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Flight in Legal Limbo:

An analysis of the public-private protection dilemma against *refoulement* of North Koreans in flight

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Zoë Eunjae Lee
Oslo, 15 May 2016

Abbreviations

1967 Protocol	The Protocol Relating to the Status of Refugees
CAT	Convention against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
COI	Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea
COI Report	Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea
CRC	Convention on the Rights of the Child
DPRK	Democratic People's Republic of Korea
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
Lao PDR	The Lao People's Democratic Republic
PDS	Public Distribution System
Refugee Convention	The Convention relating to the Status of Refugees
UDHR	Universal Declaration for Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties
The Council	United Nations Human Rights Council

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1 Introduction

My own story starts with my escape in 1997, when I was 17. I did not crawl through a tunnel or over an electrified-wire fence, nor was I spirited in disguise across the demilitarized zone. I lived near the border with China, and one night I simply left home and walked across the iced-over river that separated the two countries. I was fortunate that my family had close relationships with some of the border guards, so I was able to cross without incident.

-Hyeonseo Lee¹

This story of escape does not appear to be a story of a refugee escape at first sight—it lacks the certain drama, the adrenaline, the blatant deprivation of a dozen human rights in a single anecdote one may be conditioned to expect from a ‘refugee escape story.’ However, after this relatively ‘smooth’ escape across the border between the Democratic People’s Republic of Korea (DPRK or North Korea) and the People’s Republic of China (China), Hyeonseo faced a different violator and had to live in hiding in China for a decade before finding her way to an eventual escape.²

1.1 Background

Kim Jong-Un’s rule of the DPRK has kept the human rights situation dire within its borders, and heightened both the risk of its people attempting to escape and the punishment they face upon repatriation.³ Tight controls on its border with China have further reduced the number of North Koreans able to flee and seek refuge.⁴ In 2015, the number of North Koreans reaching the Republic of Korea (South Korea) hit a 13-year record low,⁵ which some experts⁶ attribute to Kim Jong-Un’s stricter border controls,

¹ Lee 2015

² Sinosphere 2016

³ HRW 2016

⁴ HRW 2015

⁵ Power 2016

including new border fences, increased troops in frequently crossed areas, and the “a high level of refoulement.”⁷ The few who have been able to escape the repressive regime face another arduous journey, from China to several Southeast Asian countries, including the Lao People’s Democratic Republic (Lao PDR), Thailand, and Viet Nam, from where they, if successful, are able to seek asylum at embassies, most often that of South Korea.⁸ Many, however, are stuck in China, often the first transit state, where an estimated 100,000 to 300,000 North Koreans are living in hiding.⁹ The number is difficult to estimate, as they reside clandestinely in China.¹⁰ This journey is made more difficult, as China continues to label all North Koreans in its country as “illegal economic migrants” and routinely repatriates them,¹¹ citing a secret bilateral Sino-Korean treaty to which they claim to be bound.¹² In early February 2016, Russia and North Korea have also signed a similar agreement on the extradition of “illegal immigrants” between their respective countries.¹³

Should they make it through China, the fleeing North Koreans face the fear of being captured by the local authorities of Southeast Asian countries, who deport them back to China. As recently as October 2015, nine North Koreans were apprehended by Vietnamese police and handed to the Chinese police, who then proceeded to transfer them to a military garrison near the North Korean border.¹⁴ In May 2013, Laos also deported a group of nine North Koreans, including five children, to which the United

⁶ Seymour 2005, p. 16; Others have attributed it to improving economic conditions within North Korea, lack of job security in South Korea upon resettlement, etc. See: NK News 2015 and Lankov 2015

⁷ NK News 2015

⁸ HRW 2015, supra n4

⁹ HRW 2002, p. 2; United States Committee for Refugees and Immigrants 2009;

According to Song 2015, p. 401, “No official data is available on how many North Koreans live in China. In the early 2000s, the PRC government’s estimation is around 10,000–50,000; the ROK at 30,000–50,000; the US State Department at 75,000–125,000; the United Nations High Commissioner for Refugees (UNHCR) at 50,000–100,000; and NGOs at 100,000–300,000 (Lee 2001–2002, 2004; Lohman 1996; Seymour 2005).”

¹⁰ A/HRC/25/CRP.1 para 395, 396—The COI cites various numbers and sources including a 2005 estimate of 50,000; a 2006 estimate of 100,000; a 2010 survey finding of 6,824 and 7,829 children born in China to North Korean mothers; and a 2013 estimate of about 7,500 adults and 20,000 children by KINU.

¹¹ HRW 2015, supra n4

¹² Chan &Schloenhardt 2007, p. 224

¹³ Rbth.com 2016

¹⁴ HRW 2015b

Nations High Commissioner for Refugees (UNHCR) expressed deep concern and strongly urged states to “adhere to the principle of non-refoulement as a core tenet of customary international law.”¹⁵ Despite continued condemnations from the international community, blatant disregard for international law and principles persist.

As such state challenges remain, North Koreans have increasingly turned to seeking assistance from various sources— brokers, missionaries, and human rights NGOs and activists— to ‘smuggle’ their way to freedom.¹⁶ These individuals, who have risked everything to leave their homes in search of their human dignity and rights, are not finding themselves protected against return in these transit states. This should prompt the international community to question, who *are* the duty bearers of the right against return of this vulnerable group? Whatever the answer to this question, is it enough?

1.2 Aim and purpose

The purpose of this thesis is to identify both the public and private protections available to North Koreans in flight with regards to their right to be protected against return, and to question whether the findings prompt the international community to reinterpret non-refoulement obligation. To that end, it will define the legal identity of North Koreans in flight and the corresponding right against return; identify the duty bearers in law and in practice; explore the public-private protection dilemma; and re-evaluate the obligation to the non-refoulement principle this case poses to the international community. My research question is, therefore:

Should the international community reinterpret non-refoulement obligation in light of the public-private protection dilemmas presented by the North Koreans in flight?

To make the question researchable and the findings concretely communicable, the main question is supported by the following three sub-questions:

¹⁵ UNHCR 2013

¹⁶ Song 2015

- Sq1: What is the legal identity of North Koreans in flight and the consequent rights afforded to them?
- Sq2: Who are the legal duty bearing states in question, and are they fulfilling their duties to protect North Koreans in flight?
- Sq3: Who is fulfilling the duty to protect the right of North Koreans in flight in practice and if it is not the legal duty bearers, why is that so?

1.3 Definitions

The *public-private protection dilemma* refers to the problem gap of the rights protection presented in the case of North Koreans in flight, where the legal protection of states as primary duty bearers is existent in law but lacking in practice, leaving a gap that is filled by private, non-state actors in practice. *Non-refoulement obligation* is understood primarily by the substantive obligations the relevant states have under the relevant law, to provide protection against return of an individual who is likely to face persecution, torture, or other ill-treatment upon return. This definition and principle is further explained in detail in section 3.1. A *transit state* is understood as a state that fleeing North Koreans pass through, en route to their final asylum-seeking destination, be it the most frequented destination of South Korea or elsewhere.¹⁷ *Duty bearer* is primarily understood in its traditional legal understanding of a state as a duty bearer to the rights of an individual. However, it is noted that the possibility of a broader understanding of non-state actors as duty bearers, who are not obliged by law but fulfil the duty to a right in practice, is explored. In such situations, the term *de facto duty bearer* is used. *Public protection* refers to protection provided by a state duty bearer and *private protection* refers to protection provided by a non-state actor or a de facto duty bearer. The *protection dilemma* refers to any clash or gap between these two protections.

When addressing the *rights* of North Koreans in flight, these rights primarily refer to the right against forcible return, unless otherwise specified. In the same vein, *duty to protect*

¹⁷ Increasingly, North Koreans are seeking asylum in western states, including the United States and the United Kingdom. See KINU 2015.

is used as shorthand to refer to the duty to protect against forcible returns. The term *repatriation* is understood as forcible return to the DPRK, and is used interchangeably with ‘return.’

When speaking of *North Koreans in flight*, or *fleeing North Koreans*, I refer to North Koreans who have willingly left the DPRK borders, and are in a third country yet to be given the chance to seek or be granted asylum. This includes those living or moving in hiding in third transit countries. This does not mean that they have to be in a literally physical, locomotive state, as many are stuck in a transit state, unable to avail themselves to a constant state of escape. There is no consensus over the terminology used to refer to this vulnerable group. As the terminology directly affects the legal identification of this group, and consequently their legal rights and protection, a short overview of the debate is provided below to inform the reader.

1.3.1 The label debate

North Koreans who have left the DPRK are given many labels in the social, political and legal discourses. These labels include: ‘defector’, ‘refugee’, ‘asylum seeker’, ‘escapee’, ‘economic migrant’, and ‘illegal immigrant’. This terminology debate in both academia and government practices, and both Korean and English languages, has yet to be settled in a unified agreement. This seemingly minor debate is crucial in determining the legal protection rightfully entitled to this group. A selection of widely used terms and their implications are discussed below in both the socio-political and legal contexts.

In the Korean-language discourse, there has been a complex list of terms used over the years, reflecting the history, societal, and political changes and implication in South Korea.¹⁸ *Nan-min*, the Korean word for ‘refugee’ was used in the 1990s,¹⁹ with regards

¹⁸ Note. From *Terms of Endangerment: Evolving Political and Legal Terminology for North Koreans*(Heller 2011, p. 14), Table 1:

Korean Term (period used)	Transliteration	Meaning
귀순자 (1948-1990)	Gwi-sun-ja	‘defector’, or ‘person who used to be an enemy’
난민 (1990)	Nan-min	‘refugee’

to North Koreans who fled the humanitarian crisis and famine that killed up to one million North Koreans, approximately 3-5% of the population.²⁰ However, this term has since been replaced with a wealth of labels, all laden with different connotations, reserving the use of *nan-min* for discussions of international refugee issues. The variation and change of the term over time carries a political and societal, rather than a strictly legal, significance in South Korea, as it reflects the changes and tensions “between the North Korean refugee groups, South Korean government organisations, and international humanitarian organisations” over the corresponding time.²¹ The term ‘defector’, or *tal-buk-ja*, literally meaning ‘people who fled or escaped the North’, is the most widely used in the media, government statements, and academic reports.²² In the latest English publication of South Korean Ministry of Unification, this group of North Koreans is referred to as both ‘defector’ and ‘refugee’ interchangeably.²³

An added dilemma in the debate is the lack of distinction in labels between North Koreans who have been granted asylum and are resettled and those who are still in flight, yet to reach safety, both often being singularly called ‘defector.’²⁴ This lack of distinction between those who have been provided the access to asylum- seeking procedures and those who still risk the danger of being returned further muddles the line between what labels correspond to which rights. Hence, the Korean-language discourse provides more insight into the local political and social landscape than the identification of international legal rights held by North Koreans in flight.

북한이탈주민(Post 2000)	Buk-han-i-tal-ju-min	‘North Korean migrant’, sometimes ‘North Korean escapee’
새터민(2005-2008)	Sae-teo-min	‘new settlers’, ‘persons with new homes who live with hope’
탈북자	Tal-buk-ja	‘North Korean refugee’, also ‘defector’, ‘those who escaped the north’

¹⁹ Ko et al 2004, cited in Heller 2011, p. 16

²⁰ Haggard & Nolan 2008

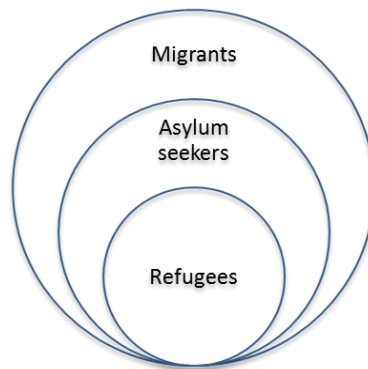
²¹ Heller 2011, p. 15

²² Shim 2013, p. 123-24 ; Chung 2008, p. 12

²³ ROK MOU, White Paper on Korean Unification, 2014

²⁴ Suh 2002

The international discourse, too, uses the terms loosely and often almost interchangeably, between the terms defector, migrant, asylum seeker and refugee.²⁵ However, there have been attempts to distinguish the uses of the terms. In its 2002 report on North Koreans in China, Human Rights Watch (HRW) used three of the most commonly used terms—‘refugee’, ‘migrant’, and ‘asylum seeker’— defining them as related, but separate terms.²⁶ HRW defined ‘*migrant*’ as “persons who leave their country for economic or other reasons”; ‘*refugee*’ as “migrants who are entitled to protection from repatriation because they have a well-founded fear of persecution in their homeland”, and ‘*asylum seeker*’ as “migrants who do not intend to return to their country; some of this subset of migrants may also be refugees under the terms of international law.”²⁷ In their use of the term ‘*refugee*’, HRW included the North Koreans who were attempting to seek asylum in South Korea, due to the DPRK government policy of persecuting anyone who attempted the move to the south, “regardless of their motive in seeking to migrate”.²⁸ According to the above, HRW’s terminology of North Koreans in flight can be organized follows:



*Figure 1: Human Rights Watch, Terminology of North Koreans in flight*²⁹

²⁵ For further context of international use, the 2014 Report of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (COI Report) uses the term ‘defector’ 30 times, mostly in quotation in reference to interview testimonies. The term ‘refugee’ is used 45 times, but in reference to the international legal regime, rather than in specifically addressing the group.

²⁶ HRW 2002, p.8

²⁷ Ibid

²⁸ Ibid

²⁹ *Figure 1* is drawn by the author, based on the definitions described in HRW 2002.

The HRW report, the report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (COI Report), as well as well as many legal academic articles make the point that this group of North Koreans in flight merit a refugee status in international law, and thus are entitled to protection accordingly. Is this claim grounded in existing international law? If not, what is the legal identity of this group? Upon the basis of this label debate as foundational knowledge, these questions are further explored in chapter 3 to determine the legal identity of this group, as prompted by sub-question 1.

1.4 Methodology and theory

As the above question requires a research of international and political nature, a multidisciplinary approach is needed. Whilst acknowledging the essential necessity of a legal analysis in any discussion of refugee law, this approach is taken to enrich the legal analysis with political science perspectives that are more updated in its research with recent developments in refugee and migration flow. With regards to the legal analysis, I follow the *law in context* approach to analyze the law within its broader social and political contexts.³⁰ It will establish and analyze the laws *de lege lata*, identifying the relevant primary legal sources acknowledged in Article 38 (1) of the International Court of Justice (ICJ) being international conventions, customary law and general principles of law, as well as relevant bilateral treaties may inform State compliance to international law.

In understanding the political situation in which the relevant refugee protection regime and relevant states find themselves, I employ the *international security theory* of international relations and forced migration. The DPRK presents various unique cases meriting academic studies. A few of those aspects are explored in this thesis, including its politically unique position in today's post- Cold War era and the unique legal adversities faced by the outflow of its population, both explored in this thesis. The chosen theory and school of thought are relevant, as it is based on the international

³⁰ McConville and Chui 2007 p. 1-5; Ratner & Slaughter 1999

political history understanding of “the refugee problem [as] essentially political’ rather than humanitarian,”³¹ in which the power dynamics and various interests of the relevant states, as well as the UNHCR, heavily affect the protection scheme. Academics of this school of thought argue that the “state-centric notions of security undermine the security of individual refugees and other forced migrants,”³² with forced migration frequently being an “instrument of state foreign policy.”³³ According to this theory, viewing issues of refugees and forced migration also affects burden-sharing, as it “encourages an atmosphere where the hosting of refugees is understood by states as a zero-sum game rather than a question of solidarity with each other and with refugees.”³⁴ Some academics call for the desecuritization of the issue, arguing that the reasons for securitizing the refugee problem is outweighed by the problems caused.³⁵ This theory is relevant to the unique case presented by North Korea and its people in flight, as it encompasses the nuances of the power dynamics between various actors and aptly places the refugee dilemma conversation within that setting.

To understand the particular population outflow from this unique political context, I further employ the *concept of survival migration*, developed by Alexander Betts within the same scholarship of international relations and forced migration. This will enable the research to interpret the identity of the North Koreans in flight beyond that of the legal structures that currently exist and in the context of other populations of forced migration and the non-refoulement obligation in a wider scope. The concept of survival migration is defined as “persons outside their country of origin because of an existential threat to which they have no access to a domestic remedy or resolution.”³⁶ In theory, survival migrants have rights under international humanitarian law but are not ensured of those rights in practice, as a clear universal institutional framework does not exist. I will explore Betts’ concept in detail—its definition, case studies, and solutions to the

³¹ Coles 1989, p. 394, as quoted by Betts 2014

³² Betts 2014

³³ Greenhill 2010, cited in Betts 2014

³⁴ Hammerstad 2011, p. 239

³⁵ Wæver 1995, cited in Hammerstad 2011, p. 239

³⁶ Betts 2010, p. 362

non-refoulement obligation dilemma— and explore whether or not the case of North Koreans in flight is a case study of survival migration. If so, I will further discuss what analyzing this unique case in light of the survival migration concept means in moving forward. In analyzing both the legal basis and international relations perspective of the problem of the North Koreans in flight, I aim to shed light on the gap of protection provided in the *de lege lata*, as well as explore the *de lege ferenda*, informed by this international relations theory and approach.

As such, the conducted research is primarily a desk-research study of legal and extra-legal sources, consisting of secondary literature, ‘soft law’ sources, NGO reports, and up-to-date news sources.

Due to resource constraints, I have chosen not to conduct interviews, but rather sought to present a thorough overview of the existing protective regime and its problems, if any are found, regarding this group of vulnerable people through the abovementioned sources. Another limitation of the study is the nature of the vulnerable group in question. As North Koreans in flight, by definition, live in transit clandestinely, the available data and its validity can be in question. Acknowledging this, I have sought to refer to the most reliable sources, including various reports by governments, NGOs, and UN monitoring bodies. As such, the timely 2014 COI Report will have a particular prominent role in the thesis as an authoritative secondary source on the domestic human rights situation in North Korea. However, as many of the recent developments regarding bilateral treaties occurred during the writing of this thesis, I have inevitably referred to various news sources and not the treaties themselves, which have not yet been made public. In this regard, I have also made efforts to find reliable sources, checking with multiple news outlets for verification.

Existing literature on the rights of North Koreans in flight discuss various relevant law and its applicability to this vulnerable group. Some literature also suggests solutions,

many presenting proposals on the level of state actors.³⁷ By analyzing this case of public- private protection dilemma through both a legal and international relations perspective, particularly by operationalizing the concept of survival migration, I aim to bring to light the potential of this case study to be a part of the wider discourse on the obligation to the non-refoulement principle and produce a thesis that adds to the discourse of human rights protection of North Korean refugees in flight.

1.5 Reader's guide

The thesis is structured into six main chapters. *Chapter one* has sought to provide a thorough background to the context, research question and the methodology chosen to answer it. *Chapter two* will outline the domestic human rights situation in North Korea which prompts the departure of North Koreans. *Chapter three* will proceed to discuss the legal identity of this group of North Koreans in flight, and the corresponding rights entitled to their identity, and brings to the fore the non-refoulement principle upon repatriation. Upon establishing their legal identity, *chapter four* will discuss the relevant international, multilateral, and domestic legal sources, and seek to identify the corresponding legal duty bearers, and assess their fulfillment of the identified duties. Based on the presented findings of duty fulfillment in the previous chapter, *chapter five* will seek to identify the de facto duty bearers in practice, if they are found not to be the same as the legal duty bearers identified in the previous chapter, it will explore the cause of this misalignment. To this end, this chapter will also employ the international security theory and explore the concept of survival migration in the context of the North Koreans in flight. *Chapter six* will provide a brief conclusion to the main research question and outline possible proposals for supplementing the existing refugee regime and legal system of protection.

³⁷ Lee, E. 2004; Lee, K. 2008; COI Report; HRW 2015b

2 DPRK: Causes of flight

Understanding the political context and human rights situation within the DPRK that causes the tens of thousands of North Koreans to flee³⁸ is an essential part of the analysis of the protection dilemma, as it informs the legal identity of the North Koreans, the corresponding rights, and the various state and non-state actors involved in its protection. Prior to discussing the duty bearer status of transit states, this chapter examines the common causes for departure that calls for the application of non-refoulement principle. Section I of this Chapter will give an overview of the domestic human rights situation in North Korea. The following sub-sections will detail the particular human rights concerns specifically relevant to North Koreans who flee in order to inform the following chapters on the legal identity of fleeing North Koreans, and the corresponding rights and duty bearers.

2.1 The general human rights situation in North Korea

The DPRK has long been criticized by the international community of depriving and violating its people of “almost every aspect of their human rights.”³⁹ On 7 February 2014, the COI Report, established the year prior,⁴⁰ was submitted to the United Nations Human Rights Council (the Council) in its 25th session.⁴¹ Despite being a State Party to the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and Convention on the Rights of the Child (CRC),⁴² the DPRK was found in “systematic, widespread and gross human rights violations.”⁴³ The documented abuses included cases of torture, execution, rape, enslavement, imprisonment, murder, among others. The Commission of

³⁸ *Supra*, n 9

³⁹ Amnesty International 2016

⁴⁰ A/HRC/22/13

⁴¹ A/HRC/25/63

⁴² A/HRC/25/63, para 21

⁴³ A/HRC/25/63, para 80

Inquiry on Human Rights in the Democratic People's Republic of Korea (COI) concluded that the violations were of such "gravity, scale and nature" as to "reveal a State that does not have any parallel in the contemporary world", in many instances constituting crimes against humanity.⁴⁴ On 27 March 2015, the Council adopted resolution 28/22 and condemned these systematic, widespread, and gross human rights violations.⁴⁵ The United Nations (UN) General Assembly 3rd Committee followed suit, issuing a resolution condemning the abuses in December 2015.⁴⁶

Since the landmark report of the COI up until the time of this thesis being written, there has been no external, documented improvement of the human rights situation,⁴⁷ other than that which the DPRK itself claims.⁴⁸ On 19 January 2016, the Special Rapporteur on the situation of human rights in the DPRK, Marzuki Darusman, reported that these documented crimes against humanity "appear to continue"⁴⁹ without improvement and called for "concrete steps aimed at achieving accountability".⁵⁰ Despite the continued international concerns and condemnations, the DPRK continues to vehemently deny the violations, arguing that its people "enjoy genuine human rights."⁵¹ During the 31st session of the Council on 1 March 2016, the DPRK stated via its foreign minister, Ri Su-yong, that it will boycott any Council session that examines its human rights record and will "never, ever" be bound by their resolutions.⁵² On the subject of North Koreans who leave its borders, the DPRK accused the United States, Japan, and South Korea of sending disguised agents to "[seduce] the DPRK citizens to flee the country" to become

⁴⁴ A/HRC/25/63, para 80

⁴⁵ A/HRC/28/L.18

⁴⁶ A/RES/70/172

⁴⁷ A/HRC/28/71, para 3 (18 Mar 2015: «Sadly, the situation on the ground has not changed since the release of that report»); A/HRC/31/70

⁴⁸ The DPRK claims that it is experiencing an «unprecedented-ever grand garden full of genuine enjoyment of human rights», Statement of H.E. Mr. Ri Su Yong, Minister of Foreign Affairs of the DPRK, High-level segment of the 31st session of the UN Human Rights Council, Geneva, 1 March 2016

⁴⁹ A/HRC/31/70, para 1

⁵⁰ A/HRC/31/70, para 2, 46

⁵¹ KCNA, Report of the DPRK Association for Human Rights Studies 2014; NK News 2014

⁵² Statement of H.E. Mr. Ri Su Yong, Minister of Foreign Affairs of the DPRK, High-level segment of the 31st session of the HRC, Geneva, 1 March 2016, p. 4

the “so-called North Korean defectors” who “fabricate and sell groundless testimonies by trying to make them sound as shocking as possible.”⁵³

2.2 Systematic discrimination: *Songbun* class system

One of the six main findings of the COI Report was the DPRK’s discrimination of its people, based on their State-assigned social class, known as the *Songbun* class system. Literally meaning “ingredient”, *songbun* effectively refers to the background of a North Korean citizen. Through the *songbun* system, the state categorizes its citizens into three broad classes— core, wavering, or hostile⁵⁴—based on “their perceived political allegiance to the regime, ascertained by reference to family background and particular actions taken by family members.”⁵⁵ These three classes then determines the citizen’s residency, occupation, access to food, health care, education and other state services, affecting their right to food, education, and freedom of movement, among other core human rights.⁵⁶

The COI Report details and quotes witness testimonies of North Koreans who credit their suffering harsh discrimination, or witnessing that of others, to the according *songbun* class.⁵⁷ Reversely, it also appears to alleviate the punishments for those of higher *songbun* class.⁵⁸ The *songbun* class system directly violates the non-discrimination principle, the entitlement of rights to all without distinction of any kind, as stipulated by Article 2 of the Universal Declaration for Human Rights (UDHR), the ICCPR, and the ICESCR, as well as Article 1 of the CEDAW, the latter three being treaties which the DPRK has ratified.⁵⁹ In addition, the core of the *songbun* determination being reliant on the political allegiances of the citizen is especially of

⁵³ Ibid., p. 3

⁵⁴ A/HRC/25/CRP.1, para 271, footnote 288— A former DPRK official testified to the COI that there are actually 103 *songbun* classes within the three broad classes today, which he reported to the South Korean authorities.

⁵⁵ A/HRC/25/CRP.1, para 117

⁵⁶ A/HRC/25/CRP.1, para 117, 271-273

⁵⁷ A/HRC/25/CRP.1, para 192, 232, 233, 245, 271, 272, 275, 280, 283, 284, 287-299

⁵⁸ A/HRC/25/CRP.1, para 280

⁵⁹ OHCHR Indicators, DPRK

concern to the refugee status determination, which will be further discussed in the following chapter.⁶⁰

2.3 Right to food

According to the DPRK Constitution,⁶¹ the state is to provide its citizens with adequate food, and does so through a food rationing system consisting of the Public Distribution System (PDS) and the food rationing mechanism in cooperative farms.⁶² Theoretically, the rations are to be calculated depending on the amount of work done by the citizen, and the ratio of rice to less nutritious grains depending on one's place of residence, which in turn, depends on one's *songbun* class.⁶³ However, the collapse of the PDS in the mid-1990s and the subsequent mass starvation that followed resulted in an increasing outflow of DPRK citizens to China and Russia in search of food⁶⁴ and forced the DPRK authorities to seek international aid in 1995.⁶⁵ Since the 1990s, alternatives to the State distribution system have emerged, most notable among which is the *jangmadang* economy, or the informal economic market place.⁶⁶ Despite the alleviations since the 1990s, the COI Report notes that hunger and malnutrition still persisted on a widespread level in 2014.⁶⁷

The DPRK's inadequacy in providing its citizens of such a fundamental right is a direct violation of the DPRK citizens' right to food. The human right to adequate food is recognized in various human rights instruments, including Article 25 of the UDHR, Article 11 of the ICESCR, and Article 24 and 26 of the CRC.⁶⁸ This "fundamental right

⁶⁰ See section 3.3

⁶¹ Article 25 (3) of the DPRK Constitution declares: "*The state provides all the working people with every condition for obtaining food, clothing and housing.*"

⁶² A/HRC/25/CRP.1, para 506

⁶³ A/HRC/25/CRP.1, para 508

⁶⁴ Lee 2005, p. 8

⁶⁵ A/HRC/25/CRP.1, para 512-514

⁶⁶ A/HRC/25/CRP.1, para 519

⁶⁷ A/HRC/25/63, para 55

⁶⁸ CRC Art 24, 26

of everyone to be free from hunger”⁶⁹ is very closely interconnected to the right to life, the protection of which should be widely interpreted to include states adopting all possible measures to increase life expectancy, “especially in adopting measure to eliminate malnutrition and epidemics.”⁷⁰ It is an inclusive right, a right that cannot be “limited to a discussion of the minimum calories, proteins and other specific nutrients required” for mere survival.⁷¹

2.4 Freedom of movement and forcible repatriation

Among its principle findings, the COI Report highlighted the DPRK’s violations of the freedom of movement and residence,⁷² stating that the DPRK’s systems of indoctrination and discrimination violate “all aspects of the right to freedom of movement,”⁷³ with the State forcibly assigning both place of residence and employment which creates a “socioeconomically and physically segregated society.”⁷⁴

The ICCPR, to which the DPRK is a State Party, guarantees everyone the right to liberty of movement, freedom to choose his residence, and freedom to leave any country, including his own.⁷⁵ In its domestic law, the DPRK guarantees this freedom in Article 75 of its Constitution, stating that “the citizens shall have freedom to reside in and travel to any place.”⁷⁶ However, contradictory to the provision of this freedom, Article 117 of the DPRK Criminal Code dictates that any persons “who crosses the border without permission shall be punished by a sentence of three years or less labour re-education.”⁷⁷ Further, its Article 47 states that any persons “who escape to another country” is guilty of “betrayal of his motherland and people,” in the same category as

⁶⁹ ICESCR Art. 11(2)

⁷⁰ HRC, GC No. 6, para. 5

⁷¹ A/HRC/25/CRP.1, para 497

⁷² A/HRC/25/63, para 38-45, A/HRC/25/CRP.1 para 355-492

⁷³ A/HRC/25/63, para 38

⁷⁴ A/HRC/25/63, para 39

⁷⁵ ICCPR Art 12(1), (2)

⁷⁶ DPRK Constitution Art 75

⁷⁷ DPRK Criminal Code, Art 117 as cited in A/HRC/25/CRP.1

espionage and treason, condemnable of “at least seven years or more labour re-education,” or “execution and forfeiture of all properties,” in “serious violations.”⁷⁸

Article 12(3) of the ICCPR does allow restrictions to the liberty of movement, only under exceptional circumstances⁷⁹— they are not to be restricted except “those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”⁸⁰. According to the UN Human Rights Committee (HRC) General Comment No. 27, the restrictive measures must not “impair the essence of the right”, be proportionate to the interest to be protected.⁸¹ Even if the DPRK was of the argument that its citizen exercising his or her right to leave the country constitutes a threat to national security or any of the above listed exceptions, it is not at all consistent with the other rights recognized in the ICCPR.⁸² Not fulfilling the exception required to restrict its citizens’ right to freedom of movement, the DPRK violates both international human rights law and its own Constitution.⁸³

Despite the DPRK-imposed “virtually absolute” travel ban abroad and its enforcement via strict border controls, DPRK citizens still take the risk in fleeing to China.⁸⁴ Since the mass starvation of the 1990s caused an invisible exodus of fleeing North Koreans,⁸⁵ the DPRK authorities has “systemized their punishment of repatriated persons”, through close coordination with different security agencies, especially with that of China.⁸⁶ Upon apprehension or forcible repatriation, DPRK officials “systematically subject them to

⁷⁸ DPRK Criminal Code, Art 47 as cited in A/HRC/25/CRP.1

⁷⁹ HRC, GC No. 27 to Art 12, para 13

⁸⁰ ICCPR Art 12(3)

⁸¹ A/HRC/25/CRP.1, para 378; HRC GC No. 27

⁸² A/HRC/25/63— The inconsistency of this practice with other recognized rights in the ICCPR is made very clear in the rest of the COI Report. A detailed discussion of the entirety of the report is **omitted** for the purposes of this research.

⁸³ Tan 2015, p. 140— Tan states that the DPRK violates its own Criminal Code as well.

⁸⁴ A/HRC/25/63, para 42

⁸⁵ Human Rights Watch 2002

⁸⁶ A/HRC/25/CRP.1, para 401

persecution, torture, prolonged arbitrary detention and, in some cases, sexual violence, including during invasive body searches.”⁸⁷ Additional punishments include forced abortions and killing of babies born to repatriated women and executions or forcible disappearances into political prison camps of repatriated persons found to have been in contact with South Koreans or Christian churches.⁸⁸ These punishments, and many others documented in the COI Report through testimonies, fall under torture and/ or cruel, inhuman and degrading punishment as is defined in the Torture Convention.⁸⁹

2.5 Causes of flight: Valid reasons against return

The above sections have highlighted the key human rights concerns that affect and drive the departure of North Koreans escaping its borders. Despite the condemnation and pressures from the international monitoring bodies, the DPRK has continued to systematically commit crimes against humanity and violate the rights of its own people. These include violations against its citizens within its borders and against its citizens who attempt escape, are captured, and repatriated. Violations committed against repatriated North Koreans are systematic and severe, which are thoroughly documented by the UN monitoring bodies and NGOs alike. The almost- certain likelihood of said violations amounting to torture or cruel, inhuman and degrading treatment or punishment, including execution, is a crucial variable in the discussion of the legal identity determination of North Koreans in flight.

⁸⁷ A/HRC/25/63, para 42

⁸⁸ A/HRC/25/63, para 42

⁸⁹ CAT Art 1(1)

3 North Korean ‘Defectors’: Identity in legal limbo

North Koreans in flight have been labeled a number of different terms, each reflecting a different political or social context.⁹⁰ However, none of these labels are used with the intent of solidifying the rights of this vulnerable group. Prior to examining the duty bearers towards the North Koreans in flight, the following chapter explores the legal identity of this group, whether or not they can be considered ‘refugees’ in international law, thus legally binding the relevant states to corresponding obligations. It will also examine the non-refoulement principle, the obligation to this principle, and assess whether or not these common causes for departure and what awaits repatriated North Koreans aligns with or against the non-refoulement principle.

3.1 The Principle of non-refoulement: Protecting the North Korean ‘refugee’ in international law

This section examines the relevant legal protections afforded to a ‘refugee’ versus individuals who do not fall under the refugee definition. The non-refoulement principle broadly prescribes protection against return.⁹¹ It is also a general principle of international law and a fundamental component of customary international law prohibition of torture and cruel, inhuman and degrading treatment or punishment.⁹² The principle is understood on two levels of law—the first is a prohibition in refugee law against states returning refugees to a country where the individual is likely to face persecution, torture, or other ill-treatment on account of his or her race, religion, nationality, membership of a particular social group, or political opinion.⁹³ The second is the understanding of non-refoulement as a principle in human rights law, belonging to the broader prohibition of torture.

⁹⁰ See Section 1.3.1

⁹¹ Goodwin-Gill and McAdam 2007, p. 201

⁹² Lauterpacht and Bethlehem 2003, p. 151, 155

⁹³ UN doc. E/1850, para 30; 1951 Convention Art 33

3.1.1 Refugee law

The binding treaties of refugee law consist of the Convention relating to the Status of Refugees (the Refugee Convention) and its Protocol Relating to the Status of Refugees (1967 Protocol), but the protection against return therein are extended beyond the treaty limitations under human rights and general international law. The treaties defines and protects a refugee from being returned to a country where the individual is likely to face persecution, torture, or other ill-treatment on account of his or her race, religion, nationality, membership of a particular social group, or political opinion.⁹⁴ Article 33(1) of the Refugee Convention binds State Parties to the prohibition of refoulement, stating that “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 the above mentioned grounds.⁹⁵ This protection, however, is limited to those determined as a ‘refugee’ by the definition set forth in Article 1A(2) of the Refugee Convention, a determination that is contested in the case of many North Koreans in flight.⁹⁶

3.1.2 Human rights and general international law

The principle of non-refoulement, however, extends beyond the Article 33 provision for the refugee, and provides protection for more than just the Refugee Convention-defined ‘refugee’. This widened scope of non-refoulement under international law, or complementary protection, obliges States to protect individuals under international legal instruments and custom.⁹⁷ In this regard, the prohibition against return is not strictly confined in the context of a refugee, but is extended to all individuals in their right to be free from torture. In treaty law, Article 3 of the Torture Convention binds State Parties against returning or extraditing a person “to another State where there are substantial

⁹⁴ UN doc. E/1850, para 30; 1951 Convention Art 33

⁹⁵ 1951 Convention Art 33(1)

⁹⁶ See section 3.2

⁹⁷ Goodwin-Gill and McAdam 2007, p. 285

grounds for believing that he would be in danger of being subjected to torture.”⁹⁸ On the determination of such grounds, all relevant considerations are to be taken into account, including the “existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”⁹⁹ Article 7 of the ICCPR also prohibits torture or cruel, inhuman or degrading treatment or punishment.¹⁰⁰ Although the article does not explicitly mention the protection against return, the HRC argued that State Parties’ duties under Article 7 extends to not exposing individuals to such treatment or punishment “upon return to another country by way of their extradition, expulsion or refoulement,” requiring State Parties to adopt positive measures to that end.¹⁰¹ The UNHCR has reaffirmed the “fundamental importance” of the principle protecting persons “irrespective of whether or not they have been formally recognized as refugees.”¹⁰² This was echoed by both the ExCom and the UN General Assembly in successive years,¹⁰³ a point that is “critical to the contention” that transit states are violating the most fundamental obligation of international refugee law.¹⁰⁴ The UNHCR has also gone further, stating that such complementary protection against return as being based on a customary norm *jus cogens*.¹⁰⁵ This *jus cogens* status of the non-refoulement principle was also reiterated in the 1984 Cartagena Declaration as a “corner-stone” of international protection.¹⁰⁶

Despite the UNHCR stance that the scope of such basic protection should be without ambiguity,¹⁰⁷ there is no guarantee that States follow this view on an international

⁹⁸ CAT Art 3(1)

⁹⁹ CAT Art 3(2)

¹⁰⁰ ICCPR Art 7

¹⁰¹ HRC, GC No. 20 to Art 7

¹⁰² UNHCR, Non-Refoulement, 1977, No. 6 (XXVIII) – 1977

¹⁰³ UNHCR Executive Committee 1996; 1997a; 1997b; UNGA Resolution 1998

¹⁰⁴ Kurlantzick & Mason 2006, p. 37

¹⁰⁵ UNHCR Note on the Principle of Non-Refoulement 1997; E/1985/62, para 22-23; Goodwin-Gill and McAdam 2007, p. 290

¹⁰⁶ Cartagena Declaration, Conclusions and Recommendations, III, 5; 10th anniv Annexe 2, No. 7; Goodwin-Gill and McAdam 2007, p. 212

¹⁰⁷ A/AC.96/799 para 18

level.¹⁰⁸ This is largely because there is no international judicial body or court that has specified what legal status should be given to someone deemed “non-removable.”¹⁰⁹ However, despite the lack of states’ abidance, non- return to torture or cruel, inhuman or degrading treatment or punishment is “absolute under international law.”¹¹⁰

3.1.3 «Chain» refoulement

‘Indirect’ or ‘chain’ refoulement refers to the practice of a state returning an individual to a territory where he or she, while not directly at risk of persecution, torture, or cruel, inhuman or degrading treatment or punishment, faces a danger of being returned to other territories where such a risk exists.¹¹¹ While the State that directly returns an individual to persecution or serious harm is “primarily responsible,” the first State that expels the individual to the directly-returning State is “jointly liable” and in violation of the principle as well.¹¹² Goodwin-Gill and McAdam argue that labeling such practices as ‘indirect’ or ‘chain’ refoulement and discussing the terminology as if they are separate from refoulement practices, misleads and “confuses the legal basis for liability” when in reality, such terminology is “essentially descriptive.”¹¹³ Therefore, individuals are, under international law, protected from State practices of ‘chain’ refoulement under the principle of non-refoulement.

3.2 ‘Refugee’ status determination of North Koreans in international law

Article 1 of the Refugee Convention defines a refugee as:

¹⁰⁸ Goodwin-Gill and McAdam 2007, p. 297

¹⁰⁹ Goodwin-Gill and McAdam 2007, p. 297; The decisions of the ECtHR is binding, however, none of the States in question for this thesis is bound to the ECtHR, with the exception of Russia.

¹¹⁰ Goodwin-Gill and McAdam 333, citing *Chahal v. UK* (1998) 23 EHRR 413.

¹¹¹ Goodwin-Gill and McAdam 252; Committee against Torture, General Comment No. 1, para 2; HRC, GC No. 31, para 12

¹¹² UNGA res. 56/83, Annex, Art 47 as cited in Goodwin-Gill and McAdam 2007, p. 252-3

¹¹³ Goodwin-Gil and McAdam 2007, p. 252-3

someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

Further, a refugee must be unable or unwilling to avail him or herself of the protection of that country due to that fear.¹¹⁴ The refugee status of North Koreans in flight under the Refugee Convention is discussed below. It should be noted that the UNHCR's mandate dictates that refugee status be determined on an individual basis.¹¹⁵ For the sake of argument, the group in question is analyzed below in a *prima facie* approach as well, as it is speculated that the reason states hesitate to grant protection is due to the fear of mass influx.¹¹⁶ Different situations are considered, including the absence of a specific, individual well-founded fear in the *prima facie* claim, and becoming a refugee *sur place*, after having left North Korea.

3.2.1 *Prima facie* claim to refugee status

A *prima facie* claim to refugee status is the recognition of refugee status on “readily apparent, objective circumstances”¹¹⁷ by a State or the UNHCR, often in group situations where individual status determination is “impractical, impossible or unnecessary in large-scale situations.”¹¹⁸ It may be argued that the population of North Koreans in flight has arguably not reached the level of an “entire group having been displaced,” with the population flow being contingent upon active individual escape.¹¹⁹ However, the UNHCR Guidelines on International Protection states that “massive human rights violations, generalized violence or events seriously disturbing public order” are “suited to forms of group recognition.”¹²⁰ The systematic and widespread human rights violations in the DPRK surely qualify as such described grounds for

¹¹⁴ 1951 Convention Art 1(a)(2)

¹¹⁵ UNHCR Handbook para 44

¹¹⁶ Chan and Schloenhardt 2007, p. 240

¹¹⁷ HCR/GIP/15/11- UNHCR Guidelines on International Protection No.11 (2015), para 1

¹¹⁸ Ibid, UNHCR Guidelines No.11, para 2

¹¹⁹ UNHCR Handbook para 44

¹²⁰ UNHCR Guidelines No.11, para 5

applying the *prima facie* claim to refugee status for this group.¹²¹ Should the much feared mass influx occur, with a flood of North Koreans seeking asylum, a *prima facie* claim can validly be made.

3.2.2 Refugee *sur place*

A refugee *sur place* is someone who was not a refugee when leaving his or her country of origin, but becomes one at a later date due to reasons arising during his or her absence.¹²² In the case of refugee *sur place* determination, the UNHCR Handbook states that it is not required for the individual to have left the country illegally or on account of a well-founded fear.¹²³ The applicant “need not show that the authorities of his country of origin knew of his opinions before he left the country,” but must be able to pass the test of well-founded fear to assess the consequences faced by the applicant, having certain political dispositions, if he returned.¹²⁴ This well-founded fear is to be determined by a careful examination of the circumstances.¹²⁵

3.2.3 Establishing a “well-founded fear” of persecution

North Koreans flee their home country for a number of reasons, including reasons of religion, membership of a particular social group or political opinion.¹²⁶ The various mixed motives do not disqualify the North Koreans from protection, and persecution may arise from a combination of reasons.¹²⁷ The argument against the well-founded fear claim of the North Koreans is that they are economic migrants, and have left their country of origin for reasons unrelated that which is listed in the Convention definition. China makes the argument that North Koreans fleeing the DPRK and found within Chinese borders are thus unqualified for protection as refugees in international law.

¹²¹ Haggard and Noland 2006, p. 41

¹²² UNHCR Handbook para 94, 95

¹²³ UNHCR Handbook para 94

¹²⁴ UNHCR Handbook para 83

¹²⁵ UNHCR Handbook para 96

¹²⁶ HRW Report 2002, p. 4; A/HRC/25/CRP.1 para 446

¹²⁷ Haggard and Noland 2006, p. 11; UNHCR Handbook para 66

The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status distinguishes economic migrants and refugees, defining the former as a person who “voluntarily leaves his country in order to take up residence elsewhere” “exclusively by economic considerations.”¹²⁸ However, it considers as refugees persons who originate from countries in which the distinction between economic and political measures is unclear, and where “economic measures destroy the economic existence of a particular section of the population” to “become refugees on leaving the country.”¹²⁹ Some North Koreans who have left the DPRK have, as China argues, left the country for economic reasons, in particular, in search for food. However, the DPRK’s economic and political measures and conditions are so interwoven, with economic resources directly related to one’s political opinion of the government and *songbun* class status that even those fleeing for economic reasons without a so-called well-founded fear of persecution qualify as refugees once outside the country. Also, the almost-certain persecution upon repatriation is dependent on the DPRK’s belief that crossing the border is a political act of treason and betrayal of the country.¹³⁰ Thus, by willfully fleeing the DPRK, a North Korean automatically establishes a well-founded fear for reasons of political opinion, atop any other reasons the individual may have had, including the search for food, religion, or *songbun* status escape. In agreement with this logic, the COI also found North Koreans in flight as arguably either refugees fleeing persecution or becoming refugees *sur place*, thereby entitled to international protection.¹³¹

In light of the above establishment of their status as individuals with valid claim to refugee status and not economic migrants, as well as their well-founded fear of persecution and imminent repercussions upon repatriation, North Koreans in flight are entitled to international protection as a refugee under the Refugee Convention, as well

¹²⁸ UNHCR Handbook (f) para 62

¹²⁹ UNHCR Handbook (f) para 63

¹³⁰ DPRK Criminal Code, Art 47 as cited in A/HRC/25/CRP.1; See section 2.4 above for a more thorough discussion

¹³¹ A/HRC/25/CRP.1 para 447

as protection from return under international human rights law and customary law of the principle of non-refoulement.

3.3 Concluding remarks

There is a multitude of labels given to North Koreans who have crossed the borders of the DPRK, risking their lives, in search for dignity, food, freedom from social hierarchy, and freedom of religion and political opinion. The dilemma of the rights of North Koreans in flight begins with this void of universal agreement of their legal identity. This lack of a universal terminological agreement reflects the lack of universal treatment in society, both in the Korean peninsula and abroad, in discourse and law. This identity in legal limbo serves as a hindrance in the international community arriving at a consensus for the legal identity, and consequent legal rights and protection due to these people, and leaves too wide a margin for individual states.

This chapter has defined the legal identity of this group as refugees— *prima facie* in the case that it would ever amount to a large scale situation, and *sur place* with a well-founded fear of persecution upon return. However, in order for this refugee status to be determined, the North Koreans in flight must be given the opportunity to seek asylum and have their statuses determined in third transit countries through the state governing body or the UNHCR. The almost certain likelihood of repatriated North Koreans facing persecution amounting to torture or cruel, inhuman and degrading treatment or punishment, including execution, is enough to invoke the application of the non-refoulement principle regarding repatriation of North Koreans found in third countries, whether or not the transit states acknowledge their legal identity as refugees.

This thesis focuses on those who have yet to reach their destination of asylum, and are still in flight. For the purposes of this research, this group of North Koreans who have wilfully left the DPRK borders and have yet to be given an opportunity for refugee status determination or assessment by an international law-abiding body will continually be referred to as *North Koreans in flight* or *fleeing North Koreans*. This is not to say that they are not entitled to the rights and corresponding protection listed in the Refugee

Convention, but rather to avoid confusion in the chapter that follows, in which states hold varied practices of refugee law, some not being party to the Refugee Convention at all. The favoured term ‘defector’ is not used for two reasons. First, it has no legal significance in international law, despite its heavy local political and social implications. Secondly, it has a history of being used to refer to both North Koreans in flight and those who have resettled, after having been granted asylum.

4 Existing legal duty bearers: Obligations and practices of transit states

The above chapters defined the legal identity of North Koreans in flight as refugees, pending status determination procedures. This legal identity entitles them to certain rights, to which states are bound under international treaty and customary law. Which states, then, bear these legal duties, and are they fulfilling their duties to protect this vulnerable group against return?

The current existing legal regime of protection may not be complete by any means,¹³² nevertheless, duties of relevant states within said regime are discussed below as a point of departure. This chapter discusses the legal obligations and practices of China, Russia, the Lao PDR, Thailand and Viet Nam in order to determine whether or not they are duty bearers to the rights of the North Koreans in flight. These states are discussed in particular, due to their being the main transit countries involved in the most common escape routes by North Koreans in flight in recent years.¹³³

The ratification statuses of relevant treaties are summarized in *Table 1* below. The ratification of the Refugee Convention and its 1967 Protocol indicates the state's binding duties in refugee law, and the Torture Convention and the ICCPR further indicates its non-refoulement duties under binding treaties of international human rights law, in addition to its status as a principle in customary international law. The treaty ratification status of the DPRK is offered as a point of reference. An 'x' indicates that the state has not taken any action with regards to the treaty. One asterisk symbol '*' indicates that one or more reservations were made upon accession or ratification. Two asterisk symbols '**' indicates declarations. Relevant reservations and/or declarations made are discussed in the relevant section below:

¹³² Goodwin-Gill and McAdams 2007, p.1

¹³³ Song 2015; Haggard & Noland 2006; KINU White Paper on Human Rights in North Korea 2015, p. 428

State/ Treaty	1951 Conv.	1967 Protocol	Torture Conv.	ICCPR
China	Accession*	Accession*	State Party*	Signatory
Russia	Accession	Accession	State Party	State Party
Lao PDR	x	x	State Party*,**	State Party
Thailand	x	x	Accession*	State Party
Viet Nam	x	x	Accession*	State Party
DPRK	x	x	x	State Party

Table 2: Treaty ratification of relevant transit states¹³⁴

4.1 China

4.1.1 International and domestic legal obligations

As indicated in *Table 1*, China acceded to both the Refugee Convention and its 1967 Protocol in 1982. As it acceded to both the two treaties, China expressed reservations to Article 14 on the artistic rights and industrial property of a refugee, and Article 16(3) on the access to courts of the former and a reservation in respect of Article 4 on information on national legislation of the Protocol.¹³⁵ China is also a State Party to the Torture Convention, having signed and ratified the treaty in 1986 and 1988 respectively. It made reservations upon signature and ratification on two accounts: not recognizing the “competence of the Committee against Torture” provided for in Article 20 and the legal binding power of Article 30(1) regarding arbitration.¹³⁶ None of the above reservations negates or refuses the principle of non-refoulement.

Further, China’s Constitution and domestic law also provides for the right to asylum to “aliens who seek asylum for political reasons”¹³⁷ and against the extradition of persons

¹³⁴ The chart has been created with information available via the UN Treaty Collection database; see OHCHR Dashboard (2016).

¹³⁵ United Nations, *Treaty Series*, vol. 606, p. 267; United Nations, *Treaty Series*, vol. 189, p. 137

¹³⁶ United Nations, *Treaty Series*, vol. 1465, p. 85

¹³⁷ Constitution of the People’s Republic of China, Art 32(2); Laws of the People’s Republic of China on Control of the Entry and Exit of Aliens, Art 15

if “the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the requesting state.”¹³⁸

4.1.2 Practices and justifications

Despite the above international obligations and domestic legal provisions, China continues to repatriate North Koreans found within its borders, arguing that they are ‘economic migrants’ or ‘illegal immigrants,’ rather than refugees.¹³⁹ China also cites a confidential 1961 bilateral treaty with the DPRK, as well as the 1986 Mutual Cooperation Protocol¹⁴⁰ as a basis for its regular repatriation practice.¹⁴¹ Article 4 of *1986 Mutual Cooperation Protocol Between China and North Korea for National Security and Social Order and Maintenance Surrounding Its Border Region* states that “both sides shall mutually cooperate on the work of preventing the illegal border crossing of residents” by sharing a “name-list or relevant materials” with the other side, depending on the situation.¹⁴² In 2004, it was estimated that some 300 North Koreans were repatriated to the DPRK each week, without access to refugee determination procedures.¹⁴³ In a particular 2002 incident, Chinese authorities went as far as to send its armed police to enter Japan’s consulate in Shenyang to capture five North Koreans seeking asylum.¹⁴⁴ This was an incident that not only violated the rights of the North Koreans according to refugee law, but of the inviolability of the consular premises article of the Vienna Convention on Consular Relations.¹⁴⁵ Further, China has continually refused access to UN monitoring bodies, including the UNHCR and the COI, and actively hindered them from accessing parts of China bordering the DPRK,

¹³⁸ Extradition Law of the People’s Republic of China, Art 8

¹³⁹ Human Rights Watch 2016; A/HRC/4/34/Add.1, para 129 and para 447; Chan and Schloenhardt 2007

¹⁴⁰ It should be noted that note that Jendrezjczyk identifies the ‘secret’ treaty and the 1986 Protocol being one and the same.

¹⁴¹ Chan and Schloenhardt 2007, p. 224; HRW 2002; Seymour 2007; Kyu Chang Lee 2008

¹⁴² PRC-DPRK Mutual Cooperative Protocol 1986, Art 4(2)

¹⁴³ Lord Hylton 2004 as cited in Chan and Schloenhardt 2007, p. 222

¹⁴⁴ Seymour 2005, p. 21

¹⁴⁵ Vienna Convention on Consular Relations Art 31(2) states that “*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.*”

including provinces most densely populated by fleeing North Koreans in China.¹⁴⁶ Thus, in practicing repatriation of fleeing North Koreans, China has not only violated refugee law and the principle of non-refoulement, but its own Constitution and the international law of diplomacy. Despite these being blatant violations of the aforementioned international treaties, China maintains that the above bilateral treaties take precedence and supersedes its obligations under the Refugee Convention, the 1967 Protocol and other international human rights instruments and considers itself not to be in breach of its international obligations.¹⁴⁷ However, such bilateral treaty cannot supersede an international human rights treaty, especially when the provisions of the former clearly go against the object and purpose of the latter.¹⁴⁸ Further, the *jus cogens* prohibition against torture and the non-refoulement principle cannot be superseded by a friendship treaty between two nations, as it is customary law.¹⁴⁹

The international community of academics, human rights activists, and organizations alike has condemned China of its practices on multiple counts,¹⁵⁰ with condemnations that China is “attempting to simply define the North Koreans out of the [1951] Convention.”¹⁵¹ In its report, the COI recommended that China respect the principle of non-refoulement and abstain from its practice of forcible repatriations, unless their treatment upon repatriation “markedly improves” among other recommendations including providing “full and unimpeded access to all persons” from the DPRK seeking contact with the UNHCR and relevant humanitarian organizations.¹⁵² However, this has not deterred China’s stance on the matter.

¹⁴⁶ A/HRC/25/63 para 17, annex II

¹⁴⁷ Seymour 2005, p. ii; Chan and Schloenhardt 2007, p. 224

¹⁴⁸ VCLT, Art 18

¹⁴⁹ VCLT, Art 53 and 64

¹⁵⁰ United States Congressional- Executive Commission on China 2014

¹⁵¹ US Committee for Refugees and Immigrants, US Senate Sub-Committee hearing 2005, as cited in Goodwin-Gill and McAdam 2007, p. 232

¹⁵² A/HRC/25/63 para 90 (a),(b)

4.1.3 Concluding remarks

In 2004, in reference to fleeing North Koreans in China, the then- Chinese Foreign Minister Li Zhaoxing reportedly stated that “these refugees that you talk about do not exist ... [They] are not refugees, but they are illegal immigrants.”¹⁵³ Being bound by all of the relevant treaty law, as well as the customary international law principle of non-refoulement, China is a duty bearer to the rights of fleeing North Koreans. Whether or not China acknowledges them as potential refugees, North Koreans in flight are entitled to a refugee determination procedure. China’s continued stance of treating fleeing North Koreans as illegal economic migrants, denying them access to any asylum seeking mechanisms, actively pursuing and repatriating North Koreans are actions that are in violation of their duties as legal duty bearers.

4.2 Russia

4.2.1 International legal obligations

Russia has acceded to both the Refugee Convention and its Protocol without reservation, and is a State Party to the Torture Convention, the ICCPR and the ICESCR. In addition, Russia is also a State Party to the European Convention on Human Rights (ECHR). While the ECHR does not have a particular provision prohibiting refoulement, it has found the prohibition “inherent in the general terms of Article 3” on the prohibition of torture.¹⁵⁴ Thus, Russia is bound by all of the relevant law, both treaty and customary, to refrain from returning North Koreans in flight.

4.2.2 Practices and justifications

According to an estimate made by the South Korean Foreign Ministry in 2013, North Korea has dispatched a total of 46,000 workers to 40 different countries, including

¹⁵³ Human Rights Watch 2004

¹⁵⁴ ECtHR, *Soering v. United Kingdom*, (Application No. 14038/88); *Chahal v. United Kingdom*, (Application No. 22414/93), *Saadi v. Italy*, (Application No. 37201/06)

China and Russia.¹⁵⁵ An estimated 10,000 of those workers¹⁵⁶ are said to be working in Russia as legitimate workers, via contract between the two states.¹⁵⁷ “A significant number” of those North Korean laborers are believed to escape their various workplaces¹⁵⁸ or stay after their contract expiration in order to seek asylum.¹⁵⁹ Because of the illicit nature of their living situation, no estimates are available. Russia has also repatriated North Koreans upon capture on a case-by-case basis,¹⁶⁰ although it has yet to amount to the systematic scale of China’s repatriation practices.

Russia’s practice, however, seems to be following that of China, as Russia and North Korea recently signed an extradition treaty on 2 February 2016,¹⁶¹ expanding upon the existing extradition treaty regarding criminal matters signed in November 2015.¹⁶² Whereas the November 2015 mutual legal assistance treaty only dealt with the extradition of criminals between the two countries, this new treaty, reminiscent of that between China and North Korea, extends to the “deportation of illegal immigrants within 30 days after they are confirmed to be staying without legitimate documents.”¹⁶³ The Special Rapporteur expressed his alarm and “strongly urge[d] Russia to respect the principle of non-refoulement and not to implement the treaty,” making note that its signing taking place in the current political context “adversely impact[s] on the constructive efforts to address the ongoing gross human rights violations in the country.”¹⁶⁴ NGOs and activists have also expressed condemnations, calling it “the same as a North Korea defector repatriation agreement,” as the North Korean laborers lack the access to refugee status determining processes.¹⁶⁵ One expert expressed that civil society action making a “big fuss and prevent[ing returns]” will no longer be an

¹⁵⁵ KINU White Paper on Human Rights in North Korea 2015, p. 198

¹⁵⁶ Shim 2016— According to 2015 Russian statistics, a total of 33,000 North Korean laborers work in Russia.

¹⁵⁷ ABC News 2016

¹⁵⁸ KINU White Paper on Human Rights in North Korea 2015, p. 428

¹⁵⁹ OHCHR 2016

¹⁶⁰ Lantreev 2016

¹⁶¹ Yonhap News Agency 2016

¹⁶² UNHCR 2016

¹⁶³ Yonhap News Agency 2016

¹⁶⁴ 2016

¹⁶⁵ Shim 2016

option, as they will now “be returned automatically, since the intergovernmental agreement has a higher status than national legislation.”¹⁶⁶

4.2.3 Concluding remarks

Being bound by both treaty and customary law, Russia holds duties to not return North Koreans in flight to the DPRK. Although it has only been a few months since the signing of the bilateral treaty, and thus statistics on the direct effect of this legislation is lacking, bilateral agreements being made in this direction breaches Russia’s obligations on multiple levels. Repatriating North Koreans on the “illegal immigrant” argument is like that of China. Russia’s labelling of all North Korean laborers as such without providing access to any refugee determination procedures and repatriating them to North Korea places Russia in breach of refugee law. In international human rights law, Russia would be in violation of the non-refoulement principle, to which they are bound by treaty via the Torture Convention and the ICCPR, as well as the principle in customary international law, upon repatriating any North Korean laborer, whether or not they acknowledge them as a refugee.

4.3 Southeast Asian States (Lao PDR, Thailand, Viet Nam)

There is less activity in the Southeast Asian countries with regards to fleeing North Koreans, as they do not share a border with the DPRK and are, thus, not the primarily receiving countries of the escaping North Koreans population. However, these countries often play a key role, as it is from these Southeast Asian countries that the fleeing North Koreans are able to seek asylum at a diplomatic embassy or otherwise.¹⁶⁷ Thus, their practices of refoulement, if existent, are crucial to the duty bearer determination.

¹⁶⁶ Tumanov & Korostikov 2016

¹⁶⁷ KINU White Papers 2015

4.3.1 International legal obligations

As *Table 1* displays above, the Lao PDR, Thailand and Viet Nam have taken no action with regards to the Refugee Convention or its 1967 Protocol. However, all three states are State Parties to the ICCPR and the Torture Convention, and are thus, bound by international human rights law to not return those likely to face torture upon return. Further, as chain refoulement is a part of the descriptive definition of refoulement,¹⁶⁸ the return of individuals to a territory where they can then be further expelled to a territory where they face persecution or torture, is also prohibited by international human rights law.

4.3.1.1 Lao PDR

Upon ratification of the Torture Convention, the Lao PDR expressed reservations to Article 28 and Article 20, not recognizing the competence of the Committee against Torture. It also did not consider itself bound to Article 30 (1) on dispute resolution of the ICJ. Further, it made a declaration on the definition of the term ‘torture’ in Article 1(1), understanding its definition as “defined in both national law and international law.” This is potentially problematic, as it gives the state a wider margin to define what it is or is not in violation of, defeating the object and purpose of the Convention.¹⁶⁹ A number of states have expressed their concern and objection to this, saying that it amounts to a general reservation “aimed at limiting the scope of the Convention” and “casts serious doubts on the commitment”¹⁷⁰ of the Lao PDR government to the “object and purpose of the Convention.”¹⁷¹ Under customary international law, a reservation that is not compatible with the object and purpose of a treaty is not to be permitted.¹⁷²

¹⁶⁸ Goodwin-Gill and McAdam 2007, p. 389

¹⁶⁹ VCLT Art 18

¹⁷⁰ UN Treaty Series, vol. 1465, p. 85, Note, Government of Norway— similar sentiments and concerns were echoed by the governments of Austria, the Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, the Netherlands, Portugal, Sweden, the United Kingdom.

¹⁷¹ UN Treaty Series, vol. 1465, p. 85, Note, Government of Sweden

¹⁷² VCLT Art 18

4.3.1.2 Thailand

Thailand also made a similar interpretive declaration regarding the definition of ‘torture’.¹⁷³ It stated that, although there is “neither a specific definition nor particular offence under the current Thai Penal Code,” the term ‘torture’ will be “interpreted in conformity with” it. Differing from the Lao PDR, Thailand expressed intentions to “revise its domestic law to be more consistent with Article 1 of the Convention at the earliest opportunity”¹⁷⁴ but has yet to make further progress with its draft bill on criminalizing torture and enforced disappearances stalled before Parliament.¹⁷⁵ Again, states raised objection and pointed to the lack of clarity as to what extent Thailand “considers itself bound by the obligations” of the Torture Convention.¹⁷⁶

4.3.1.3 Viet Nam

Viet Nam made no reservations to the Torture Convention, but declared that it does not recognize the competence of the Committee against Torture and considered itself not bound by Article 30(1), as the Lao PDR did. It also refused the Torture Convention as the “direct legal basis for extradition” as referred to in Article 4, and declared its extradition practices “shall be decided on the basis of extradition treaties to which Viet Nam is a party,” “in accordance with Vietnamese laws and regulations.”¹⁷⁷ This, too, can be problematic in the same vein that the Chinese or Russian bilateral treaty with the DPRK is, as it gives Viet Nam the margin to potentially come into a bilateral extradition treaty with a state that would result in a violation of the Torture Convention or the principle of non-refoulement. This declaration has been pointed out to amount to the definition of a reservation, in accordance to the Vienna Convention on the Law of Treaties, and to go against the object and purpose of the treaty itself.¹⁷⁸ As the Torture

¹⁷³ Thailand also made a reservation to Article 30(1) regarding arbitration.

¹⁷⁴ UN Treaty Series, vol. 1465, p. 85, Thailand, Interpretive declaration

¹⁷⁵ Amnesty International 2016b

¹⁷⁶ UN Treaty Series, vol. 1465, p. 85, Government of Sweden, on Thailand’s interpretive declaration

¹⁷⁷ UN Treaty Series, vol. 1465, p. 85, Viet Nam, declaration

¹⁷⁸ UN Treaty Series, vol. 1465, p. 85, Poland’s note on Viet Nam’s declaration

Convention entered into force in February 2016 for Viet Nam, the legal reforms for compliance to the treaty is still pending, with legislative reform under way.¹⁷⁹

4.3.2 Practices and justifications

Whilst none of the three Southeast Asian states have a systematic practice of or bilateral treaty regarding repatriation, its history is not void of refoulement practices. Rather, it is sprinkled with varying practices on the scale of compliance to violation.

4.3.2.1 Lao PDR

Until a few years ago, the Lao PDR was among the main routes to a safe third country to seek asylum for North Koreans.¹⁸⁰ In May 2013, the Lao PDR arrested and repatriated a group of nine North Koreans to China, against the recommendations of the UNHCR. Soon after the return, the “Laos Nine”, as the group came to be called, were repatriated from China to the DPRK, and appeared on North Korean television for propaganda.¹⁸¹ The UNHCR publicly condemned the return, and called on all states to “adhere to the principle of non-refoulement as a core tenet of customary international law, and refrain from any future measure that could directly or indirectly lead to the return of a person to a country where his or her freedom would be threatened.”¹⁸² This incident shocked both NGO workers and government officials as it was the first repatriation incident by Laos.¹⁸³

Recently in March 2016, DPRK news source revealed that talks took place between the Ministry of People’s Security of the DPRK National Defense Commission and the Lao Ministry of Public Security, “boosting cooperation between the security organs of the two countries and issues of mutual concern”, as well as a signing of a mutual

¹⁷⁹ Amnesty International 2016c

¹⁸⁰ Song 2014; Mullen 2013

¹⁸¹ Chasmar, J. 2013

¹⁸² UNHCR 2013

¹⁸³ Interview of Suzanne Scholte and Eun Young Kim, Citizen’s Alliance for North Korean Human Rights in Mullen 2013; interview of South Korean foreign ministry official in Park 2013

cooperation agreement.¹⁸⁴ Although its details remain unrevealed, it is speculated that the repatriation of North Koreans is a part of the agreement, like that which the DPRK has signed with China and Russia, following similar talks.¹⁸⁵ Further, observers pointed out that it is likely that the agreement contains provision on Laos hiring North Korean police trainers.¹⁸⁶ If true, this would go against the UN Security Council Resolutions that prohibit the “States from engaging in the hosting of trainers, advisors, or other officials for the purposes of military, paramilitary, or police-related training.”¹⁸⁷ Although not directly relevant to non-refoulement, if these speculations are true, it indicates the Lao PDR’s prioritization of bilateral military gains over its compliance to international human rights law.

4.3.2.2 Viet Nam

In 2004, Viet Nam showed a different approach as it cooperated with the South Korean government in airlifting 468 North Koreans to South Korea.¹⁸⁸ This was an incident that the DPRK described as a “heinous crime of terrorism,” where the North Koreans were enticed and abducted.¹⁸⁹ The Vietnamese government, whilst an “ideological ally” of the DPRK, sided with the South Korean authorities to maintain good ties for economic reasons, and received a 21-million-dollar loan from South Korea several weeks after the incident.¹⁹⁰

However, Viet Nam also followed the trend towards deporting North Koreans to China in November 2015. The Vietnamese police arrested nine North Koreans in flight, including an 11-month old baby, during a random bus check in northeastern Vietnam near the Chinese border.¹⁹¹ The Vietnamese authorities proceeded to turn the North

¹⁸⁴ <http://www.kcnawatch.co/newstream/1457187721-473507727/talks-between-delegations-of-dprk-ministry-of-peoples-security-and-lao-ministry-of-public-security-held/>

¹⁸⁵ NK News 2016

¹⁸⁶ Pollack 2016 : Panda 2016

¹⁸⁷ S/RES/ 2270 (2016) para 9; S/RES/ 1874 (2009) para 9

¹⁸⁸ Haggard & Noland 2006, p. 60

¹⁸⁹ Kirkpatrick 2013

¹⁹⁰ Ibid

¹⁹¹ Human Rights Watch 2015b

Koreans to the Chinese police, who transferred the group to a military garrison near the North Korean border. Although the exact fate of the captured group is unknown, it is speculated that the Chinese authorities have repatriated them to the DPRK. The Office of the High Commissioner of Human Rights raised grave concerns and further “urge[d] all concerned governments to refrain from forcibly returning individuals who have fled the DPRK.”¹⁹²

4.3.2.3 Thailand

The number of North Koreans illegally entering Thailand from Laos, in hopes of seeking asylum in South Korea or the United States, has steadily grown since 2004.¹⁹³ With this constant growth, the Thai authorities have also begun arresting groups of North Koreans who have crossed into their borders illegally and fining or imprisoning them for the illegal entry.¹⁹⁴ However, there have been no reported cases of deportation, as Thai’s general policy has been to allow North Koreans to seek asylum in a third country.¹⁹⁵ The International Crisis Group credited this general policy against repatriation to the “number of countries and physical distance” between Thailand and the DPRK, “humanitarian priorities,” “diplomatic concerns”¹⁹⁶ and the longstanding “strong presence” of the UNHCR in the country.¹⁹⁷ With the heightened arresting, it is clear that Thai authorities discourage illegal entry, but do not repatriate and rather “tolerate” the flow, due to various factors.¹⁹⁸

4.3.3 Conclusion

None of the three Southeast Asian transit states have an obligation under the refugee treaties, but they all bear duties under the Torture Convention, the ICCPR, and thus,

¹⁹² OHCHR 2015

¹⁹³ KINU White Papers on the Human Rights in North Korea 2015, p. 435-436

¹⁹⁴ KINU White Papers 2015, p. 436; Song 2015, p 405: “*The Thai authority imposes a fine of THB 2,000–6,000 (approximately US\$187) or 10–30 days imprisonment in a local prison for illegal entry.*”

¹⁹⁵ International Crisis Group 2006, p. 22

¹⁹⁶ Ibid p. 22

¹⁹⁷ Ibid p. 25

¹⁹⁸ Song 2015, p. 406

international human rights law and the general principle of non-refoulement. In terms of Convention compliance, all three states displayed a problem with an international definition and understanding of the term ‘torture,’ or reforming its domestic law accordingly, bringing other State Parties to question the commitment of the Southeast Asian states to the object and purpose of the Torture Convention.

In practice, the Lao PDR and Viet Nam displayed a shift in its refoulement practices, displaying more actions akin to that of China and Russia. Thailand has yet to deport individuals, which displays hope. However, if North Koreans in flight are arrested and repatriated from the Lao PDR before they are able to cross the border into Thailand, hope in Thai practices is frankly of little to no benefit to the rights security of fleeing North Koreans.

4.4 Concluding remarks: The hindrances to bearing duties

“More and more States appear to believe that the legal architecture of the international system is a menu from which they can pick and choose – trashing what appears to be inconvenient in the short term.”

- Zeid Ra’ad Al Hussein, UN High Commissioner for Human Rights¹⁹⁹

Whether it be treaty-bound in refugee law or international human rights law, the relevant states discussed all hold duties to protect fleeing North Koreans from the impending torture or cruel, inhuman or degrading treatment or punishment upon its their repatriation to the DPRK. If the transit states themselves cannot provide refugee status in their state, they must, at the very least, allow North Koreans in flight safe passage to a third country where these vulnerable people may be able to seek asylum. Of the five states discussed, Thailand was the only state that was not found in blatant breach of its duties to protect the North Koreans in flight. The remaining four states—China, Russia, the Lao PDR, Thailand and Viet Nam—were all found to be legal duty bearers, but not fulfilling their duties as such.

¹⁹⁹ OHCHR 2015b

Another finding is that the states' compliance to this duty bearing responsibility under international law is threatened by the increasing trend of bilateral treaties between the relevant states and the DPRK. China and its historical relationship with the DPRK are widely known as a unique relationship. However, the current trend with Russia following suit in February 2016 and Laos in March 2016 displays an alarming pattern.

In the cases of smaller Southeast Asian states, whose commitment to the object and purpose of the Torture Convention was questioned by other State Parties, the incentive to practice or refrain from practicing repatriation seems contingent upon most enticing incentive at the given moment. The Lao PDR did not practice refoulement until recent years, and appear to have warmed up to the DPRK to the point of signing a security-related mutual cooperation agreement. Viet Nam went from cooperating with the South Korean authorities in the safe resettlement of fleeing North Koreans for economic security to refoulement practice a decade later. The concerns voiced by the State Parties as these States entered into the Torture Convention may have a valid point—these States may not have any vested commitment to the object and purpose of the international conventions to which they are party, which makes their commitment to being duty bearers vulnerable when other opportunities arise, be it economic benefit or mutual security.

Whatever the reasons may be, the non-compliance of states to the non-refoulement principle is a cause for alarm. The relatively small population being returned, especially from the Southeast Asian countries, may not immediately appear as a cause for concern. In 2006, the then-UN High Commissioner for Human Rights António Guterres even stated that the situation regarding North Koreans being returned was not “dramatic, compared to other parts of the world” at a press conference in Thailand.²⁰⁰ However, the small scale of the violation does not make the violation itself a non- issue. Especially when a trend starts to appear, the cause for alarm for the status of the non-refoulement

²⁰⁰ Kyodo News 2006, as cited in Song 2015

principle as customary law towards this vulnerable group is very much valid and a cause that demands the attention of the international community.

5 Minding the gap: the ‘who’ and ‘why’ of the dilemma

Thus far, this thesis has ventured to answer the legal identity and identify the legal duty bearers of the rights of North Koreans in flight. The above chapter has established who the existing legal duty bearers are in law and their failure to protect in practice. This chasm between rights guaranteed in theory but deprived of in practice begs questions of ‘why’s, ‘who then’s, and ‘what now’s. This chapter explores this gap of protection—what actors have emerged in the private sector to fill this void, why this dilemma exists and why the involvement of the private sector is necessary. To that end, this chapter thoroughly explores this case study of North Koreans in flight in view of the security theory and the concept of survival migration.

5.1 The ‘who’: the protective rescue practices of non-state actors

Since the mid-2000s, an underground effort of private actors has made what is called the “Seoul Train in the Underground Railway” across China and Southeast Asian countries to transport North Koreans in flight to safety.²⁰¹ This involves various actors and sources of funding, including Christian religious organizations, NGOs and brokers. The organizations are often funded by churches, private supporters and government funding.²⁰² In recent years, more and more resettled North Koreans in South Korea have pulled together their money from their newfound livelihoods to fund the flight of a loved one by hiring local Chinese, Chinese-Korean or even North Korean brokers to provide safe passage.²⁰³ There are various motives among the non-state actors—while NGOs have varying humanitarian principles and Christian churches have a missional motivation, brokers seek financial gain. Migration scholar Jiyoung Song argues that this involvement of so-called brokers has transformed the “nature and patterns of North Korean migration from human trafficking into people smuggling.” Citing interviews with brokers, Song states that the illicit brokering networks are “highly organized” and

²⁰¹ International Crisis Group 2006, p. 14; Song 2015, p. 402

²⁰² Song 2015, p. 404

²⁰³ Song 2015, p. 402-3

so multinational and well-funded that, at times, it “only takes a few days escaping North Korea” to a Southeast Asian destination.²⁰⁴

Whoever the ‘guide’, this transportation of people from the DPRK- China border area to a Southeast Asian country is strictly illegal under Chinese domestic law and the network is thus, faced with a high risk of capture and punishment if they are captured alongside the North Koreans who are repatriated.²⁰⁵ When crossing over into Southeast Asian countries, the illegality of people smuggling remains and yet, a majority of the North Koreans reaching South Korea are reported to have been smuggled through these networks.²⁰⁶ The protection void and the lack of regulation of private actors, as it is strictly illicit in the relevant countries the rescues take place, has allowed room for chaos and injustices committed against the fleeing North Koreans. In finding brokers on their own, North Koreans often face exploitation and abuse, with women far more vulnerable to sex trafficking, should they hire a broker with particular malicious intent.²⁰⁷ This has led to NGOs seeking a “free passage model,” with no cost or condition asked of the North Koreans and funding the flight by means of grassroots efforts.²⁰⁸ However, in the grander scheme of the population of the North Koreans in flight, this is merely a comparatively small effort.²⁰⁹

In the search for a chance at safety, North Koreans in flight are forced to seek illicit means for protection that should rightfully be provided for them by states under international law. The irony of having to resort to hiring and depending on smugglers to receive a rightful, legally guaranteed protection presents the crux of the public- private protection dilemma. The North Koreans in flight inevitably find themselves having to navigate their way between the following options: the current available public

²⁰⁴ 2008 Interview of refugee-turned-broker *P*, and 2013 Interview of *C* as cited in Song 2015, p. 403-404

²⁰⁵ Kim 2010 as cited in Song 2015, p. 402

²⁰⁶ KINU 2009; Song 2015, p. 404 states as high as 90 percent of North Koreans entered South Korea through access in Southeast Asian countries via smugglers.

²⁰⁷ Liberty in North Korea 2016

²⁰⁸ Ibid, Liberty in North Korea 2016

²⁰⁹ As of October 2015, Liberty in North Korea, through its “free passage model”, rescued 465 people. See: Liberty in North Korea 2016c

protection via the refugee regime, which is hardly existent in practice; and the private protection via non-state actors, which is either not guaranteed or illicit. This crossroad, in which North Koreans have to choose between the two unsatisfactory options, testifies to the dire necessity and crucial role of empowering private protection and legitimate non-state actors in the protection of North Koreans in flight. In a time and place where the relevant state duty bearers are turning their back on their non-refoulement obligation toward this vulnerable group, the space in the refugee regime of private protection via various non-state actors are crucial to their safe transit. However, that space, too, seems to show little prospects of widening.

5.2 The ‘why’: political hindrances and the dominance of securitization

The refugee regime protection void is partially based on the systematic flaw in the regime being “conditioned by politics rather than law.”²¹⁰ Thus, the geopolitics and the substantial concerns towards securitization of the region cannot be ignored in the discussion of the protection void.

One of the main hindrances of refugee protection is that the discourse of the region, especially as it pertains to issues regarding the DPRK, most often revolves around the issue of denuclearization and disarmament efforts against the DPRK. The UN’s focus in recent years, despite the Report of the COI in 2014 bringing more attention to human rights issues, has also been more heavily towards these efforts of international security. The recent Resolution 2270 of the UN Security Council, which was adopted unanimously by the 15 members including China and Russia, also focused on sanctions against the nuclear tests conducted by the DPRK in January 2016. It should be noted that prior to outlining the sanctions, the Resolution did underline the “importance that the DPRK respond to other security and humanitarian concerns of the international community,”²¹¹ which includes human rights concerns.²¹² This underlining sentiment

²¹⁰ Betts 2013, p. 4

²¹¹ S/RES/ 2270

²¹² S/RES/ 2270, Note by Japan—Japan expressed “welcoming the resolution’s stronger emphasis on humanitarian and human rights concerns.”

can be interpreted in twofold. One interpretation is the genuine concern of the member states of the UN Security Council to other humanitarian and human rights concerns. Another interpretation is the usage of humanitarian and human rights issues as an instrument to further security agenda.

This is not to say that such resolutions and international efforts against the DPRK's nuclear activities work against human rights concerns, including the protection of North Koreans in flight. On the contrary, the two concerns— disarmament for the maintenance of international peace and security, and the concern for the protection of human rights enjoyed by all— go hand in hand.²¹³ However, efforts for both causes must be made, and not disproportionately for one over the other. While the population of the North Koreans in flight is a small population and an arguably less urgent problem, they must not be ignored. States uniting in a cause such as nuclear disarmament that can adversely affect the international community is undoubtedly noble. However, this does not excuse certain states from their duty to principles of international law. Thus far, neither China nor Russia, both states who voted in the condemning of the DPRK, were condemned for their blatant disrespect for the non-refoulement principle in their bilateral mutual cooperation treaties and the repatriation of North Koreans in flight found within their territory.

This problem of the more powerful states' lack of prioritization and urgency of the issue in comparison to security concerns is exacerbated by the void of political will among the smaller Southeast Asian states. As pointed out by other State Parties upon the Southeast Asian states acceding to the Torture Convention, the smaller states do not display any will, commitment or respect towards the object and purpose of the Conventions to which they are bound, let alone a genuine concern for the protection of North Koreans in flight.²¹⁴ This geopolitical deadlock in the region and lack of political

²¹³ UN Charter Preamble— states its determination to “*unite our strength to maintain international peace and security,*” but also to “*reaffirm faith in fundamental human rights, in the dignity and worth of the human person*” and “*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*”

²¹⁴ See section 4.3 above

will adds further weight on the crucial importance of non-state actors providing protection in practice to the legal void of protection.

5.3 The ‘who’ and ‘why’: the flawed system

In reaction to the refoulement of North Koreans in flight, the UNHCR has repeatedly taken similar action: expressing concern, urging state actors to uphold the non-refoulement principle, and reaffirming its commitment to “continue to work with all parties on the issue.”²¹⁵ In China, the UNHCR has repeatedly faced problems accessing the Jilin province in the northeast where most of the fleeing North Korean population is known to live in hiding, rendering it “virtually impossible” for North Koreans to gain access to refugee determination procedures with the UNHCR, who has only one location in China, in Beijing.²¹⁶ Earlier in this thesis, the argument was made that if the North Koreans in flight were given access to refugee determination procedures with the UNHCR, they would most likely be granted refugee status, be it *prima facie* in the event of a mass influx or *sur place*, and thus, protected by the legal refugee protective regime.²¹⁷ In 2004, the UNHCR made efforts to alleviate the situation of North Koreans in flight residing in China, labeling them ‘persons of concern.’ As such, the UNHCR argued the North Koreans deserving of humanitarian protection and proposed that China grant them “special humanitarian status,” enabling them to obtain temporary documentation, access to services, and protection from forced return.²¹⁸ However, this can be interpreted in two very different ways—while on the one hand, it suggests an alternative means of protection, on the other, it can be understood as the UNHCR acknowledging and arguably validating China’s refusal to even consider the North Korean population as potential refugees, refusing them access to a refugee determination standard procedure and treating them as ‘illegal economic migrants.’ If

²¹⁵ UNHCR 2012

²¹⁶ Kumar 2012; Brookings-Bern Project on Internal Displacement 2012

²¹⁷ See section 3.2 & 3.3 above

²¹⁸ Cohen 2012

the latter is true, it in turn, validates China's repatriation practices which violate China's obligations under both refugee and international human rights law.

At the news of Russia's treaty with the DPRK, the UNHCR expressed concern and strongly urged Russia to respect the principle of non-refoulement and not to implement the treaty.²¹⁹ In the cases of Southeast Asian countries participating in chain refoulement, sending North Koreans to China where they will most likely be repatriated to the DPRK, the UNHCR has expressed concern, reminding states of the principle of non-refoulement, which they should adhere to.²²⁰ However, this language of urging and concern has not yielded results in the protection of North Koreans in flight. Why is it that the entire refugee regime and complementary protection standards in international human rights law are falling short of fulfilling its purpose of protecting the vulnerable people unprotected by states?

5.4 The 'why' and 'what next': refugee regime frustrations and survival migration

This frustration with the protective refugee regime and the UNHCR is not unique to the case of North Koreans in flight. The existing refugee regime is premised upon the states being the central actors in the Westphalian world politics and having primary responsibility in refugee protection, and the UNHCR assisting and overseeing that the states meet that obligation towards refugees.²²¹ Unfortunately, there has been an increasing international trend of states perceiving the rights of its citizens to be in competition with that of non-citizens,²²² their failing to meet their duty towards the latter, and the UNHCR stepping in to try and fill the ever-expansive gaps of protection left behind.²²³ However, the UNHCR is limited in this endeavor, as it is not the

²¹⁹ OHCHR 2016

²²⁰ UNHCR 2012; UNHCR 2013; OHCHR 2015; OHCHR 2015b; OHCHR 2016

²²¹ Betts, Loescher and Milner 2012, p. 83-84

²²² Betts, Loescher and Milner 2012, p. 83

²²³ Roberta Cohen, «Recent Trends in Protection and Assistance for Internally Displaced People,» in *Internally Displaced People: A Global Survey* (London: Earthscan, 1998), 4-5 as cited in Betts, Loescher and Milner 2012, p. 83

primarily obligated duty bearer. This makes the duty of the UNHCR particularly difficult, as the “search for protection and solutions,” contrary to the UNHCR’s non-political statute,²²⁴ is an “inherently political task that relies upon UNHCR’s ability to influence states’ behavior.”²²⁵

One of the main causes of this dilemma can be credited to the fact that the Refugee Convention and its protective regime were not created with the emerging new drivers of forced migration in mind. The Refugee Convention was created to address the “reality that some states fail to provide for the fundamental human rights of their citizens” in the aftermath of the Second World War in 1951, with the particular European context and authoritarian regimes of the Cold War era in mind.²²⁶ Since then, new drivers of displacement have emerged in various contexts all over the world— including state fragility, generalized violence, livelihood collapse, food insecurity— creating a trend towards fewer people fleeing persecution resulting from acts of states, and an increasing number fleeing human rights deprivations resulting from the “omission of weak states that are unable or unwilling to ensure fundamental rights.”²²⁷ Having been created for a particular era for specific circumstances, yet remaining essentially the same 65 years after its creation, the refugee regime provides “little legal precision” on the obligation of states towards people fleeing deprivations that “fall outside the conventional understanding of persecution.”²²⁸ Despite the efforts of the complementary protection standard through international human rights law, the reality remains largely unchanged, with the slow and geographically uneven development of jurisprudence. As such, the resulting protection provided to people fleeing “deprivations that fall outside the conventional understanding of persecution” is “inconsistent and conditioned by politics rather than law.”²²⁹

²²⁴ Cohen 1998 as cited in Betts, Loescher and Milner 2012, p. 83

²²⁵ Betts, Loescher and Milner 2012, p. 83

²²⁶ Betts 2013, p. 4; Betts 2010, p. 361

²²⁷ Betts 2013, p. 4

²²⁸ Betts 2010, p. 363; Betts 2013, p. 4

²²⁹ Betts 2013, p. 4

This produces groups of people, which Betts dubs ‘survival migrants’, who “look very much like refugees” and yet are denied protection, due to their consequences not meeting the conventional understanding of persecution.²³⁰ This failure to meet the conventional understanding of persecution does not equate the lack of deserve for rights protection. On the contrary, survival migrants have the right to protection against return under the non-refoulement principle of human rights law in theory, but the institutional mechanism to ensure the rights are made available in practice is lacking. A contributing problem, Betts points to the lack of clear terminology to identify people who “should have an entitlement not to be returned to their country of origin on human rights grounds.”²³¹ This problem is further exacerbated by both states and international institutions continuing to see the terminology debate largely as a dichotomy between economic migrant versus refugee.²³² To address this dilemma, there have been a range of labels discussed in academia and policy circles.²³³ This abundance in the emerging terminology is a testament of a broad consensus that the new drivers of forced displacement validly exist, and the people displaced by them need to be acknowledged and protected. In naming this group of people who fall between the cracks of protection ‘survival migrant’, Betts argues that the issue at hand is not the particular causes of movement but rather “identifying the threshold of fundamental rights which, when unavailable in a country of origin, requires that the international community allow people to cross an international border and receive access to temporary or permanent sanctuary.”²³⁴ Thus, the difference in rights and entitlements provided to refugees versus survival migrants who are “fleeing serious deprivations” is arbitrary.²³⁵ The relationship between the terms ‘refugee’ and Betts’ ‘survival migrant’ is shown below:

²³⁰ Betts 2013, p. 4

²³¹ Betts 2013, p. 5

²³² Betts 2010, p. 362

²³³ Betts 2010, p. 364— The emerging terminology includes “externally- displaced people,” “people in distress,” “distress migration,” and “vulnerable irregular migrants.”

²³⁴ Betts 2013, p. 6

²³⁵ Betts 2013, p. 6

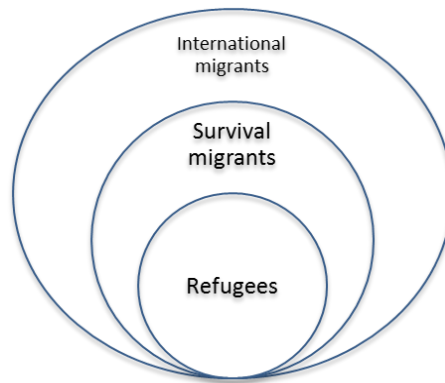


Figure 2: Betts' survival migration- refugee terminology²³⁶

5.4.1 Regime stretching and a soft law framework

To address this protection gap, Betts proposes that existing institutions are made better rather than replaced with new ones, or that the regime is stretched. Regime stretching is based on the idea that international regimes are not “fixed and static entities” but rather “dynamic and adaptive, and vary in their local and national manifestation.”²³⁷ To address the normative gaps, Betts suggests the establishment of “some kind of authoritative set of guiding principles” to help “to consolidate understanding of what existing human rights law standards imply for survival migrants who are at the margins of the refugee regime.”²³⁸ Institutionally, regime stretching can be operationalized around the two core elements of a regime—norms and the international organization of international refugee law and the UNHCR.²³⁹ This requires: domestic legislation enabling a “plausible argument” for the application of refugee law to the broader category of survival migrants; domestic political interest; functional spillover from the UNHCR’s mandate to provide protection to a broader category; and the willingness and interest of the UNHCR’s country representative to stretch into new protection activities

²³⁶ Betts 2010, p. 366, adapted from *Figure 1: Diagram Showing Conceptual Relationship of Survival Migration to Refugees and International Migration*

²³⁷ Betts 2010, p. 363

²³⁸ Betts 2013, p. 6

²³⁹ Betts 2010, p. 374

as well.²⁴⁰ Depending on countries' fulfillment of these conditions, different countries show varied reactions to survival migration, ranging from true regime stretching, ad hoc practices to a protection vacuum.²⁴¹

Among other case studies in the context of sub-Saharan Africa, Betts presents the case of fleeing Zimbabweans in South Africa during the decade of 2000-2010, who were fleeing desperate situations of economic and political collapse in their home country where “there were almost no viable livelihood opportunities to sustain even the most basic conditions of life.”²⁴² However, due to only a small minority facing persecution that met the conventional understanding— individualized persecution on political grounds— the overwhelming majority of the estimated two million Zimbabweans entering South Africa, and other neighboring countries, fell outside the protection of the Refugee Convention and the refugee regime. While all Zimbabweans were given asylum seeker permits pending refugee status determination, only 10 percent of the population was granted refugee status for having political reasons of persecution, due to links to the opposition movement.²⁴³ The majority were deemed to have only economic causes of flight, and received “limited access to assistance in neighboring countries; hundreds of thousands have been rounded up, detained and deported back to Zimbabwe,” displaying a practice closer to a protection vacuum rather than a stretch in regime to accommodate for the fleeing migrants.²⁴⁴ In terms of domestic conditions of regime stretching, South Africa had failed attempts of new legislation creation and increasing political pressure to limit migration. In terms of the UNHCR conditions, there has been a functional intent of the UNHCR to protect “people in the context of mixed flows,” but lacking in its country presence being “over-stretched” and unwilling to take on more responsibility.²⁴⁵ Not fulfilling all of the conditions for successful

²⁴⁰ Betts 2010, p. 375

²⁴¹ Betts 2010, p. 374-375

²⁴² Betts 2013, p. 5

²⁴³ Betts 2010, p. 368

²⁴⁴ Betts 2013, p. 5; Betts 2010, p. 368

²⁴⁵ Betts 2010, p. 375-376

regime stretching, South Africa displayed a mixed response between ad hoc and vacuum protection on the spectrum.

In contrast, the case of mass influx of Somalis in Kenya displayed a dramatically different response of regime stretching. Kenya met the domestic conditions with its informal acceptance of all Somalis as a group on a *prima facie* basis since 1991, formalized with its Refugee Act in 2006, the first in Africa to explicitly include *prima facie* recognition.²⁴⁶ Its domestic politics followed suit, in favor of more sustainable policies. Further, the UNHCR condition of functional spillover was met, with its protection of survival migrants “inextricably linked” to its refugee protection role.²⁴⁷ With this dramatic variation in both countries’ and the UNHCR’s responses, Betts suggests an overarching non-binding normative framework be developed to clarify both the role of states and the UNHCR, fully acknowledging the protection gaps that currently exist. He argues that having a “consolidation, application, and a clear division of operational responsibilities” between states and international organizations would “clarify the existing legal and normative obligations,”²⁴⁸ bettering the currently existing refugee regime to fully function in its protective intention.

5.4.2 Survival migration and North Koreans in flight

Betts includes the outflow from North Korea as a case of survival migration, along with Haiti, Iraq, and Myanmar, stating that “significant numbers” of people have fled from these countries “not because of a well-founded fear of individualized persecution, but more often because of serious deprivations of socioeconomic rights related to the underlying political situation.”²⁴⁹ This section assesses the case of North Koreans in flight as a case of survival migration and its arguable added value to the larger international discussion of reinterpreting non-refoulement obligation.

²⁴⁶ Betts 2010, p. 372

²⁴⁷ Betts 2010, p. 376

²⁴⁸ Betts 2010b, p. 224

²⁴⁹ Betts 2010, p. 362

Firstly, the polarizing problem of terminology that gives rise to survival migration as a concept rings true in the case of North Koreans in flight. This label dichotomy of refugee versus voluntary economic migrant jeopardizes the protection of individuals who fall outside the conventional understanding of a refugee, but deserve rightful protection against return under international human rights law. As discussed throughout the thesis, this is one of the main justifications used by China, now joined by Russia, to legitimize illegal state practices of repatriation. The term ‘survival migrant’ fits the fleeing North Koreans—they look like refugees, yet are repeatedly and continuously denied protection. However, it is not for lack of meeting the conventional understanding of persecution, but rather because the relevant states do not acknowledge them as potential refugees, denying them access to refugee status determination procedures.

Compared to the case of fleeing Zimbabweans, the population of fleeing North Koreans is far smaller in sum, the largest estimated number of North Koreans in China being 300,000.²⁵⁰ Thus, the two case studies differ in circumstance, in that the North Koreans in flight today has yet to be called a ‘mass influx’ in an international context,²⁵¹ although the fear of the population increasing into a mass influx is one of the reasons states like China have been reluctant to openly allow them access to the UNHCR.²⁵² Further, it should be noted that while a mass influx demands the immediate attention of the receiving country, it should not be a prerequisite in discussing the protection that rightfully belong to all individuals, regardless of how many in their categorical party. This lack of discussion of the survival migrants who do not present the population-receiving country with a mass influx dilemma is a potential flaw in Betts’ survival migration concept. Despite this difference in number, however, the two cases show a similarity in that only a small minority of both the populations faced individualized persecution on political grounds prior to departure from their country of origin. In view of the case of Zimbabweans in South Africa, I remind the reader of reaction of China,

²⁵⁰ *supra*, n 9

²⁵¹ The first wave of fleeing North Koreans in the 1990s was dubbed a ‘mass exodus’ by various NGO reports, as cited above, but not in recent decades.

²⁵² Chan and Schloenhardt 2007, p. 240

the most immediate and largest population of North Koreans in flight. It not only classified the population as economic migrants, but also rejected them in terms of every condition of regime stretching: domestic political rejection, aggressive legislative hindrance, and actively refusing the UNHCR to access the most densely populated region. It can only be presumed that should the North Koreans in flight present China with a mass influx the scale of Zimbabweans in South Africa, China will display an even greater rejection and protection void.

Despite this similar reception, it should be pointed out that North Koreans in flight find themselves in a unique position between the existing refugee regime and the necessity of survival migration as an advocating tool for securing protection. The causes of flight of this group often vary between political reasons that qualify as a conventional understanding of persecution and those that do not, including the deprivation of the right to food.²⁵³ The latter is what states use to justify their use of the term ‘economic migrant’. However, all of the varying causes of flight are all arguably political, due to the unique political loyalty-informed *songbun* class system of the DPRK that cause the varying socioeconomic rights deprivations.²⁵⁴ Further, unlike the fleeing Zimbabweans without individualized political persecution grounds, the departure of the North Koreans itself is acknowledged by the DPRK as a political act of treason, grounds upon which the individual is punished and subjected to torture and other cruel, inhuman or degrading treatment or punishment upon repatriation.²⁵⁵ This makes this particular case of survival migration unique, as it falls under both the refugee regime and the concept of survival migration.

An additional exclusive factor to the North Koreans in flight is their country of origin. The DPRK is both an authoritarian state reminiscent of the Cold War era, the era for which the Refugee Convention was written,²⁵⁶ whilst simultaneously being a fragile

²⁵³ See chapter 2

²⁵⁴ See section 2.2

²⁵⁵ See Section 2.4

²⁵⁶ Betts 2013, p. 4

state in the modern post- Cold War era today, that most often produces survival migrants who do not fall within the conventional definition and consequent protection of the refugee regime. Thus, the DPRK produces an outflow of migrants that are unique in the international discourse of migration that can arguably be understood in both perspectives of protection.

Despite this unique characteristic of persecution faced by the North Koreans in flight, the treatment and protection vacuum that they face appears to be similar to that of how Zimbabweans were received in South Africa—deemed only to have economic causes, receiving little to no access to assistance in neighboring countries, and being detained and deported to the country of origin. Whereas regime stretching is a viable solution for other contexts like Kenya, the North Koreans in flight find themselves in various geographical contexts where neither the domestic political interests and legislative efforts nor the UNHCR conditional requirements exist are exhibiting strong willingness to stretch to accommodate and protect them. The only case in which the regime stretching does not exhibit a complete protection vacuum is in Thailand, in which the UNHCR is a significant presence compared to the other relative contexts. Even then, neither the domestic legislation nor political will exists to classify the case of North Koreans in flight in Thailand as a case of successful regime stretching.

The North Koreans in flight presents itself to the concept of survival migration as a unique population that could, if given the access to determination procedures, qualify as a refugee in the conventional understanding, but remain unprotected in practice. Because of its de facto lack of protection, it also fits within the concept and definition of survival migration. In several ways, the concept of survival migration and the case study of North Koreans in flight mutually add to each other. This case study adds to the survival migration concept in that it further accentuates the dire need of a solution to this increasing dilemma and alarming trend of theoretically and rightfully protected people being abandoned in legal protection limbo. It adds urgency to the case for positive actions to be taken on an international level, simultaneously with domestic efforts, to preserve and reaffirm the non-refoulement principle in practice. The concept

of survival migration adds to the case of North Koreans in flight as it sheds light on what conditions have to be met in order for any of the state contexts in which this group finds itself, to display positive regime stretching towards protection. It has shown that all the conditions for regime stretching are lacking, reflecting the findings against protection of the legal duty bearer study in the previous chapter. The concept of survival migration and the case study of this vulnerable group mutually shed light on each other to appeal to the urgent need to fill the ever expansive gap of protection created by the public-private protection dilemma.

5.5 Concluding remarks

The refugee regime has evolved into a contradiction of the duty of protection not being guaranteed by the primary duty bearers, the international agency designed to support the duty bearers attempting but falling short of provision, and the individuals for which the regime exists falling between the cracks into non-protection and return. The protection void of the state legal duty bearers leaves the North Koreans in flight with little option but to seek private actors. This option not only leaves the population more vulnerable to other human rights deprivations, such as sex trafficking and human smuggling. The complete lack of geopolitical will and prioritization of this issue further aggravates the problem, with no actor advocating for this vulnerable group, other than the NGOs, religious organizations and broker networks, none of whom are obliged by law or part of the refugee regime to provide protection it is solely responsible for providing in practice.

This chapter has explored the unfortunate fact that this contradiction and frustration with the refugee regime is not a unique dilemma to the North Koreans in flight. Rather, this group, however unique in its context and country of origin, is a case study of a wider international trend of survival migrants who need to be protected on both normative and institutional levels. Regime stretching needs to be supported on levels of domestic legislation and political intent, as well as the UNHCR's functional spillover and country representation. The unique political situation of the DPRK pulls the interest of the UN, stakeholder states and international community to prioritize the

denuclearization of the DPRK, leaving human rights concerns, much less the comparatively minor population of the North Koreans in flight on the backburner.

6 Conclusion

6.1 Research question revisited

This thesis has aimed to explore the public- private protection dilemma presented in the case of the North Koreans in flight and to question whether the findings prompt the international community to reinterpret non-refoulement obligation. This small yet unique case has shed light onto the frustrations of the broader people in forced movement, survival migrants, and the shocking and blatant protection void they face, urging the international community to pay heed to this urgent issue. I arrive at this conclusion based on the following observations presented by this case study:

Firstly, the legal identity of the North Koreans in flight is identified as refugees—be it *prima facie* should a mass influx occur, but otherwise, *sur place*— and thus they should be protected under the refugee regime. However, the lack of access to a refugee status determination procedure deprives this group of the protection. The securitized labelling of states labelling this group as ‘economic migrants’ adds to the international trend of this dichotomy of terminology as a contributing factor to the perception of rights holders and consequently to the deprivation of rights.

Secondly, the legal analysis of the identified duty bearing states— China, Russia, the Lao PDR, Thailand, and Vietnam— has shown an underwhelming failure of states to protect this vulnerable group against return. Rather, a trend of practices to the contrary, including the signing of bilateral mutual cooperation treaties with the DPRK with repatriation provisions, prompts a less- than- hopeful future in the public protection of North Koreans in flight.

Thirdly, the various non-state actors voluntarily stepping in to mind the gap of protection, shows hope, but is still lacking. In view of the international security theory, explanations of refugee regime frustrations were presented. The problem was not only in the lack of political will and law abidance by State Parties, but the lack of will of the refugee regime as a whole, including the institution of the UNHCR, to stretch to provide protection for this vulnerable group. The analysis of the North Koreans in flight as a

case study of survival migration has shown that without the conditions of regime stretching being met in both the normative and institutional front, the de facto protection of non-state actors is not enough to fill the protection void.

6.2 Towards a reinterpretation of the non-refoulement principle

The above findings implore for the international community to reinterpret the obligation to the non-refoulement principle. The principle can no longer stand alone on its high pedestal, being quoted and referred to by the UNHCR to urge states to abidance. It needs to be operationalized in a way that both state and non-state actors are addressed and involved in synergy.

To do this, I echo Betts' proposal of a *soft law normative framework* to authoritatively clarify the role of the state duty bearers and non-state actors. In light of the findings, a few cautions need to be heeded in this process. Given the unique country of origin, the North Koreans in flight display a case void of political will and intent of the relevant state parties, with the greatest interest of the relevant states being focused on the denuclearization of the DPRK, and the international condemnation also being focused to that end, further deprioritizing and this small vulnerable group. It may seem growingly inopportune to raise the issue of this relatively small vulnerable group, however, the growing attention on the political, nuclear issue can be leveraged to bring attention to the issue of North Koreans in flight. This requires cooperation of the UNHCR taking initiative and grassroots movement of the non-state actors to bring this to the attention of the international community. This movement to bring the attention of the DPRK-related issues to the "people over politics" is already initiated by a small non-state actor with a grassroots mobilization already taking place.²⁵⁷ An international coalition of various non-state actors urging to shift the focus to the protection dilemma of not only North Koreans in flight, but survival migrants at large, and drafting a soft law framework could jump start the closing of this protection gap.

²⁵⁷ Liberty in North Korea 2016b

Further, the protection dilemma can be alleviated with efforts within the existing refugee regime. The UNHCR must first embrace its inherent political role in advocating on behalf of refugees and potential refugees, the broader group of individuals protected against return, and act thusly. While continuing to ‘urge’ states and express ‘deep concerns,’ it must also actively engage with the NGOs to pressure the relevant states to advocate for the protection of the very people it exists to protect.

The protection gap suffered by the survival migrants evidently concerns matters of international security, not only because of the “relationship between cross-border displacement and security,” but also because the potential destabilizing effect that would be had upon recognition of a “collective failure to provide sanctuary to people whose own states were unwilling or unable to provide their most fundamental rights.”²⁵⁸ As explored earlier in this thesis,²⁵⁹ the relevant neighboring states have largely, with the exception of Thailand, failed to provide protection against return, let alone, sanctuary. There is, unfortunately, an unlikelihood of the protection dilemma of this particular vulnerable group being addressed until there is a mass influx that forces the international community to address it. In order to avoid the possible destabilization and chaos of a protection void in the event of a mass influx, it is actually in the interest of the relevant states to proactively act, and not to continually deny the people their rightfully protected identity, but rather, take initiative to offer protection, if only as minimal as not repatriating them and allowing them safe passage to a country where they can seek asylum. Positive action in the form of creating a normative framework and strengthening the existing refugee regime with non-state engagement would alleviate the chaos the transit states would face in the event of a mass influx.

It is time for the international community, both state and non-state actors, to rise to the occasion and act upon what is just according to international law, and not what is convenient in the geopolitical context. It is time to the state actors to act positively toward its duties, instead of turning a blind eye, passively ignoring them until it is

²⁵⁸ Betts 2013, p. 5

²⁵⁹ See Chapter 4 above

forced via a mass influx. It is time for the synergy of non-state actors to push and rally together for a new soft law framework. New drivers of forced migration, unfortunately, do not show signs of ceasing to emerge. However, the international community can work to better prepare and better protect the displaced survival migrants in flight with stretching the existing refugee regime to be accountable to its non-refoulement obligation.

7 Table of reference

Treaties and Statutes

1986 Mutual Cooperation Protocol Between China and North Korea for the Work of Maintaining National Security and Social Order and Maintenance Surrounding Its Border Region, 1986	
1967 Protocol	The Protocol Relating to the Status of Refugees, 31 January 1967
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, Dec. 10, 1984
Cartagena	Cartagena Declaration on Refugees, Colloquium on the International
Declaration	Protection of Refugees in Central America, Mexico and Panama, 22 November 1984
CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965
CRC	Convention on the Rights of the Child, 20 November 1989
CRPD	Convention on the Rights of Persons with Disabilities, 13 December 2006
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950
ICCPR	International Covenant on Civil and Political Rights, 16 December 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 16 December 1966
ICJ	Statute of the International Court of Justice, 26 June 1945
Refugee Convention	The Convention relating to the Status of Refugees, 28 July 1951
UDHR	Universal Declaration of Human Rights, 10 December 1948

UN Charter	Charter of the United Nations, 24 October 1945
VCCR	Vienna Convention on Consular Relations, 24 April 1963
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969

UN Documents

A/ AC.96/799	UN General Assembly, Note on International Protection (submitted by the High Commissioner) , 25 August 1992, A/AC.96/799, available at: http://www.refworld.org/docid/3ae68bfe18.html [accessed 23 Mar 2016], para 18.
A/HRC/22/13	UN Human Rights Council, <i>Situation of human rights in the Democratic People's Republic of Korea : resolution / adopted by the Human Rights Council</i> , 14 July 2013, A/HRC/RES/22/13, available at: http://www.refworld.org/docid/53c3bb5d4.html [accessed 10 May 2016]
A/HRC/25/63	UN Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, 7 February 2014, A/HRC/25/63, available at: http://www.refworld.org/docid/530313074.html [accessed 9 May 2016]
A/HRC/25/CRP.1	UN Human Rights Council, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, 7 February 2014, A/HRC/25/CRP.1, available at: http://www.refworld.org/docid/530314234.html [accessed 9 May 2016]
A/HRC/28/71	UN Human Rights Council, <i>Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea</i> , 18 March 2015, A/HRC/28/71, available at: http://www.refworld.org/docid/550fefe14.html [accessed 11 May 2016]
A/HRC/28/L.18	UN Human Rights Council, <i>Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups</i> , 13 March

- 2015, A/HRC/28/18, available at:
<http://www.refworld.org/docid/550ad5814.html> [accessed 10 May 2016]
- A/HRC/31/70 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea*, 19 January 2016, A/HRC/31/70, available at:
<http://www.refworld.org/docid/56c582c14.html> [accessed 11 May 2016]
- A/HRC/4/34/Add.1 UN Human Rights Council, *Report on Communications to and from Governments*, 19 March 2007, A/HRC/4/34/Add.1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/119/48/PDF/G0711948.pdf?OpenElement> [accessed 11 May 2016]
- A/RES/70/172 UN General Assembly, *Situation of human rights in the Democratic People's Republic of Korea : resolution / adopted by the General Assembly*, 25 February 2016, A/RES/70/172, available at:
<http://www.refworld.org/docid/56d7e6b24.html> [accessed 10 May 2016]
- E/1850 UN Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950*, 25 August 1950, E/AC.32/8;E/1850, available at: <http://www.refworld.org/docid/3ae68c248.html> [accessed 11 May 2016]
- HCR/1P/4/ENG/REV. 3 UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at:
<http://www.refworld.org/docid/4f33c8d92.html> [accessed 10 May 2016]
- HCR/GIP/15/11 UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, available at: <http://www.refworld.org/docid/555c335a4.html> [accessed 10 May 2016]

- HRC/GC/6 UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, available at:
<http://www.refworld.org/docid/45388400a.html> [accessed 10 May 2016]
- HRC/GC/20 UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, available at:
<http://www.refworld.org/docid/453883fb0.html> [accessed 23 March 2016]
- CCPR/C/21/Rev.1/Add.9 UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, *CCPR/C/21/Rev.1/Add.9*, available at:
<http://www.refworld.org/docid/45139c394.html> [accessed 10 May 2016]
- OHCHR Dashboard (2016). *Indicators.ohchr.org*. [online] Available at:
<http://indicators.ohchr.org/> [Accessed 10 May 2016].
- S/RES/1160 UN Security Council, *Resolution 1160 (1998) Adopted by the Security Council at its 3868th meeting, on 31 March 1998*, 31 March 1998, S/RES/1160 (1998), available at:
<http://www.refworld.org/docid/3b00f1622c.html> [accessed 10 May 2016]
- S/RES/1874 UN Security Council, *Security Council resolution 1874 (2009) [on measures against the Democratic People's Republic of Korea in connection with its nuclear weapon tests]*, 12 June 2009, S/RES/1874(2009), available at:
<http://www.refworld.org/docid/4a3754e72.html> [accessed 11 May 2016]
- S/RES/2270 UN Security Council, *Security Council resolution 2270 (2016) [on condemning the nuclear test of 6 Jan. 2016 and strengthening sanctions against the Democratic People's Republic of Korea]*, 2 March 2016, S/RES/2270 (2016), available at:
<http://www.refworld.org/docid/56dd2cb54.html> [accessed 11 May 2016]
- UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at:

<http://www.refworld.org/docid/3ae6b3a94.html> [accessed 11 March 2016]

UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 11 March 2016]

UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html> [accessed 11 March 2016]

UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html> [accessed 15 February 2016]

UN High Commissioner for Refugees (UNHCR), *Non-Refoulement*, 12 October 1977, No. 6 (XXVIII) - 1977, available at: <http://www.refworld.org/docid/3ae68c43ac.html> [accessed 23 March 2016]

UN High Commissioner for Refugees (UNHCR), *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009, 1975-2009 (Conclusion No. 1-109), available at: <http://www.refworld.org/docid/4b28bf1f2.html> [accessed 10 March 2016]

UNHCR/OHCHR Press Releases

UNHCR (2012). UNHCR urges humanitarian solution for detained North Koreans . [online] UNHCR. Available at: <http://www.unhcr.org/4f4761556.html> [Accessed 2 Feb. 2016].

UNHCR (2013). *UNHCR chief calls on states to respect non-refoulement after North Koreans deported from Laos*. [online] UNHCR. Available at: <http://www.unhcr.org/51a7510b9.html> [Accessed 9 March 2016].

OHCHR (2015). Press briefing note on China, Thailand, Viet Nam and Democratic People's Republic of Korea . (2015). [online] Ohchr.org. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16784&LangID=E> [Accessed 26 Feb. 2016].

OHCHR (2015b), *Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights : Geneva, 14 September 2015* , 14 September

2015, available at: <http://www.refworld.org/docid/55f7d2c64.html> [accessed 10 May 2016]

OHCHR (2016). *UN rights expert urges Russia not to implement the new extradition treaty with North Korea*. (2016). [online] Ohchr.org. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17094&LangID=E> [Accessed 2 Mar. 2016].

National laws and reports

DPRK Constitution *Socialist Constitution of the Democratic People's Republic of Korea*, 5 September 1998, available at: <http://www.refworld.org/docid/3ae6b56d0.html> [accessed 11 Feb 2016]

PRC Constitution *Constitution of the People's Republic of China* [China], 4 December 1982, available at: <http://www.refworld.org/docid/4c31ea082.html> [accessed 11 Feb 2016]

PRC Extradition Law China: Law No. 42 of 2000, Extradition Law [China], 28 December 2000, available at: <http://www.refworld.org/docid/4c31ec672.html> [accessed 11 Feb 2016]

PRC Law China: Law of 1985 on Control of the Entry and Exit of Aliens [China], 1 February 1986, available at: <http://www.refworld.org/docid/4da3199f2.html> [accessed 11 Feb 2016]

ROK Ministry of Unification, *White Paper on Korean Unification 2014*, February 2014, available at: <http://eng.unikorea.go.kr/content.do?cmsid=1819> [accessed 11 Feb 2016]

DPRK reports and statements

UN Human Rights Council, *Statement of H.E. Mr. Ri Su Yong, Minister of Foreign Affairs of the Democratic People's Republic of Korea*, High-level segment of the 31st session of the HRC, Geneva, 1 March 2016, available at: <http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx> [accessed 26 March 2016]

Korea Central News Agency, “Report of the DPRK Association for Human Rights Studies”, Ncnk.org. (2016). *Report of the DPRK Association for Human Rights Studies — National Committee on North Korea*. [online] Available at: http://www.ncnk.org/resources/publications/Report_of_the_DPRK_Association_for_Human_Rights_Studies.pdf/view [Accessed 10 May 2016].

KCNA Watch. (2016). [online] KCNA Watch. Available at:
<http://www.kcnawatch.co/newstream/1457187721-473507727/talks-between-delegations-of-dprk-ministry-of-peoples-security-and-lao-ministry-of-public-security-held/> [Accessed 26 March 2016].

List of judgments

Chahal v. The United Kingdom, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at:
<http://www.refworld.org/docid/3ae6b69920.html> [accessed 11 Feb 2016]

Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, available at:
<http://www.refworld.org/docid/3ae6b6fec.html> [accessed 11 Feb 2016]

Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at:
<http://www.refworld.org/docid/47c6882e2.html> [accessed 11 Feb 2016]

Secondary Literature

Betts, A. (2009). *Forced Migration and Global Politics*. Chichester, U.K.: Wiley-Blackwell.

Betts, A. (2010). Survival Migration: A New Protection Framework. *Global Governance*, 16, pp.361-382.

Betts, A. (2010b). Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants. *International Journal of Refugee Law*, 22(2), pp.209-236.

Betts, A. (2011). *Global migration governance*. Oxford: Oxford University Press.

Betts, A. (2013). State fragility, refugee status and 'survival migration'. *Forced Migration Review*, [online] 43, pp.4-6. Available at:
<http://www.fmreview.org/fragilestates/betts.html> [Accessed 11 Mar. 2016].

Betts, A (2014), "International Relations and Forced Migration", Fiddian-Qasmiyeh, E., Loescher, G., Long, K. and Sigona, N. (n.d.). *The Oxford Handbook of Refugee and Forced Migration Studies*. Oxford University Press, 2014.

Betts, A., Loescher, G., Milner, J. and Loescher, G. (2012). *The United Nations High Commissioner for Refugees (UNHCR)*. New York: Routledge.

- Brookings-Bern Project on Internal Displacement, China's Repatriation of North Korean Refugees, 5 March 2012, available at:
<http://www.refworld.org/docid/4f588cde2.html> [accessed 30 Mar. 2016]
- Chan, E. and Schloenhardt, A. (2007). North Korean Refugees and International Refugee Law. *International Journal of Refugee Law*, 19(2), pp.215-245.
- Cohen, R. 1998, «Recent Trends in Protection and Assistance for Internally Displaced People,» in *Internally Displaced People: A Global Survey* (London: Earthscan, 1998), p. 4-5.
- Cohen, R. 2012, North Koreans in China in Need of International Protection. [online] The Brookings Institution. Available at:
<http://www.brookings.edu/research/articles/2012/12/north-korea-china-cohen>
 [Accessed 29 Mar. 2016].
- Goodwin-Gill, G. and McAdam, J. (2007). *The Refugee in International Law*. Oxford: Oxford University Press.
- Hammerstad, A 2011, 'UNHCR and the Securitization of Forced Migration' in *Refugees in International Relations*, eds A Betts & Gil Loescher, Oxford University Press, Oxford, pp. 237-260.
- Haggard, S & Noland, M 2006, *The North Korean Refugee Crisis: Human Rights And International Response*. Washington, D.C.: U.S. Committee for Human Rights in North Korea, 2006. Print.
- Heller, B 2011, 'Terms of Endangerment: Evolving Political and Legal Terminology for North Koreans,' *Oxford Monitor of Forced Migration* vol. 1, no. 1, pp.14-19. Web. Available from: www.oxmofm.com [Accessed 20 Feb. 2016].
- Kirkpatrick, Melanie. *Escape from North Korea: The Untold Story of Asia's Underground Railroad* (2013).
- Kurlantzick and Mason, "North Korean Refugees: The Chinese Dimension", *The North Korean Refugee Crisis: Human Rights And International Response*. Washington, D.C.: U.S. Committee for Human Rights in North Korea, 2006. Print.
- Lauterpacht, E and Bethlehem D (2003), *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, Cambridge University Press , available at: <http://www.refworld.org/docid/470a33af0.html> [accessed 11 Jan 2016]
- Lee, E 2004, "Human Rights Protection of North Koreans in a Third Country: A Legal Approach." *Journal of Korean Law* 4.1 (2004): 155-177. Web. [accessed 14 Jan 2016]

- Lee, K 2008, "Protection of North Korean Defectors in China and the Convention Against Torture." *Regent Journal of International Law* 6 (2008): 139-169. Web. [accessed 14 Jan 2016]
- Lee, S 2005, *The DPRK Famine of 1994-2000: Existence and Impact*. Seoul. Web. Available from: <http://www.kinu.or.kr/upload/neoboard/DATA05/05-06.pdf> [Accessed 3 Mar. 2016].
- McConville, M. and Chui, W. (2007). *Research Methods for Law*. Edinburgh: Edinburgh University Press.
- Ratner, S and A-M Slaughter (1999), "Appraising the Methods of International Law", *The American Journal of International Law*, Vol. 93, No. 2, pp. 291-302.
- Seymour, J. D. 2005, 'China: Background Paper on the Situation of North Koreans in China.' Rep. WRITENET Independent Analysis, Web. [Accessed 14 Jan. 2016].
- Shim, D. (2013). *Visual Politics and North Korea: Seeing is Believing*. Routledge.
- Song, J 2013. "Smuggled Refugees": The Social Construction of North Korean Migration. *International Migration*, 51(4), 158-173.
- Song, J 2015. "Twenty Years' Evolution of North Korean Migration, 1994-2014: A Human Security Perspective." *Asia & the Pacific Policy Studies Asia and the Pacific Policy Studies* 2.2 (2015): 399-415.
- Suh, Jae-jean 2002, 'North Korean defectors: their adaptation and resettlement', *East Asian Review*. Vol. 14, No. 3, pp. 67-86. Web. [Accessed 20 Feb. 2016].
- Tan, M 2010. "A State of Rightlessness: The Egregious Case of North Korea." *Mississippi Law Journal* 80.2 (2010): 681-708. Web. 14 Jan. 2016.
- Tan, M 2015. *North Korea, International Law and the Dual Crises: Narrative and Constructive Engagement*. London: Routledge, 2015. Print.
- White Paper On Human Rights In North Korea 2015*. Seoul: Korea Institute for National Unification (KINU), 2015. Web. 9 March 2016. White Paper On Human Rights In North Korea.
- White Paper On Human Rights In North Korea 2009*. Seoul: Korea Institute for National Unification (KINU), 2009. Web. 9 March 2016. White Paper On Human Rights In North Korea.
- Wolman, A 2011. "North Korean Escapees' Right to Enter South Korea: An International Law Perspective." *Yonsei Law Journal* 2.2 (2011): 141-159. Web. [Accessed 13 Jan. 2016].

Web Resources- NGO documents

- Amnesty International. (2016). *Amnesty International Report 2015/16 - Korea (Democratic People's Republic of)*, 24 February 2016, available at: <http://www.refworld.org/docid/56d05b4215.html> [accessed 24 Feb 2016].
- Amnesty International. (2016b). *Amnesty International Report 2015/16 - Thailand*, 24 February 2016, available at: <http://www.refworld.org/docid/56d05b0c15.html> [accessed 25 March 2016].
- Amnesty International. (2016c). *Amnesty International Report 2015/16 - Viet Nam*, 24 February 2016, available at: <http://www.refworld.org/docid/56d05aff15.html> [accessed 25 March 2016].
- Human Rights Watch. (2002). *The Invisible Exodus: North Koreans in the People's Republic of China*, 19 November 2002, C1408, available at: <http://www.refworld.org/docid/3e3141740.html> [accessed 9 May 2016].
- Human Rights Watch. (2004). *China: Protect North Korean Refugees*, 9 March 2004, available at: <https://www.hrw.org/news/2004/03/09/china-protect-north-korean-refugees> [accessed 19 Feb 2016].
- Human Rights Watch. (2015b). *China: Don't Return Nine North Korean Refugees*. [online] Available at: <https://www.hrw.org/news/2015/11/21/china-dont-return-nine-north-korean-refugees> [Accessed 9 May 2016].
- Human Rights Watch. (2015). *World Report 2015: North Korea*. [online] Available at: <https://www.hrw.org/world-report/2015/country-chapters/north-korea> [Accessed 9 May 2016].
- Human Rights Watch. (2016). *North Korea: End Kim Family's Legacy of Abuse*. [online] Available at: <https://www.hrw.org/news/2016/02/13/north-korea-end-kim-familys-legacy-abuse> [Accessed 9 May 2016].
- Human Rights Watch. (2016b). *World Report 2016 - North Korea*, 27 January 2016, available at: <http://www.refworld.org/docid/56bd992a3b.html> [accessed 19 February 2016].
- International Crisis Group (2006), *Perilous Journeys: The Plight of North Koreans in China*, Asia Report No. 12, 26 October 2006., available at: <http://www.crisisgroup.org/en/regions/asia/north-east-asia/north-korea/122-perilous-journeys-the-plight-of-north-koreans-in-china-and-beyond.aspx> [accessed 11 January 2016]
- Kumar, T., *China's Repatriation of North Korean Refugees, Testimony to the China's Repatriation of North Korean Refugees Before the Congressional-Executive Commission on China* (2012). [online] Amnesty International USA. Available

at: <http://www.amnestyusa.org/news/news-item/china-s-repatriation-of-north-korean-refugees> [Accessed 29 Mar. 2016].

Liberty in North Korea. (2016). *Refugee Rescues - Liberty in North Korea*. [online] Available at: <http://www.libertyinnorthkorea.org/rescue-refugees/> [Accessed 1 Apr 2016].

Liberty in North Korea. (2016b). *People over politics - Liberty in North Korea*. [online] Available at: <http://www.libertyinnorthkorea.org/people-over-politics/> [Accessed 11 May 2016].

Liberty in North Korea. (2016c). Liberty in North Korea. [online] Available at: <http://www.libertyinnorthkorea.org/> [Accessed 12 March 2016].

United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 - China*, 17 June 2009, available at: <http://www.refworld.org/docid/4a40d2a3c.html> [accessed 20 Feb 2016].

Web resources- News articles

ABC News (2016). UN voices fears over North Korea-Russia extradition pact. [online] ABC News. Available at: <http://www.abc.net.au/news/2016-02-26/un-voices-fears-over-north-korea-russia-extradition-pact/7204614> [Accessed 2 Mar. 2016].

Chasmar, J (2013). 9 North Korean defectors may have been executed upon return: report. [online] The Washington Times. Available at: <http://www.washingtontimes.com/news/2013/oct/1/9-north-korean-defectors-may-have-been-executed-up/> [Accessed 26 Feb. 2016].

Jendrezjczyk, M (2002) 'From Eating Rats in North Korea to Sex Abuse in China: A Refugee Travesty' (19 Nov. 2002) International Herald Tribune (Paris), available at hrw.org/editorials/2002/nkorea-refugees.htm

Lankov, A. (2015). Why have North Korean defections dropped?. [online] the Guardian. Available at: <http://www.theguardian.com/world/2015/may/07/north-korea-defectors-drop> [Accessed 28 Feb. 2016].

Lantreev, Emma (2016). *For Refugees, Russia Is the Purgatory to North Korea's Hell* (2016). [online] Gawker.com. Available at: <http://gawker.com/for-refugees-russia-is-the-purgatory-to-north-koreas-h-1763534414> [Accessed 21 Mar. 2016].

Lee, H. (2015). North Korean Truths. [online] Nytimes.com. Available at: http://www.nytimes.com/2015/02/06/opinion/north-korean-truths.html?_r=0 [Accessed 4 May 2016].

Lee, H. (2016). Hyeonsoo Lee | Speaker | TED.com. [online] Ted.com. Available at: https://www.ted.com/speakers/hyeonsoo_lee [Accessed 1 May 2016].

- Mullen, J. (2013). Outcry over young North Korean refugees handed back to regime by Laos. [online] CNN. Available at: <http://edition.cnn.com/2013/05/31/world/asia/laos-north-korea-refugees/> [Accessed 26 Feb. 2016].
- NK News - North Korea News. (2014). KCNA leans on Western critics of human rights reports | NK News - North Korea News. [online] Available at: <https://www.nknews.org/2014/11/kcna-leans-on-western-critics-of-human-rights-reports/> [Accessed 10 May 2016].
- NK News - North Korea News. (2015). North Korean defection by the numbers | NK News - North Korea News. [online] Available at: <https://www.nknews.org/2015/07/north-korean-defection-by-the-numbers/> [Accessed 9 May 2016].
- NK News - North Korea News. (2016). N.Korea, Lao security ministries sign security agreement | [online] NK News - North Korea News. Available at: <https://www.nknews.org/2016/03/n-korea-lao-security-ministries-sign-security-agreement/> [Accessed 26 Mar. 2016].
- Panda, Ankit. (2016). North Korea, Laos Security Ministries Sign Agreement. [online] The Diplomat. Available at: <http://thediplomat.com/2016/03/north-korea-laos-security-ministries-sign-agreement/> [Accessed 11 May 2016].
- Park, Songwu (2013). Laos Deports Nine North Korean Defectors to China. Radio Free Asia. [online] Available at: <http://www.rfa.org/english/news/korea/laos-05282013161702.html> [Accessed 11 May 2016].
- Pollack, Joshua H. [Joshua_Pollack] 2016, 'Your friendly reminder about what UNSCR 2270 says about hiring North Korean police trainers', Twitter post, 8 March, Available from: https://twitter.com/Joshua_Pollack/status/707255011680645120. [17 Mar 2016].
- Power, J. (2016). North Korean Defectors to South Hit 13-Year Low . [online] The Diplomat. Available at: <http://thediplomat.com/2016/01/north-korean-defectors-to-south-hit-13-year-low/> [Accessed 9 May 2016].
- Rbth.com. (2016). Moscow agrees to repatriate illegal North Korean immigrants. [online] Available at: http://rbth.com/international/2016/02/11/bleak-future-awaits-north-korean-deportees-from-russia_566735 [Accessed 9 May 2016].
- Shim, E. (2016). Russia, North Korea deal leaves defectors exposed, activist says. [online] Available at: http://www.upi.com/Top_News/World-

News/2016/03/22/Russia-North-Korea-deal-leaves-defectors-exposed-activist-says/1611458664650/ [Accessed 2 April 2016].

Russia, North Korea deal leaves defectors exposed, activist says. (2016). [online] UPI. Available at: http://www.upi.com/Top_News/World-News/2016/03/22/Russia-North-Korea-deal-leaves-defectors-exposed-activist-says/1611458664650/ [Accessed 2 Apr. 2016]

Synosphere. (2016). Q. and A.: Hyeonsoo Lee on North Korean Defectors in China. [online] Nytimes.com. Available at: http://www.nytimes.com/2016/04/01/world/asia/china-north-korea-defector-hyeonsoo-lee.html?_r=0 [Accessed 4 May 2016].

Tumanov, G & Korostikov, M. (2016). *Moscow agrees to repatriate illegal North Korean immigrants*. [online] Rbth.com. Available at: http://rbth.com/international/2016/02/11/bleak-future-awaits-north-korean-deportees-from-russia_566735 [Accessed 21 Feb. 2016].

United States Congressional-Executive Commission on China. (2014). *UN Report Criticizes China for Treatment of North Korean Refugees Amid Worsening Situation* [online] Available at: <http://www.cecc.gov/publications/commission-analysis/un-report-criticizes-china-for-treatment-of-north-korean-refugees> [Accessed 11 May 2016].

Yonhap News Agency (2016). *N. Korea, Russia sign agreement on extradition of illegal migrants*. [online] Yonhap News Agency. Available at: <http://english.yonhapnews.co.kr/northkorea/2016/02/04/33/0401000000AEN20160204004100315F.html?569fc698> [Accessed 21 Feb. 2016].