*, Georgetown Immigration Law 1997
- ✚ Jari Pirjola, *Shadows in Paradise-exploring non-refoulement as an open concept*, International Journal of Refugee Law 2008
- ✚ David Weissbrodt & Isabel Hortreiter, *The Principle of Non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties*, Buffalo Human Rights Law Review Vol.5, 1999
- ✚ U.S. CRS Report for Congress-*North Korean Refugees in China and Human Rights Issues: International Response and US policy opinion*. Washington 2007
- ✚ Korea Institute for National Unification, *White Paper on Human Rights in North Korea*. Seoul 1998 & 2007 reports
- ✚ Andrei Lankov, *North Korean Refugees in Northeast China*, Asian Survey vol.44. University of California press 2004
- ✚ Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection – A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultation*. October 2001
- ✚ Dr. Nadia Milanova, *Lack of International Protection for North Korean Refugees*, Human Rights without Frontiers Int. 2005

- ✚ Good-Friends, *Report on Daily and Human Rights of North Korean Food Refugees in China*. Seoul 1999

Electronic documents

- ✚ U.S. Committee for Human Rights in North Korea: *North Korean Refugee Crisis- Human rights and International response*. Edited by Stephan Haggard & Marcus Noland. Washington 2006. <http://www.hrnk.org/refugeesReport06.pdf> (Visited 27 April 2008)
- ✚ David Hawk, *The Hidden Gulag: Exposing North Korea's Prison Camps*, U.S. Committee for Human Rights in North Korea. Washington 2001. <http://www.hrnk.org/HiddenGulag.pdf> (Visited 7 May 2008)
- ✚ Stephan Haggard & Marcus Noland, *Hunger and Human Rights: The Politics of Famine in North Korea*, U.S. Committee for Human Rights in North Korea. Washington 2005. <http://www.hrnk.org/hunger/hungerReport05.pdf> (Visited 14 May 2008)
- ✚ Failure to Protect: *A Call for the UN Security Council to Act in North Korea*. Commissioned by Vaclav Havel & Kjell Magne Bondevik & Elie Wiese, U.S. Committee for Human Rights in North Korea. Washington 2006. <http://www.hrnk.org/failureToProtect-Report.pdf> (Visited 21 May 2008)
- ✚ Human Rights Watch, *The Invisible Exodus-North Koreans in the People's Republic of China*. New York 2002. <http://www.hrw.org/reports/2002/northkorea/norkor1102.pdf> (Visited 20 May 2008)
- ✚ Sir Eilhu Lauterpacht & David Bethlehem, *The Scope and Content of the principle of Non-refoulement: opinion*. <http://www.unhcr.org/pub/PUBL/419c75ce4.pdf> (Visited 27 May 2008)
- ✚ Amnesty International Report 2002 (North Korea). http://www.amnesty.org/en/library/asset/POL10/001/2002/en/dom_PoL1000/2002_en.pdf (Visited 19 July 2008)

- ✚ Amnesty International Report 2003 (North Korea).
[http://asiapasific.amnesty.org/web/web.nsf/report2003/prk-summary-eng/\\$FILE/korea%20democratic%20peoples%20republic.pdf](http://asiapasific.amnesty.org/web/web.nsf/report2003/prk-summary-eng/$FILE/korea%20democratic%20peoples%20republic.pdf) (Visited 19 July 2008)
- ✚ Amnesty International Report 2007 (North Korea).
<http://report2007.amnesty.org/eng/Regions/Asia-Pasific/North-Korea> (Visited 19 July 2008)
- ✚ World Food Program (WFP) Annual Report 2003.
http://www.wfp.org/policies/annual_reprts/documents/2003_wfp_annual_report.pdf (Visited 29 of May)
- ✚ U.S. Department of state, 2007 Country Reports on Human Rights practices-North Korea. <http://www.state.gov/g/drl/hrrpt/2007/100524.htm> (Visited 10 June 2008)
- ✚ U.S. Department of state, International Religious Freedom Report 2007-North Korea. <http://www.state.gov/g/drl/rls/irf/2007/90140.htm> (Visited 13 June 2008)
- ✚ U.S. Congressional – Executive Commission on China, 2005 Annual Report.
<http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf> (Visited 15 June 2008)
- ✚ U.S. Committee for Refugee and Immigration, World Refugee Survey-China 2005
<http://www.refugees.org/countryreports.aspx?VIEWSTATE=dDwtOTMxNDcwOTk7O2w8Q291bnRyeUREOkdvQnV0dG9uOz4%2BUwqzZxIYLI0SfZCZue2XtA0UF EQ%3D&cid=1305&subm=&ssm=&map=&searchtext=> (Visited 8 June 2008)
- ✚ Draft Articles on the law of treaties, Report of the of the International Law Commission on the work of its Eighteenth Section, 4 May-19 July 1966, Official Records of the general Assembly, 21st Session, supplement No.9 (A/6309/Rev.1).
http://www.untreaty.un.org/documentation/english/a_cn4_191.pdf (Visited 15 July 2008)
- ✚ United Nations-International Human Rights Instruments, HRI/CORE/Add.21/Rev.2, para.51 & 53, June11 2001.
http://www.bayefsky.com/core/china_hri_core_1_add.21_rev.2_1993_2000_2001.pdf (Visited 20 July 2008)

- ✚ United Nations: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Summary record of the 419th Meeting of the U.N. Committee Against Torture: China and Poland.
[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/97b22a78ff7adfe2802568e3003518ae?open](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/97b22a78ff7adfe2802568e3003518ae?open) document (Visited 23 March 2008)
- ✚ United Nation Treaty body Data base.
<http://www.unhchr.ch/tbs/doc.nsf/StatusFrset?OpenFrameSet> (Visited 23 July 2008)
- ✚ UNHCR Statistical Yearbook 2002.
<http://www.unhcr.org/homes/STATISTICS/41206f7c0.pdf> (Visited 23 July 2008)
- ✚ U.S. House Representative Hearing 2004.
<http://www.foreignaffairs.house.gov/archives/108/93390.pdf> (Visited 17 May 2008)
- ✚ Testimony to The Subcommittee on Asia and the Pacific, U.S. House of Representatives, Committee on International Relations (April 28 2005)
<http://internationalrelations.house.gov/archives/109/buw042805.pdf> (Visited 22 July 2008)
- ✚ Constitution Finder: North Korea's Socialist Constitution
http://www.korea-np.co.jp/pk/062nd_issue/98092413.htm (Visited 25 April 2008)
- ✚ On-line Wikipedia <http://en.wikipedia.org/wiki/juche> (Visited 7 July 2008)

Opinions/ Comments

- ✚ UNHCR EXCOM Conclusion No.6 (1997)
- ✚ UNHCR EXCOM Conclusion No.22 (1981)
- ✚ UNHCR EXCOM Conclusion No.97 (2003)
- ✚ UN Human Rights Committee, General Comment No.20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art.7) (1992)

- ✚ Office of the High Commissioner for Human Rights, General Comment No.15: The position of aliens under the Covenant, 11/04/86
- ✚ Office of the High Commissioner for Human Rights, General Comment No.17: Rights of the child (Art. 24), 07/04/89
- ✚ United Nations Working Group on Arbitrary Detention, UNWGAD, opinion No.20/2005 (People's Republic of China) June 2004
- ✚ Vitit Muntarbhorn, UN Human Rights Committee, Concluding Observations and Recommendations of the Human Rights Committee: Democratic People's Republic of Korea. UN Doc CCPR/CO/72/PRC (2001)
- ✚ ILC Commentary 2001

Statements/ Press release/ Newspaper Articles

- ✚ UNHCR High Commissioner's Statement at EXCOM on 29 Sep. 2003
- ✚ Timothy A. Peter's Statement, US House of Reprehensive Hearing 28 April 2004
- ✚ The vice Foreign Minister of the People's Republic China, Mr. Guangya's statement at the Ministerial Meeting of States parties to the 1951 Convention Relating to the status of Refugee on December 12, 2001. <http://www.china-un.ch>
- ✚ Ministry of Foreign Affairs of the People's Republic of China, Spokesperson's Comment on the Reported Turning Over of Seven DPRK Illegal Immigrants by Russia on Dec. 1, 2000
- ✚ Good-Friends Press release. 6 March 2008
- ✚ Amnesty International Press release. 6 March 2008
- ✚ Shim Jae-Yun, Over 100 Korean Missionaries Detained in China. In Korea Times. 20 June 2002.
<http://www.Korealink.co.kr/times/200205/t2002052018443240110.htm>
- ✚ Harvey Stockwin, China Escalates Hardline on Refugees. In Times of India. 15 June 2002

Other documents/ Letters/ Communications

- ✚ UNHCR, Sexual Violence Against Refugees: Guidelines on Prevention and Response, Geneva 1995
- ✚ UNHCR Revised Guidelines on the Detention of Asylum-Seekers, February 1999
- ✚ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees
- ✚ Conference summary records, 7th Conference of New Approaches North Korea on North Korean Human Rights & Refugees (2006 Bergen Norway)
- ✚ Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001, United Nations International Law Commission
- ✚ The Map of North Korea and Northeast China (Appendix A)
- ✚ Letters from Chinese Ministry of foreign Affairs to foreign Embassies. Issued 31 May 2002 (Appendix B)
- ✚ Electronic Communication with LFNKR. Communicated 8 April 2008 (Appendix D)

APPENDIX A: Map of North Korea and Northeast China



**APPENDIX B: LETTER FROM CHINESE MINISTRY OF FOREIGN AFFAIRS TO
FOREIGN EMBASSIES, MAY 31, 2002²⁰⁸**

(Informal translation)

(2002) LINGSIZI NO. 694

To all foreign embassies in China:

The Consular Department of the Ministry of Foreign Affairs of the People's Republic of China presents its compliments to all foreign embassies in China and has the honour to inform the following:

Recently the events occurred in succession that the third country nationals intruded into foreign embassies and consulates in China. This directly endangered the security of the embassies and consulates concerned and disturbed their routine work. It also provoked Chinese law and affected the public security and stability of China. Upon the request of many foreign embassies and consulates in China, the Chinese side has taken a series of measures to protect the security of foreign diplomatic and consular representing institutions. These security measures are in conformity with the interests of both sides. In the future the Chinese side will make great efforts as always to provide safe working and living environment for foreign embassies and consulates, and conscientiously undertake due obligations as receiving country in accordance with "Vienna Convention of Diplomatic Relations" and "Vienna Convention of Consular Relations" . According to the principle of international law that embassies and consulates has no right of asylum, the Chinese side also wishes embassies concerned to render cooperation and inform the Consular Department of Chinese Ministry of Foreign Affairs in case the illegal intruders were found, and hand over the intruders to the Chinese public security organs.

The above-mentioned principle is also applicable in dealing with the intruders into foreign consulate institutions.

May 31, 2002, Beijing

²⁰⁸ The source of this letter from Human Rights Watch: *Invisible Exodus*, supra pp.35

**APPENDIX C: SITUATION OF HUMAN RIGHTS IN THE
DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA – Human Rights
Resolution 2005/1
(OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS)**

The Commission on Human Rights,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights and other human rights instruments,

Reaffirming that all States Members of the United Nations have the obligation to promote and protect human rights and fundamental freedoms and to implement the obligations they have assumed under international instruments,

Recalling its resolutions 2003/10 of 16 April 2003 and 2004/13 of 15 April 2004,

Mindful that the Democratic People's Republic of Korea is a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women,

Noting the submission by the Democratic People's Republic of Korea of its second periodic report concerning the implementation of the International Covenant on Economic, Social and Cultural Rights (E/1990/6/Add.35) and its second periodic report on the implementation of the Convention on the Rights of the Child (CRC/C/65/Add.24) as a sign of more active engagement in international cooperative efforts in the field of human rights, and encouraging the Democratic People's Republic of Korea to continue to submit its reports in a timely manner,

Taking note of the concluding observations of the Committee on Economic, Social and Cultural Rights on the reports submitted by the Democratic People's Republic of Korea, including suggested measures to guarantee the right to be free from hunger,

Welcoming the invitation by the Democratic People's Republic of Korea to members of the Committee on the Rights of the Child and to the Special Rapporteur on violence against women, its causes and consequences, to visit the country,

Welcoming also the fact that the Democratic People's Republic of Korea has held consultations with some countries on human rights issues,

Underlining the importance of the effective continuation of the process of rapprochement between the two Koreas and noting progress in this respect,

Welcoming the report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (E/CN.4/2005/34),

Desiring to promote an open and constructive approach leading to concrete progress in the field of human rights,

1. *Expresses its deep concern* about continuing reports of systemic, widespread and grave violations of human rights in the Democratic People's Republic of Korea, including:

(a) Torture and other cruel, inhuman or degrading treatment or punishment, public executions, extrajudicial and arbitrary detention, the absence of due process and the rule of law, imposition

of the death penalty for political reasons, the existence of a large number of prison camps and the extensive use of forced labour;

(b) Sanctions on citizens of the Democratic People's Republic of Korea who have been repatriated from abroad, such as treating their departure as treason leading to punishments of internment, torture, inhuman or degrading treatment or the death penalty;

(c) All-pervasive and severe restrictions on the freedoms of thought, conscience, religion, opinion and expression, peaceful assembly and association and on access of everyone to information, and limitations imposed on every person who wishes to move freely within the country and travel abroad;

(d) Continued violation of the human rights and fundamental freedoms of women, in particular the trafficking of women for prostitution or forced marriage, ethnically motivated forced abortions, including by labour-inducing injection or natural delivery, as well as infanticide of children of repatriated mothers, including in police detention centres and labour-training camps;

2. *Expresses its grave concern* that the Government of the Democratic People's Republic of Korea has not accepted the mandate of the Special Rapporteur, as contained in Commission resolution 2004/13 of 15 April 2004, and has not extended any cooperation to the Special Rapporteur;

3. *Also expresses its concern* that the Government of the Democratic People's Republic of Korea has not engaged in technical cooperation activities with the United Nations High Commissioner for Human Rights and her Office, despite efforts by the High Commissioner to engage in a dialogue with the authorities of the Democratic People's Republic of Korea in this regard;

4. *Further expresses its deep concern* at the precarious humanitarian situation in the country, in particular the prevalence of infant malnutrition which, despite recent progress, still affects the physical and mental development of a significant percentage of children;

5. *Strongly urges* the Government of the Democratic People's Republic of Korea to address these concerns in an open and constructive manner, including:

(a) By immediately putting an end to the systemic, widespread and grave violations of human rights mentioned above;

(b) By providing all pertinent information concerning the above-mentioned issues to, and removing restrictions on access to the country by, the international community;

(c) By accepting the mandate of the Special Rapporteur, extending its full and unreserved cooperation and assistance to the Special Rapporteur in the discharge of his mandate and, to this end, taking all necessary steps to ensure that the Special Rapporteur has free and unlimited access to any person in the Democratic People's Republic of Korea whom he might wish to meet;

(d) By ratifying human rights instruments to which the Democratic People's Republic of Korea is not yet a party, in particular the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Elimination of All Forms of Racial Discrimination, and by implementing its obligations under the human rights instruments to which the Democratic People's Republic of Korea is a party, ensuring that all necessary measures are undertaken to this end;

(e) By adhering to internationally recognized labour standards and considering as a matter of priority joining the International Labour Organization and becoming a party to the International Labour Organization Convention concerning Forced or Compulsory Labour, 1930 (No. 29) and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182);

(f) By implementing the recommendations of the Committee on the Rights of the Child, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights;

(g) By cooperating with the United Nations system in the field of human rights and cooperating without restriction with the thematic procedures of the Commission on Human Rights relevant to the situation of the Democratic People's Republic of Korea, in particular with the Special Rapporteur on the right to food, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right to freedom of opinion and expression, the Special Rapporteur on violence against women, its causes and consequences, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, as well as with international human rights organizations, including human rights defenders;

(h) By developing a constructive dialogue with the United Nations High Commissioner for Human Rights and her Office with a view to establishing technical cooperation programmes in the field of human rights, as well as consultations on human rights with other countries;

(i) By ensuring that humanitarian organizations, including non-governmental organizations and United Nations agencies, in particular the World Food Programme, have full, free, safe and unimpeded access to all parts of the Democratic People's Republic of Korea in order for them to ensure that humanitarian assistance is delivered impartially on the basis of need, in accordance with humanitarian principles;

(j) By upholding international human rights standards together with democratic pluralism and the rule of law, with greater space for civil society participation at all levels of decision-making and implementation, and establishing a national human rights commission or equivalent;

(k) By resolving, clearly and transparently and urgently, all the unresolved questions relating to the abduction of foreigners in the form of an enforced disappearance, which remains a grave violation of human rights, including by ensuring the immediate return of abductees;

(l) By cooperating with its neighbouring Governments to bring an end to the trafficking of women;

6. *Requests* the international community:

(a) To urge the Government of the Democratic People's Republic of Korea to extend full and unreserved cooperation to the Special Rapporteur;

(b) To continue to urge the Government of the Democratic People's Republic of Korea to ensure that humanitarian assistance, especially food aid, destined for the people of the Democratic People's Republic of Korea is distributed in accordance with humanitarian principles and that representatives of international humanitarian actors are allowed to travel throughout the country to monitor this distribution;

(c) To urge States to ensure respect for the fundamental principles of asylum;

7. *Requests* the Special Rapporteur to continue his efforts to establish direct contact with the Government and with the people of the Democratic People's Republic of Korea, to report on the situation of human rights in the Democratic People's Republic of Korea and on the Government's compliance with its obligations under international human rights instruments, including through visits to the country and information received from all relevant actors, such as Governments, non-governmental organizations and any other parties who have knowledge of these matters;

8. *Requests* all relevant special rapporteurs and special representatives to examine alleged human rights violations in the Democratic People's Republic of Korea and to report thereon to the

Commission at its sixty-second session, and requests the Secretary-General to give all necessary assistance to enable the special rapporteurs and special representatives to discharge their mandates fully, including through visits to the country;

9. *Requests* the High Commissioner to continue her efforts to engage in a comprehensive dialogue with the authorities of the Democratic People's Republic of Korea with a view to establishing technical cooperation programmes in the field of human rights and to submit her findings and recommendations to the Commission at its sixty-second session;

10. *Decides* to extend the mandate of the Special Rapporteur, as contained in Commission resolution 2004/13 of 15 April 2004, for a further year;

11. *Requests* the Secretary-General to give the Special Rapporteur all necessary assistance in the discharge of his mandate;

12. *Requests* the Special Rapporteur to report his findings and recommendations to the General Assembly at its sixtieth session and to the Commission at its sixty-second session;

13. *Urges* other United Nations bodies, in particular the General Assembly, to take up the question of the situation of human rights in the Democratic People's Republic of Korea if the Government does not extend cooperation to the Special Rapporteur and if improvement of the situation of human rights in the country is not observed;

14. *Decides* to continue its consideration of this question at its sixty-second session under the same agenda item, as a matter of high priority;

15. *Recommends* the following draft decision to the Economic and Social Council for adoption:

"The Economic and Social Council, taking note of Commission on Human Rights resolution 2005/11 of 14 April 2005, endorses the Commission's decision to extend the mandate of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, as contained in Commission resolution 2004/13 of 15 April 2004, for a further year. The Council further approves the request to the Special Rapporteur to report his findings and recommendations to the General Assembly at its sixtieth session and to the Commission on Human Rights at its sixty-second session and the request to the Secretary-General to give the Special Rapporteur all necessary assistance in the discharge of his mandate."

50th meeting

14 April 2005

*[Adopted by a recorded vote of 13 to 9,
with 14 abstentions. See chap. IX, E/CN.4/2005/L.10/Add.9]*

APPENDIX D: China Raises Bounty on NK Refugees 1600%

From: lfnkr-update@profollow.com on behalf of LFNKR - the NK Refugee Japanese NGO

Sent: April 9, 2008 12:47:08 PM

To: Chang Sig Park (legal_specialist@hotmail.com)

Kato Hiroshi here, with a shocking new development just beginning to leak out of China.

The government there has just raised the stakes in the human rights issue now coming to a boil.

While the world's attention is focused on the uproar in Tibet, other developments are quietly taking place.

China claims Tibetan protestors are being agitated by foreign religious elements, and so now is starting to suspect foreign connections behind any activities of which it disapproves. Government officials have reportedly ordered the Department of Religion in each province to start thorough investigations into any involvement with foreign influences.

LFNKR has received a report from our local staff in Jilin Province that any Christian church in Yanbien found to be involved with foreigners, including South Koreans, are being forced to shut down.

In addition, the punishment has been made more severe for extending help to North Korean defectors. Until recently, violators were fined, but now they face imprisonment. This has further discouraged our local staff and others who had been helping protect North Korean defectors.

And there is more - The Yanbien Autonomous Korean Prefecture in Jilin Province recently issued oral instructions to the Dept. of Security, Dept. of Public Safety, and Dept. of Religion on attracting more informants to report NK defectors. According to people familiar with the Dept. of Religion in the Yanbien Autonomous Korean Prefecture, "The bounty has been raised from 500 RMB to at least 8000 RMB for one NK defector." This amount is equivalent to the average annual income in China.

China is encouraging people to hunt down North Korean refugees by increasing the bounty 1600 percent. This inhumane behavior should not be tolerated. The North Korean refugees in China should be protected as refugees under the international refugees convention.

LFNKR suggests that you send a letter urging the Chinese government to listen to the voice of the world and demonstrate to international society that they respect human rights by halting this inhumane behavior.

You can find the PRC embassy in your country by clicking here.

<http://www.fmprc.gov.cn/eng/wjb/zwjg/2490/default.htm>

Regards from Japan, Kato Hiroshi Executive Director

Regards from Japan,

Kato Hiroshi

Secretary General

A-101 Nishi Kata Hyteru, 2-2-8 Nishi Kata, Bunkyo-ku, Tokyo, Japan 113-0024

APPENDIX E:

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GENEVA

February 1999

UNHCR Revised Guidelines Applicable Criteria and Standards relating to the Detention of Asylum Seekers

Introduction

1. The detention of asylum seekers is, in the view of UNHCR inherently undesirable.

This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.

2. Of key significance to the issue of detention is Article 31 of the 1951 Convention.

Article 31 exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The Article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularised, or they obtain admission into another country.

3. Consistent with this Article, detention should only be resorted to in cases of necessity.

The detention of asylum seekers who come 'directly' in an irregular manner should, therefore, not be automatic, or unduly prolonged. This provision applies not only to recognised refugees but also to asylum seekers pending determination of their status, as recognition of refugee status does not make an individual a refugee but declares him to be one.

Conclusion No 44 (XXXVII) of the Executive Committee on the Detention of

Refugees and Asylum seekers examines more concretely what is meant by the term 'necessary'. This Conclusion also provides guidelines to States on the use of detention and recommendations as to certain procedural guarantees to which detainees should be entitled.

4. The expression 'coming directly' in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept

‘coming directly’ and each case must be judged on its merits. Similarly, given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanically applied or associated with the expression ‘without delay’. The expression ‘good cause’, requires a consideration of the circumstances under which the asylum seeker fled. The term ‘asylum seeker’ in these guidelines applies to those whose claims are being considered under an admissibility or pre-screening procedure as well as those who are being considered under refugee status determination procedures. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request.

5. Asylum seekers are entitled to benefit from the protection afforded by various International and Regional Human Rights instruments which set out the basic standards and norms of treatment. Whereas each State has a right to control those entering into their territory, these rights must be exercised in accordance with a prescribed law which is accessible and formulated with sufficient precision for the regulation of individual conduct. For detention of asylum seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.

6. Although these guidelines deal specifically with the detention of asylum seekers the issue of the detention of stateless persons needs to be highlighted. While the majority of stateless persons are not asylum seekers, a paragraph on the detention of stateless persons is included in these guidelines in recognition of UNHCR’s formal responsibilities for this group and also because the basic standards and norms of treatment contained in international human rights instruments applicable to detainees generally should be applied to both asylum seekers and stateless persons. The inability of stateless persons who have left their countries of habitual residence to return to them, has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

Guideline 1: Scope of the Guidelines

These guidelines apply to all asylum seekers who are being considered for or who are in, detention or detention-like situations. For the purpose of these guidelines, UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. There is a qualitative difference between detention and other restrictions on freedom of movement. Persons who are subject to limitations on domicile and residency are not generally considered to be in detention. When considering whether an asylum seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.

Guideline 2: General Principle

As a general principle asylum seekers should not be detained.

According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

Guideline 3: Exceptional Grounds for Detention

Detention of asylum seekers may exceptionally be resorted to for the reasons set out below as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments. There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

In assessing whether detention of asylum seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with EXCOM Conclusion No 44 (XXXVII) the detention of asylum seekers may only be resorted to, if necessary:

(i) to verify identity

This relates to those cases where identity may be undetermined or in dispute.

(ii) to determine the elements on which the claim for refugee status or asylum is based

This statement means that the asylum seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

(iii) in cases where asylum seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

(iv) to protect national security and public order

This relates to cases where there is evidence to show that the asylum seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry. Detention of asylum seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related to residency at reception centres, or refugee camps. Escape from detention should not lead to the automatic discontinuation of the asylum procedure, or to return to the country of origin, having regard to the principle of non-refoulement.

Guideline 4: Alternatives to Detention

Alternatives to the detention of an asylum seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum seeker concerned and prevailing local conditions.

Alternatives to detention which may be considered are as follows:

(i) Monitoring Requirements

Reporting Requirements: Whether an asylum seeker stays out of detention may be conditional on compliance with periodic reporting requirements during the status determination procedures. Release could be on the asylum seeker's own recognisance, and/or that of a family member, NGO or community group who would be expected to ensure the asylum seeker reports to the authorities periodically, complies with status determination procedures, and appears at hearings and official appointments.

Residency Requirements: Asylum seekers would not be detained on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum seekers would have to obtain prior approval to change their address or move out of the administrative region. However this would not be unreasonably withheld where the main purpose of the relocation was to facilitate family reunification or closeness to relatives.

(ii) Provision of a Guarantor/Surety

Asylum seekers would be required to provide a guarantor who would be responsible for ensuring their attendance at official appointments and hearings, failure of which a penalty most likely the forfeiture of a sum of money, levied against the guarantor.

(iii) Release on Bail

This alternative allows for asylum seekers already in detention to apply for release on bail, subject to the provision of recognisance and surety. For this to be genuinely available to asylum seekers they must be informed of its availability and the amount set must not be so high as to be prohibitive.

(iv) Open Centres

Asylum seekers may be released on condition that they reside at specific collective accommodation centres where they would be allowed permission to leave and return during stipulated times. These alternatives are not exhaustive. They identify options which provide State authorities with a degree of control over the whereabouts of asylum seekers while allowing asylum seekers basic freedom of movement.

Guideline 5: Procedural Safeguards

If detained, asylum seekers should be entitled to the following minimum procedural guarantees:

- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order and their rights in connection with the order, in a language and in terms which they understand;
- (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
- (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum seeker or his representative would have the right to attend;
- (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;
- (v) to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available. Detention should not constitute an obstacle to an asylum seekers' possibilities to pursue their asylum application.

Guideline 6: Detention of Persons under the Age of 18 years

In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, minors who are asylum seekers should not be detained.

In this respect particular reference is made to the Convention on the Rights of the Child in particular:

- Article 2 which requires that States take all measures appropriate to ensure that children are protected from 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 members;
- Article 3 which provides that in any action taken by States Parties concerning children, the best interests of the child shall be a primary consideration;
- Article 9 which grants children the right not to be separated from their parents against their will;
- Article 22 which requires that States Parties take appropriate measures to ensure that minors who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance;
- Article 37 by which States Parties are required to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate period of time;

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered.

All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity. If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time. If children who are asylum seekers are detained at airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.

During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play which is essential to a child's mental development and will alleviate stress and trauma. Children who are detained, benefit from the same minimum procedural guarantees (listed at Guideline 5) as adults. A legal guardian or adviser should be appointed for unaccompanied minors.

Guideline 7: Detention of Vulnerable Persons

Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum seekers falling within the following vulnerable categories:

Unaccompanied elderly persons

Torture or trauma victims

Persons with a mental or physical disability

In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication, counselling etc., should it become necessary.

Guideline 8: Detention of Women

Women asylum seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided. Where women asylum seekers are detained they should be accommodated separately from male asylum seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres, the use of female staff is recommended.

Women asylum seekers should be granted access to legal and other services without discrimination as to their gender,⁷² and specific services in response to their special needs. In particular they should have access to gynaecological and obstetrical services.

Guideline 9: Detention of Stateless Persons

Everyone has the right to a nationality and the right not to be arbitrarily deprived of their nationality.

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally. Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.

In the event of serious difficulties in this regard, UNHCR's technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought.

Guideline 10: Conditions of Detention

Conditions of detention for asylum seekers should be humane with respect shown for the inherent dignity of the person. They should be prescribed by law.

Reference is made to the applicable norms and principles of international law and standards on the treatment of such persons. Of particular relevance are the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

The following points in particular should be emphasised:

- (i) the initial screening of all asylum seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.
- (ii) the segregation within facilities of men and women; children from adults (unless these are relatives);
- (iii) the use of separate detention facilities to accommodate asylum seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no commingling of the two groups;
- (iv) the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;
- (v) the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate;
- (vi) the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;
- (vii) the opportunity to continue further education or vocational training;
- (viii) the opportunity to exercise their religion and to receive a diet in keeping with their religion;
- (ix) the opportunity to have access to basic necessities i.e. beds, shower facilities, basic toiletries, etc.;
- (x) access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

Conclusion

The increasing use of detention as a restriction on the freedom of movement of asylum seekers on the grounds of their illegal entry is a matter of major concern to UNHCR, NGOs, other agencies as well as Governments. The issue is not a straight-forward one and these guidelines have addressed the legal standards and norms applicable to the use of detention. Detention as a mechanism which seeks to address the particular concerns of States related to illegal entry requires the exercise of great caution in its use to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based.