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SUMMARY:

Abstract The severe food crisis of the 1990s forced thousands of North Koreans to leave their country in search of food. Most of them crossed the border into China, to which the Government of the People's Republic of China (the PRC) responded by forcibly repatriating defectors to North Korea, thus placing many of them at risk of being subjected to inhumane and degrading treatment and, at times, even death. This article provides an overview of the situation of North Korean asylum seekers and analyses the legal protection available to North Korean defectors under international law. The article focuses specifically on the situation of North Koreans in mainland China and China's obligations under international human rights and refugee law. The aim of the article is to contribute to the elaboration of durable solutions for the plight of North Korean asylum seekers and to develop a range of recommendations for law reform and policy change.

TEXT:

1. Introduction

The severe food crisis of the 1990s forced thousands of North Koreans n3 to leave their country in search of food. Most of them crossed the border into China, to which the Government of the People's Republic of China (the PRC) responded by forcibly repatriating defectors to North Korea, thus placing many of them at risk of inhumane and degrading treatment and, at times, even death.

This article provides an overview of the situation of North Korean asylum seekers and analyses the legal protection available to North Korean defectors under international law. The paper focuses specifically on the situation of North Koreans in mainland China and China's obligations under international human rights and refugee law. The aim of the article is to contribute to the elaboration of durable solutions for the plight of North Korean asylum seekers and to develop a range of recommendations for law reform and policy change. The article acknowledges that the human rights

situation in the Democratic People's Republic of Korea (the DPRK) cannot be held in isolation from the country's pursuit of nuclear weapons; any solution to the challenge must take into account the current global climate and political sensitivities in the region.

Given the scarcity of academic scholarship in this field, the political isolation of the DPRK, and the country's general unwillingness to permit external human rights actors to monitor developments in the country, it is necessary to explain where the information for this study came from, how it was handled, and the problems that have been encountered. Much of the conventional wisdom about the DPRK and North Korean refugees derives not from academic research or from field studies but from the media, governmental sources, international organisations and reported anecdotal evidence. Obtaining credible and verifiable information is difficult. n4 Official English translations of national legislation from the PRC and from South Korea (the Republic of Korea, or ROK), international human rights instruments and other UN documents are, for the most part, available electronically. This, however, is not the case for North Korean legislation. In particular, the Criminal Code of the DPRK is currently not available in English and therefore unofficial translations were relied upon.

The majority of reports on the human rights situation in North Korea and on the situation of refugees from the DPRK have been published by non-government organisations (NGOs), most notably Human Rights Watch and Amnesty International. While these organisations have released a wealth of factual information and statistics, it must be noted that neither organisation has access to the DPRK or the border region of the PRC. n5 Many NGOs have either left the DPRK due to frustrations in working with the Government or they operate outside the DPRK and have no access to the country. n6 NGOs also admit the difficulty in obtaining credible information for their reports due to the limited access they obtain to North Korean defectors. n7 But even when access is available - generally to North Korean refugees in South Korea - many defectors are reluctant to reveal much information for fear of endangering their family members who remain in the DPRK. n8 In addition, some NGO documents are far from objective, are heavily politically influenced, and seem preoccupied with criticising the North Korean Government regime, rather than addressing the needs and interests of DPRK defectors. n9

2. Human rights in North Korea

2.1 Domestic human rights protection

The DPRK has been under the absolute rule of Kim Jong Il since the death of his father, Kim Il Sung, in 1994. North Korea is a Communist state under a one-man dictatorship without any notable opposition movement or any democratic processes.

While the freedoms of speech, press, assembly, demonstration and association are guaranteed under Article 67 of the Socialist Constitution of the Democratic People's Republic of Korea of 1998 (the DPRK Constitution), n10 reports from defectors reveal that these guarantees do not exist in practice. n11

Similarly, while freedom of religion and worship is enshrined in Article 68 of the DPRK Constitution, n12 the article contains an explicit limitation of religious freedom by stating that religion cannot be used 'as a pretext for drawing in foreign forces or for harming the State and social order'. Indeed, religious worship has been severely repressed both in the public and private spheres; reports from defectors have revealed that the Government of the DPRK has used the limitation clause in Article 68 to justify its severe oppression; a practice which has been fiercely criticised by the United Nations (UN) Commission on Human Rights. n13

The right of citizens to equality is enshrined in Article 65 of the DPRK Constitution, n14 but, in practice, reports claim that the Government continues in its division of the population into three classes. n15 Several sources have found that

[t]he government divides all North Koreans into three classes 'core', 'wavering' and 'hostile', depending on their loyalty to the state and social background. Those belonging to the 'core' class get preferential access to food, medicine,

education and employment; those at the bottom of this class system suffer permanent discrimination and the most intense persecution, a fate that is passed from generation to generation. n16

Amnesty International claims that up to a quarter of the total population of the DPRK are considered to belong to the 'hostile class' and

comprise people suspected of opposing the government or whose family members have been imprisoned. They also include the so-called 'impure elements' such as prisoners of war from South Korea who were reportedly relocated to remote mountainous areas in provinces such as North Hamgyong in the period 1953 to 1960, immediately after the Korean War. n17

The United States Committee for Human Rights in North Korea estimates that approximately 150,000 to 200,000 persons - nearly 1 percent of the total population - are detained in political penal labour colonies throughout the DPRK. n18 A unique characteristic of the prison camp system is the concept of 'collective responsibility' where entire families may be imprisoned for up to three generations for the 'political crimes' of their parents, grandparents or even ancestors in order to 'cleanse' the population of opponents to the Government regime. n19

2.2 International obligations

The DPRK is party to four of the key international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR), n20 the International Covenant on Economic, Social and Cultural Rights, n21 the Convention on the Rights of the Child n22 and the Convention on the Elimination of All Forms of Discrimination against Women. n23

There is little, if any, evidence to suggest that the DPRK is adhering to its international human rights obligations. The DPRK has remained largely uncooperative in granting access to international observers. n24 Only on rare occasions has the DPRK allowed a few select external human rights actors to enter the country. n25 While the DPRK consistently denies any allegations of human rights abuses within its borders, n26 it has been internationally condemned for its gross and systemic human rights violations.

3. The 'Silent Famine' n27 and the 'Invisible Exodus' n28

With the collapse of the Soviet Union in 1991, the DPRK lost strategic economic ties upon which the country's economy had been heavily dependent. The effects of the country's struggling economy were further exacerbated by a decrease in trade levels with the PRC following China's improved relations with South Korea, and the inadequate economic infrastructure of the DPRK itself. Moreover, heavy floods in the mid-1990s and droughts in 2000 and 2001 led to a complete collapse of North Korea's agricultural industry. The poor state of the country's economy and the failure of its agricultural sector resulted in a food crisis that, according to some sources, affected almost the entire population of the DPRK. n29

By 1995, the DPRK was in desperate need of international aid to feed its starving population. n30 Due to the limited information available, it is difficult to discern the exact number of persons who died from starvation during the famine. Estimates range from 2 to 3.5 million, n31 some 12 to 13 percent of the total population. n32 In their struggle to survive, thousands of hungry North Koreans were driven across the border into the PRC in search of food. Others, in search for freedom from persecution, attempted to flee to neighbouring South Korea. n33 Due to the immense difficulties and dangers associated with crossing the demilitarised zone or escaping via a direct sea route to the ROK, the majority of North Korean defectors attempt to reach the ROK by first crossing the border into the PRC, and then travelling through a third country before arriving in the ROK. n34 Official Chinese estimates put the number of DPRK nationals currently hiding in the PRC at 10,000. n35 Independent sources claim that the number ranges between 100,000 and 300,000 persons. n36

4. Sanctions on illegal departure

Under Article 75 of the DPRK Constitution, citizens enjoy the 'freedom to reside in and travel to any place'. Nevertheless, leaving the country without the possession of a valid travel certificate and without permission from the authorities is considered a criminal offence under Articles 117 and 47 of the Criminal Code (DPRK).ⁿ³⁷ Article 117 provides that, any person 'who crosses the border without permission shall be punished by a sentence of three years or less labour re-education'.ⁿ³⁸ Article 47 states that any person

who escapes to another country or to the enemy in betrayal of his motherland and people, or who commits treacherous acts towards the motherland such as espionage or treason, shall be punished by at least seven years or more labour re-education. If it is a serious violation, he shall be punished by execution and forfeiture of all property.ⁿ³⁹

The restriction imposed on travel has been widely criticised by the UN Human Rights Committeeⁿ⁴⁰ and the UN Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea (the Special Rapporteur).ⁿ⁴¹ It has been held that the provisions in the Criminal Code (DPRK) violate the right of a person to freely leave a country, which is guaranteed in multiple human rights treaties, including the ICCPR and the Universal Declaration of Human Rights.ⁿ⁴²

5. China's position

The PRC is a party to the 1951 Convention relating to the Status of Refugees (the Refugee Convention)ⁿ⁴³ and the 1967 Protocol relating to the Status of Refugees (the Refugee Protocol).ⁿ⁴⁴ Moreover, Article 32(2) of the Constitution of the PRC provides for the right to seek asylum from political persecution.ⁿ⁴⁵ However, irrespective of its international obligations and despite the grave situation awaiting North Korean defectors upon return to the DPRK, it is estimated that some 300 North Koreans are repatriated to the DPRK each week without any access to the UN High Commissioner for Refugees (UNHCR) and no other formal procedures to determine their status.ⁿ⁴⁶ North Korean asylum seekers have no access to refugee status determination procedures and, hence, have no effective legal protection. The Chinese Government also denies UNHCR any access to the border region with the DPRK.

With a view to asylum seekers in China, the UN Committee on Economic, Social and Cultural Rights in May 2005 expressed its concern

that non-citizens including asylum seekers, refugees and stateless persons, are excluded from the constitutional guarantees to the enjoyment of rights and freedoms enshrined in the Covenant that are extended to all citizens in the State party. The Committee notes that some asylum seekers are excluded by the refugee determination procedure of the State party, in particular those coming from North Korea who are regarded by the State party as economic migrants, and are thus compelled to return to their countries.ⁿ⁴⁷

The lack of legal protection has made many North Korean asylum seekers vulnerable to trafficking, sexual exploitation and abuse,ⁿ⁴⁸ constantly fearing forced repatriation to the DPRK.ⁿ⁴⁹ Those who are forcibly repatriated are interrogated by DPRK officials upon return and have been known to be tortured, imprisoned and, on some occasions, executed.ⁿ⁵⁰ Moreover, pregnant women who are repatriated to the DPRK from the PRC are often forced into abortions, or their infants are killed upon birth for fear of foreign impregnation.ⁿ⁵¹

The lack of avenues to obtain effective asylum and protection in China has also resulted in desperate and highly publicised attempts by North Korean asylum seekers to force entry into foreign embassies and other expatriate facilities in Beijing and elsewhere in the PRC.ⁿ⁵² While such attempts have alerted the international community to the plight of North Korean asylum seekers, they have also come at a high cost, placing not only the asylum seekers involved, but also those remaining in the PRC, at greater risk of forced repatriation due to the resulting crackdowns by Chinese authorities.ⁿ⁵³

In defiance of its international obligations, the PRC alleges that it is bound by a confidential Sino-Korean treaty signed in 1961ⁿ⁵⁴ and subsequent protocols that provide for the return of all DPRK nationals who have entered the PRC without a valid travel certificate.ⁿ⁵⁵ The text of this treaty is not publicly available. In 1986, the DPRK's

Ministry of State Security and the PRC's Ministry of Public Security entered into a further agreement entitled Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas. Article 4 of this agreement states:

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

In the case of crossing the border without possession of a legal certificate or without passing through screening agencies or the passage places stated on the possessed certificate, [the individual] shall be treated as an illegal border crosser [...].

(2) Regarding individuals who illegally cross the border, depending on the situation a name-list or relevant materials should be turned over to the other side [...]. n56

The PRC also maintains the position that North Korean asylum seekers are not refugees but rather, are economic immigrants. Hence, the PRC considers itself not in breach of its international obligations under the Refugee Convention by returning North Koreans found within its borders to the DPRK. n57 This position is manifested in a statement by the Chinese Foreign Minister, Li Zhaoxing, saying, 'These refugees that you talk about do not exist [...]. [They] are not refugees, but are illegal immigrants'. n58

6. Eligibility of DPRK defectors for refugee status

The legal foundation for the protection of refugees stems from the Refugee Convention as amended by the Refugee Protocol. These international instruments contain provisions for the treatment and protection to be afforded to refugees, as well as the obligations of State Parties to cooperate with UNHCR in executing its functions. n59 The Refugee Convention recognises a person as a refugee if he or she

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his/her nationality and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country. n60

The Refugee Convention seeks to protect specific types of migrants from the country from which they fear persecution by placing obligations on State Parties to provide refuge. The Convention contains provisions relating to the definition of refugee (Article 1), provisions that define the rights and legal status of refugees (Articles 2-24), and provisions dealing with the implementation of the Convention obligations (Articles 25-46).

In his first report to the UN Commission on Human Rights in 2004, the Special Rapporteur identified two main categories of DPRK refugees: (1) those who flee the DPRK for fear of political persecution thus satisfying the traditional concept of the refugee definition; and (2) those who fled the DPRK for other reasons, for example in search of food during times of crisis, and who now fear persecution should they be returned to the DPRK due to the imposition of severe sanctions for illegal departure; so-called refugees sur place. n61

The following parts dissect both the common arguments put forward by the Government of the PRC, as well as the requirements specified under the Refugee Convention and the Refugee Protocol, in order to determine the eligibility of North Korean asylum seekers for refugee status.

6.1 Economic migrant or refugee?

The economic (and illegal) immigrant can be differentiated from a refugee in that the former enjoys the protection of his or her country of origin while the latter does not. n62 On this point, the Special Rapporteur stated:

The former [illegal immigrants] implies that they can be sent back to their country of origin, while the latter [refugees] are protected by the principle of non-refoulement. I submit that a key test is whether they are protected by

their country of origin. If they are not, this should open the door to international protection and legitimize their classification as refugee. Even if some countries are not ready to classify them openly as refugee, these persons should at least be treated as persons in need of international protection, and basic international law principles, such as non-refoulement, should be applied. n63

The Chinese Government argues that DPRK asylum seekers are not refugees but, rather, are illegal and economic immigrants. n64 In support of this position, many sources available also suggest that the majority of North Koreans leave the DPRK primarily in search of food, not for fear of persecution. n65 For example, of the thirty-eight North Korean defectors interviewed by the NGO Refugees International, none claimed that they had experienced any persecution for reasons of political opinion or religious belief prior to their departure from the DPRK. n66

However, all available sources also report that North Koreans who are forcibly repatriated to the DPRK face harsh interrogation, torture, imprisonment and, in some cases, execution. n67

It is well documented by Human Rights Watch and other human rights organisations that North Koreans who left without state permission are detained, tortured and even executed on return to their country. Their fear of persecution is more than well founded. n68

Thus, human rights organisations usually consider North Korean asylum seekers as refugees.

6.2 Prosecution versus Persecution

In order to be eligible for refugee status, the Refugee Convention and the Refugee Protocol require that there be a 'well-founded fear of being persecuted' for one of the five convention grounds. n69

Available sources claim that all DPRK defectors, irrespective of their motives for leaving the country, have committed a 'crime' under the Criminal Code (DPRK) and are punishable under Articles 117 or 47. In relation to these articles, it is necessary to distinguish between sanctions imposed as a means of controlling orderly migration (and, therefore, prosecution for breach of a law) on the one hand, and persecution for a convention ground on the other. Sanctions placed on illegal departure do not necessarily amount to persecution and, hence, do not result in eligibility for refugee status. Sanctions may be placed on illegal departure in order to maintain border control where a person may be legitimately prosecuted for breach of a national law. n70 However, where sanctions impose punishments that are disproportionate to the crime committed, such sanctions may amount to persecution if the person can demonstrate that his or her motives and reasons for illegal departure and for remaining outside the country stem from one of the five grounds of persecution listed under Article 1A(2) of the Refugee Convention. n71

Article 117 of the Criminal Code (DPRK) applies to defectors even if they have left the country solely in search of food during food shortages. In regards to Article 47, the punishment is imposed irrespective of whether the defector genuinely perceives him or herself to have 'betrayed the motherland' as the act of leaving the country itself may amount to treason. n72 The UNHCR Handbook makes it clear that for a well-founded fear of persecution to arise, the person need not genuinely possess that particular political opinion; it is sufficient that the authorities of the country from which he or she is fleeing perceive or have imputed that opinion upon him or her. For the purposes of the Refugee Convention and the Refugee Protocol, this imputed opinion is sufficient to assess the 'well-foundedness' of the fear as this opinion would be the basis of any punishment the authorities might subject on him or her.

The seriousness of the penalties prescribed under Article 117 and, in particular, under Article 47 of the Criminal Code (DPRK), in combination with the re-education component of the punishment, suggest that the objective of the provisions is not to maintain effective border control, but rather, to punish 'disloyal' nationals who leave the country, thus indicating their rejection of its political system. This is, in essence, punishment based on a - real or imputed - political opinion. n73

While some defectors have successfully avoided imprisonment and even managed to cross the border several times

without interference during periods of low control, n74 it has been held that the significant risk of imprisonment in inhumane and degrading conditions and the general arbitrariness with which the sanctions are imposed, is sufficient to justify a well-founded fear of persecution. According to Amnesty International,

[d]eaths from malnutrition and infectious diseases are high - even for people who receive light sentences. Therefore, many North Koreans view forced repatriation from China as a death sentence regardless of whether they are classed as 'political offenders' or given a 'light' sentence. n75

Thus, the sanctions imposed under Articles 47 and 117 of the Criminal Code (DPRK) for illegal departure can amount to a 'well-founded fear of persecution' on the grounds of an imputed political opinion and therefore satisfy the criteria for refugee status set out under Article 1A(2) of the Refugee Convention.

6.3 Illegal departure as a basis for refugees sur place claims

The Refugee Convention requires that a refugee be 'outside the country of his nationality' in order to be eligible for refugee status. Article 1A(2) does not require that the refugee leave the country as a result of a well-founded fear of persecution. The Refugee Convention does not exclude an asylum seeker from eligibility for refugee status due to changed circumstances after having left his or her country of origin for some time. Under international law, a person who becomes a refugee only after he or she has left his or her country of origin is, nevertheless, a refugee, a so-called refugee sur place. n76

A person may also become a refugee sur place through his or her own actions. There is no provision or requirement under the Refugee Convention or the Refugee Protocol to suggest that he or she can only become a refugee through an involuntary action. n77 All that is required is that a refugee sur place demonstrate that having left his or her country of nationality, he or she is 'unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. n78

It is submitted that the sanctions imposed under Articles 117 and 47 can amount to a 'well-founded fear of persecution' and that the sanctions are imposed arbitrarily on persons irrespective of their motives for leaving the country. It is therefore arguable that North Koreans who may have initially left the country purely in search of food and not for fear of persecution, may still be eligible for international protection under the international instruments as refugees sur place. n79

6.4 Starvation as a ground of persecution

The fundamental right to life is enshrined in Article 6 of the ICCPR which states that 'every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The protection of such a right involves positive action on the part of a government against threats to its enjoyment, such as malnutrition or disease, and this right cannot be derogated from even in a time of State emergency. n80 Starvation is a threat to life and, as such, can amount to a violation of a fundamental human right. In relation to the DPRK, the UN Human Rights Committee noted:

Given the State party's obligation, under Article 6 of the Covenant, to protect the life of its citizens and to take measures to reduce infant mortality and increase life expectancy, the Committee remains seriously concerned about the lack of measures by the State party to deal with the food and nutrition situation in the Democratic People's Republic of Korea and the lack of measures to address, in cooperation with the international community, the causes and consequences of the drought and other natural disasters which seriously affected the country's population in the 1990's. n81

In order to establish whether starvation can amount to persecution, n82 it is necessary to analyse whether the effects of the famine are widespread and felt indiscriminately, or whether the famine targets a particular vulnerable group. Where there is a shortage of food and the effects of the famine or crisis are spread indiscriminately across the

entire population of the country, starvation is unlikely to sufficiently satisfy the persecution threshold under Article 1A(2) of the Refugee Convention. For starvation to amount to persecution, it must be shown that a particular group was more vulnerable to starvation due to one of the five Convention grounds. n83 In this context, UNHCR recognised that

[t]he distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g., withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country. n84

Some sources have claimed that the Government's prejudiced Public Distribution System (the PDS) n85 exacerbated the effects and widespread suffering of persons during the famine. The PDS has been criticised for its partiality in the distribution of food rations; giving priority during food crises to those it considers to be loyal to the regime, party leaders, workers in critical industries and soldiers, leaving many in the 'hostile' class n86 beyond the reach of the PDS. As a result, food shortages have a disproportionate effect on some parts of the population. n87

Much of the information available lacks depth and consistency to support an argument that during times of general food shortage, persons classified as belonging to the 'hostile' group are more vulnerable to starvation and death due to their perceived 'disloyalty' to the regime. Humanitarian organisations such as the World Food Programme and other NGOs simply lack sufficient access to the country in order to monitor the situation on the ground and to make any conclusions regarding the distribution of food. n88 For example, Amnesty International has reported that during food shortages, urban dwellers were more vulnerable to starvation - some spending up to 85 percent of their income on food to support the household - than persons living in rural areas. n89 This suggests that the discriminatory effects of the famine may not be limited to class distinction alone, but may be a combination of several factors, geographical location being one.

6.5 Other vulnerable groups

Membership of a particular group may deem a person more vulnerable to harsh treatment upon return to the DPRK and therefore make that person more likely to be in need of international protection.

6.5.1 Collective responsibility

Family ties remain strong in the DPRK; family background is a strong determinant of the level and quality of education a person is to receive, his or her occupation and who he or she is able to marry. Human Rights Watch reports that:

One of the most striking features of North Korea's philosophy of social control is collective responsibility. Persons who commit crimes may be punished, but so may their parents, siblings, and other relatives, regardless of their individual innocence or guilt. Likewise, persons may be blacklisted, not just for their own political opinions or actions, but for the imputed opinions or actions of relatives, even long-dead ancestors. n90

The political 'crimes' of one family member can result in the blacklisting or punishment of other family members. This is evident in the comment made by Human Rights Watch that many of the DPRK defectors they had interviewed

insisted on using pseudonyms and deleting material that could identify relatives left behind in DPRK. Several persons related incidents where they knew of specific individuals who had been sent to a political prison camp because of relatives who were known as defectors. n91

6.5.2 Religious groups

While the freedom of religious belief is guaranteed under Article 68 of the DPRK Constitution, in practice, this constitutional right is rarely enforced, if not actively violated. n92 This is illustrated in the punishments and sentences received by defectors who confess to having contact with Christian missionaries in the PRC. Sources bearing the accounts of testimonies of defectors seem to suggest that those who confess to having contact with Christian missionaries or nationals of the ROK in the PRC are more likely to be subjected to harsher treatment, torture, extended periods of imprisonment and, in some cases, execution. n93

6.6 Dual nationality

The Refugee Convention and the Refugee Protocol are intended to protect those persons who do not enjoy any national protection based on citizenship or any other privileged quasi-citizenship status. Therefore, where a person possesses dual nationality and where he or she enjoys the protection of at least one country of nationality, the person will be excluded from international protection. n94 Article 1E of the Refugee Convention states that, '[t]his Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country'.

Further clarification is given in the second paragraph of Article 1A(2) which states that:

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

North Korean defectors are entitled to ROK citizenship under a combination of provisions in the Constitution of the Republic of Korea (ROK Constitution), the Nationality Act (ROK) and the Protection of North Korean Residents and Support of their Settlement Act (the Settlement Act (ROK)). n95 Article 3 of the ROK Constitution states that, '[t]he territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent lands' (thereby, including the territory of the DPRK) and Article 2 states that '[n]ationality in the Republic of Korea is prescribed by law'. n96 Furthermore, the Nationality Act (ROK) defines a 'Korean national' as any person 'whose father or mother is a national of the Republic of Korea at the time of his or her birth'. n97 Hence, given that the territory of the DPRK is included in the definition of the ROK under the Constitution, the provisions effectively provide that any DPRK national, provided that his or her parent is a Korean national, is entitled to ROK citizenship.

There is some confusion about the practical implications of these provisions. n98 It appears that nationals of the DPRK are entitled to automatic ROK citizenship under the ROK Constitution; the decision to grant citizenship is not discretionary. The Settlement Act (ROK) is not intended to determine a person's eligibility for citizenship but, rather, merely governs the implementation of ROK citizenship. n99 Once a person has been identified as a North Korean national, he or she is automatically granted ROK citizenship. n100 Although Article 9 of the Settlement Act excludes certain persons from the protection provided under the Act, according to the ROK Ministry of Unification, 'in practice, the decision to grant citizenship [is] not discretionary and no genuine North Korean refugee ha[s] ever been refused South Korean citizenship'. n101

Nevertheless, while nationals of the DPRK are potential holders of dual citizenship, it must be taken into account that a national of the DPRK does not enjoy the rights associated with ROK citizenship so long as he or she remains in the territory of the DPRK or is otherwise denied effective diplomatic protection from South Korean authorities. The ROK citizenship is effectively 'dormant'. UNHCR states that:

In examining the case of an applicant with dual or multiple nationality, it is necessary, however, to distinguish between the possession of a nationality in the legal sense and the availability of protection by the country concerned. There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed ineffective as it does not entail the protection normally granted to nationals. In such

circumstances, the possession of the second nationality would not be inconsistent with refugee status. As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of a reply within reasonable time may be considered a refusal. n102

Furthermore, the limitation under Article 1A(2) of the Refugee Convention does not apply to DPRK defectors as they cannot avail themselves of the protection of the ROK while they remain within the DPRK. n103 Protection is also unavailable in China, where, after several incidents in which DPRK defectors have forced entry into foreign embassies and schools, the PRC Government has reacted by tightening security around foreign embassies and implemented more severe border control measures. n104

The limitation under Article 1E of the Refugee Convention also does not apply to DPRK defectors as they have not yet 'taken residence' within the ROK. Therefore, the possibility of obtaining ROK citizenship under the South Korean Constitution and the Nationality Act (ROK) should not preclude DPRK defectors from protection under international refugee law.

6.7 The principle of non-refoulement

A fundamental right enshrined in Article 33(1) of the Refugee Convention is the so-called principle of non-refoulement:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The same principle can be found in Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, n105 which states that '[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. n106 Similarly, in its General Comment devoted to the interpretation and application of Article 7 of the ICCPR, n107 the UN Human Rights Committee has interpreted the provision to incorporate the principle of non-refoulement where it stated that:

In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end. n108 The principle of non-refoulement is considered to be part of customary international law n109 and is also prohibited under various other international instruments including Article 45(4) of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, n110 Article 8(1) of the Declaration on the Protection of all Persons from Enforced Disappearance n111 and Principle 5 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. n112 Therefore, protection from refoulement is not limited to refugees and is binding on States irrespective of whether they are party to the Refugee Convention and Protocol. n113

The PRC has been consistently criticised that its actions in returning North Korean defectors to the DPRK are tantamount to refoulement. n114 The Special Rapporteur stated:

A key international principle in refugee protection is non-refoulement. Currently, there are lapses in compliance with this principle in some countries that are receiving those seeking asylum from the Democratic People's Republic of Korea, and the principle needs to be adhered to by all countries. n115

As a measure of State sovereignty, the PRC is entitled to protect its borders from illegal migrants. However, this right must also be balanced with the PRC's obligation under international law not to return refugees and persons who are likely to face torture upon return. Moreover, under the Refugee Convention and Protocol, n116 and reiterated under

its 1995 Agreement on the Upgrading of the UNHCR Mission in the People's Republic of China, n117 the PRC is under an obligation to cooperate with the Office of the UNHCR in the exercise of its functions and its mandate and, hence, to grant access to the UNHCR to North Korean asylum seekers in order to conduct refugee status determinations. n118

7. Diplomatic protection

The 1964 Convention on Diplomatic Relations n119 and the 1963 Convention on Consular Relations n120 provide for the absolute inviolability of a mission or consular premise by the host country. For example, Article 22(1) of the Convention on Diplomatic Relations states that '[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission'. Similarly, Article 31(1), (2) of the Convention on Consular Relations reads:

Consular premises shall be inviolable to the extent provided in this Article. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

While there is no specific provision guaranteeing the protection of persons who seek asylum within diplomatic compounds, the effect of these provisions is to provide de facto protection to any person receiving shelter within diplomatic compounds.

Starting in 2002, several groups of North Korean asylum seekers have forced entry into embassy and consular compounds and other foreign buildings, with the assistance of local NGOs and other humanitarian organisations, to request asylum. n121 The Chinese Government, in an attempt to avoid international criticism, has largely been cooperative in permitting DPRK defectors who successfully entered diplomatic and consular compounds to leave for a third country before proceeding to the ROK. n122 However, the PRC has reacted to every attempt to enter an embassy or consular compound 'by tightening security around diplomatic compounds, demanding that embassies turn over North Koreans, and tightening security measures at the border'. n123

In an instance on 8 May 2002, armed Chinese authorities entered the Japanese consulate located in Shenyang, forcibly removing five North Korean asylum seekers who had been sheltering within the compound. n124 While the PRC Government argued that authorities had received permission from the Japanese officials to enter the building, both Tokyo and Seoul accused the PRC Government of violating the Convention on Consular Relations. n125 The Chinese Government justified its actions by claiming that under Article 31(3), n126 as the receiving State, it had a responsibility to protect the compounds of the sending State during a climate of heightened terrorist attacks. This justification was given despite the fact that the Convention explicitly states that Article 31(3) is subject to the inviolability of a consular premises. n127 Also in response to the forced entry, the Chinese Government issued a diplomatic memorandum on 21 May 2002 demanding that foreign governments hand over any 'illegal intruders' found within their premises. n128

It is arguable that in circumstances in which an asylum seeker seeks protection within a diplomatic compound, the State in whose diplomatic compound the asylum seeker is seeking protection may have a responsibility not to return the asylum seeker to the host State where it is believed that the asylum seeker will be returned to his or her country of origin by the host State. Given reports of the forcible repatriation of North Koreans back to the DPRK, where they may face torture, imprisonment or even execution, handover of such persons to Chinese authorities may be regarded as refoulement.

8. Towards durable solutions

The situation of human rights in the DPRK and that of North Korean refugees is inseparable from the historical and

ideological ties with the wider region, the associated political sensitivities, and the current and ongoing nuclear weapons issue; these matters, however, are beyond the scope of this paper. Nevertheless, any discussion or search for durable solutions must be seen in the context of such concerns and related challenges. Furthermore, any durable solution must aim to bring about the necessary changes without causing any further suffering to the people of the DPRK.

8.1 Amnesty

Earlier discussion has shown that it would be desirable for the DPRK to remove the sanctions imposed under Article 117 of the Criminal Codeⁿ¹²⁹ and to provide an automatic amnesty for North Koreans currently residing in the PRC. A formal declaration of amnesty would reduce the incentive to force entry into foreign diplomatic compounds while also diffusing tension within the DPRK and preventing a sudden regime collapse and large-scale displacement. Insofar as possible, voluntary repatriation ought to be the preferred solution.ⁿ¹³⁰ Alternatively, where a formal declaration of amnesty cannot be achieved, the PRC ought to consider informally relaxing its policy on forced repatriations.

International organisations, including UNHCR, need to continue to persuade the PRC that further tightening of its borders with the DPRK will result in mounting tensions within North Korea that could lead to a premature collapse of the DPRK regime and massive displacement and refugee flows which would be detrimental to the entire region.ⁿ¹³¹ However, it has to be acknowledged that given the closed and generally uncooperative attitude of the DPRK, it would be extremely difficult, if not impossible, for UNHCR to effectively monitor and supervise any amnesty arrangement between the two countries.

8.2 Refugee and humanitarian status

It is clear that any argument on the part of UNHCR and the international community, if intended to be persuasive and acceptable to both the DPRK and the PRC, while remaining firm and addressing the human rights violations at stake, must not take the form of the usual refugee protection or anti-regime rhetoric. Such an approach has proven counterproductive.ⁿ¹³² It has caused the Government of the DPRK to be more determined to resist any suggestions for reform, convinced that the international community is hostile to its regime.ⁿ¹³³

Instead, it would be desirable to encourage the PRC to acknowledge its international obligations and to protect those fleeing from persecution from refoulement. The PRC's argument that it is bound by semi-secretive bilateral memoranda with Pyongyang makes a mockery of its signature under the Refugee Convention and Protocol. This practice raises greater concerns about situations in which a country willingly becomes a party to the Refugee Convention and Protocol but then flouts the resulting obligations. The question 'what to do' if a country, here the PRC, enters into agreements that conflict with, or otherwise compromise its obligations under, both existing and subsequent multinational conventions requires further research and discussion that are beyond the scope of this article.

More immediately, the PRC needs to be encouraged to grant temporary asylum or humanitarian status to North Koreans who are entitled to international protection until UNHCR can arrange for their resettlement in a third country.ⁿ¹³⁴ This strategy would avoid labelling North Korean asylum seekers formally as 'refugees', and may thus assist in maintaining any loyalty the PRC may feel towards the DPRK given its historical and ideological ties to the country. This would also address any reluctance the PRC may have towards UNHCR's involvement in refugee status determinations,ⁿ¹³⁵ while also protecting the basic human rights of North Korean asylum seekers and guarding against refoulement.ⁿ¹³⁶

8.3 Access to UNHCR

Similarly, any argument for greater access to North Korean asylum seekers by UNHCR must always stress the benefits available to the PRC. Unhindered access to UNHCR will reduce the incentive of North Koreans to force entry into foreign embassies and consular compounds and distil the tensions of dissidents within the DPRK.ⁿ¹³⁷ The international community must assure the PRC that free and unhindered access to UNHCR will not necessarily lead to a

mass exodus from North Korea and to the collapse of the DPRK regime; however, maintaining the current status quo may have these effects. As noted by Foster-Carter:

[T]he current situation on the Korean peninsula is both risky and unprecedentedly fluid. Anything could happen. With no appetite for war, but also fading prospects and inadequate political will to pursue a comprehensive package deal, present trends, if unchecked, point towards the DPRK's isolation and ultimate collapse. n138

8.4 Military intervention

The international community has a responsibility to intervene when a State is either unwilling or unable to protect its citizens from an 'avoidable catastrophe'. n139 However, any intervention, if not planned strategically, may prove counterproductive. In response to a perceived threat of any military or other intervention in the DPRK, the PRC may react by closing its borders, which would only be more disastrous to North Koreans than any of the current measures. n140 The International Commission on Intervention and State Sovereignty remarks:

All this presents the international community with acute dilemmas. If it stays disengaged, there is the risk of becoming complicit bystanders in massacre, ethnic cleansing, and even genocide. If the international community intervenes, it may or may not be able to mitigate such abuses. But even when it does, intervention sometimes means taking sides in intra-state conflicts. Once it does so, the international community may only be aiding in the further fragmentation of the state system. Interventions in the Balkans did manage to reduce the civilian death toll, but it has yet to produce a stable state order in the region. As both the Kosovo and Bosnian interventions show, even when the goal of international action is, as it should be, protecting ordinary human beings from gross and systematic abuse, it can be difficult to avoid doing rather more harm than good. n141

Maintaining 'a stable order after intervention for human protection purposes remains an equally great challenge'. n142 The sudden collapse of the DPRK would result in an exodus of thousands of North Koreans to neighbouring countries, such as the ROK, the PRC and Russia, and would potentially be catastrophic to the wider East Asian region. n143 Any solution to the challenge must aim at protecting existing refugees without contributing to further destabilisation in the region, greater displacement, suffering, and violation of human rights. Military intervention should therefore only be reverted to when every alternative has been exhausted.

8.5 Resettlement

8.5.1 United States

Section 302 of the US North Korean Human Rights Act, H.R. 4011 under Title III 'Protecting North Korean Refugees' explicitly states that North Korean asylum seekers are not to be disadvantaged or disqualified from eligibility due to any potential ROK citizenship they may be entitled to. n144 Moreover, the Section specifies that nationals of the DPRK are not to be treated as nationals of the ROK '[f]or the purposes of eligibility for refugee status [...] or for asylum'. n145 Therefore, irrespective of whether North Koreans are willing or able to eventually resettle in the ROK or obtain ROK citizenship, this does not pre-emptively exclude them from requesting asylum in the United States. n146 Moreover, considering that North Korean asylum seekers in the PRC have no access to the UNHCR, Section 303 of the Act designates North Korean refugees as a 'Priority 2' group, thus enabling them to make a direct application for refugee status under the US asylum system without the need for a UNHCR referral which would otherwise be required. n147

While the Act prima facie formally recognises North Korean asylum seekers as refugees, the practicalities of the Act remain uncertain. Many North Koreans are either unable or do not wish to make themselves available to the US asylum, resettlement or general immigration programmes. It has been found that many DPRK defectors have an intense hate towards the United States. Despite their flight they maintain strong patriotism for North Korea and perceive the United States as an enemy. n148 On the other hand, the strict investigations into the backgrounds of asylum applicants, that have been instituted in the United States in the aftermath of the September 11th events, have made it much more difficult for North Koreans, along with other nationals, to obtain asylum in the US. Some writers have expressed doubts

that North Korean asylum seekers will be able to obtain the security clearance necessary for immigration into the US.

n149 Furthermore, in practice, US consular officials have limited contact with North Korean asylum seekers. Such contact is usually limited to US embassies and consulates in China. To make its North Korean asylum seeker's policy work, the US would have to negotiate with the Government of the PRC to allow the US to conduct refugee interviews in the PRC or to permit the exit of asylum seekers to a third country. Such consent by the PRC Government is, however, highly unlikely.

8.5.2 The ROK

The ROK has been relatively receptive to DPRK defectors whilst remaining careful to maintain a 'low profile' for fear of jeopardising relations with the PRC, and for fear of losing the limited diplomatic ties with the DPRK. n150 Between 1994 and 2003, approximately 3,800 North Korean refugees had been resettled in the ROK. n151 In 2004, Amnesty International reported that over 5,000 North Koreans had been successful in reaching the ROK and had been granted South Korean citizenship. n152

Given the current political climate, historical sensitivities, and practical implications, it would seem that the ROK remains the most suitable country for the resettlement of North Korean refugees. n153 North Korean refugees not only 'share a language, ethnicity, and history (and in many cases family ties) with their countrymen in the South' but are also entitled to automatic citizenship under the ROK Constitution and provisions under the Settlement Act (ROK).

n154 Despite reports of the ROK's growing reluctance to accept North Korean defectors, the extent to which the ROK can change its policies in relation to North Korean defectors is debatable given the guarantee of citizenship under the ROK Constitution. n155

8.6 Forced entry into diplomatic compounds

High profile cases of North Korean asylum seekers breaking into diplomatic compounds have increasingly brought the plight of North Korean asylum seekers to the attention of the international community. In 2002, according to Human Rights Watch, 20 percent of those who successfully reached the ROK only made it to South Korea because they entered foreign embassies and consulates. n156 While this number pales in comparison to the thousands of asylum seekers hiding within Chinese borders, the PRC Government has reacted to the public humiliation by tightening security around diplomatic compounds and initiating border 'crackdowns', forcing hundreds of North Koreans to return to the DPRK.

n157 The presence of Chinese armed forces is increasingly apparent around diplomatic compounds. The Chinese Government argues that it is in the interests of the security of the diplomats. In practice, it has made it increasingly difficult for North Korean asylum seekers to gain access to foreign embassies for assistance and protection.

The effectiveness and motives of these high profile entries into foreign embassies and consular compounds - often facilitated by NGOs and humanitarian organisations - is debatable. On the one hand, it can be argued that such forced entries shed light on the tragic plight of North Korean defectors and enhances international awareness of the issue. On the other hand, the tightening of security measures around both embassy and consular compounds as well as border regions, has made life extremely hard for remaining North Koreans; placing them at greater risk of imprisonment, inhumane and degrading treatment, trafficking and sexual exploitation. Moreover, the Government of the PRC and other critics have argued that such NGOs, generally South Korean NGOs, are more preoccupied with achieving their own political ambitions than defending the genuine interests of North Korean defectors. n158 Therefore, it may be necessary to persuade NGOs to adopt a less dramatic but more 'professional, non-political and non-judgmental' strategy. n159

8.7 International burden-sharing

It is without doubt that international solidarity and responsibility-sharing has a significant role to play in the search for durable solutions. Whilst much criticism has been aimed at the PRC, the international community must also share the burden. n160 Food shortages continue in the DPRK. In early 2005, the UN World Food Programme, 'currently

feeding some 6.5m North Koreans - nearly a third of the population', announced that some 900,000 tons of cereals would have to be met through international aid donations in order to sustain the population until October 2005. n161 The international community ought to alleviate the situation by meeting such demands. This would indeed reduce the flow of North Koreans into the PRC. Moreover, while the international community has shown increasing concern for the plight of North Korean defectors, it must continue to assist the PRC as the first country of asylum in providing resettlement places for North Korean refugees. n162

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FOOTNOTES:

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n2 An earlier version of this paper was presented at the Monterey Institute of International Affairs (MIIS), California, USA on 27 Sept. 2005. The author wishes to thank Professor Tsuneo Akaha, MIIS, Monterey (CA), Ms Lori B Rubenstein, Santa Monica (CA), and Mr Jason Fraser (Brisbane) for their encouragement, support, and friendship at the time this manuscript was written. An earlier version of this manuscript was released by the Indian Society of International Law, New Delhi, in 2005.

n3 The term 'North Koreans' will be taken to mean a 'national of the Democratic People's Republic of Korea' (the DPRK); a 'North Korean defector' will be taken to mean a North Korean who has departed from the DPRK. The two terms are used interchangeably throughout this paper.

n4 Human Rights Watch notes that '[n]o human rights organisation has direct access to the country for research or investigation': Human Rights Watch, *Human Rights in North Korea (DPRK: The Democratic People's Republic of Korea)* (2004); David Hawk, *The Hidden Gulag Exposing North Korea's Prison Camps: Prisoners' Testimonies and Satellite Photographs*, US Committee for Human Rights in North Korea (2003) 14; moreover, NGOs also have very limited access to the PRC and humanitarian workers have been known to be arrested during crackdowns; it is 'estimated that only 20 per cent of North Koreans in China have contact with any foreign NGOs': James D Seymour, *China: Background Paper on the Situation of North Koreans in China* (2005), 19, Writenet Independent Analysis (2005) available at www.ilw.com/lawyers/articles/2005,0629-northkorean.pdf (21 July 2005).

n5 Human Rights Watch, *ibid.*; Amnesty International, *Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea* (2004), 2.

n6 Amnesty International, *Starved of Rights*, *ibid.*, 17-18; Aidan Foster-Carter, *DPR Korea: The North Korean Crisis: A Situation Update*, Writenet Independent Analysis Paper No. 16 (2003), 9.

n7 Lord Howell of Guildford, *Hansard Volume (House of Lords Debates)*, House of Lords vol. 660(70) (21 Apr. 2004), Column 311.

n8 Human Rights Watch, *The Invisible Exodus: North Koreans in the People's Republic of China* (2002) 20, available at www.hrw.org/reports/2002/northkorea/norkor1102.pdf (21 July 2005).

n9 Seymour, above n. 2, 19.

n10 Socialist Constitution of the Democratic People's Republic of Korea, adopted on 5 Sept. 1998. The Constitution was first adopted in 1948, completely revised on 27 Dec. 1972, and revised again in Apr. 1992 and Sept. 1998. Art. 67 of the 1998 Constitution reads: 'Citizens are guaranteed freedom of speech, of the press, of assembly, demonstration and association. The State shall guarantee conditions

for the free activity of democratic political parties and social organisations'.

n11 Amnesty International, *Starved of Rights*, above n. 3, 19-20; Tom Malinowski, *Advancing Human Rights in North Korea: Testimony by Tom Malinowski Before the US Senate Committee on Foreign Relations* (2003) available at http://hrw.org/english/docs/2004/03/02/usint7793_txt.htm (21 July 2005).

n12 Art. 68 DPRK Constitution, 'Citizens have freedom of religious beliefs. This right is granted by approving the construction of religious buildings and the holding of religious ceremonies. No one may use religion as a pretext for drawing in foreign forces or for harming the State and social order'.

n13 UN Commission on Human Rights, Resolution 2005/11 on the Situation of Human Rights in the Democratic People's Republic of Korea, 61st sess, 50th mtg, UN Doc E/CN.4/2005/L.10/Add.9 (2005), operative para. 1(c); adopted by a recorded vote of 13 to 9, with 14 abstentions; see also, UN Commission on Human Rights, Resolution 2004/13 on the Situation of Human Rights in the Democratic People's Republic of Korea, 60th sess, 50th mtg, UN Doc E/CN.4/2004/127 (2004), operative para. 1(c); adopted by a recorded vote of 29 votes to 8, with 16 abstentions.

n14 Art. 65 DPRK Constitution, 'Citizens enjoy equal rights in all spheres of State and public activities'.

n15 Amnesty International, *Starved of Rights*, above n. 3, 13.

n16 Malinowski, above n. 9.

n17 Amnesty International, *Starved of Rights*, above n. 3, 14.

n18 Hawk, above n. 2, 24; North Korean Human Rights Act, H.R. 4011 S 3(10) (2004) quotes the figure of 200,000; Human Rights Watch puts the figure at 200,000; Human Rights Watch, 'Cambodia: Protect North Korean Asylum Seekers' (Press Release, 24 Sept. 2004) available at <http://hrw.org/english/docs/2004/09/24/cambod9386.htm> (21 July 2005); see also, Human Rights Watch, *Human Rights in North Korea*, above n. 3; and Malinowski, above n. 9.

n19 Hawk, *ibid.*, 24; this practice is thought to have stemmed from a statement made by Kim Il Sung in 1972 that, 'Factionalists or enemies of class, whoever they are, their seed must be eliminated through three generations', 24; in the case that family members of a 'political prisoner' are not imprisoned, they are barred from higher education and professional occupations in the DPRK; Human Rights Watch, 'Cambodia: Protect North Korean Asylum Seekers', above n. 16; Malinowski, above n. 9.

n20 999 UNTS 171. The DPRK acceded to the Covenant on 14 Sept. 1981.

n21 993 UNTS. The DPRK acceded to the Convention on 14 Sept. 1981.

n22 1577 UNTS 3. The DPRK signed the Convention on 23 Aug. 1990 and ratified it on 21 Sept. 1990.

n23 UN General Assembly res 34/180, 34 UN GAOR Supp. (No. 46), 193, UN Doc A/34/46. The DPRK acceded to the Convention on 21 Feb. 2001 with this reservation: 'The Government of the Democratic People's Republic of Korea does not consider itself bound by the provisions of paragraph (f) of article 2, paragraph 2 of article 9 and paragraph 1 of article 29 of [the Convention]': Division for the Advancement of Women: Department of Economic and Social Affairs, *Convention on the Elimination of All Forms of Discrimination against Women* (2005) available at www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N26 (21 July 2005).

n24 Amnesty International, *Amnesty International Report 2004* (2004); Amnesty International, *Amnesty International Report 2003* (2003), Amnesty International, *Amnesty International Report 2002* (2002).

n25 Baroness Symons of Vernham Dean, *Hansard Volume* (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004),

Column 317; Amnesty International had access to the country in the middle of the 1990s while the DPRK Government granted permission to three members of the Committee on the Rights of the Child to enter and examine the situation in Apr. 2004: Amnesty International, Report 2004, above n. 22; an invitation to visit the country has also been extended to the Special Rapporteur on violence against women: Vítit Muntarbhorn, Question of the Violation of Human Rights and Fundamental Freedom in Any Part of the World: Situation of Human Rights in the Democratic People's Republic of Korea, UN Doc E/CN.4/2005/34 (2005), 5.

n26 Hawk, above n. 2, 17.

n27 Amnesty International, Starved of Rights, above n. 3, 15.

n28 Human Rights Watch, The Invisible Exodus, above n. 6, 21.

n29 Amnesty International, Starved of Rights, above n. 3, 6-11; for more history and general background, judicial system and legislative framework for the protection of human rights in the DPRK, see, Core Document Forming Part of the Reports of States Parties: Democratic People's Republic of Korea UN Doc HRI/CORE/1/Add.108/Rev.1 (2002).

n30 For more on the history of the food crisis in the 1990s, see generally, Amnesty International, Starved of Rights, above n. 3.

n31 Seymour, above n. 2, 7. However, it must be noted that such figures are abstract and cannot illustrate the full extent of the famine such as those persons dying from communicable diseases as a result of decreased immunity from malnutrition, those who did not perish though suffered acute malnutrition or were wasting and, in particular, the dramatic decrease in fertility rate as women were less able to reproduce due to severe malnourishment; the figure quoted in the North Korean Human Rights Act, H.R. 4011 S 3(13) (2004), is three and a half million since 1994 who 'have died from hunger or famine-related disease'; Human Rights Watch puts the figure at two million: Human Rights Watch, Human Rights in North Korea, above n. 3; Amnesty International quotes the range to be between 220,000 to 3.5 million: Amnesty International, Starved of Rights, above n. 3, 10.

n32 Amnesty International, Starved of Rights, above n. 3, 10.

n33 Lord Bishop of Edmundsbury and Ipswich, Hansard Volume (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 303; the migration of North Korean nationals across the border into China has become more organised over the years and generally consists of overland travel until travellers reach the Yalu or Tumen River and proceed crossing on foot: Seymour, above n. 2, 8.

n34 Seymour, above n. 2, 25; Lord Hylton, Hansard Volume (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 304; Hawk, above n. 2, 14.

n35 Seymour, above n. 2, 16.

n36 North Korean Human Rights Act, H.R. 4011 S 3(12) (2004); however, due to the limited accessibility of information in the DPRK and for the obvious reason that such persons are in hiding, it is extremely difficult to give a precise figure of DPRK nationals hiding in the PRC. Moreover, the figure fluctuates as some return to the DPRK either voluntarily or through forced repatriation by Chinese authorities or successfully resettle in third countries. According to Citizen's Alliance for North Korean Human Rights, there were 50,000 DPRK nationals hiding in the PRC at the end of 2001; this figure had increased to 150,000 by the end of 2003: Ann J Buwalda & Michelle Lombardo, 'Strategies for North Korean Refugees' (2005) 35 Citizen's Alliance for North Korean Human Rights: Life and Human Rights in North Korea 5, 5; the former High Commissioner for Refugees, Mr Ruud Lubbers stated in early 2003 that the number of DPRK nationals hiding in China was 100,000: Choi Wook-seok, 'UN Official Decries Starvation in North' (19 June 2003) The Chosun Ilbo, available at <http://english.chosun.com/w21data/html/news/200306/200306190029.html> (21 July 2005); most sources tend to agree that the figure of 300,000 is an exaggeration of the true situation, Refugees International put the real figure to be between 60,000 to 100,000: Joel R Charny, Protection Strategies for North Korean Refugees in China in Protecting North Korean Refugees in China - A Special Report, Refugees International (2004), 1.

n37 UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea, UN Doc CCPR/CO/72/PRC (2001).

n38 An official translation of the Criminal Code of the DPRK was unavailable; for the purposes of this paper, the unofficial translation provided by Human Rights Watch has been used: Translation quoted in Human Rights Watch, *The Invisible Exodus*, above n. 6, 20.

n39 *Ibid.*, 21.

n40 UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea, UN Doc CCPR/CO/72/PRK (2001), para. 19; International Covenant on Civil and Political Rights, 999 UNTS 171. Art. 1(1) ICCPR, states that: 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'.

n41 Mr Vitit Muntarbhorn, appointed under UN Commission on Human Rights, Resolution 2004/13 on the Situation of Human Rights in the Democratic People's Republic of Korea, 60th sess, 50th mtg, UN Doc E/CN.4/2004/127 (2004).

n42 See Art. 13 Universal Declaration of Human Rights 1948; Art. 12(2) ICCPR and many regional human rights instruments. See also Rainer Hofmann, *Die Ausreisefreiheit nach Völkerrecht und Staatlichem Recht* (1988), 309.

n43 Convention relating to the Status of Refugees, 545 UNTS 189. The PRC acceded to the Convention on 24 Sept. 1982.

n44 Protocol relating to the Status of Refugees, 606 UNTS 267. The PRC acceded to the Protocol on 24 Sept. 1982.

n45 Constitution of the People's Republic of China 1982, Art. 32(2) reads: 'The People's Republic of China may grant asylum to foreigners who request it for political reasons'; moreover, Art. 15 of the 1985 Law of the People's Republic of China on the Control of Foreigners Entering and Leaving the Country 1985 states that: 'Foreigners who seek asylum for political reasons shall be allowed to reside in China after approval by the competent authorities of the Chinese Government'.

n46 Lord Hylton, Hansard Volume (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 304; moreover, not only is the PRC returning North Koreans sheltering within its own borders, it is also preventing access of North Koreans to third countries. E.g., on 2 Apr. 2004, a North Korean defector was allegedly killed by Chinese border authorities who shot the man in the back while he attempted to cross the Chinese border into Mongolia; Hyde, North Korean Human Rights Act of 2004, House of Representatives Report 108-478, Session 2 (2004), 15; Lord Alton of Liverpool, Hansard Volume (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 295.

n47 UN Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao), UN Doc E/C.12/1/Add.107 (2005), Office of the High Commissioner for Human Rights (2005), 2-3.

n48 Cf Muntarbhorn, above n. 23, 14; Amnesty International, *Starved of Rights*, above n. 3, 30; Malinowski, above n. 9; UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea, UN Doc CCPR/CO/72/PRK (2001), para. 26.

n49 Amnesty International also reported that some fifty North Koreans were forcibly repatriated to the DPRK every second day from the border town of Longing in Jilin province while several hundred remain in detention waiting to be returned to the DPRK in other border cities in the province: Amnesty International, *Report 2002*, above n. 22.

n50 Hawk, above n. 2, 15; Amnesty International, *Starved of Rights*, above n. 3, 22, 31.

n51 Hawk, above n. 2, 15, 72; see also, Malinowski, above n. 9; Lee Keum-soon, 'Cross-Border Movement of North Korean Citizens' (2004) 16(1) *East Asian Review* 37 at 45-46; see also, Amnesty International, *Starved of Rights*, above n. 3, 28; Amnesty International acknowledges that while reports of infanticide has been received, it is unable to verify such information however does not doubt that pregnant women repatriated to the DPRK 'face very difficult times'.

n52 For recent reports, see, e.g., '5 N Korea defectors caught at expat housing compound in Tianjin' (1 Aug. 2005) *Asia Political News*; 'Apparent North Korean Defectors Enter South Korean School in China' (6 Apr. 2005) *Voice of America News*; 'Suspected N Koreans Seek Asylum at Japanese School in Beijing' (9 Mar. 2005) *JJI Press*.

n53 Human Rights Watch, 'China: Protect Rights of North Korean asylum seekers' (Press Release, 19 Nov. 2002) available at www.hrw.org/press/2002/11/nkreport.htm (21 July 2005); in its annual international report in 2002, Amnesty International reported that Chinese authorities had stepped up their home inspections and offered up to 2,000 Yuan (US \$240) to Chinese citizens who could disclose the whereabouts of North Korean refugees: Amnesty International, Report 2002, above n. 22; see also, Amnesty International, Report 2003, above n. 22.

n54 At the time of writing this paper, no available source had access to the text of this treaty; see, e.g., Seymour, above n. 2, 5, who calls it a 'still secret' treaty; see also, Human Rights Watch, *The Invisible Exodus*, above n. 6, 19-20. However, note that Mike Jendrezjczyk, '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 (21 July 2005), identifies the 'secret' treaty as being the 1986 Protocol.

n55 The PRC is of the position that its bilateral obligations to the DPRK in returning 'illegal immigrants' supersedes its obligations under the 1951 Convention, the 1967 Protocol and other international human rights instruments: Seymour, above n. 2, ii.

n56 1986 Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas, signed in Dandong in the People's Republic of China between the Democratic People's Republic of Korea Ministry of State Security and the People's Republic of China Ministry of Public Security on 12 Aug. 1986, Art. 4(2), available at www.bekkoame.ne.jp/ro/renk/Protocol.htm (21 July 2005).

n57 E.g., see, Government of the People's Republic of China, Replies by the Government of the People's Republic of China, UN Doc CESCR/NONE/2004/10 (2004) 30; Office of the UNHCHR (2004) www.ohchr.org/english/bodies/cescr/docs/HR.CESCR.NONE.2004.10.pdf (21 July 2005), where the Government of the PRC stated: 'The Chinese government has been firm in its position that DPRK nationals having entered China illegally are not refugees. In handling the issue of illegal Korean travelers, China has always adhered to international law, China's own laws and the principles of humanitarianism. Whether during their illegal stay after crossing into Chinese territory illegally, or during their detention after being caught by Chinese public security departments, they are amply provided with food, water, shelter and daily needs in the spirit of humanitarianism. There is no such thing as violation of their human rights to food'. See also, Human Rights Watch, 'North Korea: Allow Access for U.N. Rights Monitor: China Must Stop Sending Back North Koreans at Risk of Persecution' (Press Release, 15 Apr. 2005) available at hrw.org/english/docs/2005/04/15/nkorea10489.htm (21 July 2005).

n58 Human Rights Watch, 'China: Protect North Korean Refugees', above n. 51; similarly, a Chinese official stated, 'If we grant political asylum to one refugee today, there would be thousands or millions of North Koreans who might seize the opportunity and pour into China': K Platt, N. Korea Gets China's Cooperation on Refugee Returns, *Christian Science Monitor* (2000) available at csmonitor.com/cgi-bin/durableRedirect.pl?durable/2000/06/09/text/p7s1.html (21 July 2005).

n59 Art. 35 Refugee Convention and Art. 2 Refugee Protocol.

n60 Art. 1A(2) Refugee Convention as amended by the Refugee Protocol.

n61 Muntarbhorn, above n. 23, 12-13.

n62 Office of the High Commissioner for Refugees (OHCR), *A Guide to International Refugee Law* (2001) 41; for further differentiation, see, OHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* [hereinafter *Refugee Handbook*], UN Doc HCR/1P/4/Eng/REV.2 (1992), para. 62.

n63 Muntarbhorn, above n. 23, 14.

n64 Seymour, above n. 2, 12; Baroness Symons of Vernham Dean, *Hansard Volume* (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 316.

n65 Seymour, above n. 2, 9; Keum-soon, above n. 49, 42, 44; see also, Aidan Foster-Carter, DPR Korea: North Korean Refugees - An Escalating Crisis?, Writenet Independent Analysis Paper No 01/2001 (2001) 7; Amnesty International, Starved of Rights, above n. 3, 30.

n66 Charny, above n. 34, 1.

n67 Lord Alton of Liverpool Hansard Volume (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 295.

n68 Executive Director of the Asia Division of Human Watch, Mr Brad Adams, cited in Human Rights Watch, 'China: Protect North Korean Refugees', above n. 51.

n69 See Art. 1A(2) Refugee Convention.

n70 OHCR, Refugee Handbook, above n. 60, para. 56.

n71 Ibid., paras. 58, 61.

n72 Human Rights Watch, North Korea: Human Rights Concerns for the 61st Session of the U.N. Commission 2005) available at hrw.org/english/docs/2005/04/04/nkorea10410_txt.htm (21 July 2005); Human Rights Watch, 'North Korea: Allow Access for U.N. Rights Monitor', above n. 55; Human Rights Watch, Human Rights in North Korea, above n. 2; Human Rights Watch, 'China: Protect North Korean Refugees', above n. 51. This is evident by the imposition of the death penalty during food shortages when the motive for the illegal departure has been solely in search of food: Human Rights Watch, Human Rights in North Korea, above n. 2.

n73 OHCR, Refugee Handbook, above n. 60, para. 85.

n74 Available sources seem to suggest that, with the exception of crackdown periods where border security is tightened, both the PRC and the DPRK authorities seem to tolerate the 'back and forth movement' across the border where they believe that the reason for the movement to be purely in order to obtain food: Charny, above n. 34, 3.

n75 Amnesty International, Starved of Rights, above n. 3, 35; see also, Lord Bishop of Edmundsbury and Ipswich, Hansard Volume (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 303; Hawk, above n. 2, 25.

n76 OHCR, Refugee Handbook, above n. 60, para. 94.

n77 Ibid., para. 96.

n78 Art. 1A(2) Refugee Convention.

n79 Nevertheless, it must be acknowledged that the Special Rapporteur notes in his report that information received in late 2004 indicates that revision of the DPRK Criminal Code has led to a reduction in the penalties for leaving a country for non-political reasons to a pardon such as, leaving for greater employment opportunities in neighbouring countries (Muntarhorn, above n. 23, 38); in its Concluding Observations, the UN Human Rights Committee makes note of 'the reduction of the number of carrying the death penalty from 33 to 5': UN Human Rights Committee, Concluding Observations and Recommendations of the Human Rights Committee: Democratic People's Republic of Korea UN Doc CCPR/CO/72/PRC (2001), para. 4. At the time this paper was written, confirmation and verification of the alleged reforms to the Criminal Code which reduced penalties for those leaving the country illegally purely for economic reasons were not available to the general public. Provided this evidence is credible and verifiable, it may be necessary to re-examine the case for refugees sur place. However, as is commonly the problem in the DPRK, the challenge is implementation rather than legislation.

n80 Art. 4 ICCPR.

n81 UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Democratic People's Republic of

Korea UN Doc CCPR/CO/72/PRK (2001), para. 12.

n82 There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success. From Art. 33 of the Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution': OHCR, Refugee Handbook, above n. 60, para. 51.

n83 Ibid., para. 64.

n84 Ibid., para. 63.

n85 See further, Amnesty International, Starved of Rights, above n. 3, 8-9.

n86 Those who are descendants of persons who cooperated with the Japanese during their occupation in Korea or who are related to persons who have escaped to the ROK are considered to be in the 'hostile' class. This group of persons will be the first to be excluded from the public food distribution system when there is a general food shortage and hence, are more vulnerable to starvation: Human Rights Watch, The Invisible Exodus, above n. 6, 19-20; see also, Amnesty International, Starved of Rights, above n. 3, 14; Malinowski, above n. 9.

n87 Seymour, above n. 2, 8; Amnesty International, Starved of Rights, above n. 3, 8; prior to the famine, some 60 percent of the total population of the DPRK relied on the PDS for a daily allowance of 700 grams per day, however, during the famine, the PDS was only able to support some six percent of the population: Amnesty International, Starved of Rights, above n. 3, 13-16.

n88 Amnesty International, Starved of Rights, above n. 3, 18-19.

n89 Ibid., 13.

n90 Human Rights Watch, The Invisible Exodus, above n. 6, 19.

n91 Ibid., 20.

n92 Malinowski, above n. 9.

n93 Charny, above n. 34, 1, 4; see also, Benjamin Neaderland, 'Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis' (2004) 40 Stanford Journal of International Law 143, 145; Human Rights Watch, The Invisible Exodus, above n. 6, 2; Hyde, above n. 44, 15; Hawk, above n. 2, 12; Human Rights Watch, 'China: Protect North Korean Refugees', above n. 51; Malinowski, above n. 9.

n94 OHCR, Refugee Handbook, above n. 60, para. 106.

n95 Protection of North Korean Residents and Support of their Settlement Act (ROK), Law Number 6474, partial revision, 24 May 2001.

n96 Constitution of the Republic of Korea, adopted on 17 July 1948.

n97 Art. 2 Nationality Act (ROK).

n98 While DPRK defectors are supposedly granted automatic ROK citizenship, Art. 3 of the Settlement Act (ROK) states that the Act shall only 'apply to residents escaping from North Korea who have expressed their intention to be protected by the Republic of Korea', the practical implications of which, remain unclear.

n99 RRT Reference: N03/47934 (19 Feb. 2004) see, summary section; see Art. 7 Settlement Act (ROK) as cited in Human Rights Watch, *The Invisible Exodus*, above n. 6, 30-31.

n100 RRT Reference: N03/47934 (19 Feb. 2004) see, summary section.

n101 *Ibid.*, para. 3, section entitled, 'End of Summary'; see also, Human Rights Watch, *The Invisible Exodus*, above n. 6, 31.

n102 OHCR, *Refugee Handbook*, above n. 60, para. 107.

n103 UNHCR provides that '[b]eing unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, e.g., be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective [...]': OHCR, *Refugee Handbook*, above n. 60, para. 98; the heavily guarded consulate of the ROK - or any other foreign consulate or embassy for that matter - by Chinese authorities heavily restricts access to North Korean asylum seekers and effectively denies them of any diplomatic protection; such actions on the part of the Government of the PRC may well amount to a 'grave disturbance'.

n104 Human Rights Watch, 'China: Protect North Korean Refugees', above n. 51; in its annual international report in 2002, see also, Amnesty International, *Report 2003*, above n. 22.

n105 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

n106 *Ibid.*, Art. 3(1).

n107 Art. 7 ICCPR states that, '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

n108 UN Human Rights Committee, General Comment No 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7) (1992) para. 9, [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument) (21 July 2005); however, unlike the non-refoulement provision in the 1951 Convention, the prohibition of the refoulement under the Convention against Torture is absolute; it is not dependent on satisfying the persecution threshold. Moreover, it does not exclude persons who have committed a 'serious crime' or are seen as a threat to the community: OHCR, *Refugee Protection*, above n. 60, 18; indeed, in its General Comment, the UN Human Rights Committee stated that: 'The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority': General Comment No. 20, para. 3.

n109 Human Rights Watch, 'North Korea: Allow Access for U.N. Rights Monitor', above n. 55; OHCR, *Refugee Protection*, above n. 60, 126.

n110 75 UNTS 287.

n111 UN General Assembly, Declaration on the Protection of all Persons from Enforced Disappearance, UN Doc A/RES/47/133 (18 Dec. 1992) Art. 8 para. 1 states that: 'No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance'.

n112 Office of the High Commissioner of Human Rights (OHCHR), Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, available at www.unhcr.ch/html/menu3/b/54.htm (21 July 2005). Principle 5 states that: 'No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country'.

n113 OHCHR, Refugee Protection, above n. 60, 14; note that the principle is also enshrined in other regional instruments in varying forms which will not be discussed in detail in this paper; for more information, see, Art. 3(3) of the 1966 Principles Concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee (AALCC), Art. 3 of the 1967 Declaration on Territorial Asylum, Art. 2(3) of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, Art. 22(8) of the 1969 American Convention on Human Rights and para. 5 of Section III of the 1984 Cartagena Declaration; for a detailed discussion on the scope and application of the principle of non-refoulement, see, Elihu Lauterpacht & Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in Erika Feller et al (eds.), UNHCR, Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (2003), 87-177.

n114 See, Muntarhorn, above n. 23, 11, 14.

n115 Ibid., 14.

n116 Art. 35(1) Refugee Convention. Art. 2(1) Refugee Protocol places an obligation on State parties to cooperate with the UNHCR in the 'exercise of its functions' and, in particular, its supervisory role.

n117 On 1 Dec. 1995, the PRC and UNHCR entered into a bilateral agreement, upgrading its presence in the PRC from a mission to a branch office; the primary purpose of the office is to provide international protection to refugees in the PRC (Arts. II and III(1)); Art. III(5) provides that the staff of UNHCR are 'may at all times have unimpeded access to refugees and to the sites of UNHCR projects in order to monitor all phases of their implementation'; moreover, in the case of an unresolved dispute, Art. XVI, the UNHCR may invoke a binding arbitration: Agreement on the Upgrading of the UNHCR Mission in the People's Republic of China (1995) No 32371 between the United Nations High Commissioner for Refugees and China.

n118 Lord Hylton, Hansard Volume (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 304.

n119 500 UNTS 95. The PRC ratified the Convention on 25 Nov. 1975.

n120 596 UNTS 261. The PRC ratified the Convention on 2 July 1979.

n121 In 2003, Amnesty International reported that some 100 North Korean refugees left the PRC for the ROK and other third countries after forcing entry into diplomatic compounds and foreign schools: Amnesty International, Report 2003, above n. 22.

n122 E.g., five North Korean defectors sheltering within the Japanese consulate in the province of Shenyang, after negotiations between the Japanese and Chinese Governments, were allowed to leave the PRC for the ROK via the Philippines on 23 May 2002: Human Rights Watch, *The Invisible Exodus*, above n. 6, 35.

n123 Human Rights Watch, 'China: Protect North Korean Refugees', above n. 51. In its annual international report in 2002, Amnesty International reported that Chinese authorities had stepped up their home inspections and offered up to 2,000 Yuan (US \$240) to Chinese citizens who could disclose the whereabouts of North Korean refugees: Amnesty International, Report 2002, above n. 22; see also Amnesty International, Report 2003, above n. 22.

n124 For more discussion on forced entries, see, Seymour, above n. 2, 22.

n125 Human Rights Watch, *The Invisible Exodus*, above n. 6, 28.

n126 Art. 31(3) Convention on Consular Relations reads: 'Subject to the provisions of paragraph 2 of this Article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity'.

n127 Neaderland, above n. 91, 151.

n128 Human Rights Watch, *The Invisible Exodus*, above n. 6.

n129 Seymour, above n. 2, 32; Human Rights Watch, *The Invisible Exodus*, above n. 6, 5.

n130 UNHCR, Executive Committee, *Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees* (No 101 (LV) - 2004), pre-ambular para. 5; see also, UNHCR, Executive Committee, *General Conclusion on International Protection* (No 95 (LIV) - 2003).

n131 Lord Alton of Liverpool, *Hansard Volume* (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 294 and Lord Wallace of Saltaire, Column 306.

n132 'N Korea Demands US Policy Shift', BBC News (24 Apr. 2003) available at <http://news.bbc.co.uk/2/hi/asia-pacific/2971677.stm> (21 July 2005); 'N Korea Calls Rumsfeld 'Psychopath'', BBC News (27 Sept. 2003) available at <http://news.bbc.co.uk/2/hi/asia-pacific/3145966.stm> (21 July 2005); 'North Korea Rebuffs Bush Speeches', BBC News (5 Feb. 2005) available at <http://news.bbc.co.uk/2/hi/asia-pacific/4238385.stm> (21 July 2005); 'North Korea Calls for US Apology', BBC News (2 Mar. 2005) available at <http://news.bbc.co.uk/2/hi/asia-pacific/4312223.stm> (21 July 2005).

n133 Lord Wallace of Saltaire, *Hansard Volume* (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 306, Lord Howell of Guildford, *Hansard Volume* (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 309, Lord Alton of Liverpool, *Hansard Volume* (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 294.

n134 Human Rights Watch, *The Invisible Exodus*, above n. 6, 6; Malinowski, above n. 9.

n135 The PRC to a large extent, shares the same communist ideology as the DPRK and were allies during the Korean War; for more information on the history between the PRC and the DPRK, see, Seymour, above n. 2, 1-4.

n136 Muntarhorn, above n. 23, 20; UNHCR, Executive Committee, *General Conclusion on International Protection* (No. 99 (LV)-2004), see also, Amnesty International, *Starved of Rights*, above n. 3.

n137 Neaderland, above n. 91, 159.

n138 Foster-Carter, above n. 4, 1.

n139 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) viii.

n140 Seymour, above n. 2, 16.

n141 International Commission on Intervention and State Sovereignty, above n. 137, 5.

n142 *Ibid.*

n143 Lord Alton of Liverpool, *Hansard Volume* (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 294, 35; Lord Wallace of Saltaire, *Hansard Volume* (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 306.

n144 North Korean Human Rights Act, H.R. 4011 S 302(a) (2004).

n145 *Ibid.*, S 302(b) (2004).

n146 Hyde, above n. 44, 22.

n147 Ibid. This status is also granted to 'Cubans persecuted by the Cuban government; Jews and Evangelicals in the Former Soviet Union; former reeducation camp detainees in Vietnam; certain Iranian religious minorities; and others', 22.

n148 Ibid., 16-17; Lord Alton of Liverpool, Hansard Volume (House of Lords Debates), House of Lords vol. 660(70) (21 Apr. 2004), Column 294.-

n149 James Brooke, 'North Korea in Russia Makes Bid for Asylum (16 Nov. 2004) The New York Times.

n150 More commonly termed the 'Sunshine Policy': Foster-Carter, above n. 4, 3; Human Rights Watch, *The Invisible Exodus*, above n. 6, 8.

n151 North Korean Human Rights Act, H.R. 4011 S 3(14) (2004).

n152 Amnesty International, Report 2004, above n. 22; in 2003 alone, the ROK accepted some 1,040 DPRK defectors: Seymour, above n. 2, ii.

n153 Nevertheless, resettling into the ROK is often accompanied with a difficult transition - North Korean defectors resettled in the South often report of discrimination against their lack of education, occupational skills and accent: Human Rights Watch, *The Invisible Exodus*, above n. 6, 31-32; e.g., in a survey published by a South Korean newspaper in Sept. 2004, of the 100 North Koreans who were now living in the South and who were interviewed, 69 indicated that they would prefer to resettle in a Western country: Seymour, above n. 2, 26.

n154 Hyde, above n. 44, 16.

n155 For more discussion on the policies adopted by the Government of the ROK towards North Korean defectors, see, Seymour, above n. 2, 25-26; Human Rights Watch, *The Invisible Exodus*, above n. 6, 30-32.

n156 Human Rights Watch, *The Invisible Exodus*, above n. 6, 28.

n157 Ibid., 2, 3; Human Rights Watch, 'China: Protect North Korean Refugees', above n. 51.

n158 Seymour, above n. 2, 19.

n159 Ibid.

n160 Muntarhorn, above n. 23, 14.

n161 'S Korea helps N Korea food crisis', BBC News (12 July 2005) available at <http://news.bbc.co.uk/2/hi/asia-pacific/4674045.stm> (21 July 2005).

n162 Muntarhorn, above n. 23, 14; Seymour, above n. 2, 29.

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