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China's Violation of Refugee Rights: Repatriation of North Korean Refugees

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*by Ellery Saluck**

I. Introduction

The concept of the North Korean defector[1] is so pervasive that it tends to eclipse the legal reality: she is also a refugee. While the urgent economic prerogative for defecting has waned since the widespread North Korean famine of the 1990s, North Koreans continue to escape for various reasons, such as seeking a better standard of living, enjoying freedom of movement, and pursuing freedom of political and religious affiliation. The Democratic People's Republic of Korea (DPRK) legislates serious, and even fatal, retribution for the crime of defecting. Yet, Chinese authorities refuse to acknowledge the *refugee sur place*[2] status of the thousands of North Korean escapees that reach its borders. In turn, the Chinese government continues to deport refugees back to North Korea, where they are likely to face human rights abuses. In forcibly repatriating North Korean refugees, China has violated the non-refoulement principles in the 1951 UN Refugee Convention and Protocol and the UN Convention against Torture, treaties to which China is a party.[3]

II. Background

North Korean law criminalizes attempted defection and leaving the country without official permission.[4] Under Article 62 of the 2004 North Korean Criminal Code, those who illegally crossed the border due to economic reasons receive a maximum of two years of forced labor,[5] while five years of forced labor is the minimum penalty for those who defect for political reasons.[6] Political and religious defectors routinely face additional punishments including prison terms, torture, and sometimes execution.[7] The DPRK employs methods of torture — such as starvation and beatings — that routinely kill prisoners.[8] In many cases, repatriated individuals, especially women, have also been subject to sexual violence and invasive bodily searches.[9]

Despite the grave consequences that follow when a North Korean escapee returns to her homeland, China has been forcibly repatriating North Korean refugees for decades and defends this policy by claiming North Korean defectors are mere economic migrants.[10] On May 12, 2023, the

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1 Rep. of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, Hum. Rts. Council, at 108, U.N. Doc. A/HRC/25/CRP.1 (2014) (defining North Korean defectors as those who fled the Democratic People's Republic of Korea) [hereinafter Commission of Inquiry].

2 Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, 1979, ¶¶ 94-96 (explaining that a person need not have left that country illegally nor on account of a well-founded fear of persecution to be a refugee; rather, a person can become a *refugee sur place* at a later date when her actions or that country's circumstances render her at risk of a well-founded fear of persecution.).

3 Convention Relating to the Status of Refugees, art. 33, 189 U.N.T.S. 137 (1954). Notably, the 1967 Protocol allows for the universal application of the Convention by removing the temporal and geographical restrictions; *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

4 Commission of Inquiry, *supra* note 1, at 107.

5 *See* David Hawk, The Hidden Gulag: The Lives and Voices of "Those Who Are Sent to the Mountains," Rep. by the Committee for Hum. Rts. in North Korea (2ed. 2012), at 118-22 (showcasing how North Korean institutions of detention and forced labor primarily for those who have been refouled from China, include *ku-ryu-jang* police interrogation and detention facilities, *jip-kyul-so* prisons, and *ro-dong-dan-ryeon-dae* "labor training centers." Torture and beatings are routine in *ku-ryu-jang* facilities along the North Korea-China border. Forced abortions and infanticide occur at *jip-kyul-so* facilities.).

6 Art. 62 Hyeongbeob 2015 [Criminal Law of the Democratic People's Republic of Korea (2015)] translated in Law and North Korea by Daye Gang, https://www.lawandnorthkorea.com/.

7 Bureau of Dem., Hum. Rts, & Labor, *Korea, Democratic People's Republic of**, U.S. Dep't of State (Mar. 6, 2007). https://2009-2017.state.gov/j/drl/rls/hrrpt/2006/78777.htm.

8 Commission of Inquiry, *supra* note 1, at 336.

9 *Id.* at 117.

10 Stephy Kwan, *More Than an Ignorant Bystander: Chinese Accountability and the Repatriation of North Korean Defectors*, 26 Int'l J. Korean Stud. 95, 99 (2017) [hereinafter Chinese

Chinese delegation made the following statement on UN Web TV in response to concerns raised about its government's forcible repatriation of North Korean trafficking victims: "They came to China and most of them were for economic reasons. So we believe that this does not pertain to a TIP [trafficking in persons] issue."[11] Contrary to this belief, in 2012, the Korean Bar Association found that political defections were more common than economic defections.[12]

China also cites its preexisting treaty obligations as grounds for blocking pathways to asylum for North Korean escapees.[13] In 1964, both nations signed a bilateral agreement ("Mutual Cooperation Protocol") stipulating that "Illegal border crossers will be returned to the other side with information on their identity and specific situation."[14] Given that China regards North Korean refugees as economic migrants who have illegally crossed the border, the government fails to provide North Korean asylum seekers with a legal process to retain residency, which renders them at great risk of forcible deportation if discovered. In turn, the estimated 10,000 defectors in China live clandestinely without legal protections or status.[15]

As a result, North Korean refugees in China live in constant fear of repatriation.[16] When the DPRK lifted its pandemic travel restrictions in August 2023, recorded instances of North Korean repatriations from China resumed.[17] Human Rights Watch found that, in addition to the 50 North Koreans China deported in July 2021, Chinese authorities deported 80 North Koreans on August 29, 2023, and 40 more on September 18, 2023.[18] Most recently, in October 2023, Chinese authorities forcibly deported more than 500 North Korean refugees, most of whom were women.[19]

In recent decades, women have comprised the vast majority of DPRK escapees, representing 74 percent of documented forced repatriation cases since 2003.[20] In China, it is common that women and girls are trafficked into marriage or prostitution under threat of repatriation if they do not comply.[21] The Korea Future Initiative estimated that 60 percent of all female North Korean defectors in China were trafficked.[22] Even if a North Korean refugee woman marries a Chinese man, she and their children are unable to acquire Chinese citizenship, effectively rendering them stateless.[23] Furthermore, repatriated North Korean women who are found to be pregnant by Chinese men are routinely subjected to forced abortions because the DPRK disdains "impure" Chinese blood.[24] A 2014 UN Human Rights Council report detailing DPRK human rights abuses also delineate these practices of forced abortions and infanticide as racial and gender-based persecution.[25]

Since 2004, UNHCR has considered North Korean defectors in China "persons of concern," entitled to humanitarian protection.[26] With this special

Accountability].

11 UN Web TV, 1977th Meeting, 85th Session, Committee on the Elimination of Discrimination against Women (CEDAW): Consideration of China (12 May 2023).

12 Commission of Inquiry, *supra* note 1, at 110.

13 Chinese Accountability, *supra* note 10, at 99.

14 *Protocol Between the PRC Ministry of Public Security and the DPRK Social Safety Ministry for the Mutual Cooperation in Safeguarding National Security and Social Order in the Border Areas*, Wilson Ctr. Digit. Archives, art. 4 (Jun. 9, 1964).

15 Database Center for North Korean Human Rights, *Joint Submission: Universal Periodic Review: China,* 45th Session, 2 (2023), https://www.fidh.org/IMG/pdf/20230718_china_upr_dprk_js_en.pdf [hereinafter UPR: China].

16 *China's Repatriation of North Korean Refugees: Hearing Before the Cong.-Exec. Comm'n on China*, 112th Cong. 2 (2012) (congressional hearing on the repatriation of North Korean refugees) [hereinafter Congressional Hearing on Repatriation].

17 Lina Yoon, *China Forcibly Returns More than 500 to North Korea*, Human Rights Watch (Oct. 12. 2023) https://www.hrw.org/news/2023/10/12/china-forcibly-returns-more-500-north-korea.

18 *Id.*

19 *Id.*

20 UPR: China, *supra* note 15, at 3.

21 Commission of Inquiry *supra* note 1, at 135.

22 Yoon Hee-soon, *Sex Slaves: The Prostitution, Cybersex & Forced Marriage of North Korean Women & Girls in China*, Korea Future Initiative, (May 20, 2019) https://prostitutionresearch.com/wp-content/uploads/2019/05/Trafficking-North-Korean-women-to-China2019.pdf

23 Commission of Inquiry, *supra* note 1, at 135.

24 *Id.* at 139. Article 1 of the Convention Against Torture defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. *See* A/HRC/22/53 (2013), para. 48; A/HRC/7/3, para. 69 for reports by Special Rapporteurs on Torture and other Cruel, Inhuman and Degrading Treatment regarding forced abortion as an act of torture. *See also* Human Rights Committee, General Comment No. 28, CCPR/C/21/Rev.1/Add.10, para. 11.

25 *Id.*

26 Congressional Hearing on Repatriation, *supra* note 16.

distinction, UNHCR "proposed to China a special humanitarian status for North Koreans, which would enable them to obtain temporary documentation, access to services, and protection from forced return." China has rejected this proposed temporary protected status."[27] Additionally, while visiting China in 2006, High Commissioner for Refugees Antonio Guterres identified North Korean defectors as *refugees sur place*, and declared that their forcible repatriation violates the Refugee Convention.[28]

III. Legal Instruments and Arguments:

A Violation of Domestic Law

The Constitution of the People's Republic of China, adopted in 1982, provides that "The People's Republic of China may grant asylum to foreigners who request it on political grounds."[29] Furthermore, the Exit and Entry Administration Law, enacted in 2012, provides that asylum seekers in China will receive identity certificates, permitting them to them to stay within the country while awaiting final status determination.[30] Otherwise, there are no references to asylum or refugees in domestic Chinese law.[31] Accordingly, China possesses no domestic law that delineates a mechanism for refugee status determination.[32]

China has repeatedly rebuked United Nations High Commissioner for Refugees (UNHCR) entreaties for access to North Korea defectors living along China's borders.[33] North Korean refugees in China primarily reside near the border, where an estimated 2,000 North Korean asylum seekers are currently detained.[34] Despite China's self-imposed legal obligation to provide all foreigners with a pathway to apply for refugee status, China does not extend this right to North Koreans.[35] In contrast, the government permits asylum seekers from other countries to receive a fair statute determination from UNHCR.[36] Thus, North Korean defectors in China are uniquely unable to access the screening process by which their claims for refugee status can be evaluated.[37]

Lastly, the Chinese government refuses to provide citizenship to the 20,000 to 30,000 children born to Chinese fathers and North Korean mothers, and in turn, denies them public services such as education.[38] This practice violates both the PRC Nationality Law, which states that children of at least one Chinese parent shall have Chinese nationality,[39] and the Universal Declaration of Human Rights, which stipulates the right to nationality.[40] Additionally, denying these children access to public services violates the UN Convention on the Rights of the Child, which states that all children must be provided with access to education "without discrimination on the basis of nationality."[41]

A Violation of the Non-refoulement Principle & International Law

Even if all North Korean defectors flee for economic reasons as Beijing claims, China's actions would still violate the non-refoulement principle enshrined in Article 33 of the 1951 UN Convention and Protocol Relating to the Status of Refugees ("Refugee Convention") and Article 3 of the 1984 UN

27 *Id.*

28 Statement to the media by Mr. António Guterres, U.N. High Comm'r for Refugees, on the conclusion of his Mission to the People's Republic of China, Beijing (Mar. 23 2006) https://www.unhcr.org/publications/statement-media-mr-antonio-guterres-united-nations-high-commissioner-refugees.

29 Constitution of the People's Republic of China Dec. 4, 1982, art. 32.

30 Exit and Entry Administration Law, Jun. 30, 2012, art. 46 (China).

31 Lili Song, *China and the International Refugee Protection Regime: Past, Present, and Potentials*, 37 Refugee Surv. Q. 139–161 (2018).

32 *UNCHR Representation in China*, UNCHR, https://www.unhcr.org/hk/en/about-us/china#:~:text=China%20ratified%20the%201951%20Convention,UNHCR%20and%20approving%20its%20budget (last visited Oct. 22, 2023).

33 *North Korean Refugees and the Imminent Danger of Forced Repatriation from China: Hearing Before the Cong.-Exec. Comm'n on China*, 118th Cong. (2023).

34 *Id*.

35 *Lives for Sale: Personal Accounts of Women Fleeing North Korea to China*, Comm. for Hum. Rts. in N. Korea, at 59 (2009).

36 *Id.*

37 Roberta Cohen, *Legal Grounds for Protection of North Korean Refugees*, Brookings Inst. (Sept. 13, 2010), https://www.brookings.edu/articles/legal-grounds-for-protection-of-north-korean-refugees/#_ftnref10.

38 Cong.-Exec. Commission on China, North Korean Refugees in China, Ann. Rep. at 6 (2021).

39 *Zhonghua Renmin Gongheguo Guoji Fa* [PRC Nationality Law], art. 4 (1980) ("Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.'').

40 G.A. Res 217A (III), UN Doc A/810 (1948) 71, art. 15.

41 Convention on the Rights of the Child, arts. 2, 7, 28(1)(a), 1577 U.N.T.S. 3 (1990). Under the Convention, China must register children born within the country immediately after birth and also provide all children with access to education without discrimination on the basis of nationality.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). The non-refoulement principle prohibits governments from deporting individuals when there are reasonable grounds to believe they would be subject to human rights violations (such as persecution or torture) upon their return.[42] Article 33 of the Refugee Convention states: "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."[43] Article 3 of the CAT prohibits refouling those who would be in dangerous of being tortured.[44] Despite substantial evidence that North Korean deportees face serious risks to their life and freedoms, including torture, upon their return to the DPRK, China continues its practice of forcible repatriation.

Not all North Korean escapees meet the traditional definition of refugees as enshrined in international law. Yet, the international community and principles of international law consider them to fall within a special category of refugee, equally deserving of the protections that accompany the status. The 1951 Refugee Convention defines a refugee as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[45]

The definition of a *refugee sur place* is "a person who was not a refugee when he left his country, but who becomes a refugee at a later date..."[46] Furthermore, "A person becomes a refugee 'sur place' due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees."[47] Despite the international understanding that North Korean escapees are refugees, Beijing continues to regard them as unlawful economic migrants.[48] As such, China denies them the ability to seek asylum or resettlement. Yet, under the Refugee Convention and CAT, there is an obligation not to expel these individuals because there are substantial grounds to believe they would be in danger if repatriated under the UN Refugee Convention

IV. Recommendations & Conclusion

Despite China's obligations as a party to the Refugee Protocol and the CAT, the government continually classifies North Korean asylum seekers as mere economic migrants and deports them back to the DPRK. There, they face substantial risk of human rights violations, including torture and forced labor. Additionally, DPRK authorities perform forced abortions upon women returnees who become pregnant by Chinese men during their time in China.[49]

China must immediately stop forcibly repatriating North Koreans. The Government of China should create UN-supported legal pathways for North Koreans to apply for refugee status, or at least grant them safe passage to other countries. Accordingly, Chinese authorities must treat North Korean asylum seekers as refugees sur place and uphold the international conventions attached to their refugee status. China's government should also incorporate the non-refoulement principle into domestic legislation and recognize as Chinese citizens North Korean women who marry and have children with Chinese citizens, as suggested by the U.S. North Korean Human Rights Act.[50]

42 *The Principle of Non-refoulement Under International Human Rights Law*, UN Hum. Rts. Off. of the High Comm'r, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf.

43 Convention Relating to the Status of Refugees, art. 33, Jul. 28, 1951, 189 U.N.T.S. 137. Notably, the 1967 Protocol allows for the universal application of the Convention by removing the temporal and geographical restrictions.

44 G.A. Res. 39/46, at art. 33 (Dec. 10, 1984).

45 Convention Relating to the Status of Refugees, *supra* note 43, at art. 33.

46 Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, 1979, ¶ 94.

47 *Id.* at ¶ 95.

48 Hiroyuki Tanaka, *North Korea: Understanding Migration to and from a Closed Country*, Migration Pol'y Inst. (Jan. 7, 2008), https://www.migrationpolicy.org/article/north-korea-understanding-migration-and-closed-country#:~:text=On%20the%20basis%20of%20Article,residents%2C%22%20which%20primarily%20consists%20of.

49 Commission of Inquiry, *supra* note 1, at 122.

50 North Korean Human Rights Reauthorization Act, Pub. L. No. 115-198, §3(3)(D)-(E), 132 Stat. 1519 (2017).