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# THE STATELESSNESS OF THE CHILDREN OF NORTH KOREAN WOMEN DEFECTORS IN CHINA

by *Chae Mims*\*

## I. INTRODUCTION

Of the ten million estimated stateless people in the world, one-third are children.<sup>1</sup> An estimated 30,000 are children born to North Korean women defectors.<sup>2</sup> Stateless persons lack a formal identity, without which they lack access to the right to education, employment, housing, medical care, political engagement, marriage, and more.<sup>3</sup> This Article does not discuss the implications of these considerable rights violated as a result of statelessness. Instead, it is limited to the North Korean women defectors' children's right to nationality and China's refoulement policy that hinders the children from enjoying this right.

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<sup>1</sup> U.N. High Comm'r for Refugees, *Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness*, at 1 (2014).

<sup>2</sup> U.N. Hum. Rts. Council, *Report on the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, ¶ 472, U.N. Doc. A/HRC/25/CRP.1 (Feb. 17, 2014) [hereinafter COI Detailed Report].

<sup>3</sup> Sylvia Kim & Yong Joon Park, *Invisible Children: The Stateless Children of North Korean Refugees*, at 6 (2015).

North Koreans began defecting to China in the 1990s due to a famine, also known as The Arduous March.<sup>4</sup> Among North Koreans surveyed in China, twenty-three percent of men and thirty-seven percent of women had family members starve to death.<sup>5</sup> By the early 2000s, North Koreans began fleeing for reasons other than food, such as fear of political persecution and lack of economic opportunities.<sup>6</sup>

North Koreans defect primarily along the China-North Korea border through the Tumen River.<sup>7</sup> Due to the shortage of women in rural northeastern China, human traffickers target North Korean girls and sell them into prostitution or forced marriages with Chinese nationals.<sup>8</sup> Most trafficked North Korean refugee women remain in hiding due to fear of forced refoulement to North Korea where they will likely face torture.<sup>9</sup> In North Korean Criminal Law, Article Sixty-Two states, “[c]itizens that commit treason against the fatherland, including those who flee to other countries . . . shall be subject to five years or more of correctional labor . . . and in serious cases, to unlimited-term correctional labor punishment or the death penalty.” The North Korean women’s fear of refoulement also keep them from reporting their children at birth, causing their children to grow up in China as stateless persons.<sup>10</sup>

Existing international laws provide several key rights to North Korean women defectors and their children born in China. The Universal Declaration of Human Rights (UDHR) is the first UN instrument to address statelessness.<sup>11</sup> The Convention on the Rights of the Child (CRC) condemns forced separation of families, and the 1954 Refugees Convention and the Convention against Torture (CAT) prohibit forcible repatriation where freedom or physical safety is at risk. Further, the CRC and the International

<sup>4</sup> MELANIE KIRKPATRICK, *ESCAPE FROM NORTH KOREA: THE UNTOLD STORY OF ASIA’S UNDERGROUND RAILROAD* 28 (2014) (noting that “the failure of collectivist agricultural policies, bad weather, and the collapse of the Soviet Union—North Korea’s patron state—combined to create a famine”).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Kim & Park, *supra* note 3, at 6.

<sup>9</sup> *Id.* at 438.

<sup>10</sup> COI Detailed Report, *supra* note 2, at ¶ 491.

<sup>11</sup> Kim & Park, *supra* note 3, at 9.

Covenant on Civil and Political Rights (ICCPR) specifically discuss rights to a nationality. Chinese national law grants birth citizenship and is applicable to North Korean defectors' children, but China's strict refoulement agreement with North Korea discourages women refugees from registering their children at birth, frustrating the children's enjoyment of their Chinese birth citizenship rights. Considering China has a national security interest in upholding its refoulement policy, the international community should leverage China's desire for international prestige to encourage its cessation of refoulement of North Korean defectors.

## II. RELEVANT INTERNATIONAL HUMAN RIGHTS LAW

Major international human rights instruments contain a right to nationality and a non-discrimination clause to ensure equal protection of these rights. The UDHR declares in Article Fifteen that "everyone has a right to nationality" and that no one should be "arbitrarily deprived of his nationality."<sup>12</sup> Two international treaties, the CRC in Article 7(1) and the ICCPR in Article 24(3), not only reinforce the right to nationality but also explicitly extend the right to all children.<sup>13</sup> The policy of non-discrimination in the CRC and the ICCPR also protects North Korean refugees' children's right to nationality because both conventions specifically prohibit discrimination based on national or social origin, birth or other status.<sup>14</sup> The CRC's non-discrimination clause contains an element essential to combating discrimination toward North Korean refugees' stateless children by prohibiting discrimination based on the child's parents.<sup>15</sup> The ICCPR more broadly but emphatically declares protection of the right to nationality by prohibiting discrimination based on "distinction of any kind."<sup>16</sup>

<sup>12</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 19, 1948) [hereinafter UDHR].

<sup>13</sup> International Covenant on Civil and Political Rights art. 24, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>14</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; ICCPR, *supra* note 13, at Art. 2(1).

<sup>15</sup> CRC, *supra* note 14, at art. 2(1).

<sup>16</sup> ICCPR, *supra* note 13, at art. 2(1).

Stateless children's right to nationality in China cannot be discussed in isolation from North Korean women refugees' right not to be repatriated. North Korean women fear compromising their defector status by claiming their children's right to nationality. Protection from refoulement is crucial and essentially the sole hindrance to North Korean-Chinese stateless children acquiring their right to nationality.<sup>17</sup> International human rights conventions condemn refoulement. First, Article 9(1) of the CRC protects children and parents from forced separation. Second, Article 33 of the 1954 Refugee Convention strongly protects North Korean defectors from refoulement by explicitly prohibiting refoulement of a refugee "where his life or freedom would be threatened."<sup>18</sup> Third, Article 3(1) of the CAT reinforces prohibition of refoulement where substantial grounds exist for danger of being subjected to torture.<sup>19</sup> Yet, China continues to not comply with its obligations to the international community.

Pursuant to various sources of international human rights law, States Parties have an affirmative duty to ensure enjoyment of the following rights: stateless children's right to nationality, children's right against discrimination for being born of a North Korean defector mother, and the stateless children's mothers' right for protection against refoulement to North Korea. Article 29(2) of the ICCPR requires each Member State to "[undertake] . . . necessary steps . . . to give effect to the rights" in the Covenant.<sup>20</sup> Similarly, Article 7(2) of the CRC requires States Parties to "ensure the implementation" of the right to acquire a nationality.<sup>21</sup> The CRC's implementation provision is distinct from the ICCPR, however, because it requires compliance in accordance with States Parties' obligations not only under the CRC but

<sup>17</sup> COI Detailed Report, *supra* note 2 at ¶¶ 472–73.

<sup>18</sup> U.S. Department of State, *The Status of North Korean Asylum Seekers and the USG Policy Towards Them*, (2005).

<sup>19</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT] (defining torture as, "[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed").

<sup>20</sup> ICCPR, *supra* note 13, at art. 29(2).

<sup>21</sup> CRC, *supra* note 14, at art. 7(2).

also “under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”<sup>22</sup> The 1954 Convention also aggressively mandates the implementation of the right to nationality because under Article 32, States Parties “shall in particular make every effort to expedite naturalization proceedings” and to even reduce the costs of such proceedings “as far as possible.”<sup>23</sup>

### III. NATIONAL LAW AND PRACTICE

Chinese law extends the right to nationality to North Korean-Chinese children. According to Article Four of China’s Nationality Law, “any [child] born in China [where]... one of whose parents is a Chinese national shall have Chinese nationality.”<sup>24</sup> Additionally, Article Six provides “person[s] born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality.”

China’s refoulement agreement with North Korea, however, frustrates North Korean-Chinese children’s freedom to exercise their right to nationality. Stability in the Korean peninsula is a primary interest of China.<sup>25</sup> Some would say China fears North Korea’s regime collapse over North Korea’s nuclearization.<sup>26</sup> In light of such national security interest, China “rigorously” pursues the refoulement policy.<sup>27</sup> The refoulement policy stems from the China-North Korea Protocol, which disallows North Korean defectors from crossing the North Korea-Chinese border and forcibly repatriates them.<sup>28</sup> China’s Administration Law on Exit and Entry provides that “Chinese citizens should report instances of foreigners

<sup>22</sup> *Id.*

<sup>23</sup> Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

<sup>24</sup> 中華人民共和國國籍法 (Nationality Law of the People’s Republic of China), <http://www.china-embassy.org/eng/ywzn/lsw/vpna/faq/t710012.htm> (promulgated on Sept. 10, 1980, effective Sept. 10, 1980).

<sup>25</sup> Eleanor Albert, *The China-North Korea Relationship*, COUNCIL ON FOREIGN RELS., June 25, 2019, at A1.

<sup>26</sup> *Id.*

<sup>27</sup> COI Detailed Report, *supra* note 2, at ¶ 435.

<sup>28</sup> See generally Roberta Cohen, *China’s Repatriation of North Korean Refugees*, BROOKINGS INST., March 5, 2012, at A1 (reporting the testimony submitted to the Congressional-Executive Committee on China).

illegally entering, residing or working in China.”<sup>29</sup> Therefore, Chinese law pressures its citizens to expose North Korean defectors and punishes those who harbor defectors.<sup>30</sup>

Absent China’s refoulement policy, North Korean-Chinese children would obtain nationality through birth registration. China’s birth registration involves a *hukou*, a passport-like document including biographical data, current address, date and place of birth, and other identifying information.<sup>31</sup> China does not legally recognize marriages between North Korean women and Chinese men,<sup>32</sup> and North Korean-Chinese children may only obtain a *hukou* “by losing their mothers” via refoulement.<sup>33</sup> According to one Chinese father,

If you want to obtain a *hukou* for a half-Chinese, half-North Korean child, you must obtain a police document verifying the mother’s arrest or another form that you fill out explaining that the mother ran away. You also need signatures of three witnesses who would testify that she was repatriated or ran away, and submit them to the police. But that’s not all. You have to [bribe] relevant officials.<sup>34</sup>

Therefore, a Chinese father cannot obtain a *hukou* for his half-North Korean child absent a bribery of a substantial amount of money that most of them do not have.<sup>35</sup> On the other hand, children born of two Chinese nationals can obtain a *hukou* by paying “next to nothing.”<sup>36</sup>

<sup>29</sup> [Exit and Entry Administration Law of the People’s Republic of China] (promulgated by the Standing Comm. of the Nat’l People’s Cong., Jun. 30, 2012, effective Jul. 1, 2013), [cs.mfa.gov.cn/wgrlh/lhqz/lhqzjjs/t1120988.shtml](http://cs.mfa.gov.cn/wgrlh/lhqz/lhqzjjs/t1120988.shtml)

<sup>30</sup> COI Detailed Report, *supra* note 2, at ¶ 436.

<sup>31</sup> See *Denied Status, Denied Education*, HUM. RTS. WATCH, 11 (2008), <https://www.hrw.org/sites/default/files/reports/northkorea0408web.pdf>

<sup>32</sup> See *id.* at 2.

<sup>33</sup> See *id.* at 10.

<sup>34</sup> *Id.* at 10-11.

<sup>35</sup> See COI Detailed Report, *supra* note 2, at ¶ 458.

<sup>36</sup> *Denied Status, Denied Education*, *supra* note 31, at 8.

China has ratified the CRC, the 1954 Refugee Convention, and the CAT.<sup>37</sup> Though China has not ratified the ICCPR, as a signatory, it still has the obligation to act in good faith and not to undermine the purpose of the ICCPR.<sup>38</sup> In addition, China's Nationality Law complies with the principle against statelessness in the CRC, the ICCPR, and the 1954 Refugee Convention. Nonetheless, China's refoulement policy promulgated by the China-North Korea Protocol and its Administrative Law toward North Korean defectors directly violates the 1954 Refugee Convention and the CAT. China's refoulement policy also undermines the ICCPR's purpose of upholding basic human rights, which include children's right to nationality.

#### IV. IMPLICATIONS

"Stateless persons are excluded from every facet of society and are often among the most vulnerable and marginalized in society."<sup>39</sup> Defectors' children cannot enroll in school despite China's Compulsory Education law because they have no access to a *hukou*.<sup>40</sup> Many defectors' children who do obtain a *hukou* and nationality do so because of their mother's refoulement. To illustrate the toll this policy can take on a child, a six-year-old girl who lives with her Chinese father and grandparents and has obtained a *hukou* "said . . . that her mother had gone to the police station and never returned." This girl's North Korean mother was arrested and repatriated in 2005.<sup>41</sup>

Not only does repatriation leave children of North Korean defector women vulnerable in society due to their statelessness, but the women themselves face serious consequences if they are repatriated. Of North Korea's nineteen prison camps ("*kyohwaso*"), most

<sup>37</sup> See *Multilateral Treaties Deposited with the Secretary General*, UNITED NATIONS, <https://treaties.un.org/pages/historicalinfo.aspx#China>.

<sup>38</sup> See *UN Treaty Bodies and China*, HUM. RTS. IN CHINA (2013), <http://www.hrichina.org/en/un-treaty-bodies-and-china>.

<sup>39</sup> See Kim & Park, *supra* note 3, at 6; Ruma Mandal & Amanda Gray, *Out of the Shadows: The Treatment of Statelessness Under International Law*, CHATHAM HOUSE (Oct. 2014), 1, [https://www.chathamhouse.org/sites/default/files/field/field\\_document/20141029StatelessnessMandalGray.pdf](https://www.chathamhouse.org/sites/default/files/field/field_document/20141029StatelessnessMandalGray.pdf).

<sup>40</sup> See *Denied Status, Denied Education*, *supra* note 31, at 17.

<sup>41</sup> See *id.* at 11.

of the repatriated defectors are detained in *Jeongeori Kyohwaso* and *Gaechon Kyohwaso*.<sup>42</sup> A witness detained at *Gaechon Kyohwaso* from 2013 to 2014 stated prisoners "often" died due to weak health.<sup>43</sup> A witness who was detained from 2014 to 2015 stated prisoners worked 14 hours a day, and those who could not meet the daily work quota were severely beaten and not allowed to sleep.<sup>44</sup> Another witness detained in 2016 testified that the guards routinely trampled prisoners with shoes and hit inmates with hands or fists, and denied inmates access to meals or kept them awake as punishment.<sup>45</sup> Witnesses also testified of women who are repatriated while pregnant with the baby of Chinese men are forced to undergo abortion.<sup>46</sup> Female defectors have testified that the severity of punishment on forcibly repatriated women has increased under Kim Jong Un's regime.<sup>47</sup>

#### V. STEPS FORWARD

The UN and its agencies are already urging China to stop repatriating North Korean defectors pursuant to the 1954 Convention and the CAT, but China has not been responsive.<sup>48</sup> China's support for North Korea may be rooted in China's interest in having a stable Korean peninsula on its northern border and to have a buffer from the democratic South Korea.<sup>49</sup> To counterbalance China's significant national security

<sup>42</sup> Kyung-ok Do et al., *White Paper on Human Rights in North Korea 2020: Korean Institute for National Unification* 99.

<sup>43</sup> *Id.* at 110.

<sup>44</sup> *Id.* at 125.

<sup>45</sup> *Id.* at 108.

<sup>46</sup> *Id.* at 421.

<sup>47</sup> *Id.* at 420.

<sup>48</sup> See *Convention Relating to the Status of Refugees*, opened for signature July 28, 1951, 189 U.N.T.S. 137, 176; Roberta Cohen, *China's Forced Repatriation of North Korean Refugees Incurs United Nations Censure*, BROOKINGS INST., 1 (Jul. 2014), <http://www.brookings.edu/~media/research/files/opinions/2014/07/north-korea-human-rights-cohen/north-korea-un-cohen.pdf>; Lee Yeon Cheol, *UN Urges China to Stop Repatriation of North Korean Defectors*, VOA NEWS (Dec. 15, 2015, 3:01 PM), <http://www.voanews.com/a/united-nations-china-repatriation-north-korea-defectors/3104259.html>; Kenneth Roth, *Red Handed: China is also Complicit in North Korea's Crimes Against Humanity*, HUM. RTS. WATCH, (Feb. 19, 2014, 12:01 AM), <https://www.hrw.org/news/2014/02/19/red-handed-china-also-complicit-north-koreas-crimes-against-humanity>.

<sup>49</sup> See Albert, *supra* note 25.

interest in North Korea, what if the international community provides China with an incentive beyond formal censure to cease forcible refoulement of North Korean defectors?

Sophie Richardson, the China Director at Human Rights Watch, suggests “dial[ing] down the pomp” as a way to deal with China’s human rights abuses.<sup>50</sup> Cementing status as a world power has always been important to China,<sup>51</sup> and various political and apolitical entities in the international community have continued to grant China the “pomp” it desires. Despite China’s continued enforcement of its refoulement policy, the UN awarded China a seat in the United Nations Human Rights Commission in 2013 and re-elected China in 2016 and 2020.<sup>52</sup> In addition, the International Olympic Committee elected Beijing as the host city for the 2022 Winter Olympics,<sup>53</sup> making China the first nation to host both the Summer and the Winter Olympics.<sup>54</sup> The privileges the international community grants to China fortifies its status in the world. In doing so, the international community sends an inconsistent

<sup>50</sup> Sophie Richardson, *How to Deal with China’s Human Rights Abuses*, HUM. RTS. WATCH (Sep. 1, 2016, 4:54 PM), <https://www.hrw.org/news/2016/09/01/how-deal-chinas-human-rights-abuses>.

<sup>51</sup> *Id.*

<sup>52</sup> See Jonathan Kaiman, *China Granted Seat on UN Human Rights Council*, GUARDIAN (Nov. 13, 2013, 10:49 AM), <https://www.theguardian.com/world/2013/nov/13/china-granted-seat-un-human-rights-council>; *Current Membership of the Human Rights Council*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group2016.aspx> (last visited Aug. 31, 2019); *Russia Loses UN Human Rights Council Place, Saudi Arabia ReElected*, RT (October 28, 2016, 4:52 PM), <https://www.rt.com/news/364584-russia-saudi-unhrc-election/> [Hereinafter *Russia Loses*]; Eleanor Albert, *China Appointed to Influential UN Human Rights Council Panel*, THE DIPLOMAT (Apr. 8, 2020), <https://thediplomat.com/2020/04/china-appointed-to-influential-un-human-rights-council-panel/>.

<sup>53</sup> See Kriston Capps, *Why Beijing is a Terrible Choice for the 2022 Olympic Games*, CITYLAB (August 3, 2015), <http://www.citylab.com/work/2015/08/why-beijing-is-a-terrible-choice-for-the-2022-olympic-games/400358/>.

<sup>54</sup> See Stephen Wilson, *Beijing, China to be First City to Host Both Winter and Summer Olympics*, L.A. DAILY NEWS (Jul. 31, 2015, 10:10 AM), <http://www.dailynews.com/events/20150731/beijing-china-to-be-first-city-to-host-both-winter-and-summer-olympics>.

message to China and the rest of the world regarding the seriousness of international human rights law and human rights abuses.

To help leverage China’s desire for international acknowledgement, the UN Security Council could consider curtailing certain Council member privileges to China until it ratifies the ICCPR because China is the only permanent member who has not ratified the ICCPR.<sup>55</sup> Second, the Chinese government has announced its intent to become a “world soccer superpower” by 2050.<sup>56</sup> In this case, FIFA could consider rejecting China’s 2030 World Cup bid unless China ceases its refoulement of North Korean defectors.

In the interim, China should consider allowing birth registration through one parent’s documentation in accordance with its Nationality Law. Further, the UN and its agencies should continue to urge China to cease refoulement.

## VI. CONCLUSION

Approximately 30,000 children of North Korean women are stateless in China.<sup>57</sup> By violating defectors’ rights against refoulement, tens of thousands of children are denied their right to nationality, causing them to live vulnerable, stateless lives. China is a member of the CRC, 1954 Refugee Convention, and the CAT. These three international bodies of law and the ICCPR, to which China is a signatory, together obligate China not to repatriate North Korean defectors and extend nationality to their children. China complies in letter through its nationality law but negates the practicability of the law in the defectors’ children’s lives through its refoulement policy. Therefore, international human rights law alone is proving to be insufficient to protect China’s

<sup>55</sup> See *China: Ratify Key International Human Rights Treaty* (October 8, 2013, 3:59 PM), <https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty>.

<sup>56</sup> See Charlie Campbell, *China Wants to Become a ‘Soccer Superpower’ by 2050*, TIME (Apr. 12, 2016, 4:19 AM), <https://time.com/4290251/china-soccer-superpower-2050-football-fifa-world-cup/>.

<sup>57</sup> See Rachel Judah, *On Kim Jong-un’s Birthday, Remember the 30,000 Stateless Children He Has Deprived of Recognition*, THE INDEPENDENT (Jan., 7 2018, 3:08 PM), <https://www.independent.co.uk/voices/kim-jong-un-birthday-north-korea-china-children-refugees-a8146466.html>.

30,000 stateless children. China will not cease refoulement of North Korean defectors to appease North Korea. Moving forward, the international community must present China with an incentive beyond compliance with international law to counter-balance its national security interest. As Human Rights Watch's China Director, Sophie Richardson, suggested, the international community must look to an entry point beyond reprimand from the UN and its agencies to get a response from China. The wellbeing of tens of thousands of stateless children and their mothers answers the question whether such a method is worth pursuing.