THE INTERACTION AND CO-ACTION OF REFUGEE LAW AND HUMAN RIGHTS LAW: THE PROTECTION OF NORTH KOREAN ESCAPEES UNDER INTERNATIONAL LAW

Jung-hyun Cho

Thesis Submitted for the Degree of Ph.D.

School of Law
University of Edinburgh

2008

THE UNIVERSITY OF EDINBURGH

ABSTRACT OF THESIS

Regulation 3.1.14 of the Postgraduate Assessment Regulations for Research Degrees refers
These regulations are available via:- http://www.aaps.ed.ac.uk/regulations/exam.htm

Name of Candidate: Jung-hyun Cho

Address: 108-601 Myunsudae Hyundai Apt., Heuksuk2-dong, Dongjak-gu Seoul, Republic of Korea (Postal Code: 156-791)

Degree: Ph.D.

Title of Thesis: The Interaction and Co-action of Refugee Law and Human Rights Law: The Protection of North Korean Escapees under International Law

No. of words in the main text of Thesis: 83,000

Hundreds of thousands of North Koreans have escaped from their home country since the mid-1990s. The main reason for their flight is severe famine in recent years, mixed with chronic human rights abuses, in North Korea. Although it is a Party to the 1951 Refugee Convention, China, the main host country receiving the escapees, has constantly denied their refugee status without any proper procedures and instead sent all of the North Korean Escapees (NKEs) back to the high probability of persecution such as torture and even execution.

The application of international refugee law to the NKE case has been tried, mainly focusing on the refugee status of NKEs together with the principle of non-refoulement. *However, their status as Convention or political refugee is seriously challenged by the main host country, and this requires us to consider - while developing stronger arguments under refugee law,* e.g. *'Republikflucht' - additional forms of protection that may be available under other areas of international law. Given that human rights law can apply to any persons irrespective of their legal status such as refugees or illegal immigrants, it seems to be a promising alternative to refugee law. In this context, the contents of human rights treaties to which China is a Party needs to be carefully examined: among others the 1984 Convention against Torture. This thesis breaks new ground in offering a systematic examination of the rights of asylum-seekers not only under refugee law but also under human rights law and other areas of international law. No major study of the legal rights of NKEs has been undertaken before. And in addition the thesis offers insights, of broader application, into the rights of asylum-seekers more generally and especially those vulnerable asylum-seekers who arrive in States that fail to recognise their refugee status.*

After the introductory chapter, Part One deals with refugee law issues such as political refugees and NKEs (Ch. II), humanitarian refugees and NKEs (Ch. III) and protection measures under refugee law (Ch. IV). Part Two discusses human rights applicable to NKEs based on international human rights law (Ch. V) and the protection mechanisms available to NKEs under this area of law (Ch. VI). Taking into account the positive 'interaction' between international refugee law and human rights law, the 'co-action' of both laws should be pursued and supported for the protection of the desperate NKEs.

DECLARATION

I, the undersigned, declare that this thesis has been composed by me and is a record of my work. No part of it has been submitted for another degree at this or any other university.

ACKNOWLEDGEMENTS

First of all, I thank God who has guided my whole life including my study in Britain and made me focus upon His purposes for my life.

I am indebted to the numerous people who have supported and encouraged me, both professionally and personally, throughout my Ph.D. study. In particular, I express my deepest gratitude to Professor Stephen Tierney, my supervisor, for his warm and steadfast support and guidance. Without his patient understanding and support, my work could never have been completed. I would like to thank also other faculty members at the University of Edinburgh School of Law: among others, Dr. Stephen Neff, my second supervisor, for his insightful comments on my draft works, and Professor Alan Boyle, the Director of the Scottish Centre for International Law and the chair of my viva, for his valuable support throughout my study. I would also like to extend my sincere appreciation to Professor Bill Gilmore, my internal examiner, and Professor Rebecca M.M. Wallace, my external examiner, for their invaluable feedback and comments on this doctoral thesis. Many thanks are due to other Ph.D. students at Edinburgh Law School for their friendship and support.

My special thanks should go to many academics and diplomats in Seoul and elsewhere. My supervisor at Korea University, Professor Ki-Gab Park, has continuously encouraged me to keep going towards the end of my study. Judge Choon-Ho Park of the International Tribunal for the Law of the Sea has done so similarly, from Seoul, Hamburg and Edinburgh. Many other scholars also supported me academically and personally, including, but never exhaustive, Professors Nohyoung Park, Seok Hyun Kim, Jaehyong Lee, Pyoung-Keun Kang, Sihyun Cho and Keun-Gwan Lee. I sincerely thank all of them for their warm support and advice. My special thanks also go to my former colleagues at Korea University and the Korean Foreign Ministry for their continuing encouragement: Professor Kyung Soo Jung, Dr. Sun-pyo Kim, Mr. Jongin Bae, Professor Hyunho Kwon, Mr. Hee-deok Choi, Mr. Ho-kwon Ryu, Dr. Eunsuk Hong and Dr. Sung Soo Hong.

I extend my gratitude to Dr. Na-kyoung Kim for her sincere help regarding obtaining and analysing German case law. My gratitude is also due to the UK Home Office for providing useful statistical data on its asylum decisions, and to the UN Cartographic Section for the permission to use its map although I am responsible for the content of the modified map.

I am very grateful for the generous funding I received in order to conduct my

doctoral research. Thank you to the UK Foreign and Commonwealth Office for a British Chevening Scholarship and to the University of Edinburgh for a travel grant.

I express my further appreciation to Patricia Dunbar and Helen Parker for their careful reading and suggestions on the text of my earlier drafts in spite of their unfamiliarity with legal jargon as non-lawyers.

No word of gratitude can be enough for the boundless love, endless prayers and full support of my parents and parents-in-law. My humble but very special thanks go to each of them, and also to other family members. I express my heartfelt appreciation to the Reverend Kisung Kang and other members of the Edinburgh Somang Evangelical Church for their family-like fellowship and spiritual support.

Finally, I deeply appreciate three gifts God gave me during my Ph.D. study in Edinburgh. Dayeon, thank you very much for your constant love and support. Suah and Ian, thanks a lot for your presence itself.

Notwithstanding the various kinds of support stated above, the responsibility for any views and errors in this thesis remains solely my own.

CONTENTS

List of Abbreviations *xi*
List of Tables *xiv*
Map of North Korea *xv*

Chapter I. Introduction: North Korean Escapees and International Law 1
1. Introduction 1
2. North Korean Escapees (NKEs) 1
2.1 Factual Background 3
2.2 The Causes of the Flight 5
2.2.1 Food Crisis 5
2.2.2 Human Rights Abuses 7
2.3 The Human Rights Situation of NKEs 8
2.3.1 Threat of Forced Repatriation 8
2.3.2 Other Human Rights Conditions 10
3. International Refugee Law and International Human Rights Law 11
3.1 International Refugee Law: Suitable for the Protection of NKEs? 12
3.2 International Human Rights Law: Complement or Alternative? 18
4. Aim and Scope of the Study 21

Part One: International Refugee Law

Chapter II. Political Refugees and NKEs 27
1. Introduction 27
2. 'Political Refugees' or 'Convention Refugees' 28
3. The Definition under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereof 31
3.1 General Definition 31
3.2 Well-Founded Fear 33
3.3 Persecution 35
3.4 Grounds for Persecution: Nexus to Civil or Political Status 37
3.4.1 Race 37

3.4.2 Religion 38
3.4.3 Nationality 38
3.4.4 Membership of a Particular Social Group 39
3.4.5 Political Opinion 40
3.5 Alienage 41
3.6 Cessation and Exclusion 41
3.6.1 Cessation 42
3.6.2 Exclusion 42
4. Applicability of the Definition to the NKE Case 44
4.1 Introduction: Statistics 44
4.2 General Issues 47
4.3 Political Opinion 49
4.3.1 Actual Political Opinion 49
4.3.2 Imputed Political Opinion 51
4.4 Issue of 'Republikflucht' 53
4.4.1 'Republikflucht' 53
4.4.2 'Republikflucht' and NKEs 57
4.5 Membership of a Particular Social Group 66
4.5.1 Class or Caste 66
4.5.2 Family of Political Criminals, Defectors or NKEs 68
4.5.3 Women: Victims of Trafficking for Forced Marriage or Sexual Exploitation 69
4.6 Religion 72
4.7 Race or Nationality 73
4.8 Refugee *Sur Place* 74
4.9 Cessation, Exclusion and Dual Nationality 77
4.9.1 Cessation 77
4.9.2 Exclusion 77
4.9.3 Dual Nationality 79
5. Conclusion 85

Chapter III. Humanitarian Refugees and NKEs 87
1. Introduction 87
2. Expansion of Refugee Concept: 'Humanitarian Refugees' 87
2.1 Enhanced Competence of the UNHCR 89
2.1.1 'Mandate Refugees' 89
2.1.2 Practice of *Prima Facie* Determination 90

2.1.3 Internally Displaced Persons (IDPs) 91
2.2 Related Universal Instruments 92
2.2.1 The 1967 UN Declaration on Territorial Asylum 92
2.2.2 The 1977 Draft UN Convention on Territorial Asylum 92
2.2.3 The 2002 ILA Guidelines on Temporary Protection 94
2.2.4 UN Sub-Commission on Human Rights Resolution 2002/23 94
2.3 Regional Approaches 96
2.3.1 The 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa 96
2.3.2 The 1984 Cartagena Declaration on Refugees 96
2.3.3 The 2001 EU Directive on Temporary Protection and the 2004 EU Directive on Qualification for International Protection 98
2.3.4 The 2001 AALCO Revised Bangkok Principles on Status and Treatment of Refugees 100
2.4 State Practice 102
3. Scope and Legal Character of the Expanded Refugee Concept 103
4. Applicability of the 'Humanitarian Refugees' Concept to the NKE Case 105
5. Conclusion 106

Chapter IV. Protection of NKEs under International Refugee Law 108
1. Introduction 108
2. Protection under the 1951 Refugee Convention 108
3. Principle of *Non-refoulement* 110
3.1 The Content of the Principle 110
3.1.1 Concept and Personal Scope of the Principle 110
3.1.2 Exceptions to the Principle 112
3.2 Application to the NKE Case: Conflict of Obligations? 113
3.2.1 General Issues 113
3.2.2 *Non-refoulement* versus Extradition 114
3.2.3 Legal Character of the Principle: Customary Law and *Jus Cogens*? 121
4. Access to a Procedure for Refugee Status Determination 124
5. Unimpeded Access by UNHCR 127
6. Non-discrimination among Refugees or Asylum-seekers 131

7. Diplomatic Asylum 132
8. Diplomatic Protection and Consular Assistance 133
9. Conclusion 134

Part Two: International Human Rights Law

Chapter V. Human Rights of NKEs under International Human Rights Law 137
1. Introduction 137
2. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 140
   2.1 Principle of *Non-refoulement* in the 1984 Convention against Torture 140
   2.2 Application to the NKE Case 144
      2.2.1 General Issues 144
      2.2.2 *Non-refoulement* versus Extradition: Question of *Jus Cogens* 149
3. Other Applicable Treaties 153
   3.1 The 1966 International Convention on the Elimination of All Forms of Racial Discrimination 153
   3.2 The 1979 Convention on the Elimination of All Forms of Discrimination against Women 156
   3.3 The 1989 Convention on the Rights of the Child 158
4. Customary International Law 162
   4.1 The 1948 Universal Declaration of Human Rights 163
   4.2 The 1966 International Covenant on Civil and Political Rights 165
5. Conclusion 167

Chapter VI. Protection Mechanisms of International Human Rights Law and NKEs 169
1. Introduction 169
2. Treaty Monitoring Committees 169
   2.1 Functions and Limits of the Treaty Monitoring Committees 169
   2.2 Periodic Reporting System and China 175

3. UN Human Rights Council (HRC) 177
3.1 Special Procedures of HRC 178
3.2 Complaint Procedure of HRC 179
3.3 Universal Periodic Review of HRC 181
3.4 Resolutions of HRC 182
4. Other UN Bodies 183
4.1 UN High Commissioner for Human Rights (UNHCHR) 183
4.2 UN Children's Fund (UNICEF) 183
4.3 UN General Assembly and Economic and Social Council 184
5. Non-Governmental Organisations (NGOs) 186
6. Asian Regional Human Rights System? 188
7. Conclusion 188

Chapter VII. Conclusion: Interaction and Co-action of International Refugee Law and Human Rights Law 190

Table of Cases *195*
Bibliography *198*

LIST OF ABBREVIATIONS

AALCO	Asian-African Legal Consultative Organization (Asian-African Legal Consultative Committee (AALCC) before 2001)
A.C.	Appeals Cases (U.K.)
ACHR69	American Convention on Human Rights
ACHRP81	African Charter on Human and Peoples' Rights
AI	Amnesty International
AJIL	*American Journal of International Law*
BIA	Board of Immigration Appeals (U.S.A.)
BVerwGE	Entsheidungen des Bundesverwaltungsgerichts (Decisions of the Federal Administrative Court of the Federal Republic of Germany)
BYIL	*British Year Book of International Law*
CAT	Committee against Torture
CAT84	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	Human Rights Committee
CEDAW	Committee on the Elimination of Discrimination against Women
CEDAW79	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights (United Nations, replaced by HRC in 2006)
CMW	Committee on Migrant Workers
CRC	Committee on the Rights of the Child
CRC89	Convention on the Rights of the Child
CSR51	Convention relating to the Status of Refugees
CSRP67	Protocol Relating to the Status of Refugees
CSW	Commission on the Status of Women (United Nations)
DPRK	Democratic People's Republic of Korea (North Korea)
ECHR50	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council (United Nations)
EHRR	European Human Rights Reports
EJIL	*European Journal of International Law*

EPIL	*Encyclopedia of Public International Law*
ETS	*European Treaty Series*
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
F.C.T.D.	Federal Court Trial Division (Canada)
F.T.R.	Federal Trial Reporter (Canada)
F.3d	Federal Reporter, 3rd Series (U.S.A.)
Handbook	*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (UNHCR)
HRC	Human Rights Council (United Nations)
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR66	International Covenant on Civil and Political Rights
ICERD66	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR66	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice (United Nations)
I.C.J. Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLQ	*International & Comparative Law Quarterly*
ICRMW90	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ICTY	International Criminal Tribunal for the former Yugoslavia (United Nations)
IDP	Internally Displaced Person
IJRL	*International Journal of Refugee Law*
ILA	International Law Association
ILC	International Law Commission (United Nations)
Imm AR	Immigration Appeal Reports (United Kingdom)
IOM	International Organization for Migration
InfAuslR	Informationsbrief Ausländerrecht (Information Notes on Aliens Law) (Germany)
INS	Immigration and Naturalization Service (U.S.A.)
IRO	International Refugee Organization (United Nations, until 1952)
I&N Dec.	Administrative Decisions under Immigration and Nationality Law (U.S.A.)

KCCR	Korean Constitutional Court Report (South Korea)
LNTS	League of Nations, *Treaty Series*
MEI	Minister of Employment and Immigration (Canada)
NGO	Non-Governmental Organisation
NKE	North Korean Escapee
OAS	Organization of American States
OAU	Organisation of African Unity (African Union (AU) since 2002)
OAUR69	Convention governing the Specific Aspects of Refugee Problems in Africa
PCIJ	Permanent Court of International Justice (League of Nations)
PDS	Public Distribution System (North Korea)
RFA	Radio Free Asia
ROK	Republic of Korea (South Korea)
UDHR48	Universal Declaration of Human Rights
UKHL	United Kingdom House of Lords
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights (also known as OHCHR)
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund (formerly United Nations International Children's Emergency Fund)
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNTS	United Nations, *Treaty Series*
UPR	Universal Periodic Review (United Nations Human Rights Council)
U.S.C.	United States Code
USCR	U.S. Committee for Refugees (U.S. Committee for Refugees and Immigrants (USCRI) since 2005)
VCLT69	Vienna Convention on the Law of Treaties
WFP	World Food Programme (United Nations)
WHO	World Health Organization (United Nations)

LIST OF TABLES

Chapter I

<The Number of NKEs Arriving in South Korea> 4
Table 1: Number of NKEs since 1990 4
Table 2: Number of NKEs by Period 4
Table 3: Number of NKEs by Gender 4
Table 4: Number of NKEs by Age 4
Table 5: Number of NKEs by Geographic Origin in North Korea 4
Table 6: Number of NKEs by Occupational Background in North Korea 4

Chapter II

Table 7: Number of NKEs Arriving in South Korea by Reason for Flight 49
Table 8: Annual Grain Production of North Korea since 1990 68
Table 9: Refugee Categories by Time and Characteristic of Grounds: Case of Political Opinion with special reference to 'Republikflucht' 76

Chapter VI

Table 10: Monitoring Mechanisms of the 6 Major International Human Rights Treaties 171
Table 11: Treaty Monitoring Mechanisms and China 173
Table 12: Compulsory Dispute Settlement Mechanisms and China 175

MAP OF NORTH KOREA

Modified by the author based on the UN Map No. 4163, Rev. 2 (January 2004).

Chapter I. Introduction: North Korean Escapees and International Law

1. Introduction

Significant numbers of North Koreans are reported to have escaped to neighbouring countries, mainly China, because of severe famine in recent years and chronic human rights abuses, in North Korea. In addition to 'humanitarian' considerations, this requires a careful and detailed analysis of the 'legal' status of the North Koreans, in order to secure their protection on irrefutable legal grounds. This analysis may also shed new light on the possibility of a durable solution for this situation. Until now, some legal scholars have tried to apply international 'refugee' law for the protection of these North Koreans. This research will deepen such work and also investigate the applicability of related international 'human rights' law.

The current introductory chapter provides background information about the case of the desperate North Koreans and the general structure of this research. Firstly, it deals with who are the North Koreans, what has made them flee their homeland and what is their current vulnerable situation in the neighbouring countries. This chapter then examines briefly two related areas of international law, which are international refugee law and international human rights law. Based on them, this Introduction finally sets out the aim and scope of the whole study.

2. North Korean Escapees (NKEs)

In January 2000, China deported seven North Koreans back to their native country, North Korea.[1] They had been granted refugee status by the United Nations High Commissioner for Refugees (UNHCR) in Russia in December 1999, but were

[1] The official name of 'North Korea' is 'Democratic People's Republic of Korea (DPRK)'.

subsequently forced back into China.[2] In June 2001, another seven North Koreans, all members of the same family and all aged between 15 and 69, entered the UNHCR office in Beijing claiming their lives would be in danger if sent home. On this occasion, China, although not recognising their refugee status, allowed the family members to go to Seoul via a third State on humanitarian grounds.[3] Since March 2002, many North Koreans have entered foreign diplomatic facilities and foreign schools in several Chinese cities to seek asylum. In 2002 itself, over 160 persons were permitted to go to South Korea via third countries, and China has continued this practice to date for those seeking asylum on diplomatic premises. However, the Chinese authorities responded by stepping up their crackdown on North Koreans, particularly in provinces bordering North Korea, and forcibly returning them across the border to an uncertain fate. In addition, the fate of a group of North Koreans, who boldly tried to apply for refugee status directly to the Chinese Foreign Ministry in Beijing in August 2002 just to be arrested by its guards, is unknown.[4]

Many North Koreans are reported to have fled North Korea into neighbouring countries, mainly China and Russia, owing to severe famine and socio-economic breakdown in North Korea since the mid-1990s. According to a refugee-specialised non-governmental organisation (NGO), at least 100,000 North Koreans were thought to be hiding in China at the end of 2002.[5] The so-called 'North Korean Escapees (NKEs)' are those who fled North Korea and refuse to return to their home country due to serious food shortages and widespread human rights violations in North Korea. To avoid any misunderstanding or prejudging, 'North Korean Escapees' will be used in this study as a more neutral term, rather than 'North Korean Defectors' or 'North Korean Refugees'.[6]

---

[2] See Amnesty International (AI), "Persecuting the Starving: The Plight of North Koreans Fleeing to China (Democratic People's Republic of Korea)", AI Index: ASA 24/003/2000 (15 December 2000), pp. 8-9, available at <http://www.amnesty.org>; U.S. Department of State, *Country Reports on Human Rights 2000* (February 2001): Democratic People's Republic of Korea <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/726.htm>.

[3] "North Korean asylum seekers arrive in South Korea", UNHCR News Stories (2 July 2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/news>.

[4] AI, *Report 2003*: Democratic People's Republic of Korea & People's Republic of China, AI Index: POL 10/003/2003. For details, see also *Yonhap News* from March 2002 (in Korean) <http://www.yonhapnews.co.kr>.

[5] U.S. Committee for Refugees (USCR), "Country Reports: North Korea", *World Refugee Survey 2003* (2003) <http://www.refugees.org/world/countryrpt/easia_pacific/2003/north_korea.cfm>.

[6] Up to now, the term 'North Korean Defectors' has been used more widely by academics and journalists. However, this may not explain the situation of NKEs fully and properly, because one of

2.1 Factual Background

Before presenting an overview of the factual background of NKEs, it should be noted that despite many human rights reports covering the NKE issue, there are no official statistics concerning NKEs. The number of NKEs and their individual motives are virtually impossible to ascertain given the sensitivity of their situation. NKEs have to hide to avoid being arrested and repatriated to their home country. Also, many of them do not reside in a single location, but tend to move periodically. Furthermore, their host countries and home country usually do not demonstrate a cooperative attitude with respect to this matter. Therefore, the overall number of, and comprehensive information about, NKEs remain little known at the moment.

The only reliable statistics available currently are the numbers concerning NKEs who obtained asylum in South Korea.[7] The data from the South Korean authorities show that there was a sudden increase in the number of NKEs entering South Korea in 1994 and the number has doubled each year since 1999. The number of women has increased rapidly and the NKE age range has widened so as to include under 10 and over 60 year olds. These two age groups and women are amongst the most vulnerable in the population. Today, the region from which most NKEs originate is the North Hamgyong Province (Hamgyong-buk-do), located in the northeastern part of North Korea and far from Pyongyang, the capital. This is a poor area bordering China and Russia. Whereas historically it was mainly soldiers who defected to South Korea, today labour workers form the majority of those arriving in Seoul. The former crossed the border between North and South Korea directly, but the latter have usually crossed the other borders, with China and Russia. As of the end of 2004, over 6,000 NKEs are residing in South Korea.

---

major reasons of their escape is a severe food shortage and not all NKEs want to go to an opposing party such as South Korea. NKEs may also be called as 'North Korean Refugees'. This seems to be more preferable in view of their protection, but whether NKEs can be recognised as refugees under the legal definition cannot be prejudged at the first stage. This issue will be examined in detail afterwards in this study.

[7] The official name of 'South Korea' is 'Republic of Korea (ROK)'.

<The Number of NKEs Arriving in South Korea>

Table 1: Number of NKEs since 1990 (All tables below as of the end of 2004)[8]

Year	1990	1991	1992	1993	1994	1995	1996	1997
NKEs	9	9	8	8	52	41	56	86
Year	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**Total**
NKEs	71	148	312	583	1,139	1,281	1,894	**5,697**

Table 2: Number of NKEs by Period

Period	Before 1990	1990s	After 2000	Total
NKEs	607	488	5,209	**6,304**

Table 3: Number of NKEs by Gender

Year or Period	Before 1990	1990 - 1996	1997	1998	1999	2000	2001	2002	2003	2004	Total
Male	564	158	56	53	90	180	294	514	468	625	**3,002**
Female	43	25	30	18	58	132	289	625	813	1,269	**3,302**

Table 4: Number of NKEs by Age

Age	Under 10 years	10 – 19 years	20 – 29 years	30 – 39 years	40 – 49 years	50 – 59 years	60 years and over	Total
Before 1990	None	104	288	131	55	25	4	**607**
1990 – 2004	260	740	1,555	1,892	695	279	276	**5,697**

Table 5: Number of NKEs by Geographic Origin in North Korea

Hometown	North Hamgyong Province	South Hamgyong Province	S. & N. Pyongan Provinces	Yanggang & Jagang Provinces	Gangwon Province	S. & N. Hwanghae Provinces	Others
Before 1990	48	55	177	5	31	117	174
1990 – 2004	3,814	650	435	228	132	162	276

Table 6: Number of NKEs by Occupational Background in North Korea

Occupation	Office Worker	Professional	Artist, Athlete	Labour Worker	Service Worker	Soldier	Unemployed, Others
Before 1990	13	14	None	141	1	386	52
1990 – 2004	192	160	89	2,368	254	71	2,563

(Sources: Ministry of Unification, Republic of Korea, *Unification White Paper* (yearly) and *Overview of Intra-Korean Exchanges & Cooperation* (monthly), available at <http://www.unikorea.go.kr>. Collected, translated and edited by the author.)

[8] 1,383 (422 men and 961 women) and 2,019 (486 men and 1,533 women) NKEs newly arrived in South Korea in the year 2005 and 2006 respectively. At last, the total number of NKEs who settled in South Korea rose over 10,000 in February 2007.

A few years ago, China unofficially estimated the number of NKEs in China to be 7,000 - 10,000, while UNHCR estimated the figure to be about 30,000 and the South Korean government estimated the number to lie between 10,000 - 30,000.[9] According to later press reports, these estimates have been increased to 30,000 (by China), 100,000 (by UNCHR) and 50,000 (by South Korea) respectively. NGOs estimate the number of NKEs in China to lie between 100,000 and 300,000.[10] In addition to these estimates, around 2,000 NKEs are believed to be staying in Russia,[11] with another 1,000 NKEs in Mongolia and Southeast Asian countries such as Thailand and Vietnam.[12]

Most NKEs cross the border into China via the Amnok (Yalu) or the Duman (Tumen) River, some of them fleeing from timber yards or construction sites in Russia. NKEs choose China as a destination because it is the easiest option and because they can expect the help of Korean-Chinese living along the border areas.[13] Until mid-1996, most North Koreans crossing the border into China often returned to North Korea shortly after, having visited relatives or acquaintances and obtained money and goods. Since 1997, however, many North Koreans who fled their home country have not returned to North Korea and instead have remained in China illegally, working either in the homes of Korean-Chinese or in warehouses, mainly in the Jilin Province. This activity has spread to many other regions in China.[14]

2.2 The Causes of the Flight

2.2.1 Food Crisis

The main reason for forced migration of NKEs is the food crisis, compounded by repression and human rights abuses. An extreme food shortage began in the mid-1990s resulting from natural disasters such as the devastating floods of 1995-96 and the drought in 1997, and the government's failure in economic policies and the

---

[9] Ministry of Foreign Affairs and Trade, Republic of Korea, "The Republic of Korea's Position on the North Korean Refugees Issue" (26 May 2002), available at <http://www.mofat.go.kr>.
[10] "UNHCR estimates the number of NKEs in China at 100,000", *Yonhap News* (16 June 2003).
[11] Eric Yong-Joong Lee, "National and International Legal Concerns regarding Recent North Korean Escapees", *International Journal of Refugee Law (IJRL)*, Vol. 13, No. 1/2 (2001), p. 143.
[12] Korea Institute for National Unification, *White Paper on Human Rights in North Korea 2005* (Seoul, May 2005), p. 323. Also available at <http://www.kinu.or.kr>.
[13] *Ibid.*, pp. 323-324.
[14] Eric Yong-Joong Lee, *supra* note 11, p. 143.

collapse of strategic economic ties with the former Soviet Union and other East European communist countries. According to NGOs' reports, between 220,000 and 3.5 million North Koreans, or between 12 and 18 per cent of the population of North Korea have died of hunger or famine-related disease since 1994.[15] A joint report by the UN Food and Agriculture Organization (FAO) and World Food Programme (WFP) indicated that 6.5 million vulnerable North Koreans out of the country's 22.5 million people required food assistance still in 2004, and malnutrition rates remained 'alarmingly high', for example, four out of ten young children suffered from chronic malnutrition around that year.[16]

The international community has tried to help starving North Koreans, but several major international NGOs have suspended operations in North Korea, citing the government's failure to provide a transparent food distribution system and to grant access to the country's most vulnerable people as reasons for the suspension. The government has also reportedly blocked aid to parts of the country, such as the northeastern provinces, that have seen anti-governmental rebellions and protests.[17] Although Article 65 of the revised 1998 North Korean Constitution recognises citizens' rights to equality,[18] the government continues to use the three class labels, 'core', 'wavering' and 'hostile', to prioritise access to education, jobs, residence permits and entitlement to items including food which is distributed through the Public Distribution System (PDS). A quarter of the population reportedly still are categorised as the 'hostile class' and are granted lower status, forced into specific geographical locations and suffer travel restrictions. These factors inhibit their access to food. Recently, North Korea reduced and virtually abandoned even this unfair state rationing system in favour of private markets to supply staple food to its population.[19] All these facts above may partly explain the reason why the majority of NKEs are labour workers from the Hamgyong Provinces in the northeastern part of

[15] The wide range of the estimates results from the fact that reliable figures on North Korea are difficult to obtain, given the lack of access and barriers to information gathering. AI, "Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)", AI Index: ASA 24/003/2004 (20 January 2004), sections 3, 4; USCR, *supra* note 5.

[16] FAO, "North Korea urgently needs food aid: millions of people at risk" (30 October 2003), available at <http://www.fao.org/newsroom/en/index.html>.

[17] USCR, *supra* note 5.

[18] Art. 65: "Citizens enjoy equal rights in all spheres of state and public activities." As translated by the North Korean government in its 2nd periodic report to the UN Human Rights Committee, UN Doc. CCPR/C/PRK/2000/2 (4 May 2000), para. 161.

[19] AI, *supra* note 15, section 5.1.

North Korea, which are not only border areas near China and Russia, but also many political prison camps are located in and probably many 'hostile' class people are residing in.

2.2.2 Human Rights Abuses

Extremely poor human rights conditions in North Korea have often been cited as one of major reasons for the people's flight.[20] Recently, the Commission on Human Rights and the General Assembly of the UN expressed their deep concern about reports of systematic, widespread and grave violations of human rights in North Korea.[21] According to their resolutions, entitled 'Situation of human rights in the Democratic People's Republic of Korea', many civil, political and economic, social rights have been violated severely: torture and other cruel, inhuman or degrading treatment, public executions, extrajudicial and arbitrary detention, the absence of due process and the rule of law, the imposition of the death penalty for political reasons, the existence of a large number of prison camps, the extensive use of forced labour, and lack of respect for the rights of persons deprived of their liberty; severe restrictions on the freedoms of thought, conscience, religion, opinion and expression, peaceful assembly and association, and on access of everyone to information, and limitations imposed on every person who wishes to move freely within the country and travel abroad; the mistreatment and discrimination against disabled children and continued violation of the human rights and fundamental freedoms of women; and failures to respect and ensure the right of everyone to be free from hunger and the right to food, etc.

Even though NKEs did not fully realise these serious human rights conditions

---

[20] For more detailed information on human rights situation in North Korea, see generally Korea Institute for National Unification, *supra* note 12, and following editions published annually.

[21] The Commission had adopted relevant resolutions for three consecutive years before its replacement by the newly established UN Human Rights Council: UN Doc. E/CN.4/RES/2003/10 (16 April 2003), UN Doc. E/CN.4/RES/2004/13 (15 April 2004) and UN Doc. E/CN.4/RES/2005/11 (14 April 2005). Eventually, the UN General Assembly has also adopted resolutions on human rights situation in North Korea annually since 2005: UN Doc. A/RES/60/173 (16 December 2005), UN Doc. A/RES/61/174 (19 December 2006) and UN Doc. A/RES/62/167 (18 December 2007). Formerly, there were two resolutions on human rights in North Korea adopted by the UN Sub-Commission on Human Rights in 1997 and 1998 (the name of the Sub-Commission was changed in 1999 from 'Sub-Commission on Prevention of Discrimination and Protection of Minorities' into 'Sub-Commission on the Promotion and Protection of Human Rights'): UN Doc. E/CN.4/SUB.2/RES/1997/3 (21 August 1997) and UN Doc. E/CN.4/SUB.2/RES/1998/2 (19 August 1998).

in North Korea when they fled their native country, which is mainly due to the government's strict restrictions on information, most of them have subsequently come to know the realities of their past tragic lives in North Korea and often refuse to go back to their home country.

2.3 The Human Rights Situation of NKEs

2.3.1 Threat of Forced Repatriation

It is reported that if NKEs are apprehended in China and forcibly returned to North Korea, they often face long interrogation sessions and torture and are sent to prison or labour camps where the deaths rate in detention is very high.[22] North Koreans who flee their country are usually considered by their government to be traitors and/or criminals if they leave North Korea without official permission which is nearly impossible for them to get. According to the North Korean Criminal Code, defection shall be punished with a minimum of five years imprisonment and even the death penalty.[23] It is believed that an affirmative answer to the following questions would result in execution or being sent to a harsher political prison camp: "Did you meet any South Koreans?", "Did you go to a Christian church?", "Did you watch or listen to South Korean TV or Radio?" and "Were you trying to go to South Korea?" The denials of NKE returnees are not generally considered credible by their interrogators, who attempt to starve and beat admissions out of the detainees. There seems to be no trial or judicial process before being sent to these hard-labour detention or

---

[22] David Hawk, *The Hidden GULAG: Exposing North Korea's Prison Camps*, U.S. Committee for Human Rights in North Korea (22 October 2003), p. 56 <http://www.hrnk.org/HiddenGulag.pdf>.

[23] AI, *supra* note 2, p. 5. On 11 August 1999, the relevant provisions in the 1987 Criminal Code were amended and the severity of the penalty was mitigated at least nominally.

Art. 47: "A citizen of the Republic who commits such acts against the country as defecting to a foreign country for the purpose of overthrowing the Republic shall be committed to a reform institution for between five and ten years (in the 1987 Code, 'for not less than seven years'). In cases where the person commits an extremely grave offence, he or she shall be committed to a reform institution for not less than ten years, or shall be given the death penalty and the penalty of the confiscation of all property (in the 1987 Code, there was no alternative, but only the death penalty)."

Art. 117: "A person who crosses a frontier of the Republic without permission shall be committed to a reform institution for up to three years." Translated by the author.

The full text of the 1999 Code both in Korean and in English can be found in Il-Young Chung & Choon-Ho Park (eds.), *Issues on Korean Chinese and North Korean Refugees*, Baeksang Foundation (Seoul, 2003) (in Korean), pp. 265-306.

On 29 April 2004, these provisions were slightly amended again, but two more minor amendments of North Korean Criminal Code on 19 April and 26 July 2005 did not revise these provisions. See Chapter II for more details.

punishment facilities.[24] Worst of all, it is reported that repatriated pregnant North Koreans may face ethnically-motivated infanticide and abortions, that is to prevent 'half-Chinese' babies.[25] Although there is some information to indicate that the practice of severe persecution has subsided to some extent recently, there is no authentic confirmation of this.

China does not regard NKEs as refugees under the 1951 Geneva Convention relating to the Status of Refugees (the 1951 Convention or CSR51)[26] to which China is a Party State,[27] but it considers them illegal economic migrants. China has said that bilateral agreements with North Korea such as the 1986 Protocol[28] take precedence over its obligations to UNHCR under the 1951 Convention and that if UNHCR were to 'legitimise' the NKEs this would lead to a sharp increase in illegal immigrants in the border region. The Chinese government has refused UNHCR the access to NKEs seeking refuge in China especially since 1999, when UNHCR conducted a visit to the border and determined that some North Koreans were refugees.[29] Meanwhile, China does not have procedures for determining refugee status.[30] In 2003, it was told by the Chinese Ambassador to the UN that China's policy was now to deport people back to North Korea only if they had committed a crime.[31] However, this assertion cannot be confirmed by any third party such as UNHCR, indeed, many related sources show that China's repatriation practice has been constant at least up to now,

---

[24] David Hawk, *supra* note 22, p. 58. For details, see Korea Institute for National Unification, *supra* note 12, pp. 89-98. See also AI, *supra* note 15, sections 6.6, 6.7, 6.8.

[25] David Hawk, *supra* note 22, p. 59. For details, see generally PART TWO of this report.

[26] United Nations, *Treaty Series (UNTS)*, Vol. 189, p. 137 (No. 2545), adopted on 28 July 1951 and entered into force on 22 April 1954. As of June 2008, 144 States are Parties to the Convention.

[27] China acceded to it on 24 September 1982.

[28] "Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas", adopted in Chinese and Korean in Dandong, China on 12 August 1986. This is a kind of secret treaty between China and North Korea, so there is no official version. Instead, a Japanese NGO issued this instrument and it can be found in Chung & Park (eds.), *supra* note 23, pp. 251-264.

[29] USCR, "Country Reports: China", *World Refugee Survey 2003* (2003) <http://refugees.org/world/countryrpt/easia_pacific/2003/china.cfm>.

[30] The only related provision can be found in the China's Constitution.

Art. 32 (2): "The People's Republic of China may grant asylum to foreigners who request it for political reasons." <http://www.oefre.unibe.ch/law/icl/ch00000_.html>.

It is also reported that China's 1986 immigration control law permits individuals who seek asylum for political reasons to reside in China upon approval by the competent authorities. Stephan Haggard & Marcus Noland (eds.), *The North Korean Refugee Crisis: Human Rights and International Response*, U.S. Committee for Human Rights in North Korea (2006), p. 37.

[31] United Kingdom Foreign & Commonwealth Office, *HUMAN RIGHTS Annual Report 2003* (September 2003), p. 34, available at <http://www.fco.gov.uk/humanrights>.

which seems to be explicitly against the basic principle of *non-refoulement* (prohibition of expulsion or return) under international law. The number of forcible repatriations by Chinese border guards is thought to have increased to tens of thousands a year since 1999, although no comprehensive figures are available. During 2002, China again intensified its crackdown on NKEs, particularly after several incidents beginning in March when groups of NKEs sought protection at foreign missions in Beijing and Shenyang.[32] In December 2002, Chinese and North Korean security forces launched a 100-day campaign to locate and return NKEs. According to NGOs, China returned as many as 1,000 North Koreans each day during this campaign.[33]

2.3.2 Other Human Rights Conditions

The human rights situation of NKEs who manage to remain in China is not tolerable. Many of them want to go to South Korea in search of a better life and greater freedom. In addition, they are recognised as its citizens under the South Korean Constitution[34] and relevant case law. However, in principle this happens only after entry to South Korean territory, and in practice it is available only for those who have succeeded in entering South Korean or other foreign embassies in China or entering other neighbouring countries such as Mongolia and Thailand. Given the relevant statistics and estimates above, the number of NKEs who have settled down in South Korea is a very small proportion of the total number of NKEs. All other North Koreans residing 'illegally' in China live in appalling conditions and are vulnerable to physical, emotional and sexual exploitation.[35]

Some NKEs find shelter in villages and farms where they are supported by China's ethnic Korean community and ethnic Chinese people, but others are forced into begging and stealing. Others still are reported to resort to eating grass and roots in order to survive.[36] Many male NKEs are exploited in the harsh underground

---

[32] AI, "Crackdown on North Koreans must end (China)", AI Index: ASA 17/024/2002 (21 June 2002).
[33] USCR, *supra* note 5.
[34] Art. 3: "The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands." The full text in English is available at the website of the Constitutional Court of Korea <http://www.ccourt.go.kr>.
[35] AI, *supra* note 15, section 6.6.
[36] AI, *supra* note 2, p. 6.

labour market in return for food and shelter.[37] According to Amnesty International, almost three quarters of NKEs in China are women and girls who are particularly vulnerable. Its reports claimed that many were sold to professional bride traffickers who in turn sold these women to Chinese or ethnic Korean farmers, or were targeted by organised gangs, repeatedly raped and forced into prostitution.[38] Another vulnerable NKE group is North Korean orphans in China. They were estimated to number about 20,000 and are a result of escaping alone when the family is dispersed in North Korea, or parental deaths or deportations after the family has escaped to China. They are left to engage in begging or theft for survival, without any adequate educational opportunities for their age.[39] Also, children of NKE women who 'married' Chinese men have special problems, even in the case where their 'marriage' life is more tolerable than more tragic cases. In addition to their marriage not being recognised as legal by the Chinese authorities, their children cannot officially be registered in China. Therefore, the children are not guaranteed the right to any nationality and, even when they reach school age, they cannot receive a proper education.[40] Recently, it has also been reported that NKEs are often tortured by the Chinese police at detention centres before being forcefully repatriated.[41]

3. International Refugee Law and International Human Rights Law

The tragic plight of NKEs has led to the suggestion that they should be protected more widely and in a more effective way by the international community. The best way to solve the problem is to improve economic, social and political conditions in North Korea especially with respect to food supply and human rights conditions. For the time being, however, it does not seem that there will be a fundamental change in

---

[37] Human Rights Watch (HRW), "The Invisible Exodus: North Koreans in the People's Republic of China (North Korea)", Vol. 14, No. 8 (C) (November 2002), p. 12 <http://hrw.org/reports/2002/north korea/norkor1102.pdf>.
[38] AI, *Report 2002*: Democratic People's Republic of Korea, AI Index: POL 10/001/2002. See also HRW, *supra* note 37, pp. 12-15.
[39] Korea Institute for National Unification, *supra* note 12, pp. 347-348.
[40] Korea Institute for National Unification, *White Paper on Human Rights in North Korea 2006* (Seoul, May 2006), p. 227.
[41] "The Chinese police tortured NKEs", *Yonhap News* (22 April 2003); HRW, *supra* note 37, p. 16.

North Korea, and such human disaster or human rights abuse as the NKE case always demands immediate action. If host countries do not provide adequate treatment to NKEs, the international community should urge those countries to do it and remind them of the relevant international obligations placed on them.

Raising legal issues would not be necessarily the best way to tackle this kind of humanitarian question; rather, a political or diplomatic approach might be more appropriate for this problem to be resolved efficiently and definitively. In a similar context, a *de facto* policy of toleration or acquiescence (towards NKEs) on one side - China or Russia, and 'quiet diplomacy' on the other side - South Korea or others, may also be necessary in the short term. However, a political or diplomatic approach cannot always guarantee constant and predictable results. In many cases, this approach is influenced by the interests of the States concerned, while disregarding urgent humanitarian needs and/or international legal principles. In the case of NKEs, the traditionally close relationship between China and North Korea and other delicate geopolitical factors in the Far East have blocked the comprehensive resolution of this matter. Therefore, a careful and detailed analysis of NKEs' legal status is really necessary for their protection on irrefutable legal grounds, which could also present a general view of a sound and durable solution for the NKE issue.

There may be several areas of international law applicable to this case. *Prima facie*, refugee law seems to be the most related area for the purpose of the international protection of NKEs.

3.1 International Refugee Law: Suitable for the Protection of NKEs?

Since ancient times people have been forced to flee their homes and seek asylum in other places. The Greeks and Romans set aside certain areas to provide refuge for such individuals, not to mention the similar description in the Bible. History records that in medieval times whole populations were sometimes forced to flee and seek asylum. Religious intolerance led to the expulsion of thousands of Jews from Spain in 1492, followed ten years later by the expulsion of thousands of Muslims. Protestants fled France after the Massacre of Saint Bartholomew's Day in 1572 and again after the repeal of the Edict of Nantes in 1685. More Protestants were expelled

from Salzburg in 1731 and thousands of Jews were forced out of Bohemia in 1744.[42] Religious persecution was not the sole force that generated large groups of refugees. Political persecution also played a part. For instance, the British Governor of Nova Scotia (now a Canadian province), suspicious of the political sympathies of French-Acadian farmers, expelled over 12,000 from their homes in 1755. In the early twentieth century, the Balkan Wars generated forced migrations of large populations of Greeks, Bulgarians and Turks. The Russian Revolution triggered successive waves of refugees. The Nazi regime in Germany reached new depths in the expulsion of national groups and the forced transfer of whole populations from lands their families had inhabited for centuries.[43]

The disintegration of the Turkish, Russian and Austro-Hungarian empires in the early twentieth century emphasised the international scope of refugee movements. Millions of refugees fled in all directions. The international community began to assume responsibility for protecting and assisting refugees for humanitarian reasons. The pattern of international action on behalf of refugees was established by the League of Nations, such as creating some High Commissioners for different kinds of refugees and the Nansen International Refugee Office,[44] and led to the adoption of a number of international agreements for their benefit.[45] Early definitions in these instruments tended to relate each category of refugees to their national origin, to the territory that they left and to the lack of diplomatic protection by their former home country, implicitly recognising that political events had triggered the flight of certain groups of people. With this type of definition 'by categories' interpretation was simple and caused no great difficulty in ascertaining identifying refugees. These persons who meet the definitions of international instruments prior to the 1951 Convention are usually referred to as 'statutory refugees'.[46]

The disaster of World War II and the streams of humanity it displaced gave

---

[42] Maryellen Fullerton, "The International and National Protection of Refugees", in Hurst Hannum (ed.), *Guide to International Human Rights Practice (3rd ed.)*, Transnational Publishers (1999), p. 227.
[43] *Ibid.*
[44] Guy S. Goodwin-Gill, *The Refugee in International Law (2nd ed.)*, Oxford University Press (1996), pp. 207-209; Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects*, Butterworths (2000), p. 15.
[45] These instruments are referred to in Article 1.A (1) of CSR51.
[46] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees (Handbook)*, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited) (Geneva, January 1992), paras. 1-4; Maryellen Fullerton, *supra* note 42, p. 229.

impetus to a new international instrument to define the legal status of refugees. Instead of *ad hoc* agreements adopted in relation to specific refugee situations, there was a call for an instrument containing a general definition of who was to be considered a refugee. The Convention relating to the Status of Refugees was adopted at a Conference of Plenipotentiaries of the UN in 1951, and entered into force in 1954.[47] Article 1.A (2) of the 1951 Convention defines a refugee as follows:

> any person who: ... (2) As a result of events occurring before 1 January 1951 and owing to 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 nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The above 1951 dateline restriction and the optional geographic limitation[48] were removed later by the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol or CSRP67).[49] The definition in the 1951 Refugee Convention diverged from earlier definitions mainly in two important respects: firstly, it took a more universal approach by specifying five different bases for persecution that can occur in any society, rather than listing specific national or religious groups at risk in certain societies; and secondly, it chose an individual basis determination approach instead of a group or category approach.[50]

To be protected as a refugee under this definition, each NKE needs to show that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. The major host country, China, has not admitted any possibilities of NKEs being recognised as refugees under the 1951 Convention which binds also China and Russia,[51] and instead has contended that NKEs are just economic migrants searching for food or economic betterment, who are not eligible for the protection accorded to

---

[47] UNHCR, *Handbook*, para. 5.
[48] The possibility of geographical limitation is provided for in Article 1.B of CSR51.
[49] See Art. 1 of CSRP67 (*UNTS*, Vol. 606, p. 267 (No. 8791), adopted on 31 January 1967 and entered into force on 4 October 1967. As of June 2008, 144 States are Parties to the Protocol.).
[50] Maryellen Fullerton, *supra* note 42, p. 229.
[51] China acceded to CSR51 and CSRP67 on 24 September 1982 and Russia acceded to both on 2 February 1993.

refugees. It is true that a considerable number of NKEs might not be regarded as political refugees under the Convention definition. However, on the other hand, many of them can be considered refugees even on a strict literal interpretation, for reasons of 'religion', 'membership of a particular social group' or, more persuasively, 'political opinion'. As observed in the previous section, even today, in addition to other various discriminative treatments, there are three class labels in North Korea, based on each person's family, political or religious background. North Koreans' economic situation including access to food is not just economic in its nature, but is closely related to their political or social class categorised unjustly by their government. It should also be noted that North Korea is one of the last Stalinist regimes in the world, possessing a very unique and clandestine character and imposing very harsh punishment on its nationals, especially in the case of illegal border-crossing. In this respect, the issue of 'Republikflucht (crime of flight from the republic)' needs to be assessed.[52] Another special concept to be addressed with respect to the NKE case is 'refugee *sur place*'. A person who was not a refugee when he or she left his country, but who becomes a refugee at a later date, is called a refugee *sur place*. His or her claim can be grounded in either events in the country of origin, or his or her activities abroad.[53] Many NKEs could claim this case strongly.

The definition in the 1951 Convention has been the epicentre of many battles in academia and in the determination process of refugee status in many jurisdictions. First of all, the above definition recognises only so-called 'political' refugees, excluding other common scenarios of forced migration such as victims of famine, natural disaster, human rights violations or civil wars. Secondly, the individualistic approach might not be proper for today's massive refugee flows. Both points look to be highly relevant to the NKE issue. This 1951 Convention definition was drawn up in the context of the post-war years and does not correspond to many of today's refugee situations. As a result, some countries, especially in Africa and Latin America have expanded the definition of the term 'refugee'.[54] For example, the

---

[52] See Guy S. Goodwin-Gill, *supra* note 44, p. 53. See also, Mark R. von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law*, Martinus Nijhoff Publishers (2002), pp. 162-166.

[53] UNHCR, *Handbook*, paras. 94-96. See also James C. Hathaway, *The Law of Refugee Status*, Butterworths Canada (1991), pp. 33-39.

[54] United Nations High Commissioner for Human Rights (UNHCHR or OHCHR), *Human Rights and*

Convention governing the Specific Aspects of Refugee Problems in Africa (OAUR69),[55] which was adopted by the Organisation of African Unity (OAU) in 1969, defines a refugee, in addition to the 'Convention refugee' definition above, as "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[56] The 1984 Cartagena Declaration on Refugees (CRD84)[57] includes, as refugees, "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[58] This definition suggests that in some instances group determination of refugee status is appropriate and that the harm refugees fear may be indeterminate.[59] In reality, in spite of some preferable implications of these developments, the evolving concepts of refugee cannot be applied directly to the NKE issue because of their limited regional application and non-binding character of the Declaration. Interestingly, however, the Asian-African Legal Consultative Organization (AALCO), of which China has been a Member State since 1983, adopted the same extended definition of refugee as in the 1969 African Convention above, in the revised Bangkok Principles of 2001.[60]

On the other hand, there is a crisis in refugee protection quite apart from the magnitude of displacement. The demise of the Cold War has changed the context in which refugee protection is addressed. Governments, particularly those of Western developed countries, are increasingly treating those once considered to be part of

---

Refugees (Fact Sheet No. 20), Centre for Human Rights, UN Office at Geneva (1993), pp. 16-17 <http://www. unhchr.ch/html/menu6/2/fs20.htm>.

[55] *UNTS*, Vol. 1001, p. 45 (No. 14691), adopted on 10 September 1969 and entered into force on 20 June 1974.

[56] Art. I.2 of OAUR69.

[57] *Annual Report of the Inter-American Commission on Human Rights 1984-1985*, OAS Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1 October 1985), pp. 190-193, adopted on 22 November 1984. The full text is also available in Guy S. Goodwin-Gill, *supra* note 44, pp. 444-448.

[58] Para. III.3 of CRD84.

[59] Maryellen Fullerton, *supra* note 42, p. 231.

[60] "Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees", as adopted on 24 June 2001 at the AALCO's 40th Session, New Delhi, Art. I.2. The full text is available at the website of AALCO <http://www.aalco.org>.

refugee movements as unauthorised migrants. Foreign policy ceases to be a motivating force to assist and protect refugees. Instead, budgetary constraints come to the fore and efforts follow to privatise both assistance and protection. The informing principle thus changes from an ideological perspective to migration management. Today, most asylum-seekers are considered economic migrants from less developed countries.[61] In addition, security concerns since the attack in the United States on 11 September 2001 dominate the debate, including in the migration area, and have at times overshadowed the legitimate protection interests of individuals.[62]

Against these unfavourable attitudes of States, UNHCR has been seeking more effective ways to protect refugees and displaced persons in cooperation with other UN agencies and some dedicated human rights NGOs. Although its 1950 Statute[63] defines a refugee, for the purpose of its function of providing protection, as almost the same as in the 1951 Convention,[64] UNHCR, in practice, has extended its mandate coverage with flexibility, based on resolutions of UN General Assembly (UNGA) and Economic and Social Council (ECOSOC).[65] This extension by UNGA and ECOSOC resolutions cannot have a direct legal effect to obligations of States. Nevertheless, it is noticeable that UNHCR concludes not only that many NKEs may well be considered refugees (so-called 'political refugees' or 'Convention refugees'), but also that, in view of protection needs, the group of NKEs is of concern to UNHCR (so-called 'humanitarian refugees' or 'mandate refugees').[66]

Various favourable treatments are accorded to refugees under the 1951 Convention.[67] With respect to the protection of NKEs, foremost attention should be

---

[61] Arthur C. Helton, "Refugees: An Agenda for Reform", in Louis Henkin & John Lawrence Hargrove (eds.), *Human Rights: An Agenda for the Next Century (Studies in Transnational Legal policy, No. 26)*, The American Society of International Law (1994), p. 52.

[62] Volker Türk & Frances Nicholson, "Refugee protection in international law: an overall perspective", in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 4.

[63] "Statute of the Office of the United Nations High Commissioner for Refugees", UN Doc. A/RES/428 (V) (14 December 1950), Annex.

[64] Para. 6.A (ii) of the UNHCR Statute.

[65] See Guy S. Goodwin-Gill, *supra* note 44, pp. 8-18, 212-214.

[66] "Opening statement by Mr. Ruud Lubbers United Nations High Commissioner for Refugees", *Report of the fifty-fourth session of the Executive Committee of the High Commissioner's Programme (Geneva, 29 September - 3 October 2003)*, UN Doc. A/AC.96/987 (10 October 2003), Annex II, pp. 35-36.

[67] See generally Arts. 3, 4 & Chs. II, III, IV, V of CSR51.

paid to the principle of *non-refoulement*. According to Article 33 of the 1951 Refugee Convention, "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened ..."[68] This obligation is a very important legal constraint on States' discretion, and also presupposes that States provide asylum-seekers with access to fair and effective refugee determination procedures and have their cases heard. As will be discussed later in detail, it seems that China has infringed this obligation in relation to NKEs. Its contrary assertion based on the bilateral extradition treaty with North Korea also does not seem to be a strong argument, considering the customary or peremptory nature of the above principle.

International refugee law can give protection to NKEs to a substantial degree. As examined above, many, but maybe not all, NKEs could be recognised as refugees under the 1951 Convention. Currently, however, this possibility is totally and deliberately disregarded by the Chinese government. It has continuously repatriated NKEs to North Korea, just as illegal migrants. Any humanitarian status such as 'mandate refugees' accorded by UNHCR seems to be useless unless the State concerned is willing to cooperate, because this status is not legally binding on the State. At worst, it can be imagined that most NKEs would not be recognised as refugees even if China finally permits them the access to procedures for determining refugee status. In the last case, does it mean that there is a protection vacuum in international law regarding NKEs? In this respect, it seems highly arguable that if international refugee law is not enough for the protection of NKEs or it is completely not suitable for the NKE issue, international human rights law may support it as a complement or replace it as an alternative.

3.2 International Human Rights Law: Complement or Alternative?

Traditionally, the way a State treated its citizens was regarded as an internal matter over which it had sovereign control. If a State violated the rights of foreigners on its territory, the State of nationality could intervene to provide its nationals with

[68] Art. 33.1 of CSR51.

diplomatic or consular protection.[69] This basic tradition regulating human beings in the international arena has radically changed since the end of the Second World War, and now international human rights law is one of the fast developing areas of international law. In a broad sense, refugee law may be included in international human rights law. However, the origin, object, governing international organ and many other characters of international refugee law are distinct from those of international human rights law. For the purpose of this study, therefore, international refugee law is considered independent of international human rights law.

At the time of the drafting of the 1951 Refugee Convention, the only comprehensive standard for international human rights law was the Universal Declaration of Human Rights (UDHR48),[70] a simple, unenforceable UN General Assembly resolution.[71] Today, in contrast, international human rights law comprises not only the International Covenant on Civil and Political Rights (ICCPR66)[72] and the International Covenant on Economic, Social and Cultural Rights (ICESCR66),[73] but also a range of specialised universal accords, and regional human rights regimes in Europe, Africa and the Americas. As a result, the individual is today the holder of an impressive range of human rights.[74] In principle, asylum-seekers and refugees are also entitled to all the rights and fundamental freedoms that are spelled out in international human rights instruments.[75] It is of particular significance to them that most civil rights are not subject to requirement of nationality. For example, the 1966 ICCPR extends its protection to 'everyone' or 'all persons'.[76] Even if they are illegal migrants, they can enjoy many of the rights just as human beings.[77]

The majority of applications for asylum are rejected on a strict reading of the 1951 definition. From a human rights perspective, this situation raises great concern.

---

[69] Volker Türk & Frances Nicholson, *supra* note 62, p. 37.
[70] UN Doc. A/RES/217A (III) (10 December 1948).
[71] B.S. Chimni (ed.), *International Refugee Law: A Reader*, Sage Publications (New Delhi, 2000), p. 165.
[72] *UNTS*, Vol. 999, p. 171 (No. 14668), adopted on 16 December 1966 and entered into force on 23 March 1976. As of June 2008, 160 States are Parties to the Covenant.
[73] *UNTS*, Vol. 993, p. 3 (No. 14531), adopted on 16 December 1966 and entered into force on 3 January 1976. As of June 2008, 157 States are Parties to the Covenant.
[74] James C. Hathaway & John A. Dent, *Refugee Rights: Report on a Comparative Survey*, York Lanes Press (Toronto, 1995), reprinted in B.S. Chimni (ed.), *supra* note 71, p. 202.
[75] UNHCHR, *supra* note 54, p. 13.
[76] James C. Hathaway & John A. Dent, *supra* note 74, pp. 202-203.
[77] Guy S. Goodwin-Gill, *supra* note 44, p. 232.

It will not always be possible to distinguish, with certainty, between a refugee and an economic migrant. It may be argued that if the emphasis is placed on threats to life and freedom, there is little to distinguish between a person facing death through starvation and another threatened with arbitrary execution because of his or her political beliefs. These considerations aside, the fact remains that regardless of whether a person is a refugee or an economic migrant, a citizen or a non-citizen, whether he or she is fleeing persecution, armed conflict, threats to his or her life or abject poverty, that person is entitled to minimum human rights and minimum standards of treatment.[78]

Human rights violations relating to displaced persons can occur at different stages, including before displacement, during flight, and after the victim has found refuge or has returned.[79] Debate on forced migration is inextricably linked to various human rights issues. Many universally recognised human rights are invoked as directly applicable to asylum-seekers or refugees. These include the right to life, protection from torture and ill-treatment, the right to a nationality, the right to freedom of movement, the right to leave any country, including one's own, and to return to one's country, and the right not to be forcibly returned.[80]

International human rights law is implemented in a manner that differs significantly from refugee law. Whereas no international tribunal exists to adjudicate claims that refugees' rights under the 1951 Convention and 1967 Protocol have been violated, and refugees and asylum-seekers must depend upon national authorities in the State of refuge for protection, there are various international human rights bodies such as universal human rights committees and regional human rights courts that can receive individual victims' human rights claims.[81]

From a human rights perspective, NKEs are also entitled to a minimum standard of human rights treatment, irrespective of their status as refugees. It would not be permissible for States concerned to act in total disregard of this positive development of international human rights law. More specifically, the right to seek

---

[78] UNHCHR, *supra* note 54, p. 17.
[79] Joan Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures*, Transnational Publishers (2002), p. 1; UNHCHR, *supra* note 54, p. 4.
[80] UNHCHR, *supra* note 54, pp. 14-15.
[81] Joan Fitzpatrick (ed.), *supra* note 79, p. 4.

and enjoy asylum, the right of non-discrimination, the right to life in connection with the right to food, the right to liberty and security of person, the right to physical integrity against torture and ill-treatment, the right to protection from slavery, servitude and forced labour, and the right to freedom of thought, conscience and religion, etc. may be applied to the NKE case. Besides legal instruments already stated above, the following international human rights texts are also highly relevant to the NKE issue, to all of which China is a State Party: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT84),[82] the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD66),[83] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW79)[84] and the Convention on the Rights of the Child (CRC89).[85]

4. Aim and Scope of the Study

Although the current situation of NKEs is not less severe than other 'refugee' crises such as those originating from Iraq, Afghanistan, former Yugoslavia and several African States, the NKE case is less known to the general public and also to international lawyers. The principal purpose of this research is, while drawing more international attention to the case, to examine how NKEs can be protected under public international law, not under just humanitarian considerations. To this end, this research will focus on their legal status under international refugee law and international human rights law respectively and, at the last stage, discuss the positive interaction and co-action of these two areas of international law. Each NKE may

---

[82] *UNTS*, Vol. 1465, p. 85 (No. 24841), adopted on 10 December 1984 and entered into force on 26 June 1987. As of June 2008, 145 States are Parties to the Convention. China signed it on 12 December 1986 and ratified it on 4 October 1988.

[83] *UNTS*, Vol. 660, p. 195 (No. 9464), adopted on 7 March 1966 and entered into force on 4 January 1969. As of June 2008, 173 States are Parties to the Convention. China acceded to it on 29 December 1981.

[84] *UNTS*, Vol. 1249, p. 13 (No. 20378), adopted on 18 December 1979 and entered into force on 3 September 1981. As of June 2008, 185 States are Parties to the Convention. China signed it on 17 July 1980 and ratified it on 4 November 1980.

[85] *UNTS*, Vol. 1577, p. 3 (No. 27531), adopted on 20 November 1989 and entered into force on 2 September 1990. As of June 2008, 193 States are Parties to the Convention. China signed it on 29 August 1990 and ratified it on 2 March 1992.

have different, and often mixed, motives for escape, and the current conditions of NKEs can vary considerably. In principle, the legal status of NKEs must be determined on an individual basis. Nevertheless, because there are also many common points among NKEs enough for a broad generalisation, this study will analyse their legal status in general, which may be properly modified and applied to each individual case later on.

Up to now, some legal scholars and practitioners have tried to apply international refugee law to this NKE issue,[86] but no major study of the legal rights of NKEs has been undertaken before. The focus of the existing research has usually been limited to the refugee status of NKEs and the principle of *non-refoulement*. This research will not stop at this point, but, while developing stronger arguments under refugee law, will also look into the applicability of related international human rights law. This could offer important and useful legal implications for the protection of NKEs because a considerable number of NKEs might not be recognised as legal refugees according to a narrow interpretation of the positive refugee law as enshrined in the 1951 Refugee Convention. Even in such cases, international human rights law can function to a high degree because its object is not just specific categories of people, but all human beings. In this vein, this research will break new ground in offering the first systematic examination of the rights of NKEs not only under refugee law but also under human rights law and other areas of international law. In addition, this will offer also insights, of broader application, into the rights of asylum-seekers more generally and especially those vulnerable asylum-seekers who arrive in States that fail to recognise their refugee status.

As observed in the previous section, human rights of NKEs can be violated at three different phases: before their escape, during their stay within neighbouring States and, lastly, after the forced repatriation. Although the first and the last cases must be considered to a reasonable degree, especially in relation to refugee law, this study will basically focus on the second stage, that is the human rights violations in their residing States. NKEs are hiding or residing in various neighbouring countries

---

[86] See, for example, Eric Yong-Joong Lee, "National and International Legal Concerns regarding Recent North Korean Escapees", *International Journal of Refugee Law (IJRL)*, Vol. 13, No. 1/2 (2001); Benjamin Neaderland, "Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis", *Stanford Journal of International Law*, Vol. 40 (2004); Elim Chan & Andreas Schloenhardt, "North Korean Refugees and International Refugee Law", *IJRL*, Vol. 19, No. 2 (2007).

such as China, Russia, Mongolia and some Southeast Asian countries. Most attention will be paid to the case in China because the great majority of NKEs, and most related legal problems, are there now. Almost all NKEs firstly escape to China across the Duman (Tumen) River. The main reason why many of them try to escape farther from China to other neighbouring countries such as Mongolia and Thailand is the Chinese ongoing policy of the forced return of all caught NKEs. If, instead, China allowed them to have access to an asylum procedure to find out whether there was really no one eligible for refugee status, or to go to a third resettlement country (some States are actually available now such as South Korea and the U.S.A.), or, at least, to remain, though illegally, in China while the authorities considered their tragic fate upon their return, then most of them would not seek other places of refuge so eagerly at the risk of their life again. At present, other neighbouring countries, including Russia,[87] 'basically' do not repatriate NKEs against their will to China or North Korea, irrespective of the countries' status as a Party to the 1951 Convention.[88] For those quantitative and qualitative reasons, the situation in China will be the main object of this study. In spite of this limitation of scope, which is inevitable for effective research, this study could provide valuable legal guidance to NKEs in other regions as well as other refugee-like escapees in the world.

Various kinds of primary materials such as treaties (international, regional and bilateral), domestic laws, case law (international, regional and national) and documents of international organisations (reports, resolutions, guidelines, etc.), and also various secondary sources comprising monographs, articles, book chapters and other commentaries, on refugee law, human rights law, law on asylum and other general areas of international law will be extensively and critically explored. After this, a logical analysis of the applicability to the NKE issue will be carefully carried out from the viewpoint of 'positive' international law, based on the facts and rules surrounding this issue. Detailed interpretation of refugee law may vary to a degree

---

[87] Cf. *supra* note 2. Its practice has not been constant, depending on regions and times.

[88] See UNGA, "Situation of human rights in the Democratic People's Republic of Korea: Report of the Special Rapporteur, Vitit Muntarbhorn", UN Doc. A/60/306 (29 August 2005), paras. 55, 63-64; International Crisis Group, "Perilous Journeys: The Plight of North Koreans in China and Beyond", Asia Report No. 122 (26 October 2006), pp. 19-26. Laos may be the only exception in that it officially repatriates NKEs to China. However, in fact there are many opportunities to negotiate their release through bribery and malfeasance, and its border control is not tight so as for it to be used as a good transit country to Thailand. Among the neighbouring countries, only Cambodia is a Party to the 1951 Convention (acceded on 15 October 1992), in addition to China and Russia.

from country to country, considering that currently there exists no universal or regional court governing it and refugee issues heavily depend on each country's national courts. To secure more objective and uniform interpretation of it, this research will refer to the position of UNHCR as the most important basis for discussions under refugee law. This approach may also conform to the interests of asylum-seekers or refugees such as NKEs. In a similar context, the views of the UN bodies on human rights law issues will take precedence over others, later in this study. As noted earlier in this chapter, it is virtually impossible to obtain any official factual information regarding NKEs from the Chinese and the North Korean governments. The alternative can be information from the South Korean government, and sometimes from other governments and the UN. In many other cases, however, this study cannot help but rely on various reports and papers presented by human rights NGOs. In this respect, it needs to be noted that the lack of more authoritative, comprehensive and concrete information about the current NKE situation may also unavoidably limit this research to rather generalised analyses.[89]

After this introductory chapter, the study is divided into two Parts: 'International Refugee Law (Part One)' and 'International Human Rights Law (Part Two)'. Part One is composed of Chapters II, III and IV. Chapter II deals with the first key question, which is whether NKEs can be recognised as so-called 'political refugees' under the 1951 Refugee Convention. In addition to the overall examination of the Convention refugee definition and relevant law, the situation of NKEs and North Korea, which is really *sui generis*, will be seriously considered and correspondingly analysed. Chapter III, acknowledging the limitations of utilising the former refugee concept in reality, explores another possibility of refugee status: that is, can NKEs be recognised as 'humanitarian refugees' under currently developing refugee law? In the chapter, a comprehensive survey of 'humanitarian refugees' will be carried out and the relevance to the NKE case will then be critically evaluated. Chapter IV explores the third key question: what kinds of protection may be

[89] The author himself actually made a research trip to the Chinese border area neigbouring North Korea in 2004. However, the main purpose of the trip (in the initial stage of this study) was just to obtain some general ideas for this study, not to conduct a major factual research on NKEs which seemed to be not only difficult but also dangerous and therefore require much more time, money, skills and efforts. The author's conclusion is that it is more realistic and effective for this study to focus upon legal analysis, rather than factual finding, which can be based on the facts and information already found in other various sources.

available for NKEs under international refugee law? This chapter deals with how NKEs can be protected as (political or Convention) refugees under the 1951 Convention, focusing on the principle of *non-refoulement* and its conflict with a bilateral treaty. In addition, related issues of diplomatic asylum and diplomatic protection will be examined.

Part Two comprises Chapters V and VI, and explores 'International Human Rights Law' issues. Chapter V will try to answer the following question: what kinds of international human rights can be applied to the NKE case? This question is particularly important because NKEs can be protected under these rules irrespective of their refugee status. The main discussion will be based on the contents of human rights treaties to which China is a Party, among others the 1984 Convention against Torture. Then, Chapter VI examines the protection mechanisms available to NKEs under this area of international law. The chapter will look into various implementation mechanisms of human rights law, including the newly established UN Human Rights Council (HRC) and several treaty monitoring Committees. Although international human rights mechanisms still retain many weaknesses, they seem to deserve more attention and careful examination, especially with respect to the NKE case. Finally, in Chapter VII, general conclusions will be drawn about the legal status of NKEs under international law and the related interaction and co-action of international refugee law and human rights law.

PART ONE

INTERNATIONAL REFUGEE LAW

Chapter II. Political Refugees and NKEs

1. Introduction

The Chinese government basically considers all the North Korean Escapees (NKEs) just 'illegal' migrants fleeing for economic reasons. The main host country deliberately denies any possibilities that NKEs could be recognised as refugees and sends them all back to their unwanted home country, in spite of constant protests from international organisations, relevant governments and, especially, various human rights NGOs. China, instead of accepting the complaints, argues briefly that "[it] has all along been handling [NKEs] appropriately in accordance with domestic and *international law* and humanitarian principles" (emphasis added).[1] Then, what international law is it that China argues itself compliant with?

As discussed in the previous chapter, international refugee law may be the most relevant part of international law with respect to the NKE case. There have been various legal arguments based on refugee law for the protection of NKEs. However, it is required, first and foremost, to examine whether NKEs can be 'recognised' as 'refugees' under the 'positive' provisions of the 1951 Refugee Convention (the 1951 Convention or CSR51)[2] and its 1967 Protocol (the 1967 Protocol or CSRP67),[3] which are regarded as fundamental instruments of refugee law, and both of which are legally binding on China.

This chapter, in the first place, differentiates varieties of the term 'refugee', and then it, overall but briefly, examines every element of the definition of 'political

---

[1] Ministry of Foreign Affairs of the People's Republic of China, "Foreign Ministry Spokeswoman Zhang Qiyue's Remarks on Recent Intrusions into Foreign Diplomatic Missions and Schools" (27 October 2004) <http://www.fmprc.gov.cn/eng/xwfw/s2510/t167965.htm> (last accessed on 7 June 2008). The same position has repeatedly been expressed by many Chinese officials.

[2] United Nations, *Treaty Series (UNTS)*, Vol. 189, p. 137 (No. 2545), adopted on 28 July 1951 and entered into force on 22 April 1954. As of June 2008, 144 States are Parties to the Convention. China acceded to it on 24 September 1982.

[3] *UNTS*, Vol. 606, p. 267 (No. 8791), adopted on 31 January 1967 and entered into force on 4 October 1967. As of June 2008, 144 States are Parties to the Protocol. China acceded to it on 24 September 1982.

refugee' or 'Convention refugee', which will be the main tool of legal analysis in the rest of this chapter. Based on this examination and the related factual information provided in the preceding chapter, it will explore all the legal issues, whether inclusion or exclusion and such as 'Republikflucht', refugee *sur place*, the 'hostile' class and victims of human trafficking as a particular social group, and dual nationality, which are raised in connection with the first key question of this research: if NKEs can be recognised as 'political or Convention refugees' under the 1951 Geneva Convention.

2. 'Political Refugees' or 'Convention Refugees'

The term 'refugee' in the sociological sense has been used for centuries, whenever and for whatever reasons persons have been compelled to leave their homes and to seek refuge elsewhere. The term has, however, acquired its 'legal' significance only in modern times, especially after the First World War.[4] Currently, several different categories of 'refugee' appear in the international law area, such as 'political refugee', 'Convention refugee', 'humanitarian refugee', 'mandate refugee', 'statutory refugee' and so on. Before the main argument of this chapter is discussed, it is necessary to look into what these varieties mean respectively.

Firstly, the term 'statutory refugee' refers to any person considered to be a refugee under the provisions of international instruments preceding the 1951 Convention,[5] which is stipulated in Article 1.A (1) of the 1951 Convention as follows:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
> (1) Has been considered a refugee under the Arrangements of 12 May 1926[6] and 30 June 1928[7] or under the Conventions of 28 October

---

[4] Eberhard Jahn, "Refugees", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law (EPIL)*, Vol. IV, Elsevier Science (2000), p. 72.
[5] United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees (Handbook)*, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited) (Geneva, January 1992), para. 32.
[6] "Arrangement relating to the Issue of Identity Certificates to Russian and Armenian refugees, supplementing and amending the previous Arrangements dated July 5, 1922, and May 31, 1924",

> 1933[8] and 10 February 1938[9], the Protocol of 14 September 1939[10] or the Constitution of the International Refugee Organization;[11]
>
> Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

The above enumeration is given to provide a link with the past and to ensure the continuity of international protection of refugees who became the concern of the international community at various earlier periods. These instruments have, however, by now lost much of their significance, and a discussion of them would be of little practical value to the current issues like the NKE case.[12] They are mostly concerned with some specific groups of refugees in the past, such as groups of Russian and Armenian refugees, and groups of Jewish or other victims of the Nazi or fascist regimes from Germany, Austria and Spain. Furthermore, the International Refugee Organization (IRO) ceased to exist more than fifty years ago. Therefore, 'statutory refugee' will not be included in main discussions of this study which chiefly deals with the present issue, the NKE case.

Secondly, the term 'Convention refugee' relates to any person whose refugee status is recognised under the definition of the 1951 Refugee Convention and/or 1967 Protocol. The formal determination of this is usually made by a relevant Party State.[13] The term 'political refugee' is also generally used in lieu of 'Convention

---

League of Nations, *Treaty Series (LNTS)*, Vol. LXXXIX, p. 47 (No. 2004).

[7] "Arrangement relating to the Legal Status of Russian and Armenian Refugees", *LNTS*, Vol. LXXXIX, p. 53 (No. 2005); "Arrangement concerning the Extension to other Categories of Refugees of certain Measures taken in favour of Russian and Armenian Refugees", *LNTS*, Vol. LXXXIX, p. 63 (No. 2006); "Agreement concerning the Functions of the Representatives of the League of Nations High Commissioner for Refugees", *LNTS*, Vol. XCIII, p. 377 (No. 2126); Vol. CCIV, p. 445; Vol. CCV, p. 193.

[8] "Convention relating to the International Status of Refugees", *LNTS*, Vol. CLIX, p. 199 (No. 3663); Vol. CLXXII, p. 432; Vol. CLXXXI, p. 429; Vol. CC, p. 530; Vol. CCIV, p. 464; Vol. CCV, p. 214.

[9] "Convention concerning the Status of Refugees coming from Germany", *LNTS*, Vol. CXCII, p. 59 (No. 4461); Vol. CC, p. 572; Vol. CCV, p.218.

[10] "Additional Protocol to the Provisional Arrangement and to the Convention, signed at Geneva on July 4th, 1936, and February 10th, 1938, respectively, concerning the Status of Refugees coming from Germany", *LNTS*, Vol. CXCVIII, p. 141 (No. 4634); Vol. CCV, p. 219.

[11] *UNTS*, Vol. 18, p. 3 (No. 283); Vol. 26, p. 416, adopted by UN General Assembly resolution 62 (I) on 15 December 1946 and entered into force on 20 August 1948. Resolution No. 108, adopted by the General Council of the International Refugee Organization at its 101st meeting on 15 February 1952, provided for the liquidation of the Organization.

[12] UNHCR, *Handbook*, para. 33.

[13] Guy S. Goodwin-Gill, *The Refugee in International Law (2nd ed.)*, Oxford University Press (1996), pp. 18-20, 33; UNHCR, *Determination of Refugee Status*, Training Module: RLD 2 (1989), Glossary.

refugee' due to the political character of this kind of refugee.[14]

As a contrary concept to 'political refugee', the term 'humanitarian refugee' has been widely used. It is also called '*de facto* refugee' by some scholars. The term 'humanitarian refugee' applies to a person who does not meet the Convention definition but nonetheless has a compelling need for protection. Without enough political nexus, this refugee category relates to some disasters, either man-made or natural.[15] With respect to the broadened activities of UNHCR, the term 'mandate refugee' appears frequently and is understood to include any person within the mandate or competence of UNHCR, but it should be noted that 'mandate refugee' basically applies to a person who meets the criteria to be qualified as a refugee under the definition of the Statute of UNHCR,[16] and, even in the broader sense of the definition, the term seems to cover both preceding categories of refugees, 'political' as well as 'humanitarian'.[17]

Additionally, the term 'displaced person' has been employed in various international discussions including in the UN, distinguished from the strictly interpreted 'refugee', but many times, except especially in the activities of IRO, this term has just referred to 'internally' displaced persons who are displaced within their own country.[18] Therefore, the term 'displaced person' may be of limited relevance to the subject of this research in general. More details of 'humanitarian refugee' and the expanded concept of 'refugee', including 'internally displaced person (IDP)', will be discussed in the next chapter.[19]

---

[14] Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. I: Refugee Character, A.W.Sijthoff (Leyden, 1966), pp. 78-79; S. Prakash Sinha, *Asylum and International Law*, Martinus Nijhoff (1971), pp. 95-98. Cf. Sometimes the term 'statutory refugee' is also used for this kind of refugee. Guy S. Goodwin-Gill, *supra* note 13, p. 29.

[15] Maryellen Fullerton, "The International and National Protection of Refugees", in Hurst Hannum (ed.), *Guide to International Human Rights Practice (3rd ed.)*, Transnational Publishers (1999), pp. 241-242.

[16] "Statute of the Office of the United Nations High Commissioner for Refugees (the UNHCR Statute)", UN General Assembly Resolution 428 (V) (14 December 1950), Annex.

[17] Guy S. Goodwin-Gill, *supra* note 13, p. 33. See also UNHCR, *Handbook*, para. 16.

[18] See Guy S. Goodwin-Gill, *supra* note 13, pp. 11-14; Sadruddin Aga Khan (United Nations High Commissioner for Refugees), "Legal Problems relating to Refugees and Displaced Persons", *Recueil des Cours (Collected Courses of the Hague Academy of International Law)*, 1976-I: Tome 149 de la collection (1977), pp. 295-296, 339-343, 347-348; Chooi Fong, "Some Legal Aspects of the Search for Admission into other States of Persons leaving the Indo-Chinese Peninsula in Small Boats", *The British Year Book of International Law (BYIL)*, 1981: Vol. LII, Oxford University Press (1982), pp. 75-90. Since the 1990s, the term 'internally displaced persons (IDPs)' has been commonly used in the UN rather than 'displaced persons'.

[19] Law on asylum is closely related to refugee law. Probably for this reason, the term 'asylum-seeker'

Among these various kinds of refugees, 'political refugee' or 'Convention refugee', the only category of refugee who may enjoy the full spectrum of international legal protection, is the main subject of this chapter. After general discussions on the definition of 'refugee' under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereof, specific analyses will be followed with special reference to the NKE case.

3. The Definition under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereof

3.1 General Definition

The definition of the term 'refugee' is laid down in the first Article of the 1951 Convention relating to the Status of Refugees. Among six sections of Article 1, sections A and B have been termed 'inclusion' clauses, which define the criteria that a person must satisfy in order to be a refugee.[20] Apart from the already discussed 'statutory refugee' definition set out in subsection A (1), the positive basis for refugee definition is as follows:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
> (1) .....
> (2) As a result of events occurring before 1 January 1951 and owing to 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 nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

---

has been confusingly used to refer to '(political) refugee' from time to time. In brief, the concept of 'asylum' has a longer history and is wider than that of 'refugee status' in that 'asylum' can be granted at the discretion of the relevant State even when the person has no fear of persecution. Anthony Aust, *Handbook of International Law*, Cambridge University Press (2005), pp. 187-188. The issue of asylum will be dealt with in Chapter IV.

[20] UNHCR, *Handbook*, paras. 30-31. Section C relates to so-called 'cessation' clauses, and sections D, E and F contain so-called 'exclusion' clauses.

> 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.

The 1951 dateline condition originated in the wish of the participating States, at the time the 1951 Convention was adopted, to limit their obligations to refugee situations that were known to exist at that time, or to those which might subsequently arise from events that had already occurred.[21] However, with the passage of time and the emergence of new refugee situations, the need to remove this time restriction was increasingly felt. As a result, the 1967 Protocol was adopted to make the Convention definition apply to such new refugees without any dateline.[22] The Protocol also eliminated the optional geographic limitation that had given States Parties the option to choose between "events occurring in Europe" or "events occurring in Europe or elsewhere" according to Article 1.B of the 1951 Convention.[23]

In addition to the general situation of refugees holding single nationality, there can, as shown above, be slightly special cases dealing with refugees who have

---

[21] UNHCR, *Handbook*, para. 7.

[22] UNHCR, *Handbook*, para. 8.

Art. I.2 of CSRP67: "For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and ..." and the words "... as a result of such events", in article 1 A (2) were omitted."

[23] See UNHCR, *Handbook*, paras. 108-110.

Art. 1.B of CSR51: "(1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951", and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations."

Art. I.3 of CSRP67: "The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol."

As of June 2008, just four States (Congo, Madagascar, Monaco and Turkey) stick to their choice to alternative (a). While Madagascar and Monaco are the Parties only to the 1951 Convention, Congo and Turkey have not changed their attitudes even after they acceded to the 1967 Protocol in 1970 and 1968 respectively.

dual or multiple nationality or stateless refugees.[24] For efficiency, this research will focus on the general situation with single nationality unless special observations are demanded for the other cases.

Consequently, the very general and currently applicable definition of 'refugee' without any restriction and speciality is as follows:

> any person who, owing to 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 nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

A well-founded fear of persecution based on reasons specified above, and being outside the country of nationality coupled with unwillingness to return to the country, are all significant elements in the refugee definition.[25] However, the phrase 'well-founded fear of being persecuted' is the core of the definition of 'refugee' and shows well the main elements of refugee character which are different from those in earlier definitions. It replaces the formerly used group or category approach, by the general concept, in respect of defining refugees.[26] The other elements of the definition, namely outside the country of nationality and unwillingness to return, are essentially questions of fact. They constitute evidence of the claimants' fear of persecution in their country of nationality, as well as of the fact that they have lost the protection of their home country.[27]

3.2 Well-Founded Fear

The first part of the definition, 'well-founded fear', is composed of two elements, subjective and objective. A state of mind, 'fear', is a subjective element in the person applying for recognition as a refugee.[28] An evaluation of this subjective element is

---

[24] See UNHCR, *Handbook*, paras. 101-107.
[25] Chaloka Beyani, "Intoduction", in Paul Weis (ed.), *The Refugee Convention, 1951: The Travaux Preparatoires Analysed, with a Commentary by the late Dr Paul Weis*, Cambridge University Press (1995), p. xv.
[26] UNHCR, *Handbook*, para. 37.
[27] Chaloka Beyani, *supra* note 25.
[28] UNHCR, *Handbook*, paras. 37-38. This UNHCR Handbook is widely accepted by most governments and practitioners as an authoritative interpretation of the 1951 Convention and the 1967

inseparable from an assessment of the personality of the applicant, because psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable, but another may have no such strong convictions even with the similar political opinion or the same religion.[29] An assessment of credibility is also indispensable where the case is not sufficiently clear from the facts on record. It is necessary to obtain and take into account all possible information about the applicant's background, such as the personal and family background, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences, to confirm that the predominant motive for his application is fear.[30] The term 'fear' relates not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.[31]

The frame of mind of the person concerned must be supported by an objective situation to satisfy the full meaning of 'well-founded fear'. The term 'well-founded' indicates the objective element of 'well-founded fear'.[32] Determination of refugee status, whether subjective or objective element related, basically requires an evaluation of the applicant's statements rather than a judgment on the situation prevailing in the applicant's country of origin. However, the applicant's statements cannot be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin is also an important factor in assessing the applicant's credibility. The applicant's fear should generally be considered well-founded "if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."[33] These considerations do not necessarily need to be based on the applicant's own experience, so what happened to his relatives, friends or other members of the same social group, may well show that his fear that

---

Protocol.

[29] UNHCR, *Handbook*, para. 40; UNHCR, *Determination of Refugee Status*, Training Module: RLD 2 (1989), Analysis of Case Studies, Case A.

[30] UNHCR, *Handbook*, para. 41.

[31] UNHCR, *Handbook*, para. 45.

[32] UNHCR, *Handbook*, para. 38.

[33] UNHCR, *Handbook*, paras. 37, 42.

sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and especially the manner in which they are applied, can also be related. The situation of each person must, however, be assessed on its own merits, with all relevant factors considered, such as a person's character, his background, his influence, his wealth or his outspokenness, etc.[34]

Whether fear is really well-founded or not can generally be measured by the reasonable possibility (reasonable likelihood, reasonable chance, substantial chance, substantial grounds, serious likelihood, serious possibility, good reason, good grounds, valid basis, real chance, real possibility, real likelihood or realistic likelihood) test, not by the probability test (*i.e.*, presentation is more probable than not).[35] For example, if one third of the members of a religious minority have been killed by a government, the chances of being killed on return will therefore be only one in three. This demonstrates very well that the probability test is not appropriate for refugee cases.[36] In sum, fear just needs to be reasonable, but indeed must be reasonable. Some exaggerated fear may, however, also be well-founded if such a state of mind can be regarded as justified in all the circumstances of the case. [37]

3.3 Persecution

No definition of 'persecution', for the purpose of refugee status determination, is found in international law,[38] but, based on Articles 31 (Refugees Unlawfully in the

---

[34] UNHCR, *Handbook*, para. 43.

[35] The reasonable possibility test has particularly been adopted by various courts of U.S.A., U.K., Canada, Germany, France and Australia. Chaloka Beyani, *supra* note 25, pp. xv-xix; Guy S. Goodwin-Gill, *supra* note 13, pp. 35-40, 52; Richard Plender, *International Migration Law (Revised 2nd ed.)*, Martinus Nijhoff Publishers (1988), pp. 416-417; UNHCR, *Determination of Refugee Status*, *supra* note 29, Analysis of Case Studies, Case A; Nicholas Sitaropoulos, *Judicial Interpretation of Refugee Status: In Search of a Principled Methodology Based on a Critic Comparative Analysis, with Special Reference to Contemporary British, French and German Jurisprudence*, Ant. N. Sakkoulas Publishers (Athens, 1999), pp. 321-348. For more details, see Brian Gorlick, "Common burdens and standards: legal elements in assessing claims to refugee status", New Issues in Refugee Research: Working Paper No. 68, UNHCR (October 2002).

[36] UNHCR, *Determination of Refugee Status*, *supra* note 29, Analysis of Case Studies, Case A.

[37] UNHCR, *Handbook*, para. 41.

[38] The only international instrument containing a definition of 'persecution' is the 1998 Rome Statute of the International Criminal Court (ICC) (*UNTS*, Vol. 2187, p. 3 (No. 38544), adopted on 17 July 1998 and entered into force on 1 July 2002. As of June 2008, 105 States are Parties to the Statute.). In principle, however, this definition may be applied only in the context of international criminal law, more specifically to the case of 'crimes against humanity'.

Art. 7.2 (g) of the 1998 Rome Statute: ""Persecution" means the intentional and severe deprivation

Country of Refuge)[39] and 33 (Prohibition of Expulsion or Return)[40] of the 1951 Convention, it may be inferred that any threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion is always persecution. Threats to life, bodily harm, torture, prolonged detention, repeated interrogations and arrests, and internal exile could be some examples of persecution, and other serious human rights violations, in connection with the same reasons above, would also constitute persecution.[41]

Discrimination generally does not rise to the level of persecution, but if measures of discrimination lead to consequences of a substantially prejudicial nature, for instance, serious restrictions on the right to earn a livelihood, the right to practise a religion, or access to normally available educational institutions and/or health services, this would amount to persecution.[42] Similarly, punishment or criminal prosecution for a common law offence normally does not constitute persecution. However, there are also some exceptional cases such as excessive or arbitrary punishment, political crime, and improper legislation or its improper application not in conformity with accepted human rights standards.[43]

Economic migrants are persons who voluntarily leave their country in order to take up residence elsewhere exclusively by economic considerations, not by reason of persecution. In some cases, however, the distinction between economic migrants and refugees is not clear, so that more careful analysis of all relevant circumstances of each individual case is required. What appears at first sight to be primarily an economic motive for departure may in reality also involve a political

---

of fundamental rights contrary to international law by reason of the identity of the group or collectivity;"

[39] Art. 31.1 of CSR51: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where **their life or freedom was threatened in the sense of Article 1**, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence" (emphasis added).

[40] Art. 33.1 of CSR51: "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**" (emphasis added).

[41] Maryellen Fullerton, *supra* note 15, p. 231; UNHCR, *Handbook*, para. 51. See Art. 9 (Acts of persecution) of the EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal of the European Union*, 30 Sep. 2004, L 304/12.

[42] UNHCR, *Handbook*, para. 54; Maryellen Fullerton, *supra* note 15, pp. 231-232.

[43] UNHCR, *Handbook*, paras. 56-60; Maryellen Fullerton, *supra* note 15, p. 232.

element.[44]

Persecution typically stems from action by government authorities, but it may also originate from action by private individuals if the authorities cannot or will not offer effective protection to the victims.[45]

3.4 Grounds for Persecution: Nexus to Civil or Political Status

In the definition of Convention refugee, there are five reasons for persecution: race, religion, nationality, membership of a particular social group and political opinion. In order to be considered a refugee, an applicant must show that well-founded fear of persecution is for one of the five civil or political grounds stated above. Frequently these reasons overlap one another: for example, a political opponent may belong to a religious or national group, or both; a person's refusal to practise a particular religion may be perceived by authorities as political opposition to a regime based on that religion; or a person's ethnicity may fall under both race and nationality. Neither of these instances in any way undermines or renders invalid the connection between the feared persecution and its basis.[46] [47]

3.4.1 Race

'Race', as a reason for persecution in the context of the refugee definition, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage. Frequently it also entails membership of a specific social group of common descent forming a minority within a larger population. Discrimination on racial grounds has been widely condemned as one of the most striking human rights violations in the world. Therefore, many times racial

---

[44] UNHCR, *Handbook*, paras. 62-64.

[45] Maryellen Fullerton, *supra* note 15, p. 232; UNHCR, *Handbook*, para. 65. See Nicholas Sitaropoulos, *supra* note 35, pp. 398-399.

[46] James C. Hathaway, *The Law of Refugee Status*, Butterworths Canada (1991), pp. 133-141; UNHCR, *Handbook*, paras. 66-67; UNHCR, "The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees (hereinafter "Interpreting Article 1 of the 1951 Convention")" (April 2001), para. 24.

[47] In UNHCR's practice, the Convention ground must be a relevant contributing factor, but this Convention ground need not be shown to be the sole, or dominant, cause. UNHCR, "Interpreting Article 1 of the 1951 Convention", para. 23. See Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection*, Cambridge University Press (2003), p. 341.

discrimination may amount to persecution in the sense of the 1951 Convention. This will be the case, "if, as a result of racial discrimination, a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences."[48]

3.4.2 Religion

The right to 'religion' is provided for in major human rights instruments such as the Universal Declaration of Human Rights (UDHR48)[49] and the International Covenant on Civil and Political Rights (ICCPR66),[50] which includes freedom to have or change one's religion, and freedom, either individually or in community with others and in public or private, to manifest it in worship, observance, practice and teaching. Persecution for reasons of religion may appear as many different forms: for instance, prohibition of membership of a religious community, of worship in public or private, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.[51]

3.4.3 Nationality

The 'nationality' ground has at times given rise to some confusion, because the same word can be used to refer to both a person's citizenship and a person's membership of an ethnic or linguistic group. In the case of stateless persons, their very lack of citizenship may attract upon them severe discrimination amounting to persecution. However, the most frequent meaning of nationality in the eligibility practice of States is that denoting ethnicity or ethnic origin, and in this context the nationality ground may occasionally overlap with the term 'race'. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national, ethnic or linguistic 'minority', but, as can be seen in many cases in different continents, a

---

[48] UNHCR, *Handbook*, paras. 68-69.
[49] Art. 18 of UDHR48. UN Doc. A/RES/217A (III) (10 December 1948).
[50] Art. 18 of ICCPR66. *UNTS*, Vol. 999, p. 171 (No. 14668), adopted on 16 December 1966 and entered into force on 23 March 1976. As of June 2008, 160 States are Parties to the Covenant.
[51] UNHCR, *Handbook*, paras. 71-72.

person belonging to a 'majority' group may fear persecution by a dominant minority group.[52]

3.4.4 Membership of a Particular Social Group

The next ground is 'membership of a particular social group'. Although the term 'particular social group' is not defined in the Convention, it is normally understood to comprise persons of similar background, habits or social status. A claim based on this ground may frequently overlap with a claim under other grounds such as race, religion or nationality. This category has been applied to families of capitalists, landowners, entrepreneurs, former members of the military, students, tribal groups, trade unions and individuals who violate the caste system. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the government's policies.[53]

Recently, 'gender-related persecution' has been much discussed in connection with this ground. In many relevant cases, however, persecution may be gender-related only in the sense that the method used to achieve the persecution is related to sex or to gender roles. For example, women of a certain ethnic group may be subjected to rape as a form of persecution, not for reasons related to sex or gender, but to nationality or religion. Moreover, even when persecution seems to be on account of sex or gender at first sight because of gender roles in that society, it may frequently in fact be based on one or more of the other grounds such as religion or political opinion. Nevertheless, there will also be cases, particularly but not exclusively gender-related cases, which do not fall into any other category and may only be determined under the particular social group rubric. Specific examples include women threatened with female genital mutilation, women facing domestic violence who have no recourse to government protection, individuals ostracised as

---

[52] Guy S. Goodwin-Gill, *supra* note 13, pp. 45-46; UNHCR, *Handbook*, paras. 74-76; UNHCR, "Interpreting Article 1 of the 1951 Convention", para. 26. Cf. Clauses prohibiting discrimination in major international human rights law instruments use the term 'national origin', but there appears no 'nationality': "... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, **national** or social **origin**, property, birth or other status. ..." (emphasis added). Art. 2 of UDHR48 & Art. 2.1 of ICCPR66.

[53] UNHCR, *Handbook*, paras. 77-78; Maryellen Fullerton, *supra* note 15, p. 232.

AIDS victims, and homosexual transvestites suffering because of behaviour and perceptions associated with that group. Accordingly, persecution may be gender-related in the sense that it is experienced on account of a person's sex, sexual orientation or gender role, and in the appropriate case, this could be because of membership of a particular social group.[54]

3.4.5 Political Opinion

Last but not least, 'political opinion' can be a ground for persecution in the refugee definition. As in the case of other grounds, just holding political opinions different from those of the government is not in itself a ground for claiming refugee status, and it must be shown that there is a fear of persecution for holding such political opinions. 'Political opinion' refers to ideas not tolerated by the authorities, which are critical of government policies or methods. It also includes opinions attributed to an individual by the authorities, even if the individual does not actually hold those opinions. For instance, a person may be wrongly suspected of being a dissident by his government. Persecution based on political opinion presupposes that the authorities are aware, or will become aware, of the opinion. Individuals who conceal their political opinions until after they have fled their countries may also be eligible for refugee status if they can show that their views are likely to subject them to persecution if they return to their home countries.[55]

In the case of a political offence, proper prosecution for punishable 'acts' committed out of political motives basically does not constitute persecution in the refugee context. However, prosecution for a political offence may be a pretext for punishing the offender for his political 'opinions' or the 'expression' thereof, and there may also be cases where a political offender would be exposed to excessive or arbitrary punishment for the alleged offence, which will amount to persecution. In this regard, therefore, the following factors should be considered to determine whether a political offender can be recognised as a refugee: "personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives[, and] the nature of the law

---

[54] UNHCR, "Interpreting Article 1 of the 1951 Convention", paras. 29-31; Maryellen Fullerton, *supra* note 15, p. 232.
[55] Maryellen Fullerton, *supra* note 15, pp. 232-233; UNHCR, *Handbook*, paras. 80-83.

on which the prosecution is based."[56]

3.5 Alienage

To become a refugee, a person has to 'be outside the country of his nationality'. International protection for refugees cannot come into play as long as a person is within the territorial jurisdiction of his home country. In this context, 'nationality' refers to 'citizenship' only, which is different from the broader meaning of 'nationality' stated above as one of the grounds.[57] This requirement does not necessarily imply that a refugee must have left his country of origin for fear of persecution. An individual may have left his country for reasons other than Convention grounds, for example, as a student, a diplomat or a traveller, but circumstances may have changed since departure so that the individual now fears persecution if he returns. Such a person is known as a 'refugee *sur place*'.[58]

To be eligible as a refugee, a person must also show that he is 'unable or, owing to such fear, unwilling to avail himself of the protection of that country'. Whether unable to have the protection or unwilling to accept the protection of his government, the fact is that the person lacks any effective protection from his home country.[59] It is generally agreed that this element of the definition refers only to diplomatic or consular protection available to nationals who are outside the country of origin.[60]

3.6 Cessation and Exclusion

The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be a refugee, and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the

---

[56] UNHCR, *Handbook*, paras. 84-86.
[57] UNHCR, *Handbook*, paras. 87-88.
[58] Maryellen Fullerton, *supra* note 15, p. 233; UNHCR, "Interpreting Article 1 of the 1951 Convention", paras. 33-34. See also UNHCR, *Handbook*, paras. 94-96.
[59] See UNHCR, *Handbook*, paras. 97-100.
[60] UNHCR, "Interpreting Article 1 of the 1951 Convention", para. 35.

inclusion clauses.[61] Considering, generally, their nature as exceptions and also the serious consequences of their application for the person concerned, these negative clauses must be interpreted in a restrictive manner.[62]

3.6.1 Cessation

The Convention lists six circumstances under which persons recognised as refugees may lose that status because they no longer need international protection. The first four are acts voluntarily taken by the refugees in question, and the last two concern changes in the country of origin.[63] Those six cessation situations described in Article 1.C of the 1951 Convention are as follows:

> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
> (2) Having lost his nationality, he has voluntarily re-acquired it; or
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of pervious persecution for refusing to return to the country of his former habitual residence.

3.6.2 Exclusion

The 1951 Convention, in sections D, E and F of Article 1, explicitly excludes from

---

[61] UNHCR, *Handbook*, para. 31.
[62] See UNHCR, *Handbook*, paras. 116, 149, 180; UNHCR, "Interpreting Article 1 of the 1951 Convention", para. 38.
[63] Maryellen Fullerton, *supra* note 15, p. 234.

refugee status those persons who, despite satisfying the refugee definition, fall into the following categories: persons already receiving United Nations protection or assistance (section D); persons who are not considered to be in need of international protection (section E); and persons who are not considered to be deserving of international protection (section F).[64] The relevant clauses are as follows:

> D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
>
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.
>
> E. This Convention shall not apply to a person who is recognized 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.
>
> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Only one current situation relating to section D is Palestinian refugees who fall within the mandate of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), and section E could relate to refugees of German extraction having arrived in the Federal Republic of Germany (West Germany) who were recognised as possessing, the rights and obligations attaching to German nationality, but not formal citizenship.[65] With respect to section F, many international instruments containing those international crimes such as war crimes and crimes against humanity have been adopted since the end of the Second World War, most recently the Rome Statute of the International Criminal Court (ICC) in 1998. At subsection F (b), a 'serious' crime must be a

---

[64] *Ibid.*; UNHCR, *Handbook*, para. 140.
[65] UNHCR, *Handbook*, paras. 142, 144.

capital crime or a very grave punishable act,[66] and the 'purposes and principles' of the UN at subsection (c) can be found in the Preamble and Articles 1 and 2 of the UN Charter.[67] [68]

4. Applicability of the Definition to the NKE Case

4.1 Introduction: Statistics

According to UNHCR statistics based on data provided by governments, there were 288 North Korean refugees and 78 North Korean asylum-seekers at the end of 2005.[69] In these statistics, 'refugees' refer to "[p]ersons recognized as refugees under the 1951 UN Convention/1967 Protocol, the 1969 OAU Convention, in accordance with the UNHCR Statute, persons granted a complementary form of protection and those granted temporary protection", and 'asylum-seekers' relate to "[p]ersons whose application for asylum or refugee status is pending at any stage in the procedure".[70] Although the number of North Korean 'refugees' given here includes the number of humanitarian refugees as well as Convention refugees, these statistics indicate that there are at least some North Korean refugees formally recognised by some States and the recognition procedure is still being processed, even if the region open to the formal procedure may be rather limited. For more specific information, statistics regarding 'asylum applications and refugee status determination by origin, 2005' need to be looked into.[71] According to the related table, 23 North Koreans were formally recognised as political refugees during 2005 and 15 North Koreans were granted humanitarian status, but 56 applications made by North Koreans were

---

[66] See UNHCR, *Handbook*, paras. 147-163; UNHCR, "Interpreting Article 1 of the 1951 Convention", paras. 41-51.
[67] Adopted on 26 June 1945 and entered into force on 24 October 1945. As of June 2008, 191 States are Members of the UN.
[68] UNHCR, *Handbook*, para. 163.
[69] UNHCR, "2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR (2005 Global Refugee Trends)" (9 June 2006), Table 2, available at <http://www.unhcr.org/statistics>.
[70] *Ibid.*
[71] UNHCR, "2005 Global Refugee Trends", Table 8.

rejected during the same year.[72] This second source clearly shows that at least a quarter (24.5%) of North Korean applicants are generally recognised as political refugees or Convention refugees, and also shows that four out of ten (40.4%) North Korean applicants are successful in being regarded as refugees in need of international protection, either political or humanitarian.

Radio Free Asia (RFA), a private, non-profit corporation based in Washington, DC in the U.S.A.[73] reported in February 2006 that seven West European countries had accepted over 280 North Koreans as refugees since the late 1990s until 2005, including Germany (232), the U.K. (25), Denmark (7), the Netherlands (6), Belgium (6), Sweden (5) and Norway (2),[74] and reported again later in March that, citing UNHCR sources obtained by itself, there were 326 North Korean refugees in the same European countries plus Ireland, Switzerland and France at the end of 2004, which includes even the number of resettlement arrivals from other regions.[75] Considering the practice regarding refugee statistics of UNHCR and the relevant European countries, original information providers, the 'refugees' here may be a mixture of political and humanitarian refugees, and it is also necessary to confirm whether these 'refugees' were originally NKEs the issue of which this research is examining, or mainly diplomats, high-ranking officials or students studying abroad, namely real defectors originating from North Korea. Therefore, more detailed information, such as more classified statistics, relevant documents, decisions or judgments, needs to be obtained and assessed in order to make more correct analyses of this matter and to take more reliable lessons with respect to the NKE case. However, the access to these kinds of detailed information, especially the first instance decisions, seems to be actually impossible for a third party to have, for reasons of confidentiality and privacy, which is usually subject to each State's domestic law such as the Data Protection Act[76] of the U.K.[77]

---

[72] *Ibid.*

[73] Although RFA is formally a private, non-profit corporation, it is actually funded by an annual U.S. federal grant. Its website address is <http://www.rfa.org>.

[74] Related RFA articles on 17, 21, 22, 23 Februarly 2006 & 3, 13 January 2006 (in Korean), available at the above website.

[75] Related RFA articles on 8 & 13 March 2006.

[76] Data Protection Act 1998, 1998 Chapter 29 (U.K.).

[77] The author tried to contact relevant government departments of those European countries and UNHCR to obtain more detailed documents, but there were only three replies from them, the British, the Belgian and the Swedish authorities concerned. Even the replies contain only a notification of the

In spite of this lack of detailed information, it can be concluded as the following: obviously there are some North Korean Convention (or political) refugees formally recognised recently by these European countries and, even if not all of them, many or most of them may be the former NKEs. In addition to the UNHCR statistics mentioned above, other statistics provided by the British government also support this argument. The data show that five North Koreans were granted full asylum as Convention refugees both in 2004 and in 2005, while five and ten North Koreans were granted just humanitarian protection respectively in 2004 and in 2005.[78] Furthermore, according to the interviews conducted by Radio Free Asia with a Belgian official and North Korean refugees in Belgium, it is confirmed that six North Koreans recognised as refugees there are all political refugees and they were actually common NKEs who could usually, with the help of their relatives in China, reach Belgium together with their Chinese guides.[79]

---

rejection of the access and the reasons for it as stated in the main text above: "... It is not possible to provide details of individual decisions. Every asylum application is decided on its individual merits, although obviously there are guidelines. The text of each decision is therefore subject to the Data Protection Act and is not available. ... (Home Office, U.K., Personal communication dated 25 April 2006)"; "... However, for reasons of confidentiality and privacy, the Office of the Commissioner General may not communicate to a third party any information concerning an individual asylum dossier. Such information may only be communicated to the asylum applicant or his legal council in the asylum procedure. (Office of the Commissioner General for Refugees and Stateless Persons, Belgium, Personal communication dated 25 April 2006)"; "I have now consulted our expert on Asia and he has not heared[*sic*] about these North Koreans that should have been granted asylum in Sweden. I have also searched our archives about North Korea, but is[*sic*] does not show anything in this matter either. We do publish our decisions on our website, www.migrationsverket.se, but only in swedish[*sic*] at the moment. (Migration Board, Sweden, Personal communication dated 26 April 2006)". Additionally, some more detailed statistics were received from the British Home Office.

[78] See *ibid*. According to a recent press report of RFA, among 100 NKEs who applied for asylum and received decisions in the U.K. between January to September in 2007, 75 NKEs were granted full asylum and 15 NKEs were given humanitarian protection. The success rate is really high, but it is also reported that some of them are former NKEs who have already settled in South Korea before so basically are not eligible for asylum or other protection. "The success rate of asylum for NKEs in the U.K. is 75%", *RFA* (16 January 2008).

[79] "Belgium accorded six North Koreans refugee status", *RFA* (13 January 2006). There is another report that one NKE whose surname is "Huh" was recognised as a refugee by the Mexican National Institute of Migration after the seven-month-long investigation in 2005. Huh had firstly arrived at some place in South America from China with a forged Chinese passport, and then entered Mexico with a forged South Korean passport. Huh had originally wanted to go to the U.S.A., but, after having been arrested at a Mexican airport because of his/her forged South Korean passport, Huh disclosed his/her actual nationality as a North Korean and applied for refugee status there. "One North Korean approved as a refugee in Mexico", *RFA* (8 September 2005).

4.2 General Issues

The statistics and State practice discussed above clearly show that NKEs could be acknowledged as Convention refugees. Therefore, this possibility should be duly considered by all States Parties to the 1951 Convention and/or the 1967 Protocol. China is a Party State to both treaties[80] and adopted alternative (b) of Article 1.B (1) of the Convention regarding geographic option,[81] and made reservations about just a few things,[82] other than the definition in respect of which a reservation cannot originally be made according to the restrictions on making reservations.[83] Accordingly, without any time or geographic limitations, the same 'general definition of refugee' as already discussed in this chapter is applicable to the NKE question which has arisen mainly in China.

Before the main arguments are discussed, the following statement needs to be stressed: "[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee."[84] This means that if an NKE fulfils the positive criteria of the definition and does not meet any negative criteria in the definition, the NKE is a Convention refugee in itself, even if the State concerned such as China does not officially confirm that he or she is a refugee. This should be kept in mind while the remaining examinations in this chapter are carried out.

For the purposes of this research, 'North Korean Escapees (NKEs)' are 'those who fled North Korea and refuse to return to their home country due to serious food shortages and widespread human rights violations in North Korea.'[85] This meaning excludes from NKEs, North Koreans who voluntarily return to North Korea regularly

---

[80] China acceded to both the Convention and the Protocol on 24 September 1982.
[81] See *supra* note 23.
[82] China made reservations in respect of the latter half of Article 14 (Artistic Rights and Industrial Property) and paragraph 3 of Article 16 (Access to Courts) of the 1951 Convention, and Article IV (Settlement of Disputes) of the 1967 Protocol. Relevant information available at the United Nations Treaty Collection <http://untreaty.un.org>.
[83] See Art. 42 (Reservations) of CSR51 & Art. VII (Reservations and Declarations) of CSRP67.
[84] UNHCR, *Handbook*, para. 28. See also Guy S. Goodwin-Gill, *supra* note 13, p. 32.
[85] See note 6 of Ch. I.

for their illegal transnational trade or business, and those who cross the frontier illegally to visit their relatives or acquaintances in China to get some food and/or money but also return to North Korea voluntarily.

Now then, are NKEs Convention or political refugees, as some States have formally recognised and many NGOs have eagerly argued? Or are they just illegal economic migrants as China has constantly and bluntly asserted? As stated above, a (Convention) 'refugee' is "any person who, owing to 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 nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country." Firstly, NKEs are outside their home country and unwilling to avail themselves of the protection of their country; on the contrary, they are trying to escape being captured by its agents. Secondly, NKEs have already experienced various kinds of persecution including intolerable discrimination amounting to persecution, or they fear being tortured and severely punished when they return to their country. Their fear of being persecuted, the harsh human rights conditions in North Korea considered together, seems to be reasonable and therefore the fear can be regarded as 'well-founded'.[86] Thirdly, the cessation and exclusion clauses may not be applied to the normal cases of NKEs. Some exceptional cases will, however, be dealt with below.

In the end, the only remaining element of the definition in question is about 'the Convention grounds'. NKEs' fear of persecution must be based on at least one of the reasons in the definition in order for them to be considered refugees. Their related reasons can be political opinion (actual or imputed, and the issue of 'Republikflucht'), membership of a particular social group (class, family, and women as victims of trafficking), religion, and/or race or nationality. This last element, 'the Convention grounds', is the most controversial issue in debates on the legal status of NKEs, so each of those reasons is discussed below in turn.

[86] Related issues of 'persecution' will be discussed in more detail at section 4.4.2 "Republikflucht' and NKEs' below.

4.3 Political Opinion

4.3.1 Actual Political Opinion

There could be various direct or indirect individual reasons behind the flight of NKEs and these reasons might often be mixed together to make the NKEs flee their home country. In spite of this variety and complexity, it is important, in order to examine the possibility of their refugee status, to know what has 'mainly' made them escape from their country. The table below gives a useful clue to this.

Table 7: Number of NKEs Arriving in South Korea by Reason for Flight

Reason	Economic Hardship	Fear of Punish -ment	Political Dissatis -faction	Accompa -nying	For Settlement in China	Family Trouble	Others	Total
2000	127	66	52	51	13	2	1	**312**
2001	293	73	33	171	7	2	4	**583**
2002	606	93	96	259	37	39	9	**1,139**
2003	774	80	123	194	46	53	11	**1,281**
2004 (-June)	463	44	63	148	2	39	1	**760**
Total	**2,263 (55.53%)**	**356 (8.74%)**	**367 (9.01%)**	**823 (20.19%)**	**105 (2.58%)**	**135 (3.31%)**	**26 (0.64%)**	**4,075 (100%)**

(Source: Ministry of Unification, Republic of Korea. Translated by the author.)

As seen in the table, the majority of the cases (55.53%) relate to economic hardship resulting mainly from food shortages, and this reason may also affect all the other reasons in reality. However, 367 persons among 4,075 NKEs who currently settled in South Korea (9.01%) clearly replied that they had fled North Korea owing to their political dissatisfaction with the dictatorial regime in North Korea. This means that although various or mixed reasons could make them decide to leave their country, their main motive for the flight was their political opinions against their government.[87]

It is generally known that there is no freedom of opinion and expression in North Korea,[88] and if a person there expresses, or just implies, any opinion or

---

[87] See *supra* note 47.

[88] Nominally, the revised 1998 North Korean Constitution guarantees these kinds of rights.

Art. 67: "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 organizations." (unofficial translation) <http://confinder.richmond.edu/local_nkorea.html>.

In addition, North Korea is a State Party to ICCPR66. It acceded to it on 14 September 1981.

thought against the government, which also includes opinions against the leader and his family, the person can, at worst, be sent away, with his or her family, to a political prison camp for the rest of life.[89] North Korea is also notorious as one of the most well-controlled clandestine countries in the world, so few political protests have been reported for a long time. Generally speaking, it is impossible to live there as a political dissident. Therefore, even the NKEs who have their real political opinions against the government cannot usually help but conceal those opinions until they succeed in fleeing their country.[90] Needless to say, it is certain that their views are likely to subject them to persecution if they return to North Korea.

Here are some actual cases. Young-kuk Lee, a former bodyguard of Jong-il Kim, the leader of North Korea, came to realise, while listening to South Korean radio broadcasts illegally in his poor hometown after his ten-year-long compulsory military service, that the political indoctrination he had been taught was not true and South Korea was a real democracy with real freedom. Therefore, he fled to China hoping to defect to South Korea. After his flight, he was told that his parents had either disappeared or were somewhere in detention.[91] There are also many escapees

---

Art. 19 of ICCPR66

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

[89] See Korea Institute for National Unification, *White Paper on Human Rights in North Korea 2006* (Seoul, May 2006), pp. 116-123, 235-238. Also available at <http://www.kinu.or.kr>. See also UN Commission on Human Rights, "Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Vitit Muntarbhorn", UN Doc. E/CN.4/2006/35 (23 January 2006), para. 18 (There is also another report of the same title in 2005. UN Doc. E/CN.4/2005/34 (10 January 2005)); UN General Assembly (UNGA), "Situation of human rights in the Democratic People's Republic of Korea: Report of the Special Rapporteur, Vitit Muntarbhorn", UN Doc. A/60/306 (29 August 2005), para. 35.

For the North Korean government's official position on its human rights situation with respect to ICCPR, including this issue, and the conclusion of the UN Human Rights Committee on it, see North Korea's 2nd Periodic Report to the Committee, UN Doc. CCPR/C/PRK/2000/2 (4 May 2000); Concluding Observations of the Committee, UN Doc. CCPR/CO/72/PRK (27 August 2001); Replies of North Korea, UN Doc. CCPR/CO/72/PRK/Add.1 (5 August 2002). However, discussions at the Committee were mainly about North Korean law itself, and did not include enough practice analyses due to the lack of information from the North Korean government.

[90] See James C. Hathaway, *supra* note 46, p. 149.

[91] David Hawk, *The Hidden GULAG: Exposing North Korea's Prison Camps*, U.S. Committee for

who had already experienced political prison camps before they fled to China, such as Chol-hwan Kang.[92] They usually hold strong political opinions against their government. Recently, some former South Korean prisoners of war, who had been captured during the Korean War over fifty years ago, finally escaped from North Korea and sought asylum in South Korea.[93] They may also be regarded as political refugees in some sense, although this case contains other complex legal issues as well.[94]

4.3.2 Imputed Political Opinion

In addition to political opinions actually held by refugees, there can also be political opinions imputed to refugees by their governments.[95] It is now generally agreed that imputed or perceived grounds, or mere political neutrality, can form the basis of a refugee claim. For example, a person may not in fact hold any political opinion, but may be perceived by the persecutor as holding such an opinion. In such a case, the imputation or perception which is enough to make the person liable to a risk of persecution is likewise, for that reason, enough to fulfil the Convention ground requirement, because it is the perspective of the persecutor which is determinative in

---

Human Rights in North Korea (22 October 2003), pp. 33-34 <http://www.hrnk.org/HiddenGulag.pdf>.

[92] *Ibid.*, pp. 30-31. Mr. Kang's story is well known to the public because of his book published in French and English: *Les Aquariums de Pyongyang*, Éditions Robert Laffont (2000) & *Aquariums of Pyongyang: Ten Years in the North Korean Gulag*, Basic Books (New York, 2001).

[93] Korea Institute for National Unification, *supra* note 89, p. 289. See UN Commission on Human Rights, *supra* note 89, para. 53. Many of South Korean prisoners of war, between 19,000 and 50,000, were compelled to remain in North Korea, although they should have been sent back to South Korea after the ceasefire of the Korean War in 1953 according to the 3rd 1949 Geneva Convention: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. ..." Art. 118 of the Geneva Convention Relative to the Treatment of Prisoners of War (*UNTS*, Vol. 75, p. 135 (No. 972), adopted on 12 August 1949 and entered into force on 21 October 1950. As of June 2008, 194 States are Parties to the Convention. North Korea and South Korea acceded to it on 27 August 1957 and 16 August 1966 respectively.). Actually, the Convention was not in effect at the time of the outbreak of the War and no belligerent States including North Korea were Parties to the Convention at that time. However, North Korea, like other belligerent States such as U.S.A. and South Korea, declared in writing on 13th July 1950 that North Korea would abide by all the principles relating to the Geneva Convention on prisoners of war.

[94] For example, their legal status as prisoners of war, their current nationality, South or North, the nature of the Korean War, civil or international, the applicability of the 1949 Geneva Conventions to the Korean War, the extent of the application if applicable, and differences in the interpretation of the Article 118 of the 3rd Geneva Convention (automatic repatriation of all prisoners of war, or respect for each prisoner's own decision among being repatriated, remaining in the detaining country, or going to a third country), etc.

[95] The logic of 'imputed or perceived grounds' can also be applied to the reasons of 'religion' and 'membership of a particular social group'.

this respect.[96]

This 'imputed political opinion' may make more NKEs be eligible for recognition as refugees. In North Korea, the inflow of information is strictly blocked by the government. All radio dials are fixed to the North Korean official broadcasting service channels and sealed. A police officer visits each home every three months and, if a seal is found broken, the person involved is assumed to be guilty of listening to South Korean or other foreign broadcasting services and treated as a political criminal. These sorts of controls are ongoing. According to an NKE whose surname is Suh, people in North Korea must register their radios, televisions and tape recorders, and the frequencies must remain firmly fixed at all times.[97] People who listen to or sing South Korean songs, or see video tapes of any South Korean or foreign television serials, films or publications, are also generally regarded as political offenders. The following case is a good example of this.

> ..... In September 1998, I was caught by the North Korean security agency after watching videos of a Korean television show entitled "Sandglass" and passing them around to my friends, which later led me to flee to China. At that time, people who watched or circulated movies or publications from South Korea or other capitalist countries such as the United States, Japan and the United Kingdom were charged with condemning socialism, spreading capitalism or, in the worst case, opposing the monolithic ideological system of the party. People so charged were either executed according to the socialist Constitution or sent to concentration camps. Today many innocent people are dying in underground prisons of the security agency (bowibu), lodgings converted into interrogation rooms and concentration camps such as Yodok Political Prisoners' Camp.
>
> I am also one example. In early October 1998, after a close call with the North Korean security agency I fled to China, ...[98] [99]

---

[96] UNHCR, "Interpreting Article 1 of the 1951 Convention", para. 25. There are many related legal cases held in Canada, U.S.A., Belgium, Germany, U.K. and the Netherlands. *Ibid.* See also UNHCR, *Handbook*, paras. 78, 80; Guy S. Goodwin-Gill, *supra* note 13, p. 49; James C. Hathaway, *supra* note 46, pp. 154-157. For more details of this concept, see Mark R. von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared*, Martinus Nijhoff Publishers (2002), pp. 45-49, 55-57; Nicholas Sitaropoulos, *supra* note 35, pp. 400, 405, 411, 416, 418, 421.

[97] Korea Institute for National Unification, *supra* note 89, pp. 117-118. See UN Commission on Human Rights, *supra* note 89. In addition, the common North Koreans cannot use the internet generally, because not only the use of the internet is severely restricted by the government, but also just a few North Koreans can have their personal computers (official permission is also needed to get a computer). See UN Commission on Human Rights, *supra* note 89, para. 18.

[98] Kwang-il Park, "The Plight of Children in North Korea", in Citizen's Alliance for North Korean Human Rights *et al.*, *The 6th International Conference on North Korean Human Rights & Refugees:*

It can, therefore, be concluded that there are surely some NKEs who, based on their well-founded fear of being persecuted for reasons of their own or imputed political opinions, could be eligible as Convention refugees.[100]

4.4 Issue of 'Republikflucht'

4.4.1 'Republikflucht'

Traditionally, totalitarian or communist countries have severely restricted their citizens' departure for other countries.[101] Passports are difficult to obtain, and illegal border-crossings or unauthorised stays abroad usually attract heavy penalties.[102] The cases involving those fleeing their countries against the strict restriction are commonly called the German term 'Republikflucht', that is 'flight (or escape) from the Republic' in English. Considering the object and purpose of relevant laws containing harsh punishment, and a context in which the fact of leaving or staying abroad is seen as a political act, asylum-seekers relating to 'Republikflucht' can be regarded as their having actual or, more probably, 'imputed' political opinions.[103] Consequently, the severe punishment for 'Republikflucht' may justify the asylum-

---

Seoul, Korea (St. Ignatius House / Sogang University, February 14-16, 2005), p. 136.

There is another related case of Hae-nam Ji. She was arrested and sent to a prison for three years because she sang a South Korean song. David Hawk, *supra* note 91, pp. 46-47.

[99] There are two relevant Articles of the North Korean Criminal Code.

Art. 195 (Crime of listening to hostile broadcasts and collecting, retaining or disseminating of hostile publications or leaflets): "A person who systematically listens to broadcasts opposing the Republic, or who collects, retains or disseminates handbills, photographs, video tapes, publications or leaflets opposing the Republic, without anti-State purposes, shall be committed to a detention labour facility for up to two years. In cases where the person commits a grave offence, he or she shall be committed to a reform institution for up to five years."

Art. 222 (Crime of fabrication and circulation of unfounded rumours): "A person who fabricates or circulates unfounded rumours that could contribute to mistrust of the State, and consequently causes social confusion, without anti-State purposes, shall be committed to a detention labour facility for up to two years." The 2004 Criminal Code of North Korea (Source: Ministry of Unification, Republic of Korea <http://www.unikorea.go.kr>. Translated by the author.).

The 1987 North Korean Criminal Code was amended in 1999 and 2004. The content of Article 195 newly appeared in the 2004 Code, and the content of Article 222 had originally deleted in the 1999 Code but revived in the 2004 Code with little revision of the corresponding Article of the 1987 Code. It must always be understood that the law is one thing and its actual application is quite another, especially in North Korea. There have been many reports that harsher and inconsistent punishment is carried out in North Korea, sometimes even without any due legal process.

[100] This possibility was also confirmed by the UN Special Rapporteur. UNGA, *supra* note 89, para. 26.

[101] For the cases of the former Soviet Union and East Germany, see Richard Plender, *supra* note 35, pp. 97, 107-111, 114-115.

[102] Guy S. Goodwin-Gill, *The Refugee in International Law*, Oxford University Press (1983), p. 31.

[103] *Ibid.*, pp. 32-33; James C. Hathaway, *supra* note 46, pp. 40-41. Mark R. von Sternberg, *supra* note 96, pp. 165-166.

seekers' fear of persecution within the meaning of the Convention.[104]

A decision regarding 'Republikflucht' was actually made by the Federal Administrative Court of West Germany in 1971. In the decision, the Court observed on the object and purpose of relevant laws and penalties as follows:

> [Punishment for the crime of flight from the Republic] serves the goal of securing the political sovereign authority of communism. It is not comparable with the penalties with which, even in "constitutional States", unauthorized border crossing is punished.[105]

In Austria, an earlier ministerial directive expressly provided for recognition of refugee status "where penal sanctions applied to overstayers, where the asylum-seeker had overstayed, and where he or she declared an unwillingness to return to the country of origin for political reasons considered in the widest sense."[106] [107]

Canada and United States, against their traditionally restrictive tendency on 'exit control' claims, have changed their views in case law into more favourable ones towards asylum-seekers.[108] For instance, in *Rodriguez-Roman v. INS*,[109] the U.S. Federal Court of Appeals held, while directly citing UNHCR's Handbook as an authoritative guide, that the rule regarding military desertion, "that punishment for

---

[104] Richard Plender, *supra* note 35, p. 418. See also UNHCR, *Handbook*, para. 61.

[105] Bundesverwaltungsgericht, 26 October 1971, I C 30/68, BVerwGE 39, 27 (West Germany), p. 29, as translated in Guy S. Goodwin-Gill, *supra* note 102, p. 32.

[106] Directive of the Minister of the Interior, 22.501/4-II/0/75, part ii, as cited in Guy S. Goodwin-Gill, *supra* note 102, p. 32. See also Guy S. Goodwin-Gill, *supra* note 13, p. 53; Richard Plender, *supra* note 35, p. 418, note 189 (p. 451).

[107] In practice, many States are wary of recognising refugee status in the case of this kind, for fear of attracting asylum-seekers motivated by purely economic considerations. Guy S. Goodwin-Gill, *supra* note 13, p. 53. But, see also related discussions below in this chapter. On the other hand, some States such as Denmark have instead granted *de facto* refugee status to asylum-seekers relating to 'Republikflucht'. Pia Lynggaard Justesen, "Denmark", in Jean-Yves Carlier *et al.* (eds.), *Who is a Refugee?: A Comparative Case Law Study*, Kluwer Law International (1997), pp. 298-300.

[108] Mark R. von Sternberg, *supra* note 96, pp. 162-166. See also James C. Hathaway, *supra* note 46, pp. 41-43.

[109] *Francisco Lucas Rodriguez-Roman v. Immigration and Naturalization Service (INS)*, 98 F.3d 416 (9th Cir. 1996) (U.S.A.). It refers to many related U.S. legal cases.

For related Canadian cases, see *Roberto Martinez Castaneda v. Canada (Minister of Employment and Immigration (MEI))* (1993), 69 F.T.R. 133 (F.C.T.D.) (Canada), in which the Canadian Federal Court Trial Division ruled that the Cuban asylum-seeker who had violated the Cuban exit law was eligible for Convention refugee status, especially based on the extrajudicial mistreatment of his family by the Cuban authorities as a result of his act of defiance.

Also for related U.K. cases, see *R v. Secretary of State for the Home Department, ex parte Velpiyasslan*, Court of Appeal (Civil Division), unreported (transcript available at LexisNexis), 31 March 2000 (England/Wales); *R v. Secretary of State for the Home Department, ex parte Jensath*, Queen's Bench Division, [2000] Imm AR 330, 5 November 1999 (England/Wales).

desertion , *per se*, does not constitute persecution", and the rule concerning law of general application, "that prosecution for an act deemed criminal and made applicable to all of a country's citizens is not persecution", were both inapplicable to this case of the crime of illegal departure, and that "[this] crime is *sui generis* and should not be treated in the same manner as other crimes."[110] Based on this, the Court further ruled that "[a] petitioner may establish persecution within the meaning of the statute if he can show that he left or remained away from his homeland for political reasons and that, if returned, he would be subject to severe punishment, whether as the result of criminal prosecution or otherwise."[111] More importantly, the Court concluded about the motive requirement as follows:

> Because the crime is intended to punish those who exhibit a grave form of disloyalty to their homeland, we simply acknowledge here what should by now have been apparent to all: that *a state which severely punishes unlawful departure views persons who illegally leave as disloyal and subversive* and seeks to punish them accordingly. Thus, the motive that a petitioner must show on the part of the state is initially established on the face of a statute that criminalizes illegal departure. To put it in different terms, *the statute imputes to those who are prosecuted pursuant to it, a political opinion that state believes warrants an extreme form of punishment* (emphasis added).[112]

At the later stage, however, even this progressive judgment added a more stringent and probably 'unnecessary' criterion, just following its precedent without due consideration. That is, in addition to the imputed political opinion just discussed above, the petitioner must prove that he has fled his homeland for political reasons.[113] In the *Rodriguez-Roman* case itself, this additional requirement did not raise any special problem because the petitioner had actually fled Cuba for his political opinions, and therefore his petition was finally accepted by the Court. However, there could be another strong case where a person may face the same severe punishment if he returns, owing to unwillingly attributed political opinions by

---

[110] *Rodriguez-Roman v. INS*, *supra* note 109, p. 426.
[111] *Ibid.*, p. 429.
[112] *Ibid.*, p. 430. This argument was cited by many following cases such as: *Fengchu Chang v. INS*, 119 F.3d 1055 (3rd Cir. 1997) (U.S.A.), p. 1064; *Naseem Salman Al-Harbi v. INS*, 242 F.3d 882 (9th Cir. 2001) (U.S.A.), p. 893.
[113] *Rodriguez-Roman v. INS*, *supra* note 109, p. 430. See *Fengchu Chang v. INS*, *supra* note 112, pp. 1065, 1069; *Naseem Salman Al-Harbi v. INS*, *supra* note 112, p. 889.

his totalitarian government with respect to his illegal departure, although he has actually fled his home country for other reasons than political. As explained in the UNHCR Handbook, even in the case of 'unlawful departure' or 'Republikflucht', there also needs to be shown that "[the applicant's] *motives* for leaving or remaining outside the country *are related to the reasons enumerated in Article 1 A (2)* of the 1951 Convention" (emphasis added),[114] but the motives here could be understood to include not only his actual motives but also his imputed or attributed motives. Thus, if just either of them, not both of them as in *Rodriguez-Roman*, is satisfied in the determination process, the person concerned should be recognised as a refugee. This argument is actually supported by many international refugee law experts including James C. Hathaway and Guy S. Goodwin-Gill. [115] In addition, the Baden-Württemberg Administrative Court in Germany granted refugee status to "a Vietnamese man who, *solely because he left the country*, was under threat of an inordinately severe penalty should he return", given that "if the sanction inflicted in the event of an unauthorized stay abroad serves rather to impose a total prohibition against leaving the country, the penalty is of a political nature, as demonstrated by its severity" (emphasis added).[116] This case law indicates that there needed to be just 'passive' or 'presumed' political opinions in relation to the Convention reasons, for

---

[114] UNHCR, *Handbook*, para. 61.

[115] James C. Hathaway, *supra* note 46, p. 41: "... the illegal departure or stay abroad must ***either*** be **explicitly politically** motivated, ***or*** the state of origin must view the unauthorized departure or stay abroad as an **implied political** statement of disloyalty or defiance" (emphasis added).

Guy S. Goodwin-Gill, *supra* note 13, p. 53: "It may reflect an **actual and sufficient political opinion** on the part of the individual, ***or*** dissident **political opinion** may be **attributed** to the individual by the authorities of the State of origin;" (emphasis added).

See B. Martin Tsamenyi, "The "Boat People": Are They Refugees?", *Human Rights Quarterly*, Vol. 5, Johns Hopkins University Press (1983), pp. 369-370: "It is therefore relevant that, though some of the boat people may have **purely economic motives, by joining the exodus** they have put themselves in a situation where they are likely to suffer persecution if they ever return home. In this sense, it may be contended that they have developed a well-founded fear of being persecuted. The **relevant reasons here must be their political opinion** because they have **by implication** expressed their disgust for the Vietnamese political system. ... The attitude of the home government must be taken into consideration in such cases. It is foreseeable that the government of Vietnam will apply **sanctions of persecutory nature to any of the boat people who left for purely economic reasons** but later return to Vietnam. This means that, though some of the boat people may have left Vietnam **for purely economic reasons**, they have **by implication** put themselves in a situation in which they may be persecuted for their **political opinions** against their government, should they return home" (emphasis added).

See also Bundesverwalstungsgericht, 26 October 1971, I C 30/68, *supra* note 105, pp. 30-31.

[116] Verwaltungsgerichtshof Baden-Württemberg, 31 August 1992, A 16 S 1055/92 (Germany), as translated and cited in Klaus Hullmann, "Germany", in Jean-Yves Carlier *et al.* (eds.), *supra* note 107, pp. 286-287, 261-262. See also UNHCR, "Interpreting Article 1 of the 1951 Convention", pp. 7, 19.

the person concerned to be granted refugee status.[117] This reasoning was followed by another case of the same Court, where, focusing on the purpose of the penalty, the German Court considered whether the penalty for illegal departure was political in nature, and concluded that if the purpose was, *inter alia*, to punish "the perpetrator's, even presumed, politically-oppositional convictions (die - jedenfalls vermutete - politisch-oppositionelle Überzeugung des Täters)", then the character of the penalty was political.[118] [119]

In the end, there can be drawn two conditions of recognition of refugee status with special reference to 'Republikflucht': firstly, the country of origin must impose 'severe penalties' on nationals who depart from the country in an unlawful manner or remain abroad without authorisation; secondly, the person concerned must show that his/her motives for leaving or remaining outside the country are related to 'his/her actual or imputed (attributed, perceived, presumed, implied, ascribed, or passive) political opinions'.[120]

4.4.2 'Republikflucht' and NKEs

The issue of 'Republikflucht' may be less important nowadays, considering the demise of communism and widespread democratisation. However, with respect to the NKE case, this issue is still very relevant.[121] Although the Constitution of North

---

[117] See Klaus Hullmann, *supra* note 116, pp. 286-287.

[118] Verwaltungsgerichtshof Baden-Württemberg, 14 January 1994, A 16 S 1748/93, InfAuslR 1994, 161 (Germany), also available at UNHCR, *RefWorld2005* (Issue 14), CD Two: Legal Information. The English abstract of this judgment is available at *International Journal of Refugee Law (IJRL)*, Vol. 8, No. 1/2 (1996), pp. 192-194.

[119] For the unique German system of asylum and refugee status, and its tendency to focus mainly on the objective element, namely 'political persecution', based on relevant provisions of its Constitution (Basic Law, 'Grundgesetz') and Aliens Act ('Ausländergesetz'), see Reinhard Marx, "The Criteria for Determining Refugee Status in the Federal Republic of Germany", *IJRL*, Vol. 4, No. 2 (1992); Nicholas Sitaropoulos, *supra* note 35, pp. 126-142, 413; Klaus Hullmann, *supra* note 116, pp. 230-235.

Art. 16 a [Asylrecht (Right of asylum)] of the German Grundgesetz (Basic Law): "(1) Politische Verfolgte genießen Asylrecht (Persons persecuted on political grounds shall have the right of asylum)." As translated by the German Bundestag.

The 1990 Aliens Act above was replaced by the new Immigration Act (Zuwanderungsgesetz) in 2005.

[120] See James C. Hathaway, *supra* note 46, pp. 40-41, providing similar conditions: "First, the country of origin must punish unauthorized exit or stay abroad in a harsh or oppressive manner" and "Second, the illegal departure or stay abroad must either be explicitly politically motivated, or the state of origin must view the unauthorized departure or stay abroad as an implied political statement of disloyalty or defiance". See also UNHCR, *Handbook*, para. 61; UNHCR, *Determination of Refugee Status*, *supra* note 29, Analysis of Case Studies, Case B.

[121] Even when compared with its past comrade countries in Eastern Europe, North Korea is notorious for its worse human rights conditions. For a brief comparison of situations between East German and

Korea expressly stipulates that "[c]itizens have freedom of residence and travel",[122] it is generally known that there are, in practice, significant constraints on the right to liberty of movement. For example, the 'traveller's certificate' system is maintained to restrain even domestic travel and movement, and 'travel restrictions' on some special areas are imposed, including Pyongyang, the capital, border regions and military areas. It is understood that restrictions of this kind are to prevent the spread of possible anti-governmental opinions through the exchange of information between regions. Moreover, it seems to be virtually impossible for the common North Koreans to gain a permit or a passport for overseas travels. Exceptionally, people who have their relatives in China may get an overseas travel permit with some restrictions after a long examination process, but, even in this case, an application form is difficult to obtain and an application fee is too expensive for the common North Koreans to even think of the application itself.[123] In this respect, the Human Rights Committee, after commenting on incompatibility of the 'traveller's certificate' system for domestic travels with Article 12.1 of ICCPR,[124] concluded as follows:

> In the Committee's opinion, *the requirement*, under the Immigration Law of the Democratic People's Republic of Korea, *of administrative permission to travel abroad*, and the requirement, for foreigners in the Democratic People's Republic of Korea, to obtain exit visas to leave the country, *are incompatible with the provisions of article 12, paragraph 2, of the Covenant.*

North Korean asylum-seekers, see Benjamin Neaderland, "Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis", *Stanford Journal of International Law*, Vol. 40 (2004), pp. 143-145.

[122] Art. 75. This clause firstly appeared in the revised 1998 Constitution, which was probably affected by UN Human Rights Sub-Commission's resolutions in 1997 and 1998 blaming North Korea for its poor human rights conditions. For the resolutions, see note 21 of Ch. I.

[123] Korea Institute for National Unification, *supra* note 89, pp. 109-113. See UNGA, *supra* note 89, para. 25. See also UN Commission on Human Rights, *supra* note 89, para. 13.

[124] Human Rights Committee, *Concluding Observations*, *supra* note 89, para. 19.

Art. 12 of ICCPR66

"1. 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.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country."

> The State party *should eliminate the requirement of administrative permission* and an exit visa *as a general rule* and require them only in individual cases that can be justified in the light of the Covenant (emphasis added).[125]

When this internationally criticised law is broken, namely when a North Korean crosses a border without any permission from his/her government, the offender is, 'in principle', treated according to relevant clauses of North Korean immigration law and criminal law. The related provisions of the 1999 Immigration Act and the 2004 Criminal Code read as follows:

> **Article 45 of the Immigration Act**
> A citizen who violates this Act shall be *fined*, or shall be given *prohibition of departure from and entry to the Republic*. In cases where the person commits a grave offence, he or she shall be given *criminal punishment*.[126]

> **Article 62 (Crime against the State) of the Criminal Code**
> A citizen who commits such acts against the State as *escaping to a foreign country* or surrendering to the enemy or turning traitor to the State or handing over a secret, in betrayal of the State, shall be committed to *a reform institution for not less than five years*. In cases where the person commits an extremely grave offence, he or she shall be given *life imprisonment in a reform Institution*, or *the death penalty and the penalty of confiscation of all property*.

> **Article 233 (Crime of illegal border crossing) of the Criminal Code**
> A person who *unlawfully goes and comes across a border* of the Republic shall be committed to *a detention labour facility for up to two years*. In cases where the person commits a grave offence, he or she shall be committed to *a reform institution for up to three years* (emphasis added).[127]

---

[125] Human Rights Committee, *Concluding Observations*, *supra* note 89, para. 20. For the relevant provisions, see *supra* note 124.

[126] This Act was firstly adopted in 1996 (Source: National Intelligence Service, Republic of Korea <http://www.nis.go.kr>. Translated by the author.).

[127] Source: Ministry of Unification, Republic of Korea <http://www.unikorea.go.kr>. Translated by the author. In 2005, there were two minor amendments of the North Korean Criminal Code, but the relevant provisions were not changed. Corresponding provisions of the 1987 and the 1999 North Korean Criminal Code are as follows:

Art. 47 of the 1987 Criminal Code: "A citizen of the Republic who commits such acts against the State as escaping to a foreign country or to the enemy or acting the espionage or assisting the enemy, in betrayal of the State and the people, shall be committed to a reform institution for **not less than seven years**. In cases where the person commits an extremely grave offence, he or she shall be given **the death penalty and the penalty of confiscation of all property**."

Art. 117 of the 1987 Criminal Code: "A person who crosses a border of the Republic without permission shall be committed to **a reform institution for up to three years**."

As mentioned above, there may be some North Koreans who cross the border 'regularly', but illegally, for their business purposes, reportedly bribing border guards, and there may also be a few North Koreans who 'voluntarily' return to their home country just after visiting their relatives and/or acquiring some food or money, in spite of possible penalties relating to their illegal departure if caught. Article 45 of the Immigration Act or Article 233 of the Criminal Code could be applied to these types of North Koreans and this application may also raise some legal questions especially about its severity relating to Article 233, but this case is basically outside the interest of this research as discussed above. Unlike the previous case, most North Koreans who cross the border with China without permission are so-called 'NKEs' who strongly 'refuse' to return to their home country.

Above all, among NKEs, those who seek to go to South Korea, or meet any South Koreans, foreign missionaries, aid workers or journalists, or watch or listen to South Korean TV or radio, in any foreign country are believed to be punished under Article 62 as committing an anti-State crime, if they are captured and repatriated.[128] According to a North Korean professor of criminal law at Kim Il Sung University, the crime against the State covers not only an escape with political dissatisfaction, but also a flight for the purpose of living in a foreign country with the worship of other systems, and further if the flight is related to South Korea in any way, the required criminal intent is deemed demonstrated, but if the foreign country is other than South Korea, a decision should be made based on a political analysis

---

Art. 47 of the 1999 Criminal Code: "A citizen of the Republic who commits such acts against the State as escaping to a foreign country for the purpose of overthrowing the Republic shall be committed to **a reform institution for between five and ten years**. In cases where the person commits an extremely grave offence, he or she shall be committed to **a reform institution for not less than ten years**, or shall be given **the death penalty and the penalty of confiscation of all property**."

Art. 117 of the 1999 Criminal Code: "A person who crosses a border of the Republic without permission shall be committed to **a reform institution for up to three years**."

In general, those provisions of two kinds were gradually improved to reduce penalties for those who leave North Korea without permission. In particular, the penalty of 'detention labour facility' first appeared in Criminal Code in 2004, which is less severe than the penalty of 'reform institution' according to Articles 30, 31 and 45 of the 2004 Criminal Code. One day in a reform institution corresponds to two days in a detention labour facility. However, penalties for the crime against the State in Article 62 of the 2004 Code are more stringent than those in Article 47 of the 1999 Code, although the former is less stringent than those in the 1987 Code.

[128] David Hawk, *supra* note 91, p. 58. See Human Rights Watch (HRW), "The Invisible Exodus: North Koreans in the People's Republic of China (North Korea)", Vol. 14, No. 8 (C) (November 2002), pp. 20-24. <http://hrw.org/reports/2002/northkorea/norkor1102.pdf>.

considering the interests of the working class.[129] This statement shows that the crime under Article 62 is a political crime and is accordingly applied in a political way, not a legal way. 'In principle', most NKEs could be included in this category, 'traitors', because many of them are actually trying to find a way to go to South Korea or Western countries, or, at least, they want to live in their current hiding State (*i.e.*, China), maybe with 'a preference for its system', not returning to North Korea. Irrespective of their actual reasons for leaving their country, they can be regarded as or presumed to be 'traitors' by their home country. This argument is well supported by the severity of the penalty as well as its political character and purpose. The minimum penalty is five year imprisonment and the maximum is even the death penalty, which is more than enough to establish that this penalty is severe enough to constitute persecution, and therefore the NKE case under Article 62 is a typical form of the 'Republikflucht' case. Furthermore, repatriated NKEs are sent to not only a reform institution, an official prison according to criminal law, but also a harsher political prison camp, of which North Korea has officially denied even the presence. Before 1995, punishment for the 'Republikflucht' case had been much more severe than after. For example, Hyuk An was sent to the 'Yodok' prison camp because he had crossed into China mainly out of just curiosity, and Tae-jin Kim was also accused of treason and sent to the same political prison camp just because he had visited his relatives in China and stayed there for eighteen months before being arrested and repatriated. There was no judicial process, but only a long interrogation process with torture to get a wanted admission of treason.[130] Although, in recent years, there have been some reports that this practice has become more lenient, NKEs who seek to go to South Korea or meet any South Koreans or missionaries are still being sent to political prison camps. Mr. Kim, who tried to go to Mongolia for defecting to South Korea, and Ms. Park and her brothers, who looked for an opportunity to go to South Korea while moving around Vietnam, Laos and Myanmar, in 1998, were sent to the 'Yodok' political prison camp.[131] For those reasons,

---

[129] Keun-sik Kim, *Criminal Law 2 (2nd ed.)*, Kim Il Sung University Press (1987), pp. 24-26, as cited in Il-soo Kim, "Freedom of residence and movement and North Korean crime of escape from the State", *North Korea's Law and Practice Review*, Vol. 2, North Korea Law Society (Seoul, 1998) (in Korean), pp. 79-80.

[130] David Hawk, *supra* note 91, pp. 31-32.

[131] Korea Institute for National Unification, *supra* note 89, pp. 280-287.

discussions regarding Article 62 (Crime against the State) can be summed up as follows: NKEs, who are involved in seeking asylum, South Korea or Christianity, can be punished as traitors under Article 62, if arrested and returned; the penalty in the Article is severe enough to amount to persecution, and moreover, in practice there may be harsher treatments such as torture, extrajudicial punishment and being sent to political prison camps; there are actual or, at least, presumed opponent political opinions of the NKEs, judging from the political nature and purpose of the relevant penalty and its severity; in conclusion, many NKEs can be eligible for refugee status in the light of the conditions of 'Republikflucht' and Article 62 of the North Korean Criminal Code.

The most other NKEs, who are not included in the previous category, may be punished under Article 45 of the Immigration Act and Article 233 of the Criminal Code, if returned. However, no report is found that any repatriated NKE has been fined according to Article 45 of the Immigration Act, and the penalty of prohibition of exit and entry in the same Article is actually meaningless, even if applied, given the current restrictive immigration practice of North Korea. Instead, most of them are believed to be sent to reform institutions or detention labour facilities for some periods, as stipulated in Article 233 of the Criminal Code. As noted above, in spite of the North Korean government's denial, it is understood that the common North Koreans can hardly go out of their country in a lawful way.[132] This kind of restrictive immigration practice "[serving] rather to impose a total prohibition against leaving the country" may indicate that "the [related] penalty is of a political nature", which can also be deduced from the severity of the penalty (this is discussed below),[133] and that "the statute [containing this political penalty] imputes to those who are prosecuted pursuant to it, a political opinion."[134] In this context, Article 233, not to mention Article 62, of the North Korean Criminal Code can be the basis for imputed political opinions of NKEs.

With respect to the severity of the penalty, firstly, the possibility of imprisonment up to three years in Article 233 can be regarded as enough to constitute

---

[132] See *supra* note 123, particularly, Korea Institute for National Unification, *supra* note 89, pp. 112-113. See also North Korea, *2nd Periodic Report on ICCPR*, *supra* note 89, paras. 75, 79; Human Rights Committee, *Concluding Observations*, *supra* note 89, para. 20.
[133] Verwaltungsgerichtshof Baden-Württemberg, 31 August 1992, A 16 S 1055/92, *supra* note 116.
[134] *Rodriguez-Roman v. INS*, *supra* note 109, p. 430.

persecution according to various case laws. In *Rodriguez-Roman v. INS*, the U.S. Court of Appeals ruled that "*three years in prison* for having left one's country is under the case law undeniably a severe sentence which is sufficient to qualify as persecution", citing other cases including *Janus & Janek*,[135] in which *a one-year term of imprisonment and confiscation of all property*, and just *an eight-month term of imprisonment*, imposed on Janus and Janek respectively (both sentences had been passed *in absentia* in their home country for violating the Czech exit control laws) were recognised as persecution by the U.S. Board of Immigration Appeals.[136] In German cases, Article 89 (1) of the 1986 Vietnamese Criminal Code, "[t]he punishment for any person who illegally exits from or enters Viet Nam or who illegally stays abroad, shall be *a warning*, *reeducation without detention for a period of up to 1 year*, or *imprisonment for a term of 3 months to 2 years*", was held to constitute political persecution.[137] Therefore, in general, penalties in Article 233 of the North Korean Criminal Code, namely from six months in a detention labour facility to three years in a reform institution,[138] can amount to persecution by itself. Other related factors, however, should be carefully reviewed together as discussed below, considering the recent report that, since 2000, most repatriated NKEs have actually been sent to detention labour facilities just for between one month and six months, and therefore the total detention period has not usually exceeded one year.[139]

Secondly, therefore, the actual application in practice of the laws and prescribed penalties in North Korea needs to be examined. It is generally understood that the law and its implementation in North Korea do not correspond to each other

---

[135] *Matter of Janus and Janek*, 12 I&N Dec. 866 (BIA 1968) (U.S.A.).

[136] *Rodriguez-Roman v. INS*, *supra* note 109, pp. 428, 431.

[137] Verwaltungsgerichtshof Baden-Württemberg, 14 January 1994, A 16 S 1748/93, *supra* note 118. See also Bayerischer Verwaltungsgerichtshof, 1991, Az. 24 B 91.31349 (Germany). The text of the Vietnamese Criminal Code is as translated in the English abstract of the latter case, in *IJRL*, Vol. 4, No. 4 (1992), pp. 561-562. Similarly to the North Korean Code, the Vietnamese law has another provision relating to illegal departure at Article 85 (1): "The punishment for any person who flees to a foreign country or remains abroad in a foreign country with the intention of opposing the people's government shall be imprisonment for a term of 3 to 12 years."

Cf. The German Federal Administrative Court also concluded that generally a period of 'a few months' of political reeducation and indoctrination in special camps or training areas in the home country of asylum-seekers was enough to be considered persecution, in normal asylum cases relating to political opinions and freedom of speech. Bundesverwaltungsgericht, 4 December 1990, 9 C 93.90, BVerwGE 87, 187, p. 189. See Nicholas Sitaropoulos, *supra* note 35, pp. 415-416.

[138] The penalty of a detention labour facility can be between 6 months and 2 years (Art. 31), and the penalty of a reform institution can be between 1 year and 15 years (Art. 30) according to the North Korean Criminal Code.

[139] Korea Institute for National Unification, *supra* note 89, p. 275.

very often. According to a video footage obtained by a Japanese NGO, there were public executions in North Hamgyong Province of North Korea in March 2005 for those who were charged with 'illegal border crossing' and 'human trafficking', and any of the applied provisions of the Criminal Code there, including Article 233 (but not including Article 62 which has the death penalty in it), do not contain the death penalty, but three of them were executed by firing squad in front of a large crowd probably numbering several thousand, immediately after the sentences were announced.[140] In addition, under Article 106 of both the 1999 and the 2004 North Korean Criminal Procedure Act, pregnant suspects must not be detained for between three months before and seven months after childbirth, but, according to former NKEs who have already settled in South Korea, this was not observed and instead these women were sometimes forced to undergo abortions during investigations.[141] In this context, the UN Special Rapporteur on the North Korean Human Rights Situation pointed out that, while North Korean criminal law was improved to reduce sentences on those who leave North Korea without permission, "the menace of punishment facing those who do and who are then forcibly returned to the DPRK is ever-present and gives rise to potential or actual fear of persecution caused by the authorities."[142]

Last but not least, it should be clearly recalled that in North Korea various kinds of extrajudicial punishment are available and this punishment can be readily imposed on repatriated NKEs arbitrarily. In fact, there have been numerous reports on various kinds of torture during interrogation and imprisonment, including forced abortions and baby killings.[143] Furthermore, the conditions in reform institutions and detention labour facilities or other short-term detention centres, not unlike those in political prison camps, are really harsh with below-subsistence-level food rations and

---

[140] JIN-NET (Japan Independent News Net), "Jin-Net Releases Video Footage of Public Executions in North Korea" (17 March 2005) <http://northkoreanrefugees.com/dvd/statement.htm> (last accessed on 23 June 2008). For another example of public executions of North Korean illegal border crossers, see Hyuk Kim, "Beyond the Continuous Trials of Death", in Citizen's Alliance for North Korean Human Rights *et al.*, *supra* note 98, p. 133.

[141] Korea Institute for National Unification, *supra* note 89, pp. 277-279.

[142] UN Commission on Human Rights, *supra* note 89, para. 13.

[143] See David Hawk, *supra* note 91, pp. 59, 70-72; Amnesty International (AI), "Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)", AI Index: ASA 24/003/2004 (20 January 2004), section 6.7.

very high levels of deaths in detention.[144] Prisoners usually work for between fourteen and eighteen hours a day with only poor food, and also with poor sanitation and no medical care, so just one or two-month-detention is enough to make them become terribly emaciated.[145] In this case, some detainees were released to reduce the number of deaths in detention. However, many others died of malnutrition and heavy labour after three or four months, still in 2000.[146] There is another report that a returnee 'disappeared' because of the authorities and his family was discriminated against because of his fate.[147] It is also widely known that family members of NKEs, especially those who have settled in South Korea, are banished to political prison camps (in the past) or remote villages, or punished otherwise.[148] These kinds of extrajudicial factors such as torture, harsh conditions in detention including the high death rate, and any harm or mistreatment inflicted on the family of NKEs, clearly show that just shortening the term itself is not enough to make NKEs normal criminals, and that these additional factors should be properly considered while examining the element of the severity of the penalty, as in *Rodriguez-Roman v. INS* [149] and *Castaneda v. Canada (MEI)*.[150]

For the reasons stated above, discussions relating to Article 233 (Crime of illegal border crossing) may be summarised as follows: 'normal' NKEs, who are not punished expressly as 'traitors' under Article 62, can still be punished under Article 233, if arrested and repatriated; the penalty in the Article is severe enough to constitute persecution by itself considering relevant case law, and furthermore, in practice there may be various 'unlawful' legal punishment and extrajudicial punishment, such as executions for non-death-penalty crimes (a crime of illegal border crossing can be included), torture including forced abortions, harsh conditions in detention labour facilities as well as reform institutions with a high death rate, and mistreatment of the NKEs' family; there are actual or, more probably, imputed

---

[144] David Hawk, *supra* note 91, pp. 56-59. See AI, *supra* note 143, section 6.8.
[145] David Hawk, *supra* note 91, p. 63.
[146] Yong-hwa Choi's testimony, *ibid.*, pp. 60-61; Korea Institute for National Unification, *supra* note 89, p. 284.
[147] UN Commission on Human Rights, *supra* note 89, para. 68.
[148] Korea Institute for National Unification, *supra* note 89, pp. 280-287; HRW, *supra* note 128, p. 24. The persecution of family members indicates that NKEs will receive, at least, not-less-severe punishment than their families, if returned.
[149] *Rodriguez-Roman v. INS*, *supra* note 109, p. 431.
[150] *Castaneda v. Canada (MEI)*, *supra* note 109., paras. 12-16.

political opinions of the NKEs, considering the political nature and purpose of the relevant punishment and its severity; in conclusion, although there are some reports that the relevant punishment has generally become less severe than before, many NKEs could still be qualified as refugees in the light of the conditions of 'Republikflucht' and Article 233 of the North Korean Criminal Code. In spite of this possibility, however, it should be noted that the argument based on Article 233 (Crime of illegal border crossing) may not, in actual cases, be as strong as that based on Article 62 (Crime against the State) of the North Korean Criminal Code, considering, especially, differences of the severity of the penalties contained in those provisions themselves.

4.5 Membership of a Particular Social Group

As UNHCR defined it in 2002, "a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights." [151] This evolutionary Convention ground, membership of a particular social group, may cover really various cases. Among others, with special reference to the NKE issue, cases of class or caste, family, and women can be closely related.

4.5.1 Class or Caste

The addition of 'membership of a particular social group' at the final stage of the adoption of the Refugee Convention in 1951, was intended to "ensure that the Convention would embrace those, particularly in Eastern Europe during the Cold War, who were persecuted because of their membership of a social class", such as landowners, capitalist class members, independent business people, the middle class

[151] UNHCR, "Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (hereinafter "Guidelines on Membership of a Particular Social Group")", UN Doc. HCR/GIP/02/02 (7 May 2002), paras. 10-13. See Erika Feller *et al.* (eds.), *supra* note 47, pp. 261-315; Guy S. Goodwin-Gill, *supra* note 13, pp. 46-48, 358-366; James C. Hathaway, *supra* note 46, pp. 157-169.

and their families.[152]

Like other former East European communist countries, North Korea has persecuted its 'hostile' class people categorised based on their former occupation or activities and family background. In spite of its constitutional guarantees of the right to equality,[153] it is generally understood that there are three classes (and 51 sub-classes) in North Korea, 'core', 'wavering' and 'hostile'. Among them, the 'hostile' group, about 27 per cent of the population, is composed of former landowners, capitalists, public officials, religious persons, people from China or South Korea, and prisoners of war;[154] dispersed families (between South and North) and political opponents; and family members of those mentioned above, etc. People of this class are discriminated against in all aspects of their lives including jobs, education, residence, medical benefits, criminal punishment, and more importantly food rationing. Many of them are believed to have been sent to political prison camps or have been banished or forcefully relocated to remote villages, and they are often forced to work at the most laborious and hazardous manual jobs such as logging and mining.[155]

Those NKEs who escape this harsh discrimination based on their 'hostile' class (or one of its sub-classes) may be regarded as refugees because of their membership of a particular social group and related persecution. Above all, discrimination regarding food distribution is not just an economic issue, but literally a matter of life and death, especially where and when a severe food crisis arises, like that in North Korea since the mid-1990s. Normally North Korea needs 6.3 million tons of grain a year in order to feed its people, but, as shown in the table below, North Korean grain production had fallen short of this demand since 1995, and still in 2005 it fell short by about two million tons a year.

---

[152] Richard Plender, *supra* note 35, p. 421; Guy S. Goodwin-Gill, *supra* note 13, pp. 46-48; James C. Hathaway, *supra* note 46, pp. 161, 166-167.

[153] Art. 65 of the 1998 North Korean Constitution: "Citizens enjoy equal rights in all spheres of state and public activities." As translated by the North Korean government in its 2nd periodic report to the UN Human Rights Committee, *supra* note 89, para. 161.

[154] See *supra* note 93.

[155] Korea Institute for National Unification, *supra* note 89, pp. 87-103; David Hawk, *supra* note 91, pp. 26-28. See UN Commission on Human Rights, *supra* note 89, para. 70; UNGA, *supra* note 89, para. 20.

Table 8: Annual Grain Production of North Korea since 1990 (million tons)

Year	1990	1994	1995	1996	1997	1998	1999	2000	2003	2004	2005
Amount	9.1	7.1	3.4	2.5	2.7	3.2	4.3	3.3	4.3	4.3	4.5

(Source: Korea Institute for National Unification, *White Paper on Human Rights in North Korea 2006* (Seoul, May 2006), pp. 176-180.)

Therefore, unless North Korea secures enough international assistance, it cannot solve its food crisis by itself, and in this case victims of the failure may be not from the loyal 'core' class, but from the vulnerable 'hostile' class. As explained in the previous chapter, it is reported that two or three million North Koreans have already died of hunger or famine-related disease since the mid-1990s,[156] and most of NKEs fleeing from this food disaster are thought to be labour workers from poor areas.[157]

Although at first sight the flight of most NKEs seems to be economic in nature because it results directly from a food crisis, the real reason of their sufferings may be their membership of the 'hostile' group or its subsets, for which they are persecuted by way of the discriminative food distribution system.[158] Therefore, this possibility should be duly considered while assessing their refugee status in individual cases. On that occasion, as in many other similar membership claims, the perceptions of the group by other groups or State authorities, policies and practices vis-à-vis the group, and the risk of treatment amounting to persecution, are all to be carefully reviewed based on more concrete facts relevant to the applicants.[159]

4.5.2 Family of Political Criminals, Defectors or NKEs

Traditionally, in North Korea there has been the guilt-by-association system with respect to political crimes. Family members of political 'criminals' are sent to

---

[156] See note 15 of Ch. I.

[157] See Tables 5 & 6 of Ch. I.

[158] See UNHCR, *Handbook*, para. 63; James C. Hathaway, *supra* note 46, pp. 110-111, 115-124; Guy S. Goodwin-Gill, *supra* note 13, pp. 70, 78; James D. Seymour, *China: Background Paper on the Situation of North Koreans in China*, A Writenet Report (commissioned by UNHCR) (January 2005), pp. 8-10; AI, *supra* note 143, section 5.1; Joel R. Charny, *Acts of Betrayal: The Challenge of Protecting North Koreans in China*, Refugees International (April 2005), pp. 2, 7, 13-14; HRW, *supra* note 128, pp. 19-20. For more details of the relation between economic disadvantage and the 'social group' ground, see generally Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge University Press (2007). On the other hand, the possibility of overstatement of the related favouritism has been pointed out. James D. Seymour, above, p. 7; Norma Kang Muico, *An absence of choice: The sexual exploitation of North Korean women in China*, Anti-Slavery International (2005), pp. 16-17.

[159] Guy S. Goodwin-Gill, *supra* note 13, p. 366. See UNHCR, "Interpreting Article 1 of the 1951 Convention", paras. 27-28.

political prison camps together with the wrongdoers up to three generations.[160] In relation to NKEs who are the family members of this kind, there may already exist other Convention reasons such as actual or imputed political opinions and membership of the 'hostile' class, but they can also have another ground, membership of the family of political criminals.[161]

Similarly, considering various kinds of punishment or discrimination against families of NKEs, especially the immediate family of NKEs who have defected to South Korea (this family can also be considered the family of political criminals),[162] family members of defectors or other NKEs may also be recognised as refugees if they also escape to other countries for fear of being persecuted for reasons of that membership. Chang Il Ri, a son of a North Korean defector, was actually recognised as a Convention refugee in Canada, based on his membership in a particular social group, namely, family of North Korean defectors.[163]

4.5.3 Women: Victims of Trafficking for Forced Marriage or Sexual Exploitation

Gender-related refugee claims have recently been successful in many countries based on various Convention grounds, especially on membership of a particular social group.[164] In this respect, it is notable that the majority of NKEs are currently women, and many of them are victims of human trafficking[165] for forced marriage or sexual

---

[160] Korea Institute for National Unification, *supra* note 89, pp. 97-101; David Hawk, *supra* note 91, p. 15; HRW, *supra* note 128, pp. 19-20.

[161] See James C. Hathaway, *supra* note 46, pp. 64-66; Erika Feller *et al.* (eds.), *supra* note 47, p. 346.

[162] See *supra* notes 147-148. See also HRW, *supra* note 128, p. 20; Joel R. Charny, *supra* note 158, p. 51.

[163] *Re Song Dae Ri*, Immigration & Refugee Board of Canada (Refugee Protection Division), 2003 WL 17583 (2003 CarswellNat 4527), 12 September 2003 (Canada), paras. 1, 49-50, 54-55.

[164] See generally UNHCR, "Guidelines on International Protection: "Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (hereinafter "Guidelines on Gender-related Persecution")", UN Doc. HCR/GIP/02/01 (7 May 2002); James C. Hathaway, *supra* note 46, pp. 162-163.

[165] 'Trafficking' is different from 'smuggling', in that although the latter also involves the clandestine movement of people from one place to another, this is just for a fee paid by voluntary migrants, not for their subsequent coerced or deceived exploitation. See Art. 3 (a) of the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (UN Doc. A/RES/55/25, Annex II (No. 39574), adopted on 15 November 2000 and entered into force on 25 December 2003. As of June 2008, 116 States are Parties to the Protocol.); Art. 3 (a) of the "Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime" (UN Doc. A/RES/55/25, Annex III (No. 39574), adopted on 15 November 2000 and entered into force on 28 January 2004. As of June 2008, 108 States are Parties to the Protocol.).

exploitation in China.[166] Most of the victims are believed to be forced into marriage or the sex industry by way of deception, coercion or abduction. Some others, however, cannot help but accept, nominally of their free will, marriage with Korean Chinese or 'Han' Chinese in order to either survive or avoid capture by the Chinese police, or support their family in North Korea. But, very often, even in this case, the North Korean women cannot choose their husbands and cannot know the true situation of their slavery-like illegal marriage before they actually undergo it.[167] Basically, there are two kinds of women victims based on place of persecution: most North Korean victims are caught by traffickers in China after their flight; however, some others are directly trafficked from North Korea to China.[168]

Firstly, there are some cases where those women were recruited in North Korea and transferred to and exploited in China. As noted above, to be recognised as 'a particular social group' in the Convention definition, a group of persons must either (1) share a common characteristic which is innate and unchangeable (immutable, unalterable), such as gender, colour, ethnicity or linguistic background; (2) share, like previous one, an unchangeable common characteristic, but which is from the historical fact of a past association, occupation, status or experience, such as former military leadership or land ownership; (3) share a common characteristic which is so fundamental to identity, conscience or the exercise of one's human rights that he or she ought not to be required to forsake it, such groups as human rights activists, students, or trade union members; or (4) be perceived as a cognizable group by society, such members of a particular profession like shopkeepers, as well as women, families or homosexuals a group of which is also included in the first category.[169] The first group of North Korean women as victims of trafficking, who were caught by traffickers in North Korea, can be considered to be included in the

---

[166] For example, see the case of Choon-ae Kim in Citizen's Alliance for North Korean Human Rights *et al.*, *supra* note 98, pp. 165-173. See also the case of Ji-hae Nam in David Hawk, *supra* note 91, pp. 46-47. See generally Norma Kang Muico, *supra* note 158.

[167] Norma Kang Muico, *supra* note 158, pp. 3-9; HRW, *supra* note 128, pp. 12-15. The consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means set forth in Article 3 (a) of the Trafficking Protocol, including fraud, deception and the abuse of a position of vulnerability, have been used. See Art. 3 (b) of the 2000 Trafficking Protocol (*supra* note 165).

[168] Korea Institute for National Unification, *supra* note 89, pp. 264-270.

[169] See UNHCR, "Guidelines on Membership of a Particular Social Group", *supra* note 151, paras. 5-13; Guy S. Goodwin-Gill, *supra* note 13, pp. 359-363; James C. Hathaway, *supra* note 46, pp. 160-169.

category (1), namely 'women' as a particular social group sharing innate and immutable characteristics, because they are targeted for trafficking because of their gender as 'women' generally. Here, the size of the group is not relevant to criteria for whether a particular social group exists, and there is no requirement of cohesiveness of the group. Furthermore, not all members of the group must be at risk of persecution.[170] Therefore, the trafficked North Korean women directly from North Korea may base their claims on 'women' in general as a particular social group. In addition, some 'sub-groups of North Korean women', who are especially vulnerable to trafficking such as single women, widows, divorced women and women with low socio-economic status, can also be regarded as more specific particular social groups of women.[171] With respect to persecution, it must be established that there is a lack of effective protection of the North Korean authorities while persecution is pursued by traffickers, *i.e.*, non-State actors. It seems that the North Korean government does not provide effective protection to the victims both during their trafficking in North Korea and after their return to North Korea, although the government does not seem to like this kind of trafficking happening on its soil. The victims of trafficking, if returned, may face reprisals or re-trafficking by the related chain of international traffickers without effective protection from their government. North Korea, instead of providing protection, punishes these victims like other illegal border crossers, and frequently imposes even harsher penalties upon them including forced abortions and infanticide. In addition, they may fear ostracism or discrimination in their society.[172]

Secondly, most North Korean women victims of trafficking were recruited by traffickers after their escape to China, by way of deception, coercion or even

---

[170] UNHCR, "Guidelines on Membership of a Particular Social Group", *supra* note 151, paras. 15-19; UNHCR, "Guidelines on Gender-related Persecution", *supra* note 164, para. 31; UNHCR, "Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (hereinafter "Guidelines on Victims of Trafficking")", UN Doc. HCR/GIP/06/07 (7 April 2006), para. 37.

[171] UNHCR, "Guidelines on Victims of Trafficking", *supra* note 170, paras. 32, 38; Jenna Shearer Demir, "The trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?", New Issues in Refugee Research: Working Paper No. 80, UNHCR (March 2003), p. 25; James C. Hathaway, *supra* note 46, pp. 166-167. See also Mark R. von Sternberg, *supra* note 96, pp. 195-198. To these subsets of women (especially the last one, women with low socio-economic status), the category (4) of a particular social group, social or public perception approach, may also be applied.

[172] See Norma Kang Muico, *supra* note 158, p. 9; UNHCR, "Guidelines on Victims of Trafficking", *supra* note 170, paras. 18, 19, 39.

abduction. This case is seemingly not concerned with the issue of refugee status involving North Korea, but this is basically the case of their human rights problems in China, which will be discussed later in other chapters, because all related events of trafficking occur solely in China. There are, however, some arguable points relating to their status as refugees *sur place*. Although the North Korean women did not flee their home country for fear of persecution, they may now fear some persecution because of their experience of forced marriage and sexual exploitation through trafficking in persons. In this case, the 'women victims of trafficking' may be regarded as a particular social group based on the shared unchangeable characteristic resulting from their past experience of having been trafficked for gender-related exploitation (category (2)). They can also be viewed as a cognizable social group by others within their community or society (category (4)).[173] In relation to persecution, the victims of this group may fear ostracism or discrimination by the local community (or in some cases even the family) upon return, particularly in the case of those trafficked into prostitution. Severe ostracism or discrimination may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process. Victims of this kind may also become easier targets for domestic traffickers in North Korea; and severe punishment by the State authorities, including forced abortions and baby killings, still exists as in the case of the first group of women victims of trafficking.[174]

In sum, North Korean women victims of trafficking for forced marriage or sexual exploitation may, irrespective of types of trafficking, be recognised as refugees based on their membership of a particular social group ('women' in general, some 'sub-groups of women' or 'women victims of trafficking') and the relevant persecution, depending on their individual facts and merits.

4.6 Religion

Like many other totalitarian or former communist countries, North Korea has

---

[173] See UNHCR, "Guidelines on Victims of Trafficking", *supra* note 170, para. 39; Jenna Shearer Demir, *supra* note 171, para. 14.
[174] See UNHCR, "Guidelines on Victims of Trafficking", *supra* note 170, paras. 18, 19, 39.

persecuted believers of all persuasions.[175] Most of religious people in North Korea of the past were either executed or sent to political prison camps.[176] In spite of promises in its Constitution[177] and some artificial statistics provided by the government about religion,[178] it is generally known that there is still no freedom of religion in North Korea.[179]

A few NKEs may have kept their faith in some underground churches in North Korea[180] and finally succeeded in escaping from their home country to find freedom of religion (they certainly can be regarded as refugees, if any). Most NKEs who relate to religious persecution, however, have their first experience of the relevant religion after their flight.[181] In relation to these NKEs, it has been reported that any returnees who confess that they have converted to some religions, especially Christianity, or just admit that they have met Christians or other foreign religious persons, may face much harsher punishment compared with other NKEs, even execution.[182] Therefore, those NKEs who fear being persecuted upon return can also be recognised as refugees for reasons of religion.

4.7 Race or Nationality

In North Korea, there is only one race or nationality and that is Korean, so basically

---

[175] See Guy S. Goodwin-Gill, *supra* note 13, p. 44. For more details of 'religion', see generally UNHCR, "Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (hereinafter "Guidelines on Religion")", UN Doc. HCR/GIP/04/06 (28 April 2004); James C. Hathaway, *supra* note 46, pp. 145-148.

[176] Korea Institute for National Unification, *supra* note 89, pp. 135-137.

[177] Art. 68 of the 1998 North Korean Constitution: "Citizens have freedom of religious belief. This right is ensured by the permission to build religious buildings and have the legal freedom to select any religious ceremonies. ..." As translated by the North Korean government in its 2nd periodic report to the UN Human Rights Committee, *supra* note 89, para. 111. See also UNHCR, "Guidelines on Religion", *supra* note 175, para. 18.

[178] Even according to these statistics, there are only about 40,000 believers (less than 0.2 per cent of the population) of four religions in North Korea. Human Rights Committee, *Replies of North Korea*, *supra* note 89, para. 5.

[179] Human Rights Committee, *Concluding Observations*, *supra* note 89, para. 22; UN Commission on Human Rights, *supra* note 89, paras. 19-20; UNGA, *supra* note 89, para. 36; Stephan Haggard & Marcus Noland (eds.), *The North Korean Refugee Crisis: Human Rights and International Response*, U.S. Committee for Human Rights in North Korea (2006), p. 42. See generally Korea Institute for National Unification, *supra* note 89, pp. 134-150.

[180] See Korea Institute for National Unification, *supra* note 89, pp. 148-150.

[181] See UNHCR, "Guidelines on Religion", *supra* note 175, paras. 34-36.

[182] David Hawk, *supra* note 91, pp. 67, 58; Korea Institute for National Unification, *supra* note 89, pp. 147-148; Joel R. Charny, *supra* note 158, pp. 12, 52, 56.

no issues can be raised based on either of these grounds. However, as noted above, there have been many reports that repatriated North Korean pregnant women suffered infanticide and forced abortions during their detention, and frequently this kind of persecution was ethnically motivated.[183]

> Among the detainees were ten pregnant women, three of whom in the eighth to ninth month of pregnancy. Choi and two other non-pregnant women were assigned to assist these three pregnant women, who were too weak to walk alone, in walking to a military hospital outside the detention center. The woman assisted by Choi was given a labor-inducing injection and shortly thereafter gave birth. While Choi watched in horror, the baby was suffocated with a wet towel in front of the mother, who passed out in distress. When the woman regained consciousness, both she and Choi were taken back to the detention center. The two other non-pregnant women who assisted the two other pregnant detainees told Choi that those newborns were also suffocated in front of the mothers. The explanation provided was that "no half-Han [Chinese] babies would be tolerated.[184]

Therefore, pregnant NKEs, who fear the ethnically-motivated forced abortions, baby killings or other serious harm or discrimination by the North Korean authorities upon return,[185] may have a strong case for recognition of refugee status based on fear of persecution for reasons of race or nationality. This kind of case is, by its nature, the so-called refugee *sur place* case just discussed next.

4.8 Refugee *Sur Place*

The term 'refugee *sur place*' is well explained in the Handbook of UNHCR as follows:

---

[183] See *supra* notes 143, 141.
[184] David Hawk, *supra* note 91, p. 61.
[185] See UN Commission on Human Rights, *supra* note 89, para. 35. Also, there is a possibility that they will be ostracised and discriminated against by their community or society because of their babies' different ethnicity.

> The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee *"sur place"*.
>
> 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.
>
> A person may become a refugee *"sur place"* as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.[186]

Up to now, various human rights experts and NGOs, including the UN Special Rapporteur, have contended that most, or many, NKEs fall into this category, 'refugees *sur place*'.[187] This contention generally focuses on severe penalties upon

---

[186] UNHCR, *Handbook*, paras. 94-96. See UNHCR, *Determination of Refugee Status*, *supra* note 29, Analysis of Case Studies, Case B; James C. Hathaway, *supra* note 46, pp. 33-39; Guy S. Goodwin-Gill, *supra* note 13, p. 40; Atle Grahl-Madsen, *supra* note 14, pp. 94-95; Jean-Yves Carlier *et al.* (eds.), *supra* note 107, pp. 699-700, 733-734; Hélène Lambert, "The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law", *International & Comparative Law Quarterly (ICLQ)*, Vol. 55, Part 1 (2006), pp. 172-173; Nicholas Sitaropoulos, *supra* note 35, pp. 161-174.

[187] UN Commission on Human Rights, *supra* note 89, para. 14; UNGA, *supra* note 89, paras. 27, 64; James D. Seymour, *supra* note 158, pp. 9-10; Norma Kang Muico, *supra* note 158, pp. 12-14; Joel R. Charny, *supra* note 158, p. 14; David Hawk, *supra* note 91, p. 73; Stephan Haggard & Marcus Noland (eds.), *supra* note 179, pp. 39, 41, 44-45; International Crisis Group, "Perilous Journeys: The Plight of North Koreans in China and Beyond", Asia Report No. 122 (26 October 2006), pp. 36-37; Korea Institute for National Unification, *supra* note 89, p. 290.

repatriation for illegal departure, so this may be closely related to the issue of 'Republikflucht' examined above. All the other Convention grounds also contain some examples of refugee *sur place* respectively, as shown in previous discussions of the NKE case (*e.g.*, membership of a particular social group such as victims of trafficking, religion for the case of new believers, and race or nationality for the case of pregnant women). In reality, not only are political opinions often imputed to NKEs by the North Korean government, but also many NKEs actually come to interpret their past tragic lives in North Korea, whether politically or economically, after their escape from the home country, and consequently refuse to return and frequently try to seek asylum in South Korea or Western countries. Although this cogent argument about 'refugee *sur place*' in connection with the NKE case seems to be correct and desirable, it should, however, be clearly noted that the use of the concept of 'refugee *sur place*' is mainly for describing different types of refugee phenomena, but not for replacing the Convention ground based refugee claims. Therefore, this contention cannot be considered separately from the Convention grounds. In other words, even in the case of refugee *sur place*, at least one of the Convention reasons has to be presented, in order to meet full requirements for refugee status.

In this respect and at the conclusion of discussions on the inclusion clauses, broad generalisation regarding political refugee categories can be drawn as in the following table, in spite of some intrinsic defects of this kind of generalisation.

[Table 9: Refugee Categories by Time and Characteristic of Grounds: Case of Political Opinion with special reference to 'Republikflucht']

↓Time / Ground→	**Actual** Political Opinion	**Imputed** Political Opinion
Refugee Circumstances arising **before Flight**	*Category I:* **Refugee** in General	*Category II:* **Refugee** for **Imputed** Reasons
Refugee Circumstances arising **after Flight**	*Category III:* **Refugee *sur place*** (Case of 'Republikflucht')	*Category IV:* Case of **'Republikflucht'** (Refugee *sur place*)

State practice has not always provided identical views on the recognition of these categories as refugees. In general, it does seem that the practice tends to be more restrictive as the type moves from Category I to Category IV.

4.9 Cessation, Exclusion and Dual Nationality

A considerable number of NKEs may meet the positive criteria of the inclusion clauses as discussed above. However, it can be meaningless if negative clauses are also applicable to them. Although this is not the common case for NKEs, a few exceptional instances need some discussions. Not only cessation and exclusion issues, but also the issue of dual nationality, are examined below.

4.9.1 Cessation

Among six cessation clauses of Article 1.C of the 1951 Convention,[188] the third one, acquisition of a new nationality and enjoyment of the protection of the country of new nationality,[189] may be related to the NKE case. For example, if NKEs, officially North Koreans, are recognised as refugees in third countries and later resettle in South Korea, where they are regarded as its own nationals according to its domestic jurisprudence based on the Constitution,[190] this case can be considered acquiring new nationality from the viewpoint of international law.[191] Then, if the effective South Korean protection is actually available, their refugee status shall cease to exist from then on.

4.9.2 Exclusion

As explained above, exclusion clauses are composed up of sections D, E and F of Article 1.[192] Among them, section F, which covers international crimes and serious non-political domestic crimes, may be related to the NKE case.[193] That is to say, if an

---

[188] See section 3.6.1 above of this chapter.

[189] See UNHCR, *Handbook*, paras. 129-132; UNHCR, "The Cessation Clauses: Guidelines on their Application (hereinafter "Guidelines on Cessation")" (April 1999), paras. 15-18; UNHCR, "Note on the Cessation Clauses", UN Doc. EC/47/SC/CPR.30 (30 May 1997), paras. 15-18; Guy S. Goodwin-Gill, *supra* note 13, pp. 83-84; James C. Hathaway, *supra* note 46, pp. 209-211; Joan Fitzpatrick & Rafael Bonoan, "Cessation of refugee protection", in Erika Feller *et al.* (eds.), *supra* note 47, pp. 526-528.

[190] See *infra* notes 212 & 213.

[191] See section 4.9.3 below of this chapter. See also International Crisis Group, *supra* note 187, p. 37.

[192] See section 3.6.2 above of this chapter.

[193] Section E may also seem to be related to the NKE case. However, it cannot, or need not, be applied to this case, because the current countries of "residence" of NKEs, such as China, do not give them any "rights and obligations which are attached to the possession of the nationality of that country", and otherwise, if NKEs have already taken "residence" in South Korea without having been recognised as refugees in other countries before, they now have "the rights and obligations" in full just

NKE (a) has committed a crime against peace, a war crime or a crime against humanity, or (b) has committed a serious non-political crime prior to his/her admission to the country of refuge, or (c) has been guilty of acts contrary to the purposes and principles of the UN, the NKE shall be excluded from refugee status, even if satisfying the inclusion criteria.

Generally speaking, this exclusion clause is also not applicable to the normal NKE cases, considering the common situation of NKEs. In particular, although most NKEs could be regarded as criminals by their government according to Articles 62 and 233 of the North Korean Criminal Code, the crimes concerned are basically 'political' in nature, so the NKEs concerned cannot be included in the case of Article 1.F (b). Even if the crime of illegal border crossing in Article 233 could not be considered political, the crime would still not be 'serious' enough for the NKEs to be excluded from refugee status, which is also required in the Article 1.F (b).[194] With respect to international crimes in subsections (a) and (c), crimes against peace and acts against the purposes and principles of the UN can only be committed by those in positions of power in a State,[195] who are basically not included in the category of NKEs, but may more properly be described as high ranking defectors, if they seek asylum outside their country. Secondly, there has been no war around North Korea recently, so war crimes may also not be applicable.[196] Lastly, crimes against humanity do not seem to be generally applicable to the normal NKE cases either, because those crimes cannot usually be committed by the common North Koreans, save some exceptions.[197] For instance, in the *Song Dae Ri* case,[198] the Immigration and Refugee Board of Canada ruled that Mr. Ri, a former trade official of North Korea, must be excluded from refugee status because he was an accomplice of crimes against humanity committed by the North Korean government towards its nationals, while acknowledging that he could otherwise be a refugee based on his

---

as South Korean nationals under its law, who basically need not, and also cannot, apply for refugee status there. See UNHCR, *Handbook*, paras. 144-146; UNHCR, "Interpreting Article 1 of the 1951 Convention", para. 40; UNHCR, "Note on the Cessation Clauses", *supra* note 189, para. 16; Guy S. Goodwin-Gill, *supra* note 13, pp. 93-95; James C. Hathaway, *supra* note 46, pp. 211-214.

[194] UNHCR, "Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (hereinafter "Guidelines on Exclusion")", UN Doc. HCR/GIP/03/05 (4 September 2003), paras. 14-16.

[195] *Ibid.*, paras. 11, 17.

[196] See *ibid.*, para. 12.

[197] See *ibid.*, para. 13; Art. 7 of the 1998 Rome Statute of the ICC.

[198] *Re Song Dae Ri*, *supra* note 163.

political opinion. Mr. Ri, however, was a high ranking official, so he cannot be regarded as a common NKE. By the way, even in the exclusion case of this kind involving high ranking officials, "the fact that a person was at some point a senior member of a repressive government or a member of an organisation involved in unlawful violence does not in itself entail individual liability for excludable acts."[199] Rather, it has to be shown that the person actually "committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct."[200] Based on this logic, Mr. Ri was later acknowledged by the Canadian Public Safety Minister that he is not an international criminal, and allowed to stay in Canada.[201] The following case of exclusion would be a more relevant exception relating to 'common' NKEs. In July 2006, one of four NKEs in their twenties or thirties, who had succeeded in entering a U.S. consulate general in China, was denied political asylum in the U.S.A., because he had previously worked at a political prison camp, whereas the other three were all granted the political asylum.[202]

4.9.3 Dual Nationality

The second paragraph of Article 1.A (2) of the 1951 Refugee Convention reads as follows:

> 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.

This means that in the case of dual nationality, the applicant concerned must lack the protection of the both countries of his/her nationality, in order to be recognised as a

---

[199] UNHCR, "Guidelines on Exclusion", *supra* note 194, para. 19. See *ibid.*, para. 26; UNHCR, "Interpreting Article 1 of the 1951 Convention", para. 42.
[200] UNHCR, "Guidelines on Exclusion", *supra* note 194, para. 18. See Guy S. Goodwin-Gill, *supra* note 13, pp. 100-101.
[201] Marina Jimenez, "N. Korean defector can stay", *Globe and Mail* (4 March 2004).
[202] "Three NKEs, who had entered the U.S. Consulate General in Shenyang, China, went to the U.S.A.", *Yonhap News* (24 July 2006).

refugee.[203] Although this paragraph is placed in one of inclusion clauses, the content actually indicates its identity as a sort of exclusion clause, which is also supported by the fact that in the UNHCR Statute the similar content is provided for in Paragraph 7 together with other exclusion clauses.[204]

In June 2005, a German state administrative court decided that an allegedly North Korean woman could not be recognised as a refugee even if she was really North Korean, because a North Korean automatically possessed South Korean nationality according to South Korean law, so consequently she was a dual national, to whom the South Korean protection was still available.[205] Practically, this conclusion cannot be seen as unreasonable nor undesirable, if the NKE can actually secure 'effective' protection from South Korea without any fear of persecution, and considering, especially, the characteristic of international protection as a surrogate for national protection.[206] Logically, however, some questions may be raised from the viewpoint of international law, about whether North Koreans should be regarded as having dual nationality.

In principle, each State has its own discretion to determine who is, and who is not, to be considered its national. However, the decision is not always recognised as valid on the international level.[207] Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws[208] provides as follows: "[i]t is for each State to determine under its own law who are its nationals. This law shall be recognised by other States *in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality*" (emphasis added). The relevant international criteria can be found in the *Nottebohm* case of the International Court of Justice (ICJ).

---

[203] See James C. Hathaway, *supra* note 46, p. 57.
[204] See UNHCR Statute, para. 7 (a).
[205] Verwaltungsgerichtshof Baden-Württemberg, 3 June 2005, A 8 S 199/04 (Germany). This judgment was later affirmed by the Federal Administrative Court. Bundesverwaltungsgericht, 29 September 2005, BVerwG 1 B 98.05, VGH A 8 S 139/05 (Germany).
[206] See UNHCR, *Handbook*, paras. 106-107; Guy S. Goodwin-Gill, *supra* note 13, pp. 41-42; James C. Hathaway, *supra* note 46, pp. 59, 210-211.
[207] Robert Jennings & Arthur Watts (eds.), *Oppenheim's International Law (9th ed.)*, Vol. I: Peace, Longman (1992), pp. 851-853; Ian Brownlie, *Principles of Public International Law (6th ed.)*, Oxford University Press (2003), pp. 373-377. See *Nationality Decrees issued in Tunis and Morocco*, Advisory Opinion, P.C.I.J., Series B, No. 4 (1923), p. 24; *Nottebohm (Liechtenstein v. Guatemala)*, Second Phase, Judgment, I.C.J. Reports 1955, pp. 20-23.
[208] *LNTS*, Vol. CLXXIX, p. 89 (No. 4137), adopted on 12 April 1930 and entered into force on 1 July 1937. Approximately, 19 States are Parties to the Convention.

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis *a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties*. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is *in fact more closely connected with the population of the State conferring nationality than with that of any other State* (emphasis added).[209]

This issue of opposability[210] of nationality on the international plane has often been raised in relation to the exercise of diplomatic protection, like in the *Nottebohm* case. Even with respect to the NKE case, if South Korea tries to exercise diplomatic protection on behalf of North Koreans in one of the third countries, based on the South Korean domestic law, the host country, such as China, may successfully argue against it based on the genuine link test provided above. However, this question of diplomatic protection is not the main interest of the current examination.[211]

Generally speaking, the issue of opposability of nationality can also be raised in other contexts of international level, if any conflict regarding nationality arises in the third States. To this instance also, the same genuine connection test may be applied. South Korea, as mentioned before, regards all North Koreans as South Koreans based on its Constitution[212] and relevant laws, which was also confirmed by its Supreme Court.[213] However, this position may be considered by other States being against the general concept of nationality adopted in international law, because North Koreans basically seem to lack genuine connection with South Korea.

Furthermore, and maybe more importantly, this situation cannot be categorised as a normal case of dual nationality, but this must be treated as a case

---

[209] *Nottebohm*, *supra* note 207, p. 23. See Art. 5 of the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws. For more detailed analyses of the *Nottebohm* case, see Ian Brownlie, *supra* note 207, pp. 396-406.

[210] For the concept of 'opposability', see J.G. Starke, "The Concept of Opposability in International Law", *The Australian Year Book of International Law*, 1968-1969: Vol. 4, Butterworths (Sydney, 1971).

[211] This will be discussed in Chapter IV.

[212] Art. 3: "The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands." The full text in English is available at the website of the Constitutional Court of Korea <http://www.ccourt.go.kr>.

[213] Supreme Court of Korea, 12 November 1996, 96Nu1221, *Collection of Supreme Court Decisions*, Vol. 44, No. 2 (Special), p. 703 (South Korea).

really *sui generis* resulting from the complex political situation.[214] Each Korea, whether South or North, has seen the other side's residents as its own nationals since its unexpected division after the end of the Second World War, based on the denial of the other's legal existence as a State. That is to say, in the view of the two Koreas, there can be only one nationality for Koreans, only South Korean (the view of South Korea) or only North Korean (the view of North Korea), but never South and North Korean or 'dual Korean'. This kind of rather political argument by two Koreas may also not be viable in the international arena, because the reality is that both Koreas are generally recognised as States according to relevant international law,[215] which has become much clearer since they both became the Members of the UN together in 1991.[216] For example, the UK government changed its traditional position of non-recognition of North Korea, and finally recognised the latter as a State after the accession to the UN in 1991.[217] Even South Korea itself has abstained from acting based on its domestic argument on the international plane. In the *amicus curiae* brief to the Constitutional Court of Korea, the South Korean Ministry of Foreign Affairs and Trade expressed its opinion that "[c]onferring our nationality to the North Koreans who are residing in North Korea or in the third countries, where our effective control cannot actually be exercised, may cause a conflict with the North Korean authorities or a diplomatic problem with the third countries, but, at least with respect to the North Koreans who have already entered our country, the conferring of our nationality has no problem as far as they want it."[218] In relation to the issue of NKE protection, the South Korean government has a similar position, but, in practice, if NKEs could enter any South Korean jurisdiction abroad such as diplomatic

---

[214] See Robert Jennings & Arthur Watts (eds.), *supra* note 207, p. 869, note 3. See also *ibid.*, pp. 133-143.

[215] For the theory of State and recognition in international law, see generally Michael Akehurst, *A Modern Introduction to International Law (6th ed.)*, Allen & Unwin (1987), Chapter 5 (States and Governments). As of September 2006, among 191 States in the world excluding South and North Korea, 152 States cross-recognised both Koreas, while 35 States (including France, Japan and the U.S.A.) recognised only South Korea and 3 States (Cuba, Macedonia and Syria) recognised only North Korea. That is to say, South Korea has official bilateral relations with 187 States and North Korea with 155 States (Source: Ministry of Foreign Affairs and Trade, Republic of Korea <http://www.mofat.go.kr>.).

[216] Robert Jennings & Arthur Watts (eds.), *supra* note 207, p. 134.

[217] *Ibid.*

[218] Constitutional Court of Korea, 31 August 2000, 97Hun-Ka12, 12-2 KCCR 167 (South Korea), p. 178. Translated by the author. See also *ibid.*, p. 174. The full English Text of this judgment can be found in *Decisions of the Korean Constitutional Court (2000)*, The Constitutional Court of Korea (2002), pp. 52-70.

missions, they have been given diplomatic asylum, basically "based on a spirit of fraternity and humanitarian concern", in spite of some diplomatic conflicts with the host countries.[219] The recently enacted North Korean Human Rights Act[220] of the U.S.A. provides another useful supporting argument relating to the current issue of dual nationality. The U.S.A. has official diplomatic relations only with South Korea, not with North Korea.[221] Under these circumstances, the U.S. government sought to find ways to help NKEs including the utilisation of its refugee and asylum system, and finally, to avoid the possible nationality problem of NKEs concerning refugee status, the following provision was adopted in the 2004 North Korean Human Rights Act: "[f]or purposes of eligibility for refugee status under section 207 of the Immigration Act (8 U.S.C. 1157), or for asylum under section 208 of such Act (8 U.S.C. 1158), a national of the Democratic People's Republic of Korea [North Korea] shall not be considered a national of the Republic of Korea [South Korea]."[222] Therefore, NKEs who want to seek asylum in the U.S.A. can be eligible for refugee status there as 'North Koreans', not South Koreans nor dual nationals,[223] and actually, in 2006, six NKEs in one of the Southeast Asian countries and three NKEs in China (through a U.S. consulate general) were admitted to the U.S.A. as refugees based on the 2004 Act.[224]

---

[219] "The ROK government's approach to the issue of North Korean refugees is based on a spirit of fraternity and humanitarian concern. The Government takes the position of accepting all those North Korean refugees who wish to settle in the ROK. It exerts efforts to protect them and secure their safe entry into the ROK, in an appropriate manner to be fitting the situation in the country in which they are staying. The Korean Government also provides support to those refugees who wish to settle in third countries. Furthermore, the Government makes its best endeavour to prevent the possible repatriation of refugees to the North against their will. If it is possible and necessary, the Korean Government cooperates with UNHCR to address the refugees issue." Ministry of Foreign Affairs and Trade, Republic of Korea, "The Republic of Korea's Position on the Issue of North Korean Refugees" (26 September 2003).

[220] "North Korean Human Rights Act of 2004", 22 U.S.C. 7801 (U.S.A.). See generally Stephan Haggard & Marcus Noland (eds.), *supra* note 179, pp. 46-47; International Crisis Group, *supra* note 187, pp. 27-28.

[221] See *supra* note 215.

[222] 22 U.S.C. 7842(b).

[223] Former NKEs who successfully arrived in South Korea cannot be benefit from this Act. This possibility is expressly excluded in the subsection 302 (a) of the 2004 Act: "The purpose of this section is to clarify that North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea. **It is not intended in any way** to prejudice whatever rights to citizenship North Koreans may enjoy under the Constitution of the Republic of Korea, or **to apply to former North Korean nationals who have availed themselves of those rights**" (emphasis added). 22 U.S.C. 7842(a).

[224] "Rev. Chun said the second group of NKEs including two children will arrive in the U.S.A. within

In addition, some humanitarian grounds may also be adduced. As shown above, the family of NKEs who have defected to South Korea, can be discriminated or punished in North Korea in various ways.[225] To avoid this, some NKEs intentionally chose other third countries as their asylum destinations, rather than South Korea where they are eligible for many benefits including nationality. For instance, Huh, who was recognised as a refugee in Mexico in 2005, had declined the offer of asylum by South Korea in fear of his/her family's possible persecution in North Korea for reasons of his/her defection to South Korea.[226] Moreover, some North Koreans may still not like South Korea or regard it as their 'other' home country, even after their flight from the 'original' home country. North Koreans must long have regarded South Korea as not only a brother State, a part of a one nation-State, but also an enemy State against which a tragic war was waged. Therefore, their dissatisfaction with North Korea does not always mean that they like South Korea or they are happy to have an entitlement to South Korean protection or nationality. In this respect, considering together the developments of human rights over the past decades,[227] the free will of the NKEs concerned about their nationality should be duly respected.[228]

Lastly, even if the argument for dual nationality is accepted as opposable in the process of refugee status determination, the following possibilities should be considered. A few NKEs can have actual fear of possible assassination by North Korean secret agents in South Korea for some special reasons, and fewer NKEs may fear being persecuted by the South Korean government for some other reasons, although the fear seems hard to be recognised as "well-founded" or the reasons as "valid".[229]

For those reasons stated above, it may be concluded that it is not proper for

---

this month", *RFA* (8 May 2006); *Supra* note 202.

[225] See section 4.5.2 above of this chapter.

[226] See *supra* note 79. For another example, see *Re Song Dae Ri*, *supra* note 163, para. 7.

[227] See Art. 15 of UDHR48.

[228] See Joan Fitzpatrick & Rafael Bonoan, *supra* note 189, p. 527; UNHCR, "Guidelines on Cessation", *supra* note 189, para. 17; James C. Hathaway, *supra* note 46, p. 58; Verwaltungsgerichtshof Baden-Württemberg, 3 June 2005, A 8 S 199/04, *supra* note 205, section 1. b) cc). The South Korean government also seems to be supporting this position: "The Korean Government also provides support to those [North Korean] refugees who wish to settle in third countries." Ministry of Foreign Affairs and Trade, Republic of Korea, *supra* note 219.

[229] See Verwaltungsgerichtshof Baden-Württemberg, 3 June 2005, A 8 S 199/04, *supra* note 205, sections 1. b) bb) - dd).

NKEs to be regarded or treated as dual nationals on the international plane, including the refugee law area. Most importantly, the argument in favour of dual nationality (or only South Korean) will certainly not be accepted by China where most NKEs are now hiding, so, at least in this vein, NKEs need not worry about the possibility of being excluded from refugee status in China on the basis of dual nationality, namely the fictional 'dual Korean'. In the end, the possible South Korean protection for NKEs should be regarded, in the context of refugee law, as a good option of resettlement even with a new nationality, which should be considered after refugee status is firstly given to the NKEs, or, if they failed in the recognition process even without the bar of dual nationality, as the best humanitarian alternative to the forced repatriation to North Korea.

5. Conclusion

This chapter has endeavoured to explore all the relevant legal issues regarding the eligibility of NKEs as political refugees under the definition of the 1951 Refugee Convention. As discussed, NKEs can be recognised as Convention or political refugees based on various Convention grounds. Among them, the argument about 'Republikflucht', which is closely related to imputed political opinion, and the argument about the 'hostile' class as a particular social group, which has shown that seemingly economic sufferings can be closely connected with political conditions, may be generally applied to the NKE case. The argument about women victims of trafficking has also offered important legal implications to the refugee status of NKEs. If a liberal interpretation is adopted, most NKEs may be regarded as the formal refugees.

In principle, however, refugee status must be determined on an individual basis. The situation of each NKE must be assessed on its own merits. Therefore, in the legal sense, one cannot say that all of this group are automatically refugees, as do some radical human rights activists, on the one hand; nor can one argue that they are all just illegal economic migrants, as China contends, on the other hand. In fact, several European and American States have granted refugee status to 'some' of North

Korean asylum-seekers there, but not 'all' of them, although this practice cannot fully represent the real situation of NKEs. At any rate, the particularly complicated circumstances of the NKE case, including the unique interaction between political and economic factors in North Korea, the harsh human rights conditions surrounding NKEs, and even the delicate geopolitical tensions in the Far East, should be duly considered in every individual case of refugee status determination. To this end, a "holistic and integrated (and balanced) analysis"[230] and "cumulative grounds"[231] can, and should, be adopted as more suitable tools of interpretation. And, considering the special situation of asylum-seekers in general and the general aim and purpose of refugee law - even when there is a lack of evidence for some of their statements, the "benefit of the doubt" should be given as a basic principle in the refugee determination procedures.[232]

Discussions in this chapter have hopefully provided a useful interpretation and analysis of the NKE case especially for many Western countries in which some NKEs are currently seeking refuge. However, if the main host country, China, does not agree on the possibility of applying the Convention or granting political refugee status to NKEs (as now, without any proper process), these discussions may lose much of their significance in practice. Additionally, not all NKEs may be easily recognised as Convention refugees even if they can use the formal process. These facts expose the main weaknesses of international refugee law under the 1951 Convention, which are the lack of an international implementation system and the outdated narrow scope of the refugee definition. While the solution for the former problem can be found in other areas of international law such as human rights law, the latter issue may be tackled with the examination of other aspects of refugee law. As explained in the first section of this chapter, there is another category of refugee under international law, that is 'humanitarian refugee'. Therefore, the next chapter will address this issue, focusing on whether the 'humanitarian' regime can be an alternative that might compensate for the deficiencies in the 1951 'political' regime, in respect of the protection of NKEs.

---

[230] UNHCR, "Interpreting Article 1 of the 1951 Convention", paras. 7-9, 58.
[231] UNHCR, *Handbook*, paras. 53, 201.
[232] UNHCR, *Handbook*, paras. 196-197, 203-205, 219.

Chapter III. Humanitarian Refugees and NKEs

1. Introduction

A narrow textual reading of the refugee definition in the 1951 Refugee Convention may lead to the conclusion that many or most North Korean Escapees (NKEs) are not Convention or political refugees. Probably following this restrictive interpretation (actually the worse), China regards 'all' the NKEs just as illegal economic migrants. On the other hand, in addition to the formal recognition of some NKEs as Convention refugees, fifteen North Koreans were officially granted humanitarian status by some other States during 2005, according to the UNHCR statistics.[1] Moreover, according to a British governmental source, five and ten North Koreans were given humanitarian protection in the U.K. in 2004 and 2005 respectively.[2] Then, what does the 'humanitarian protection' or 'humanitarian refugee' mean; what is the legal character of this expanded refugee or protection concept; and what are the implications of the 'humanitarian refugee' debate for the NKE case? These issues are dealt with in order in this chapter.

2. Expansion of Refugee Concept: 'Humanitarian Refugees'

Since the adoption of the Refugee Convention in 1951, refugee movements have changed in many ways. Especially after the demise of the Cold War, other non-Conventional types of refugees such as so-called 'war refugees',[3] 'environmental or

---

[1] UNHCR, "2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR (2005 Global Refugee Trends)" (9 June 2006), Table 8, available at <http://www.unhcr.org/statistics>.
[2] Home Office, U.K., Personal communication dated 25 April 2006.
[3] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees (Handbook)*, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited) (Geneva, January 1992), paras. 164-166.

ecological refugees',[4] or 'internally displaced persons',[5] etc. are placed on the centre of refugee issues, rather than political refugees defined in the Convention. Although the Convention itself extended its scope in regard to time and region by its Protocol in 1967, the definition of refugee therein still does not cover those new prevalent types of refugee phenomena.

Against criticism of this limited definition of the 1951 Convention and together with developments of international human rights law, the content of 'humanitarian or *de facto* refugees' has evolved on various levels, namely in international, regional and domestic documents and practices. As explained in the previous chapter, the term 'humanitarian refugee' is used in this research as a contrary concept to 'political refugee', which applies to a person who does not meet the Convention definition but nevertheless has a compelling need for international protection.[6] Below is discussed how the concept of 'humanitarian refugee' developed or how the legal concept of refugee expanded, initially in the context of the activities of UNHCR, then through universal and regional documents, and lastly in domestic practice.

Before entering into the main discussions, Recommendation E of the Final Act of the UN Conference that adopted the 1951 Refugee Convention[7] needs to be noted.

> THE CONFERENCE
> EXPRESSES the hope that the Convention relating to the Status of Refugees will have value as an example *exceeding its contractual scope* and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and *who would not be covered by the terms of the Convention*, the treatment for which it provides (emphasis added).

---

[4] See generally Jessica B. Cooper, "Environmental Refugees: Meeting the Requirements of the Refugee Definition", *New York University Environmental Law Journal*, Vol. 6 (1998), pp. 480-529; A.A.C. Trindade, "Protection of the Environment and International Refugee Law", in A.A.C. Trindade (ed.), *Human Rights, Sustainable Development and the Environment (2nd ed.)*, Instituto Interamericano de Derechos Humanos & Banco Interamericano de Desarrollo (1995).

[5] See section 2.1.3 below of this chapter.

[6] Maryellen Fullerton, "The International and National Protection of Refugees", in Hurst Hannum (ed.), *Guide to International Human Rights Practice (3rd ed.)*, Transnational Publishers (1999), p. 241.

[7] "Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons", *UNTS*, Vol. 189, p. 137 (28 July 1951).

2.1 Enhanced Competence of the UNHCR

2.1.1 'Mandate Refugees'

The United Nations High Commissioner for Refugees (UNHCR) was established in 1951 as a subsidiary organ of the United Nations General Assembly (UNGA)[8] to provide international protection to refugees and to seek permanent solutions for the problem of refugees.[9] According to its Statute adopted by UNGA, UNHCR must follow policy directives made by UNGA and UN Economic and Social Council (ECOSOC).[10] In paragraph 6 of the Statute, there appears the definition of refugees to which UNHCR should extend its competence and protection, which is mostly the same as the Convention refugee definition. The only difference is the lack of 'membership of a particular social group' ground in the Statute definition, but the definition for UNHCR, from the beginning, includes 'general' refugees without temporal or geographic restriction in section B of paragraph 6 of the Statute.[11]

As in many other areas of international law, however, the realities of refugee movements do not always correspond to the legal definition. Therefore, the competence of UNHCR was enhanced by subsequent resolutions of UNGA and ECOSOC, instead of any formal amendments of the Statute. The resolutions gradually authorised UNHCR to perform new functions and carry out activities with respect to broader categories of beneficiaries who are usually called 'mandate refugees' or 'persons (considered to be) of concern to UNHCR'.[12] The 'mandate refugees' or 'persons of concern' category is generally understood to encompass, in addition to political refugees who fear persecution, people who flee their home country due to armed conflict and other man-made disasters: namely, "wars, armed conflicts, acts of aggression, alien domination, foreign armed intervention,

---

[8] See UNGA Resolution 319A, UN Doc. A/RES/319A (IV) (3 December 1949).
[9] Para. 1 of Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute), UN Doc. A/RES/428 (V) (14 December 1950), Annex.
[10] Para. 3 of UNHCR Statute.
[11] Para. 6.B of UNHCR Statute: "Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."
[12] See Atle Grahl-Madsen & Peter Macalister-Smith, "Refugees, United Nations High Commissioner", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, Elsevier Science (2000), pp. 79-83.

occupation, colonialism, oppressive, segregationist and racially supremacist regimes practising policies of discrimination or persecution, apartheid, violations of human rights and fundamental freedoms, mass forcible expulsions, economic and social factors threatening the physical integrity and survival, structural problems of development; man-made ecological disturbances and severe environmental damages".[13]

This enhanced competence of UNHCR in the name of 'mandate refugees' or 'persons of concern to UNHCR' is frequently interpreted as a good example of expansion of the refugee definition. At least, it is clearly notable that UNHCR's widened activities actually resulted in providing its protection and assistance to many more refugees or refugee-like people who really need international protection and assistance, beyond those narrowly prescribed in its 1950 Statute.

2.1.2 Practice of Prima Facie *Determination*

In the 1960s refugees in Africa tended to move in large groups and thereafter Asian refugees joined in this tendency. The problem of size made individual examination of refugee status impossible, so UNHCR decided to protect and assist those refugees as groups by way of so-called '*prima facie* determination'.[14] This is "a group determination of refugee status, granted in cases when entire groups of people are affected by circumstances serious enough to qualify each individual in that group as a refugee. *Prima facie* status is granted in cases when there is too little time to consider each individual case."[15] Interestingly, contrary to its individualised definition of refugee, the Statute of UNHCR seems to have already expected this

---

[13] Volker Türk, "The role of UNHCR in the development of international refugee law", in Frances Nicholson & Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press (1999), pp. 155-156; "Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees", UN Doc. A/41/324 (13 May 1986), Annex, paras. 30-40. See Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law (3rd ed.)*, Oxford University Press (2007), pp. 23-32; James C. Hathaway, *The Law of Refugee Status*, Butterworths Canada (1991), pp. 11-13; Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited*, Martinus Nijhoff Publishers (1997), pp. 177-183; Maryellen Fullerton, *supra* note 6, p. 237; Atle Grahl-Madsen & Peter Macalister-Smith, *supra* note 12, p. 82.

[14] Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 25-26; James C. Hathaway, *supra* note 13, p. 12.

[15] UNHCR, *Determination of Refugee Status*, Training Module: RLD 2 (1989), Glossary. See UNHCR, *Handbook*, para. 44. For more details, see Bonaventure Rutinwa, "Prima facie status and refugee protection", New Issues in Refugee Research: Working Paper No. 69, UNHCR (October 2002).

possibility in paragraph 2: "[t]he work of the High Commissioner ... shall relate, as a rule, to groups and categories of refugees." At any rate, the practice of *prima facie* determination or the concept of *prima facie* refugee (the latter means, technically, refugee in the absence of evidence to the contrary) has some practical value. This not only enabled UNHCR to respond quickly and effectively to large-scale refugee movements, but also enabled it to focus on groups of refugees in need of protection and assistance, while avoiding criticising political conditions in the refugees' country of origin either explicitly or implicitly which is commonly inevitable in each individual case of refugee status.[16]

Most parts of the expanded 'mandate refugees' discussed in the preceding subsection are closely related to the 'practice of *prima facie* determination' or 'group approach'. Therefore, this practice or approach may be adduced as evidence of the expansion or change of the refugee definition, together with the concept of 'mandate refugees'.[17]

2.1.3 Internally Displaced Persons (IDPs)

In addition, UNHCR has many times been involved in assistance activities for 'internally displaced persons (IDPs)', who are described by the UN as "persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disaster; and who are within the territory of their own country."[18] Considering UNHCR's original mandate, that is protection of 'refugees' who 'have crossed' an international frontier, and also basic principles of international law relating to State sovereignty and non-intervention, this enhanced capacity may seem to be a great achievement. Nevertheless, from the point of view of law, this *ad hoc* practice cannot be included in the realm of 'mandate refugees' or 'humanitarian refugees', because, in order to operate this activity, UNHCR must receive both a

---

[16] Maryellen Fullerton, *supra* note 6, p. 237; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, p. 26.

[17] See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, p. 26; Ivor C. Jackson, *The Refugee Concept in Group Situations*, Martinus Nijhoff Publishers (1999), pp. 103-111.

[18] UN Commission on Human Rights, "Internally displaced persons: Report of the Representative of the Secretary-General, Mr. Francis M. Deng", UN Doc. E/CN.4/1995/50 (2 February 1995), para. 116. For some leading principles regarding IDPs, see UN Commission on Human Rights, "Guiding Principles on Internal Displacement", UN Doc. E/CN.4/1998/53/Add.2 (11 February 1998).

specific request from the Secretary-General or other competent principal UN organ, and the consent of the State or other entities concerned. Therefore, without mentioning the States concerned, UNHCR itself recognises that basically it lacks any legal authority to protect or assist IDPs, and that this kind of protection has little to do with legal norms or remedies for now.[19]

2.2 Related Universal Instruments

2.2.1 The 1967 UN Declaration on Territorial Asylum

Just after the entry into force of the Refugee Protocol in October 1967, UNGA adopted the Declaration on Territorial Asylum through its resolution in December 1967,[20] to fill a gap in asylum issues which previous refugee treaties had not fully addressed.[21] With respect to expanded refugee definition, a hint can be found in the first clause of the Declaration. Article 1.1 of the 1967 Declaration reads as follows: "[a]sylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14[22] of the Universal Declaration of Human Rights, including *persons struggling against colonialism*, shall be respected by all other States" (emphasis added). Although the term 'refugee' is not explicitly mentioned in this Article, the 'persons' may broadly be interpreted as 'refugees', and, in this sense, "persons struggling against colonialism" can be considered an instance of a small expansion of the refugee concept.

2.2.2 The 1977 Draft UN Convention on Territorial Asylum

As the next step of the 1967 Declaration, international efforts were made to draft a convention on territorial asylum.[23] In spite of the failure in adopting the final version of the convention itself, the draft article containing a refugee definition was generally

---

[19] Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 32-35; Volker Türk, *supra* note 13, pp. 158-159; Pirkko Kourula, *supra* note 13, pp. 184-193. See also Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 481-488; James C. Hathaway, *supra* note 13, p. 32.

[20] UN Doc. A/RES/2312 (XXII) (14 December 1967).

[21] Volker Türk, *supra* note 13, p. 163. See Arts. 31-33 of CSR51; James C. Hathaway, *supra* note 13, pp. 13-14.

[22] Art. 14 of UDHR48: "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

[23] Volker Türk, *supra* note 13, pp. 163-164; James C. Hathaway, *supra* note 13, pp. 13-14.

supported by the majority of participating States in the UN Conference on Territorial Asylum in 1977.[24] Article 2 of the Draft Convention on Territorial Asylum[25] stipulates as follows:

> 1. Each Contracting State may grant the benefits of this Convention to a person seeking asylum, if he, being faced with a definite possibility of:
>   (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and *apartheid*, foreign occupation, alien domination and all forms of racism; or
>   (b) Prosecution or punishment for reasons directly related to the persecution as set forth in (a);
>
>   is unable or unwilling to return to the country of his nationality, or, if he has no nationality, the country of his former domicile or habitual residence.
> 2. .....
> 3. The provisions of paragraph 1 of this article shall also not apply to any person requesting territorial asylum for purely economic reasons.

This provision presents various clarifications and developments of refugee definition in comparison with the definition in the 1951 Convention. For example, in paragraph 1 (b) "prosecution or punishment" grounded in persecutory intent is clearly treated as the same as "persecution". It is also notable that persons seeking asylum "for purely economic reasons" shall not be entitled to territorial asylum (or, probably, shall not be recognised as refugees) pursuant to paragraph 3. However, the most relevant changes regarding expansion of the refugee concept may be the addition of more reasons for persecution in paragraph 1 (a): 'colour, national or ethnic origin, kinship, and also including the struggle against colonialism and apartheid, foreign occupation, alien domination and all forms of racism'. Although many of them may already have been included in the refugee definition through liberal or even 'neutral' interpretation, some others seem to be more distinct from the grounds in the 1951 Convention, such as "the struggle against colonialism", "foreign occupation" and "alien domination".[26]

---

[24] The Conference was held in Geneva from 10 January to 4 February 1977, but only three of the ten articles of the experts' draft were discussed and voted on. James C. Hathaway, *supra* note 13, pp. 14-16.

[25] "Report of the United Nations Conference on Territorial Asylum", UN Doc. A/CONF.78/12 (21 April 1977).

[26] See James C. Hathaway, *supra* note 13, pp. 14-15. This extension seems to have been influenced by

2.2.3 The 2002 ILA Guidelines on Temporary Protection

In the similar context of the previous instruments,[27] the International Law Association (ILA), a prestigious NGO of international lawyers, adopted Guidelines on Temporary Protection[28] in its 2002 New Delhi Conference.[29] Paragraph 4 of the Guidelines is as follows:

> Beneficiaries of temporary protection are persons who may or may not be refugees within the meaning of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. These include, in particular
> (a) persons who have fled the indiscriminate effects of *armed conflict* and *generalized violence*;
> (b) persons whose life, personal integrity or freedom is at risk as a result of *systematic or widespread human rights violations* (emphasis added).

Compared with the provisions in the foregoing universal documents, this clause contains new elements such as "armed conflict", "generalized violence" and "systematic or widespread human rights violations". The content of this new inclusion in the 2002 ILA document is also covered by the wider notion of refugee as embodied in earlier 'regional' instruments, especially the 1984 Cartagena Declaration which will be examined later.[30]

2.2.4 UN Sub-Commission on Human Rights Resolution 2002/23

Following its two previous resolutions on the similar subject in 2000 and 2001,[31] the UN Sub-Commission on the Promotion and Protection of Human Rights finally adopted Resolution 2002/23 entitled "International protection for refugees"[32] by consensus in its 54th session. The Sub-Commission, in paragraph 2 of the Resolution,

---

the 1969 OAU Convention. See section 2.3.1 below of this chapter.

[27] However, it should be noted that 'temporary protection' is a more limited concept compared with the traditional 'asylum'. See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 340-343.

[28] ILA, "Refugee Procedures: Guidelines on Temporary Protection", ILA Resolution 5/2002, *Report of the Seventieth Conference (New Delhi, 2002)*, pp. 42-51. Also available at <http://www.ila-hq.org>.

[29] See ILA, "Committee on Refugee Procedures: Final Report and Draft Guidelines on Temporary Protection (Walter Kälin)", *Report of the Seventieth Conference (New Delhi, 2002)*, pp. 433-358. Also available at <http://www.ila-hq.org>.

[30] *Ibid.*, pp. 443-444. See section 2.3.2 below of this chapter.

[31] "The right to seek and enjoy asylum", UN Doc. E/CN.4/SUB.2/RES/2000/20 (18 August 2000) and "International protection for refugees and displaced persons", UN Doc. E/CN.4/SUB.2/RES/2001/16 (16 August 2001).

[32] UN Doc. E/CN.4/SUB.2/RES/2002/23 (14 August 2002).

"express[ed] its concern over the fate of persons who ha[d] risked their lives fleeing from their homes to escape persecution and *by other factors such as starvation or destitution, motivated in part by unfair international economic relations*, and reaffirm[ed] that their human rights should be protected in accordance with international human rights instruments, in particular the 1951 Convention relating to the Status of Refugees and its 1967 Protocol" (emphasis added). At first sight, the italicised phrase may well be seen as a little bit more than progressive, in that it contains not only really new factors such as "starvation" and "destitution", but also a somewhat vague expression of "unfair international economic relations". However, examined more carefully, in spite of the novelty of the expression, it may have only a limited impact upon the expansion of the refugee concept. This is because it seems that the phrase does not replace the persecution criterion but it functions just as an additional or supplementary element of the definition of the persons of concern.[33] That is to say, the paragraph does not mean that persons fleeing for only such economic factors can be regarded as refugees without meeting the persecution criterion, but it means that persons having mixed reasons of persecution and other economic factors are, as refugees, the special concern to the Sub-Commission. Therefore, strictly speaking, this new phrase may not be interpreted as an example of an expanded refugee definition.[34] It is nevertheless notable that the UN Sub-Commission on Human Rights expressed its concern about those affected by 'starvation' or 'destitution' in the context of 'refugee protection' in the official UN document, and therefore that these 'economic factors' were anyway connected with 'persecution' and/or the 'refugee concept', either directly or indirectly.

[33] A clue to this can be found in the following fact: the persecution phrase and the economic factors phrase are actually connected by 'and', not by 'or'. See also paragraph 2 of the 2001 Sub-Commission Resolution: "[e]xpresses its concern over the fate of persons who have risked their lives fleeing from their homes to escape persecution, **often aggravated by other factors such as starvation or destitution**, and ..." (emphasis added).

[34] No subsequent support to this phrase can be found in the UN documents.

2.3 Regional Approaches

2.3.1 The 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa

The Convention governing the Specific Aspects of Refugee Problems in Africa (OAUR69)[35], which was adopted by the Organisation of African Unity (OAU)[36] in 1969, first defines a refugee as the same as the general 'Convention refugee' definition in Article I.1, and then it adds another category of refugee in Article I.2 as follows:

> The term "Refugee" shall also apply to every person who, owing to *external aggression, occupation, foreign domination or events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality (emphasis added).

The adoption of this new definition in the 1969 OAU Convention is a really meaningful achievement in the area of refugee law, in that for the first time it includes expressly the expanded refugee category, namely victims of man-made disasters,[37] as a legally-binding document, although regional. It actually affected the expanded activities of UNHCR, the 1977 Draft Convention on Territorial Asylum, and other regional or domestic legislation on refugee protection.[38]

2.3.2 The 1984 Cartagena Declaration on Refugees

The Cartagena Declaration on Refugees (CRD84)[39] was adopted by experts and governmental representatives of ten Central American States in a colloquium in

---

[35] *UNTS*, Vol. 1001, p. 45 (No. 14691), adopted on 10 September 1969 and entered into force on 20 June 1974. As of June 2008, 45 African States are Parties to the Convention.

[36] The OAU was replaced by the African Union (AU) in 2002.

[37] However, the 1969 OAU Convention, like other international documents, excludes 'natural' or 'economic' disasters in the definition. James C. Hathaway, *supra* note 13, pp. 16-17; Micah Bond Rankin, "Extending the limits or narrowing the scope?: Deconstructing the OAU refugee definition thirty years on", New Issues in Refugee Research: Working Paper No. 113, UNHCR (April 2005), pp. 16-21.

[38] See James C. Hathaway, *supra* note 13, pp. 17-19.

[39] *Annual Report of the Inter-American Commission on Human Rights 1984-1985*, OAS Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1 October 1985), pp. 190-193, adopted on 22 November 1984. The full text is also available in Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 624-628.

Colombia in 1984, to deal with numerous involuntary migrants from generalised violence and oppression in that region in the 1980s. The Declaration was later approved by the General Assembly of the Organization of American States (OAS).[40] Conclusion 3 of the Cartagena Declaration reads as follows:

> … , in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article I, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees *persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order* (emphasis added).

Compared with the expanded definition in the 1969 OAU Convention, this new definition in the 1984 Declaration seems to be more restrictive, because here refugee claimants have to show that "their lives, safety or freedom have been threatened" by those disturbing events, which is not necessary in the case of the 1969 Convention.[41] Nonetheless, the Cartagena Declaration may be viewed as including a new evolution of the refugee concept. That is, among others, the inclusion of "massive violation of human rights" in its new definition.[42] This expression of 'human rights violation' appears for the first time in international refugee law documents, and the requirement for refugee status is considerably less strict compared with the 1951 Convention definition, in that it lacks not only the element of 'fear' but also actually the 'grounds' element such as 'political opinion' or 'membership of a particular social group'. That is to say, anyone who can show his/her life, safety or freedom has been threatened by massive violation of human rights is qualified for refugee status pursuant to the definition in the 1984 Declaration. Additionally, it is notable that, despite its non-binding character, the Cartagena Declaration on Refugees influenced

---

[40] Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, p. 38; James C. Hathaway, *supra* note 13, pp. 19-20.
[41] James C. Hathaway, *supra* note 13, pp. 20-21.
[42] See *ibid.*

many domestic laws and practices, especially those of American States, plus other international or regional documents.[43]

2.3.3 The 2001 EU Directive on Temporary Protection and the 2004 EU Directive on Qualification for International Protection

The European Union (EU) Council has adopted a series of directives regarding a common policy on asylum since 2001.[44] The first one is the 2001 EU Council Directive on Temporary Protection.[45] In the context of 'the event of a mass influx', the 2001 Directive provides that, without prejudice to individual recognition of Convention refugee status, temporary protection should be given to 'displaced persons' if the normal determination procedures are not practicable.[46] Pursuant to Article 2 (c), the 'displaced persons' for the purposes of the Directive mean as follows:

> ... third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:
> (i) persons who have fled areas of *armed conflict or endemic violence*;
> (ii) persons at serious risk of, or who have been the victims of, *systematic or generalised violations of their human rights* (emphasis added);

The emphasised phrases may have been influenced by the definition in the 1984 Cartagena Declaration which also deals with a group situation.

On the other hand, the 2004 EU Council Directive on Qualification and

---

[43] See sections 2.2.3 above and 2.3.3 below of this chapter. For more details of the Cartagena Declaration, see generally Eduardo Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism", *IJRL*, Vol. 3, No. 2 (1991); UNHCR, "The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984", Discussion Document (November 2004), in *IJRL*, Vol. 18, No. 1 (2006).

[44] See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, p. 39.

[45] EU Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *Official Journal of the European Communities*, 7 Aug. 2001, L 212/12.

[46] See Arts. 1, 2 and 3 of the 2001 EU Directive.

Status as Refugees or Persons otherwise in need of International Protection[47] supplies more detailed information about the region's individualistic approach and its developments.[48] After inserting the meaning of the Convention refugee with minor changes in Article 2 (c), the 2004 Directive stipulates in paragraph (e) of the same Article that:

> 'persons eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom *substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin*, or in the case of a stateless person, to his or her country of former habitual residence, *would face a real risk of suffering serious harm* as defined in Article 15, ... , and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country (emphasis added);

Again, the meaning of the term "serious harm" in the above provision is laid down in Article 15 as follows:

> Serious harm consists of:
> (a) death penalty or execution; or
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The 2004 Directive clearly includes the secondary category of 'refugees' or '*de facto* refugees' in the name of "persons eligible for subsidiary protection". Although this kind of new protection is less than the other international protection accorded to the Convention refugees,[49] it can be regarded as a significant development of regional refugee or asylum concept with the clear language of 'subsidiary protection' in an official EU instrument. At the same time, this new concept of 'subsidiary protection' can also be interpreted as combining human rights obligations with refugee or asylum institution. In particular, paragraphs (a) and (b) of Article 15 have a close

---

[47] EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal of the European Union*, 30 Sep. 2004, L 304/12.
[48] See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 40-41.
[49] See Ch. VII (Arts. 20-34) of the 2004 EU Directive.

connection with the 1950 European Convention on Human Rights (ECHR50)[50] and its Protocols,[51] the 1966 ICCPR[52] and its Second Optional Protocol,[53] and the 1984 Convention against Torture (CAT84).[54] [55]

2.3.4 The 2001 AALCO Revised Bangkok Principles on Status and Treatment of Refugees

In the Asian region, there are no regional treaties or conventions on refugee issues.[56] Because the region lacks also a regional organisation such as the EU, OAS and AU (formerly OAU), no binding regulations, directives or decisions can essentially be made. As a less influential forum, the Asian-African Legal Consultative Organization (AALCO),[57] which is an intergovernmental organisation having as its members not only Asian but also African States, adopted the text of the revised Bangkok Principles on Status and Treatment of Refugees[58] through its resolution[59] at the 40th session in 2001. In Article I of the 2001 Revised Bangkok Principles, the definition of the term 'refugee' is stipulated as follows:

> 1. A refugee is a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group:

---

[50] "European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR50)", *ETS*, No. 5, adopted on 4 November 1950 and entered into force on 3 September 1953.
[51] Protocols 6 (*ETS*, No. 114) and 13 (*ETS*, No. 187) to ECHR50, prohibiting the death penalty.
[52] "International Covenant on Civil and Political Rights (ICCPR66)", *UNTS*, Vol. 999, p. 171 (No. 14668), adopted on 16 December 1966 and entered into force on 23 March 1976.
[53] "Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty", *UNTS*, Vol. 1642, p. 414 (No. 14668), adopted on 15 December 1989 and entered into force on 11 July 1991.
[54] "Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT84)", *UNTS*, Vol. 1465, p. 85 (No. 24841), adopted on 10 December 1984 and entered into force on 26 June 1987.
[55] See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 325-330. For more details of the 2004 EU Directive, see *ibid.*, pp. 60-63; Hélène Lambert, "The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law", *ICLQ*, Vol. 55, Part 1, pp. 161-192; María-Teresa Gil-Bazo, "Refugee status, subsidiary protection and the right to be granted asylum under EC law", New Issues in Refugee Research: Research Paper No. 136, UNHCR (November 2006); Jane McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press (2007), Ch. 2.
[56] See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, p. 39.
[57] Before 2001, it was called the Asian-African Legal Consultative Committee (AALCC). As of 2007, it has 48 Members States including China and both Koreas.
[58] "Final Text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees", as adopted on 24 June 2001 at the AALCO's 40th Session, New Delhi. The full text is available at <http://www.aalco.int>.
[59] "The Status and Treatment of Refugees", AALCO Doc. RES/40/3 (24 June 2001).

(a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or
(b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection;

2. The term "refugee" shall also apply to every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

.....

Paragraph 1 is really similar to the definition of Convention refugee with some minor differences, for example, "colour", "ethnic origin" and "gender" as additional grounds.[60] Interestingly, the reference to 'gender' seems to be the first appearance in international refugee documents. Paragraph 2 is exactly the same as Article I.2 of the 1969 OAU Convention.[61]

In addition to the 2001 Revised Bangkok Principles, there is another relevant document covering narrower Asian and African regions. That is the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World. The Arab Declaration was adopted by the group of Arab experts at the UNHCR sponsored Fourth Arab Seminar on 'Asylum and Refugee Law in the Arab World' in Cairo in 1992.[62] It is in Article 5 of the 1992 Declaration that the Arab experts broadly stressed the need for international protection even if situations were outside the coverage of the existing international instruments.[63]

---

[60] 'Colour' and 'ethnic origin' have already been included in the 1977 Draft UN Convention on Territorial Asylum. See section 2.2.2 above of this chapter.

[61] See section 2.3.1 above of this chapter.

[62] Jerzy Sztucki, "Who is a refugee? The Convention definition: universal or obsolete?", in Francis Nicholson & Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press (1999), p. 61.

[63] Art. 5 of the 1992 Arab Declaration: "In situations which may not be covered by the 1951 Convention, the 1967 Protocol, or any other relevant instrument in force or United Nations General Assembly resolutions, refugees, asylum seekers and displaced persons shall nevertheless be protected by: (a) the humanitarian principles of asylum in Islamic law and Arab values, (b) the basic human rights rules, established by international and regional organisations, (c) other relevant principles or international law;" The full text can be found in Ian Brownlie & Guy S. Goodwin-Gill (eds.), *Basic Documents on Human Rights (4th ed.)*, Oxford University Press (2002), pp. 770-773.

2.4 State Practice

In general, many European and other Western countries have maintained their policies and practices of not returning persons to countries in which there would be a significant risk of danger owing to internal turmoil, armed conflict or generalised violence. Based on compassionate or humanitarian considerations, similar protection or status to that of formal refugees or, at least, temporary refuge or asylum has been given to those who are outside the strict Convention refugee definition, according to each domestic law of these developed countries.[64] And this practice was recently confirmed, formalised and reinforced as a common legal norm in the EU area by the 2001 Temporary Protection Directive and the 2004 Qualification Directive.[65] In the U.K., for instance, the Refugee or Person in Need of International Protection (Qualification) Regulations 2006[66] were made and the Immigration Rules were amended[67] to implement this 2004 Directive, although many parts of the Directive had already existed in the British domestic legislation.[68]

Forty five African States are legally bound by the definition in the 1969 OAU Convention as States Parties.[69] On the other hand, although it is not legally binding, many American States have incorporated the expanded definition of refugee in the 1984 Cartagena Declaration into their national legislations, such as Mexico, Guatemala, Belize, Honduras, El Salvador, Ecuador, Bolivia, Brazil, Paraguay and Peru, or have put the definition into practice, such as Argentina, Chile, Nicaragua and Costa Rica.[70]

---

[64] James C. Hathaway, *supra* note 13, pp. 21-24; Maryellen Fullerton, *supra* note 6, pp. 241-242; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 41-46. For more details of each refugee or asylum regime of European countries (before the 2004 EU Directive), U.S.A. and Canada, see generally Jean-Yves Carlier *et al.* (eds.), *Who is a Refugee?: A Comparative Case Law Study*, Kluwer Law International (1997); Jane McAdam, "Complementary protection and beyond: How states deal with human rights protection", New Issues in Refugee Research: Working Paper No. 118, UNHCR (August 1995).

[65] See section 2.3.4 above of this chapter.

[66] Statutory Instrument 2006 No. 2525, adopted on 11 September 2006 and entered into force on 9 October 2006.

[67] HC 395, adopted on 23 May 1994 and amended numerous times. See especially para. 339C (Grant of humanitarian protection) of Part 11 (Asylum).

[68] See Jane McAdam, *supra* note 64, pp. 7-11. In addition to 'asylum' and 'humanitarian protection', there is a more generous system entitled 'discretionary leave' in the U.K.

[69] This definition has also been incorporated into domestic laws as in Lesotho and Zimbabwe. Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, p. 45.

[70] UNHCR, *supra* note 43, p. 267.

Lastly, refugee-related practice of the Asian countries seems to be more informal and inconsistent in general.[71] Although Pakistan and Iran sheltered the largest group of humanitarian refugees from Afghanistan, the general tendency in this region is not so friendly to refugees.[72] Considering also the fact that only several States in Asia are Parties to the 1951 Convention or the 1967 Protocol,[73] the expanded refugee concept may not be easily applicable in this region, in spite of the adoption of the 2001 Revised Bangkok Principles.[74]

3. Scope and Legal Character of the Expanded Refugee Concept

As examined above, there have been various international and regional legal documents on refugee or asylum issues since the adoption of the 1951 Convention. Some common characteristics of the expanded refugee concept can be found in two areas. Firstly, it covers generally man-made disasters including armed conflict, generalised violence and systematic violations of human rights, but it basically does not encompass natural or ecological disasters[75] or economic misfortune.[76] Secondly, most of the international and regional documents seem to focus on group situations entailing just temporary refuge or protection,[77] clearly except the 2004 EU Directive dealing with only individual cases.

Another important common characteristic is that each of them has limitations; either its non-binding legal character or its regional restrictions, or both. That is to say, there is no universally agreed, and legally binding, expanded concept of refugee or concept of 'humanitarian refugee' according to the current treaty law. For example,

---

[71] See generally Vitit Muntarbhorn, *The Status of Refugees in Asia*, Oxford University Press (1992).
[72] James C. Hathaway, *supra* note 13, pp. 23-24.
[73] As of June 2008, the States Parties in Asia are Afghanistan, Cambodia, China, Iran, Japan, South Korea, Philippines, Timor-Leste, Yemen, and some former Soviet Union countries.
[74] See Ruma Mandal, "Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")", Legal and Protection Policy Research Series (PPLA/2005/02), UNHCR (June 2005), p. 20.
[75] Only the concept of IDPs contains the natural factor, but this concept was already excluded from the current discussion of 'humanitarian refugee'. See section 2.1.3 above of this chapter.
[76] This possibility is discussed and denied in section 2.2.4 above, dealing with a UN Human Rights Sub-Commission resolution.
[77] See UNHCR Executive Committee Conclusions No. 19 (Temporary Refuge, 1980) and No. 22 (Protection of Asylum-Seekers in Situations of Large-Scale Influx, 1981).

the UNHCR's extended practice based on its Statute and UN resolutions, strictly speaking, only relates to the enhanced competence or mandate of the UNHCR itself, and therefore this practice cannot directly bind States without their consent to it.[78] All other universal documents have a non-binding character as a declaration, a draft convention, a resolution or NGO guidelines. On the other hand, the 1969 OAU Convention and the EU Directives have regional limitations notwithstanding their binding force. The Cartagena Declaration and the AALCO Principles have both problems.

The other possibility of universally binding international law of the expanded refugee concept may be grounded on customary international law. Between two elements of customary law, general practice seems to be established more easily than the other one, *opinio juris*.[79] Taking into account various international and regional documents discussed just before and relevant state practices together, it may be said that there has been a broadly uniform, constant and extensive practice regarding the expansion of refugee definition. However, even if this proves to be right, it would be much more difficult to show that the practice is based on the sense of legal obligation of the relevant States. In reality, despite some common characteristics, the details of the practices vary according to regions and countries, and furthermore in many cases States adopt the expanded refugee concept, especially 'war refugees', or humanitarian protection measures, based on just humanitarian or political considerations, not because of legal obligations, except especially in Africa and recently in Europe. Many other States just do not adopt any related law and practice regarding the expanded concept on the national level and some other States do not have any refugee system itself, especially in Asia.[80]

More interestingly, many of the extended protection measures in developed countries may not be directly linked to the expanded refugee concept, but they can be more closely related to their obligations based on various human rights treaties such

---

[78] See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 13, pp. 47-50.
[79] For the elements of customary international law, see *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 44, para. 77. See also Rudolf Bernhardt, "Customary International Law", in Rudolf Bernhardt (ed.), *EPIL*, Vol. I, Elsevier Science Publishers (1992), pp. 899-902; Robert Jennings & Arthur Watts (eds.), *Oppenheim's International Law (9th ed.)*, Vol. I: Peace, Longman (1992), pp. 27-31; Ian Brownlie, *Principles of Public International Law (7th ed.)*, Oxford University Press (2008), pp. 7-10; Rebecca M.M. Wallace, *International Law (5th ed.)*, Sweet & Maxwell (2005), pp. 9-19.
[80] See James C. Hathaway, *supra* note 13, pp. 24-26.

as the European Convention on Human Rights and the universal Convention against Torture. This clearly shows the possibility that international human rights law can protect refugees or refugee-like people in another way, outside, or in combination with, international refugee law.

In conclusion, the expanded concept of refugee discussed in this chapter cannot be applied universally, either as treaty law or as international customary law. In other words, on the international level, this expanded definition is not yet the subject of legal obligation, but just moral obligation at best, or not yet the subject of *lex lata*, but only *lex ferenda*.

4. Applicability of the 'Humanitarian Refugees' Concept to the NKE Case

Among group situation grounds, 'systematic violations of human rights' may be relevant to the NKE case. However, because NKEs usually escape from North Korea just in small groups or all alone, this ground may not automatically be utilised for individual NKE cases in general.[81] On the other hand, among individual situation mechanisms, 'subsidiary or humanitarian protection' may be available to NKEs, especially in the EU States, against the expected 'execution' or 'torture' if they are sent back. As already explained in the beginning, fifteen NKEs were actually granted this protection in the U.K. in recent years.

Moreover, according to UNHCR statistics, in addition to the NKEs formally recognised as political and humanitarian refugees by States, 37 NKEs were treated by UNHCR as 'persons of concern to UNHCR' or 'mandate refugees' in Thailand during 2005.[82] Although this protection cannot always be available, especially if a State concerned is reluctant to cooperate with UNHCR in its territory, this possibility of protection under the UNHCR's mandate may still be a meaningful option for the protection of NKEs in some Asian States such as Thailand.[83]

---

[81] Nevertheless, this ground can be utilised even in individual refugee cases in some domestic procedures in America, namely in Mexico and Ecuador. See UNHCR, *supra* note 43, p. 267.
[82] UNHCR, *supra* note 1, Table 16.
[83] Thailand is currently regarded as the best transit country where NKEs can get a flight to South

In spite of some available protection for NKEs stated above, it seems that it is not generally possible for them to rely on the expanded refugee concept of 'humanitarian refugee', mainly due to this concept's limited force as law. The main host country of NKEs, China, may not feel any legal obligations to apply this expanded definition to the NKE case. It can, however, be argued that China should, nevertheless, consider this possibility very favourably, not only as a Member State of the UNHCR Executive Committee, but also as a Member State of AALCO which recently confirmed the necessity of expansion of refugee concept and actually adopted its expanded definition.[84] [85]

5. Conclusion

The concept of 'humanitarian or *de facto* refugees' has evolved over the last few

---

Korea or the U.S.A. The Thai government, although it is not a Party to the 1951 Convention or the 1967 Protocol (but a Member of the UNHCR Executive Committee), usually respects the decisions of UNHCR that NKEs are in need of protection. Even in the worst case, namely without their access to UNHCR or the embassies concerned, NKEs are, at least, not sent back to China or North Korea, but instead they are confined in the immigration detention centre for one month or more for their illegal entry pursuant to the Thai Immigration Act (as an alternative, a fine is also available, but NKEs generally have no money) and, in the end, they are allowed to go to their final hoped destination such as South Korea or recently the U.S.A. See International Crisis Group, "Perilous Journeys: The Plight of North Koreans in China and Beyond", Asia Report No. 122 (26 October 2006), pp. 22-26; Stephan Haggard & Marcus Noland (eds.), *The North Korean Refugee Crisis: Human Rights and International Response*, U.S. Committee for Human Rights in North Korea (2006), p. 30.

[84] See James C. Hathaway, *supra* note 13, pp. 26-27. In spite of the possibility of this 'moral' obligation, seemingly no ground in the expanded definition in the 2001 AALCO Principles may be applied directly to the NKE case. However, 'widespread human rights violations' can be included in the 'events seriously disturbing public order' in Article I.2, so, in this vein, the group of NKEs may be relevant to the expanded concept in the AALCO Principles, even if they are not likely to be regarded as in a group situation generally. See Micah Bond Rankin, *supra* note 37, pp. 16-21. China has been a Member State of AALCO since 1983. During the meetings in the 40th session of AALCO in which the Revised Bangkok Principles were adopted, the Chinese delegate did not express any objections to the expanded refugee concept, but rather stressed the importance of refugee issues in the 21st century. See AALCO, *Report of the Fortieth Session (New Delhi, 2001)*, 5. Summary Records of the General Meetings held during the Session, (i) First Meeting & (v) Fifth Meeting, available at <http://www.aalco.int>. China also did not officially make any notes, comments or reservations to the 2001 Principles including Article I.2 dealing with the expanded concept.

[85] The 2001 Bangkok Principles may, in Asia, be seen as 'soft law', in that the title uses the term 'principles'; the verb 'shall' is adopted in Article I.2; they were adopted by 'consensus'; and some States made a 'reservation' to them as in treaty practice. On the other hand, the following facts diminish this possibility: in the Introductory Remarks before Notes, Comments and Reservations, it is expressly stated that the Principles are "declaratory and non-binding in character"; and a few States expressed their clear opposition to the expanded definition in their reservations, such as Singapore and India. For the details of 'soft law', see Alan Boyle & Christine Chinkin, *The Making of International Law*, Oxford University Press (2007), pp. 211-229.

decades in various ways. To tackle primarily group refugee situations resulting from man-made disasters, UNHCR, regional organisations and other international bodies produced some meaningful developments in this area. In the legal sense, however, the enhanced activities of UNHCR and the relevant international documents have their respective limitations. On the other hand, at the States level, there were also some significant developments such as humanitarian protection or other similar subsidiary status. Among them, some practices are based only on humanitarian grounds or discretionary power, so they cannot be evidence of international customary law. The other parts of the humanitarian protection are based on legal obligations, but they are basically drawn from human rights obligations and therefore this humanitarian protection practice, in principle, has no direct linkage with the expansion of the refugee concept. This does not mean that there is no link or interaction between refugee law and human rights law, or that these protection developments did not influence in any way the expansion of the refugee concept. Rather, this means that the latter part of the humanitarian protection is, in spite of the expression 'humanitarian' in its name, not based on just humanitarian considerations, but on legal obligations under international law; and that the grounds of the legal obligations are to be found in international human rights law - a neighbouring area of international refugee law. This issue of human rights law will be fully addressed in the first chapter of Part Two.

In the end, despite various debates on 'humanitarian refugee' here and there, 'Convention refugee' discussions seem to be more proper for the NKE question, at least in the 'current' situation of 'international refugee law'.[86] In this context, how NKEs can be protected under international refugee law (*i.e.*, the 1951 Convention regime) will be examined in the next chapter.

[86] This is, for sure, not to deny the necessity of expansion of refugee concept in the long run.

Chapter IV. Protection of NKEs under International Refugee Law

1. Introduction

The present chapter examines how NKEs can be protected under international refugee law and in other adjacent areas of international law such as the law on asylum. There are various protection measures and related rights of refugees in the 1951 Refugee Convention and its 1967 Protocol. Among them, however, considering the current situation of NKEs in China, prohibiting forceful return and securing access to a procedure of refugee status determination or to UNHCR assistance should be placed on the front line of the discussion for the protection of NKEs. Therefore, after a brief overview of those protection measures and rights stipulated in the 1951 Convention in general, this research will mainly focus on the principle of *non-refoulement* and its related issues, which are directly applicable to the NKE case. Although they are basically not included in the area of refugee law, issues of diplomatic asylum and diplomatic protection will also be dealt with later in this chapter.

2. Protection under the 1951 Refugee Convention

Following the detailed first provision laying down the definition of 'refugee', probably one of the most important articles in the 1951 Refugee Convention, there appear numerous provisions in the Convention, containing various protection measures or treatment for refugees: non-discrimination in applying the Convention (Art. 3), freedom of religion and religious education (Art. 4), acquisition of movable and immovable property (Art. 13), protection of artistic rights and industrial property (Art. 14), right of association regarding non-political associations and trade unions

(Art. 15), access to courts (Art. 16), wage-earning employment (Art. 17), self-employment (Art. 18), liberal professions (Art. 19), rationing (Art. 20), housing (Art. 21), public education (Art. 22), public relief (Art. 23), labour legislation and social security (Art. 24), administrative assistance (Art. 25), freedom of movement (Art. 26), identity papers (Art. 27), travel documents (Art. 28), equal treatment in the matter of fiscal charges (Art. 29), transfer of assets (Art. 30), no penalties for illegal entry or presence (Art. 31), expulsion in exceptional cases (Art. 32), prohibition of expulsion or return (*non-refoulement*, Art. 33), and facilitation of naturalization (Art. 34).

Degrees of protection in these provisions are divided into various categories. While several provisions provide for the same treatment applicable to aliens generally,[1] or treatment as favourable as possible and, at least, not less than the normal treatment for aliens,[2] many other articles set their protection standards more generously, that is most-favoured-nation treatment[3] or national treatment.[4] More importantly, although the term 'refugee(s)' is expressly contained in all the articles above, the actual beneficiaries of each article are decided on the basis of three different categories relating to their current status in the host State; refugees physically present (simple presence),[5] refugees lawfully present (lawful presence implying lawful admission)[6] and refugees lawfully staying (lawful residence including habitual residence).[7] Naturally, if a person is formally recognised as a refugee and given asylum in the country of the determination or an alternative third country, he or she can receive all the protection and benefits mentioned above, subject to any reservations the State concerned may make.[8] Given the general contents of the 'simple or physical presence' provisions, however, even if a person is just an asylum-seeker, he or she may still benefit from the treatment available for the first type (simple presence) as a prospective refugee (in the sense of formal

---

[1] Art. 26 of CSR51. See Art. 7.1 of CSR51: "Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally."
[2] Arts. 13, 18, 19, 21 and 22.2 of CSR51.
[3] Arts. 15 & 17 of CSR51.
[4] Arts. 4, 14, 16.2 & 3, 20, 22.1, 23, 24 and 29 of CSR51.
[5] Arts. 3, 4, 13, 16.1, 20, 22, 25, 27, 29, 31 and 33 of CSR51.
[6] Arts. 18, 26 and 32 of CSR51.
[7] Arts. 14, 15, 16.2 & 3, 17, 19, 21, 23, 24 and 28 of CSR51.
[8] See Art. 42 of CSR51.

recognition),[9] irrespective of the legality of his/her entry or stay.[10]

Among these provisions of the first type 'simple or physical presence',[11] Articles 3 (Non-discrimination), 16.1 (Access to courts), 31 (Refugees unlawfully in the country of refuge) and 33 (Prohibition of expulsion or return ("refoulement")) may be closely related to the NKE case, considering the current situation of NKEs in China. In addition to them, Article 35 (Co-operation of the national authorities with the United Nations) can also be connected with the NKE case regarding securing UNHCR assistance. First and foremost, the issue of *non-refoulement* (including its conflict with a bilateral treaty) needs to be addressed here in detail, and then issues relating to the other articles are also to be discussed below.

3. Principle of *non-refoulement*

3.1 The Content of the Principle

3.1.1 Concept and Personal Scope of the Principle

Paragraph 1 of Article 33 of the 1951 Convention reads as follows:

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

This clause represents the principle of *non-refoulement* in refugee law, which basically prohibits expulsion or return of refugees to any country of persecution.

---

[9] In principle, a person is a refugee as soon as he/she fulfils the criteria contained in the definition of the 1951 Convention, even before formal recognition of it. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees (Handbook)*, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited) (Geneva, January 1992), para. 28.

[10] See ILA, "Committee on Refugee Procedures: Interim Report on Temporary Protection (Walter Kälin)", *Report of the Sixty-Eighth Conference (Taipei, 1998)*, pp. 415-416. See also Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law (3rd ed.)*, Oxford University Press (2007), pp. 509-510, 524-528, 412-414; James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), pp. 11-12, 93-95, 154-238; Maryellen Fullerton, "The International and National Protection of Refugees", in Hurst Hannum (ed.), *Guide to International Human Rights Practice (3rd ed.)*, Transnational Publishers (1999), pp. 235-236.

[11] See *supra* note 5.

Country of persecution here includes both the country of origin and other countries where the life or freedom would be threatened, and the principle applies also to other third countries where, in spite of being free from direct persecution, there are risks of being sent to the country of origin or other countries of persecution.[12]

It is generally understood that the principle of *non-refoulement* prohibits not only forcible return to the country of persecution of those who have entered the country of refuge, but also it applies to such pre-admission *refoulement* as rejection at the frontier.[13] Although the last content is not expressly contained in the Convention itself, there are many instances in other refugee law documents, showing this content clearly.[14] Inclusion of rejection (or non-admittance) at the frontier in *refoulement* may also be supported by the fact that the phrase 'in any manner whatsoever' in Article 33 can make the coverage of this Article as inclusive as practicable.[15] In principle, this principle of *non-refoulement* does not entail any right or duty relating to asylum. Thus, even when a Party State admits refugees at its frontier, the State does not necessarily need to grant them asylum. However, at least, the State has an obligation to adopt a course that does not amount to *refoulement*: that is, if (full or permanent) asylum is not possible or available, any other proper measure such as removal to a 'safe' third country or grant of 'temporary' protection or refuge must be taken as the course not amounting to *refoulement*.[16]

As mentioned above, Article 33 (principle of *non-refoulement*), as one of the 'simple or physical presence' provisions of the Convention, applies irrespective of

---

[12] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2-11, 13-37*, Division of International Protection of the UNHCR (1997), pp. 230-231; Paul Weis (ed.), *The Refugee Convention, 1951: The Travaux Preparatoires Analysed, with a Commentary by the late Dr Paul Weis*, Cambridge University Press (1995), p. 341; Sir Elihu Lauterpacht & Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), pp. 121-123, 128. See also James C. Hathaway, *supra* note 10, pp. 322-333.

[13] Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, pp. 113-115; Paul Weis (ed.), *supra* note 12, pp. 341-342; S. Prakash Sinha, *Asylum and International Law*, Martinus Nijhoff (1971), p. 111; James C. Hathaway, *supra* note 10, pp. 315-318. Cf. Atle Grahl-Madsen, *supra* note 12, pp. 228-230.

[14] Art. 3.1 of the 1967 UN Declaration on Territorial Asylum; Art. 3.1 of the 1977 Draft UN Convention on Territorial Asylum; Art. II.3 of the 1969 OAU Convention; Conclusion 5 of the 1984 Cartagena Declaration; Art. III.1 of the 2001 AALCO Bangkok Principles; Para. (c) of UNHCR Executive Committee Conclusions No. 6 (Non-refoulement, 1977).

[15] Paul Weis (ed.), *supra* note 12, p. 341.

[16] Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, p. 113; Paul Weis (ed.), *supra* note 12, p. 342; James C. Hathaway, *supra* note 10, pp. 300-302. On the concept of 'asylum', see Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, pp. 355-358, 414-417.

the legality of persons' entry or stay. As a corollary of this nature, the principle protects not only persons who have been granted refugee status in a national determination procedure, but also all persons seeking asylum as long as their claim to be refugees has not been refuted in a formal procedure.[17]

3.1.2 Exceptions to the Principle

Unlike obligations of *non-refoulement* deriving from international human rights instruments such as the 1984 Convention against Torture[18] and the 1966 International Covenant on Civil and Political Rights,[19] which will be examined in the next chapter, the obligation of *non-refoulement* under the 1951 Refugee Convention has exceptions as stipulated at the second paragraph of Article 33.

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

As with all exceptions, these exceptional circumstances must be interpreted very restrictively, and also "subject to due process safeguards, and as a measure of last resort."[20] Even when a State has legitimate reasons for applying the above exceptions, the State should first consider all possible ways to secure admission of the person concerned to a safe third country, rather than to the country of origin or of persecution, given the humanitarian nature of the principle of *non-refoulement* and the related contents and developments in the neighbouring human rights law area.[21]

---

[17] ILA, *supra* note 10, p. 408; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, pp. 205, 232-233, 412. See Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, pp. 115-118; James C. Hathaway, *supra* note 10, pp. 302-307; UNHCR Executive Committee Conclusions No. 6 (Non-refoulement, 1977), para. (c): "... irrespective of whether or not they have been formally recognized as refugees."

[18] See Art. 3 of CAT84; David Weissbrodt & Isabel Hörtreiter, "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties", *Buffalo Human Rights Law Review*, Vol. 5 (1999), pp. 25-26.

[19] See Art. 7 of ICCPR66.

[20] Para. 7 of Summary Conclusions: the principle of *non-refoulement*, in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 179. See Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, pp. 133-134.

[21] See Arts. 31.2 & 32.3 of CSR51; Art. 3.3 of UN Declaration on Territorial Asylum; Art. 3.3 of Draft

3.2 Application to the NKE case: Conflict of Obligations?

3.2.1 General Issues

According to a recent Chinese source which is allegedly official, 4,809 NKEs in China were forcefully sent back to North Korea in the year 2002.[22] This practice of forceful repatriation of NKEs by China has been continued up to now since the NKE issue was first reported in the mid 1990s.

As discussed earlier, all asylum-seekers like NKEs can receive benefit from the principle of *non-refoulement*, until their refugee status has clearly been denied in related procedures. It is already examined in Chapter II that, although not all of them, at least many of NKEs can be recognised as Convention refugees, and, if a liberal interpretation is adopted, most NKEs may be regarded as political refugees. However, China seems to ignore all these possibilities intentionally for some political reasons, and it has just returned all captured NKEs to North Korea, alleging bluntly that they are all economic migrants or illegal immigrants, never a refugee.[23] Although it is difficult to calculate correctly how many NKEs or what percentage of them are actually Convention refugees considering the really limited information available now, it can never be said that all NKEs do not have any possibility of being refugees, even only with the limited information. Refugee status must, in principle, be determined on an individual basis. On the lack of this process, just returning all asylum-seekers (here NKEs) to their country of nationality where there are risks of being persecuted is clearly against the principle of *non-refoulement*, because their refugee status has not been rightly denied in any related procedure in spite of the

---

UN Convention on Territorial Asylum; Art. III.2 of AALCO Revised Bangkok Principles. See also *supra* notes 18-19. For supporting arguments by scholars, see Paul Weis (ed.), *supra* note 12, pp. 342-343; Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, p. 134.

[22] "China forcefully returned 4,809 NKEs to North Korea in 2002", *Yonhap News* (8 June 2007).

[23] "**Q:** On June 27th, the UN high Commissioner for Refugees **criticized China of repatriating North Korean "refugees"**. What's your comment?

A: We have stated our position on the illegal DPRK trespassers for many times. **They are not refugees, and therefore the Geneva Convention on the Status of Refugees can not be applied to them.** The Chinese Government has a very explicit position on the issue, that is, China always proceeds from the peace and stability of the Korea Peninsula and handle[*sic*] the issue prudently in line with our domestic law, international law and humanitarian principle. Facts have proven our measures to be appropriate and effective" (emphasis added).

People's Republic of China Ministry of Foreign Affairs, "Foreign Ministry Spokesman Liu Jianchao's Press Conference on 28 June 2005" (29 June 2005) <http://www.fmprc.gov.cn/eng/xwfw/s2510/t201684.htm> (last accessed on 19 June 2008).

strong possibilities.[24] In addition, there seems to be little possibility that exceptions to the principle are being applied to the NKE case. Therefore, it can generally be said that China, as a State Party to the 1951 Convention, violates its obligation under Article 33 of the Convention.

3.2.2 Non-refoulement *versus Extradition*

In spite of the rather clear conclusion just reached, there is an alternative defence contended by China against it. China has argued that bilateral agreements with North Korea take precedence over its obligations under the 1951 Convention.[25]

The 1986 Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas[26] seems to be the most important instrument in this respect, and it obliges China to return North Koreans who enter China illegally.[27] The 1986 Protocol was concluded between Chinese Ministry of Public Security and North Korean Ministry of State Security, which indicates that the Protocol may be just an agency-to-agency arrangement not amounting to a treaty which binds relevant States Parties. The adoption in the English text of 'Sides', not 'Parties', 'be effective', not 'enter into force', 'signed', not 'done', and '(possessing) equal validity', not '(being) equally authentic' also shows that the Protocol is probably not a binding treaty in the context of international law.[28] If this observation is proved right, it will make the matter really simple, because there cannot be any

---

[24] See James C. Hathaway, *supra* note 10, pp. 319-320.

[25] See United Kingdom Foreign & Commonwealth Office, *HUMAN RIGHTS Annual Report 2003*, (September 2003), p. 34, available at <http://www.fco.gov.uk/humanrights>; James C. Hathaway, *supra* note 10, p. 285; Benjamin Neaderland, "Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis", *Stanford Journal of International Law*, Vol. 40 (2004), notes 24, 41; Stephan Haggard & Marcus Noland (eds.), *The North Korean Refugee Crisis: Human Rights and International Response*, U.S. Committee for Human Rights in North Korea (2006), p. 40; HRW, "The Invisible Exodus: North Koreans in the People's Republic of China (North Korea)", Vol. 14, No. 8 (C) (November 2002), p. 16.

[26] Adopted in Chinese and Korean in Dandong, China on 12 August 1986. This is a secret (or confidential) treaty between China and North Korea, so no official version can be obtained. Instead, a Japanese NGO issued this instrument and it can be found, both in Korean and English, in Il-Young Chung & Choon-Ho Park (eds.), *Issues on Korean Chinese and North Korean Refugees*, Baeksang Foundation (Seoul, 2003) (in Korean), pp. 251-264. Reportedly, this Protocol was slightly amended in July 1998. Chan-kiu Kim, "Forceful repatriation of NKEs in violation of international law", *Korea International Law Review*, Vol. 25 (Seoul, 2007) (in Korean), pp. 212-213.

[27] See Arts. 4, 5 and 9 of the 1986 Protocol.

[28] See Anthony Aust, *Modern Treaty Law and Practice (2nd ed.)*, Cambridge University Press (2007), pp. 32-37, 496. The former of each pair is usually employed in non-binding instruments such as agency-to-agency arrangement and memorandum of understanding, rather than in treaties such as convention, agreement and protocol.

conflict between the 1986 Protocol and the 1951 Refugee Convention. That is to say, in that case, only obligations under the 1951 Convention may apply to China, as the 1986 Protocol is just an agency-to-agency arrangement not creating any rights or obligations in international law applicable to China as a State. On the other hand, however, the 1986 bilateral Protocol may also be seen as a legally binding treaty between China and North Korea. First, it adopts, in the title, 'Protocol' rather than 'Arrangement' or 'Memorandum of Understanding', and, in the text, 'Article' and 'Clause' rather than 'Paragraph', 'agreement' rather than 'understanding', and 'shall' rather than 'will' or 'should'.[29] Secondly, in Article 10 of the Protocol, it requires ratification by both 'governments' for it to be effective. This is a typical way adopted by a treaty for its entry into force, and this means, in the end, the 'governments' of both States, China and North Korea, must endorse their agency's signature regarding the treaty. Finally, this kind of extradition treaty, even if the Protocol regulates rather specific regions, has traditionally been a topic between States themselves, not just an agency-to-agency subject. Therefore, considering also the position of China itself as a Party to the bilateral Protocol,[30] it seems that the 1986 Protocol should be treated as a treaty between the two States, China and North Korea, binding them legally.

Then, another question about this Protocol can be raised: the legal effect resulting from the character of the Protocol as a secret or confidential treaty not registered with the Secretariat of the UN. Even if the Protocol can successfully be regarded as a treaty between States, it is generally understood that a secret treaty like the 1986 Protocol is basically prohibited in modern times.[31] More correctly speaking, however, this rule applies only within the realm of the UN as stipulated in Article 102 of the UN Charter, so, outside the UN, it cannot be said that a State concerned is

---

[29] See Anthony Aust, *supra* note 28, pp. 33-34, 496.

[30] See *supra* note 25.

[31] See Art. 102.1 of the UN Charter: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.";

Art. 80.1 of the 1969 Vienna Convention on the Law of Treaties (VCLT69) (*UNTS*, Vol. 1155, p. 331 (No. 18232), adopted on 23 May 1969 and entered into force on 27 January 1980. As of June 2008, 108 States are Parties to the Convention. China acceded to it on 3 September 1997): "Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication."

See also Paul Reuter (translated by José Mico & Peter Haggenmacher), *Introduction to the Law of Treaties (2nd English ed.)*, Kegan Paul International (London, 1995), pp. 70-71. See generally Bruno Simma (ed.), *The Charter of the United Nations: A Commentary (2nd ed.)*, Oxford University Press (2002), pp. 1277-1292.

never allowed to invoke its secret treaty.[32] Namely, during diplomatic negotiations between States, in the fora of regional organisations not directly connected with the UN, or before international arbitral tribunals, the State may, in theory and practice, invoke its obligations under the confidential treaty, irrespective of the registration of the treaty at the UN. Thus, the 1986 Protocol may be invoked by China outside the UN, although the limitation in the UN may, to a degree, affect the capacity of the Protocol negatively.[33]

Now, it is ascertained that both the 1951 Refugee Convention and the 1986 bilateral Protocol are legally binding on China. Then, can it be said that there is actually conflict between them? If so, which obligation has precedence over the other: the obligation of *non-refoulement* under the 1951 Convention, or the obligation of return or extradition under the 1986 Protocol?

Basically, there is no mention of the matter of extradition in Article 33 or any other articles of the 1951 Convention, and, while drafting Article 33, some States such as France and the U.K. expressed their view that the Article did not prejudice the right of extradition.[34] However, the matter of extradition also should, in principle, be interpreted as falling in the range of application of the principle of *non-refoulement*.[35] There are several reasons supporting this proposition. First, most important extraditable criminals are originally excluded from their refugee status according to Article 1.F of the 1951 Convention. The provision stipulates that any suspect or criminal who is believed to have committed a serious non-political crime prior to his/her admission or an international crime such as a war crime or a crime against humanity shall not be recognised as a refugee. From this provision, it can be

---

[32] See Art. 102.2 of the UN Charter: "No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement **before any organ of the United Nations**" (emphasis added). See also Anthony Aust, *supra* note 28, p. 29, 344-346.

[33] See Bruno Simma (ed.), *supra* note 31, pp. 1289-1291. In practice, however, many UN organs allowed States to invoke even unregistered treaties. *Ibid.*, pp. 1291-1292; Anthony Aust, *supra* note 28, p. 346.

[34] "Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting", UN Doc. A/CONF.2/SR.35 (1951), p. 21 (France); "Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting", UN Doc. A/CONF.2/SR.16 (1951), p. 13 (U.K.). See Paul Weis (ed.), *supra* note 12, p. 342; Atle Grahl-Madsen, *supra* note 12, p. 227; S. Prakash Sinha, *supra* note 13, p. 125.

[35] Volker Türk & Frances Nicholson, "Refugee protection in international law: an overall perspective", in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 11; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, pp. 257, 262; Paul Weis (ed.), *supra* note 12, p. 342.

drawn that the 1951 Convention has already reflected the interests of States regarding extradition.[36] Secondly, the inclusive phrase 'in any manner whatsoever' in Article 33.1 can be interpreted as covering extradition also for the purpose of *non-refoulement*.[37] Thirdly, many multilateral and bilateral instruments on extradition, and domestic judicial decisions such as in the U.K., France, Switzerland and Slovenia, support this contention.[38] For example, Article 3.2 of the 1957 European Convention on Extradition[39] provides that "[extradition shall not be granted] if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons". And similarly, Article 4.5 of the 1981 Inter-American Convention on Extradition[40] stipulates that "[extradition shall not be granted] [w]hen, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons." Fourthly, UNHCR also confirmed this position. In the Executive Committee Conclusions on extradition, it "[r]ecognized that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1(A)(2) of the 1951 United Nations Convention relating to the Status of Refugees".[41] Finally, developments in the field of international human rights law, which prohibit exposing individuals to the danger of torture or other cruel, inhuman or degrading treatment or punishment, restrict effectively expulsion, return and 'extradition' of refugees and asylum-seekers to any country of persecution.[42] Although the developments in human rights law do not

---

[36] See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, p. 257; S. Prakash Sinha, *supra* note 13, pp. 124-125.
[37] Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, p. 112; Paul Weis (ed.), *supra* note 12, p. 342; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, p. 257.
[38] Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, pp. 258-261; Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, p. 112.
[39] *UNTS*, Vol. 359, p. 273 (No. 5146), adopted on 13 December 1957 and entered into force on 18 April 1960.
[40] *UNTS*, Vol. 1752, p. 190 (No. 30597), adopted on 25 February 1981 and entered into force on 28 March 1992.
[41] UNHCR Executive Committee Conclusions No. 17 (Problems of Extradition Affecting Refugees, 1980), para. (c).
[42] For instance, see Art. 3 of CAT84. For details, see Ch. V.

directly deal with the refugee issues, for the purpose of interpreting the 1951 Convention, the relevant contents of human rights law developments since the adoption of the Convention may be taken into account, along with other subsequent agreements and practices on the interpretation of the Refugee Convention.[43]

In conclusion, it is necessary to turn to one of the basic principles on interpretation, that is the principle of harmonisation. In international law, there is a strong presumption against normative conflict, and "[i]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."[44] Although there is little judicial or arbitral practice on normative conflicts in international law, UN International Law Commission (ILC) recently acknowledged the utility of the principle of harmonisation in resolving seeming conflicts of obligations.[45] The 1951 Refugee Convention and the 1986 bilateral Protocol between China and North Korea, in principle, cannot be in conflict with each other, because they respectively deal with different subject-matter, namely refugee protection on one side and border security (including extradition) on the other. In addition, North Korea is not a Party to the 1951 Convention. Therefore, China, as a Party State to both treaties, should, as far as possible, interpret them harmoniously, avoiding or mitigating any possible conflict between them. It is generally presumed that when China concluded the bilateral treaty with North Korea in 1986, China took into account its then existing international obligations under other treaties including the 1951 Convention to which China acceded in 1982.[46] Thus, also considering those reasons stated in the preceding paragraph plus the humanitarian object and purpose of the 1951 Convention,[47] China must interpret the matter of extradition as included

---

[43] Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, p. 113. See Art. 31.3 of VCLT69; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties (2nd ed.)*, Manchester University Press (1984), pp. 138-140.

[44] ILC, "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Report of the International Law Commission: Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)*, UN Doc. A/61/10 (2006), para. 251, Conclusions (4), (42). See ILC, "Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi): Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", UN Doc. A/CN.4/L.682 (13 April 2006), pp. 25-28.

[45] See *ibid.*

[46] See ILC, "Report of the Study Group on the Fragmentation of International Law", *supra* note 44, p. 26.

[47] See Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, p. 113.

in the coverage of the principle of *non-refoulement*. More concretely speaking with respect to the NKE case, NKEs who can be regarded as refugees, or asylum-seekers as prospective refugees, under the 1951 Convention[48] must not be interpreted as the objects of return or extradition grounded on the 1986 Protocol.[49] This conclusion must be the right interpretation of the 1951 Convention and the 1986 Protocol together, in accordance with the principle of harmonisation and with the view of mutual accommodation.

The practice around NKEs, however, does not follow this advisable way to resolve possible conflict problems. Instead, China just prefers its bilateral treaty with North Korea, while denying bluntly any possibilities of NKEs' refugee status and from time to time emphasising its bilateral obligations.[50] Now, it seems that the real conflict occurs for China, because most NKEs have good possibilities of being Convention refugees and returning them in accordance with the bilateral Protocol without any screening procedure is clearly in violation of the 1951 Convention. As mentioned above, the subject-matter of the 1951 Convention and the 1986 Protocol is basically different from each other, so the general rules for resolving conflicts such as the *lex specialis* doctrine (*lex specialis derogat legi generali*, special law has priority over general law) and the *lex posterior* maxim (*lex posterior derogat legi priori*, later law supersedes earlier law) may not be easily applied to this issue.[51] Considering also that only China is a Party to both treaties, this issue of actual conflict seems to result merely in the question of choice of obligation or state responsibility, made by China: namely, whether China chooses to be responsible towards the other States Parties to the 1951 Convention, or decides to be responsible

---

[48] Naturally, NKEs, although it may be very rare, who have committed a serious non-political crime or an international crime in North Korea cannot be refugees based on the 1951 Convention, and therefore they can, in principle, be the objects of extradition according to the 1986 Protocol. For the application of exclusion clauses to the NKE case, see section 4.9.2 of Ch. II.

[49] See Arthur C. Helton, "Harmonizing Political Asylum and International Extradition: Avoiding Analytical Cacophony", *Georgetown Immigration Law Journal*, Vol. 1 (1986), pp. 480, 492-494.

[50] See *supra* note 25.

[51] ILC, "Conclusions on the Fragmentation of International Law", *supra* note 44, Conclusions (5), (6), (24), (26). See Alan Boyle and Christine Chinkin, *The Making of International Law*, Oxford University Press (2007), pp. 248-255; Dinah Shelton, "International Law and 'Relative Normativity'", in Malcolm D. Evans (ed.), *International Law (2nd ed.)*, Oxford University Press (2006), pp.159-185. For more details of the issue of conflict of norms in international law, see generally Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press (2003); Seyed Ail Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, Martinus Nijhoff Publishers (2003).

towards North Korea.[52] Given the current weakness of the implementation mechanism of international law, especially international refugee law, China's choice may not be a bad political decision, but only if China can set aside the humanitarian nature of refugee issues and its reputation regarding human rights.

Then, is this the end of the legal problem between *non-refoulement* and extradition with respect to the NKE case? There is one last mechanism of conflict solution that can be resorted to as regards this problem: that is an approach through the hierarchy in international law. There are two possibilities, the primacy of the UN Charter and, more importantly, the concept of *jus cogens*. Firstly, the UN Charter itself declares plainly its supremacy over other treaties in Article 103 as follows: "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[53] Given, with this, the fact that almost all States are currently Members of the UN[54] and the fundamental importance of many of the contents of the Charter, it can be said that the UN Charter has actually acquired some special status in international law and so it is something more than just one of treaties. Both China and North Korea are also Members of the UN.[55] Then, the question to be addressed here is whether obligations under the 1951 Refugee Convention can be regarded as those under the UN Charter. According to Articles 1.3, 55, 62.2 and 68 of the Charter, one of the main purposes of the UN is to promote and encourage universal respect for, and observance of, human rights and fundamental freedoms for all, and in Article 56 "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of [this purpose]." However, it is generally accepted that the provisions dealing with human rights in the Charter basically do not create any substantive obligations, and the notion of human rights there needs to be

---

[52] Cf. Art. 30.5 of VCLT69.

[53] See ILC, "Conclusions on the Fragmentation of International Law", *supra* note 44, Conclusions (34)-(36), (40)-(41); ILC, "Report of the Study Group on the Fragmentation of International Law", *supra* note 44, p. 168-181; Bruno Simma (ed.), *supra* note 31, pp. 1292-1302. See also Art. 30.1 of VCLT69.

[54] As of 2008, there are 192 Member States of the UN.

[55] Republic of China (currently known as Taiwan) became an original Member of the UN on 24 October 1945, but later People's Republic of China took over the membership and its permanent seat on the Security Council on 25 October 1971. North Korea (DPRK) became a Member State of the UN, together with South Korea (ROK), on 17 September 1991.

specified further through relevant international treaties.[56] Therefore, the obligation of *non-refoulement* under the 1951 Convention or any other obligations under human rights treaties does not seem to be automatically linked with obligations under the UN Charter for the purpose of applying Article 103.

Finally, the concept of *jus cogens* may help to resolve the conflict between the obligation not to return in the 1951 Convention and the obligation to extradite in the 1986 Protocol. According to Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT69), a *jus cogens* is a peremptory norm of general international law, which is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." A rule conflicting with a norm of *jus cogens* or a peremptory norm becomes thereby *ipso facto* void.[57] Therefore, if the principle of *non-refoulement* can be recognised a norm of *jus cogens*, the conflicting rule or obligation regarding extradition shall be void. This is to be dealt with in the following sub-section.

3.2.3 Legal Character of the Principle: Customary Law and Jus Cogens*?*

Before entering into the subject of *jus cogens*, it may be useful to look into firstly whether the principle of *non-refoulement* is established as customary international law. This is because not only norms of *jus cogens* are usually derived from norms of customary law, if not based on treaty law, but also the confirmation of customary status of the principle can be helpful in interpreting the 1951 Convention and the 1986 Protocol together harmoniously, in that the principle of *non-refoulement* will also be binding, as a rule of customary law, on North Korea which is not a Party to the 1951 Convention.[58] In general, the prohibition of *refoulement* is recognised as a rule of customary international law. There is much support for this. UNHCR

---

[56] Bruno Simma (ed.), *supra* note 31, pp. 942-943. But see Sibylle Kapferer, "The Interface between Extradition and Asylum", Legal and Protection Policy Research Series (PPLA/2003/05), UNHCR (November 2003), para. 41.

[57] Art. 53 of VCLT69; ILC, "Conclusions on the Fragmentation of International Law", *supra* note 44, Conclusion (41). See also Art. 64 of VCLT69.

[58] Art. 31.3 (c) of VCLT69 can also be applied to this case. See ILC, "Conclusions on the Fragmentation of International Law", *supra* note 44, Conclusions (21)-(22); Sir Ian Sinclair, *supra* note 43, pp. 138-140.

acknowledges in its Conclusions that "the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States[.]"[59] The Expert Roundtable organised by UNHCR also concluded in 2001 that "[*n*]*on-refoulement* is a principle of customary international law",[60] and this was endorsed by States Parties to the 1951 Convention in their Declaration in the same year as follows: "... the principle of *non-refoulement*, whose applicability is embedded in customary international law[.]"[61] Among legal academics, Guy S. Goodwin-Gill confirms that the rule against return is a rule of customary international law,[62] and Theodor Meron also regards the prohibition of *refoulement* in Article 33 as reflecting customary law.[63] Elihu Lauterpacht and Daniel Bethlehem, while distinguishing the principle of *non-refoulement* in refugee law from that in human rights law, consider the principle in both areas respectively a principle of customary international law.[64] In addition, some domestic courts including the U.K. House of Lords have also accepted the view that the principle of *non-refoulement* forms part of customary international law.[65] In conclusion, if this majority view is adopted,[66] the principle of *non-refoulement* can be applied to North Korea also, as a rule of customary international law: based on this, all other States can demand that not only China but also North Korea observe its obligations resulting from the principle, and China may be in the friendlier environment for considering a more harmonious interpretation of the two treaties, together with North Korea.

Returning to the issue of *jus cogens*, it does not seem to be easy to demonstrate that the principle of *non-refoulement* is, beyond the level of customary

---

[59] UNHCR Executive Committee Conclusions No. 6 (Non-refoulement, 1977), para. (a).
[60] Para. 1 of Summary Conclusions: the principle of *non-refoulement*, *supra* note 20, p. 178.
[61] Para. 4 of Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol to the Status of Refugees, in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), p. 81.
[62] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford University Press (1978), pp. 139-142; Guy S. Goodwin-Gill, *The Refugee in International Law (2nd ed.)*, Oxford University Press (1996), pp. 167-170.
[63] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press (1989), p. 23.
[64] Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, pp. 141-150. See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, pp. 345-354.
[65] *R v. Immigration Officer at Prague Airport, ex parte European Roma Rights Centre and others*, House of Lords, [2004] UKHL 55, 9 December 2004, para. 26. For the relevant case of the New Zealand Court of Appeal, see James C. Hathaway, *supra* note 10, p. 367, note 389.
[66] But see James C. Hathaway, *supra* note 10, pp. 363-367.

law, "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Nevertheless, there are some supporting arguments for the *jus cogens* status of the principle.[67] Firstly, the UNHCR Executive Committee concluded in 1982 that the principle of *non-refoulement* "was progressively acquiring the character of a peremptory rule of international law",[68] and in 1996 that the principle "is not subject to derogation."[69] Secondly, on the regional level, the 1984 Cartagena Declaration on Refugees[70] stresses more clearly the importance of the principle of *non-refoulement* in its Conclusion 5 as follows: "[t]his principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*." The 1992 Arab Declaration on Refugees also reaffirms the importance of the principle and "considers this principle as an imperative rule of international public law[.]"[71] Lastly, but most importantly, the 1951 Convention does not allow States to make any reservations to Article 33 (the principle of *non-refoulement*),[72] and this may be a good indication that the principle cannot be derogated from as a norm of *jus cogens*.[73]

Notwithstanding the favourable arguments presented above, the principle of *non-refoulement*, as stipulated in Article 33 of the 1951 Convention, has a really negative element against the presumption of the *jus cogens* status. That is the existence of exceptions found in the second paragraph of Article 33: a danger to the security of the country and a danger to the community of that country. These limitations may derogate from the basic content of the principle, even if they are applied just in exceptional cases, so, only considering this, it can be concluded that the principle of *non-refoulement* cannot be a norm of *jus cogens* from which any

---

[67] See Jean Allain, "The *jus cogens* Nature of *non-refoulement*", *IJRL*, Vol. 13, No. 4 (2002), pp. 538-541. See also Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press (2006), pp. 55, 103.

[68] UNHCR Executive Committee Conclusions No. 25 (General Conclusion on International Protection, 1982), para. (b).

[69] UNHCR Executive Committee Conclusions No. 79 (General Conclusion on International Protection, 1996), para. (i).

[70] *Annual Report of the Inter-American Commission on Human Rights 1984-1985*, OAS Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1 October 1985), pp. 190-193, adopted on 22 November 1984.

[71] Art. 2 of the Declaration on the Protection of Refugees and Displaced Persons in the Arab World, adopted on 19 November 1992. Ian Brownlie & Guy S. Goodwin-Gill (eds.), *Basic Documents on Human Rights (4th ed.)*, Oxford University Press (2002), p. 771.

[72] Art. 42 of CSR51.

[73] See Guy S. Goodwin-Gill, *Movement of Persons*, *supra* note 62, pp. 71-73, 140.

derogation must not be permitted. Also, it cannot be said that the peremptory nature of the obligation against *refoulement* in refugee law is accepted or recognised by the international community as a whole, in the light of the relevant practice of States.[74]

In the end, further research needs to be carried out on the *jus cogens* status of the principle of *non-refoulement*, but this time not based on 'refugee law', but based on 'human rights law' which mainly relates to a rule preventing torture. This issue will be discussed in the next human rights law chapter, and a better result can be expected from the discussion, in that *non-refoulement* in human rights law does not contain any exceptions as included in the 1951 Refugee Convention. In conclusion, the principle of *non-refoulement* in refugee law can be regarded as a norm of customary international law, but it does not go far enough to become a norm of *jus cogens* which can be a vital legal tool for resolving conflicts between treaties or obligations. Thus, in the case of NKEs, obligations relating to the principle of *non-refoulement* under refugee law may not operate as a strong argument, in the presence of China's adverse bilateral agreement with North Korea.[75]

4. Access to a Procedure for Refugee Status Determination

Broadly speaking, access to a procedure for refugee status determination may be regarded as implicitly included in the content of the principle of *non-refoulement*. It is because, if a State really tries to observe its obligations under Article 33 of the 1951 Convention, it is natural that the State should first take appropriate steps to determine whether an asylum-seeker can never be a refugee, before sending the asylum-seeker to a country of possible persecution.[76] Whether or not this presumable connection is mentioned, it is not easy to understand that a State, which has agreed

---

[74] Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historial Development, Criteria, Present Status*, Finnish Lawyers' Publishing Company (Helsinki, 1988), pp. 261-262. See Guy S. Goodwin-Gill, *The Refugee in International Law (2nd ed.)*, *supra* note 62, p. 168, note 234; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, pp. 345-346, note 421. But see Alexander Orakhelashvili, *supra* note 67, pp. 68-69.

[75] Even in this case, however, the issue of state responsibility still remains for the breach of the 1951 Convention. See *supra* note 52.

[76] See Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, p. 261; Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, p. 118; Stephan Haggard & Marcus Noland (eds.), *supra* note 25, pp. 35-36.

on the meaning of refugee and has also confirmed various rights and duties relating to refugees as a Party to the 1951 Convention, does nothing for the protection of refugees without any related procedures, in spite of actual existence of many asylum-seekers or refugees in its territory. UNHCR states its view in the Handbook as follows:

> It is obvious that, to enable States parties to the [1951] Convention and to the [1967] Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9[77]), is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.[78]
>
> Due to the fact that the matter is not specifically regulated by the 1951 Convention, procedures adopted by States parties to the 1951 Convention and to the 1967 Protocol vary considerably. In a number of countries, refugee status is determined under formal procedures specifically established for this purpose. In other countries, the question of refugee status is considered within the framework of general procedures for the admission of aliens. In yet other countries, refugee status is determined under informal arrangements, or *ad hoc* for specific purposes, such as the issuance of travel documents.[79]

As UNHCR points out, the type of procedure is not a crucial matter, so the determination can be made even informally or in an *ad hoc* fashion as the case may be.[80] However, if an asylum-seeker is consequently forced to return to any country of persecution without any proper determining procedures, or if, without any individual process, the State just regards all the asylum-seekers of the same nationality as illegal immigrants and repatriates them all to their home country, at least many of these

---

[77] Art. 9 of CSR51: "… , pending a determination by the Contracting State that that person is in fact a refugee …"

[78] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees (Handbook)*, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited) (Geneva, January 1992), para. 189. See UNHCR Executive Committee Conclusions No. 8 (Determination of Refugee Status, 1977); UNHCR Executive Committee Conclusions No. 30 (The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, 1983); UNHCR Executive Committee Conclusions No. 74 (General Conclusion on International Protection, 1994), para. (i).

[79] UNHCR, *Handbook*, para. 191.

[80] See James C. Hathaway, *supra* note 10, pp. 180-181.

cases may amount to *refoulement* against its obligations under the 1951 Convention.[81] This is the very case of NKEs. As noted before, NKEs are all regarded as just economic migrants or illegal immigrants by China and, if caught, they are all automatically sent back to North Korea where they may face persecution. Although there is a clause in the Constitution providing for the grant of political asylum,[82] China does not have any formally specified procedures for asylum-seekers or refugees. In this condition, China intentionally denies any possibility of NKEs' refugee status without any formal or informal individual verification procedures. To give a good example, in August 2002, seven NKEs attempted to apply for their refugee status formally at the gate of the Chinese Ministry of Foreign Affairs in Beijing, but they were all just arrested by the guards. It is believed that they were sent back to North Korea and are now dead.[83] This kind of "refusal to consider a claim to refugee status, knowing that such a refusal leaves the refugee exposed to removal on general immigration grounds [such as his/her illegal presence]" is definitely a breach of its duty of *non-refoulement*.[84]

In addition, the content of Article 31 should also be noted. Paragraph 1 of Article 31 reads as follows:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Although the decision on the 'MOFA Seven' stated above seems to have been basically made based on the China's basic policy of forced repatriation of all NKEs, if the decision were in some way related to their illegal entry or presence, it would be

---

[81] See Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, pp. 118-119.

[82] Art. 32 (2): "The People's Republic of China may grant asylum to foreigners who request it for political reasons." <http://www.oefre.unibe.ch/law/icl/ch00000_.html>.
It is also reported that China's 1986 immigration control law permits individuals who seek asylum for political reasons to reside in China upon approval by the competent authorities. Stephan Haggard & Marcus Noland (eds.), *supra* note 25, p. 37.

[83] AI, *Report 2003*: Democratic People's Republic of Korea & People's Republic of China, AI Index: POL 10/003/2003; Stephan Haggard & Marcus Noland (eds.), *supra* note 25, p. 38.

[84] James C. Hathaway, *supra* note 10, pp. 319-320; Stephan Haggard & Marcus Noland (eds.), *supra* note 25, p. 38.

also against its obligation grounded on Article 31. More generally speaking, "measures such as arbitrary detention or procedural bars on applying for asylum" may constitute 'penalties' and thus deem to be a violation of Article 31 of the 1951 Convention.[85]

In conclusion, China must cease the current practice of repatriation 'on the lack of proper screening procedures', which is clearly incompatible with its international obligations under Article 33, and also possibly Articles 31 and 16.1, of the 1951 Convention.[86] And in the meantime China should establish its national asylum system containing procedures determining refugee status in order to meet its international commitments effectively, as UNHCR continues to recommend to it.[87]

5. Unimpeded Access by UNHCR

Article 35 of the 1951 Convention[88] and Article II of the 1967 Protocol[89] provide for the general obligation of the States Parties to cooperate with UNHCR.[90] This obligation of cooperation refers to "any and all of the functions of the High Commissioner's Office, irrespective of their legal basis"[91] and has "a highly dynamic and evolutive character" following the changing role of UNHCR.[92] Not only is China

---

[85] Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, p. 266. See *ibid.*, p. 267.

[86] This does not mean that China should necessarily provide (full) asylum to NKEs, the matter of which is basically within its discretionary power based on its territorial sovereignty, but, if China really has even little intention to protect refugees, there are some valid options for their resettlement such as South Korea and the U.S.A. See section 4.9.3 of Ch. II. See also Art. 31.2 of CSR51; Paul Weis (ed.), *supra* note 12, pp. 303-304.

In addition to Articles 33 and 31, Article 16.1 of the 1951 Convention may, even if indirectly, also be related to the issue of access to procedures determining refugee status, which provides for 'free access to the courts of law'. See James C. Hathaway, *supra* note 10, pp. 626-632, 644-647.

[87] See UNHCR, *Global Report 2006* (2007), p. 396.

[88] Art. 35.1 of CSR51: "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

[89] Mostly the same content as Art. 35 of CSR51.

[90] See Paul Weis (ed.), *supra* note 12, pp. 362-363.

[91] Atle Grahl-Madsen, *supra* note 12, p. 254. For examples of UNHCR's supervisory role, see paras. 3-5 of Summary Conclusions: supervisory responsibility, in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), pp. 668-669.

[92] Walter Kälin, "Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond", in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global*

a State Party to both treaties,[93] it also concluded a special agreement with UNHCR in 1995.[94] Article III (Cooperation between the Government and UNHCR) of the 1995 Special Agreement between China and UNHCR[95] reads as follows:

> 1. Cooperation between the Government and UNHCR in the field of international protection of and humanitarian assistance to refugees shall be carried out on the basis of the Statute of UNHCR, other relevant decisions and resolutions adopted by United Nations, article 35 of the Convention Relating to the Status of Refugees of 1951 and article 2 of the Protocol Relating to the Status of Refugees of 1967.
>
> .....
>
> 5. In consultation and cooperation with the Government, *UNHCR personnel 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 (emphasis added).

In spite of these provisions, the Chinese government has refused UNHCR access to NKEs seeking refuge in China especially since 1999, when UNHCR conducted a visit to the China-North Korea border area and determined that some North Koreans were persons of concern to UNHCR.[96] This refusal by the Chinese government is in violation of Article 35 of the 1951 Convention and probably Article III of the 1995 Special Agreement as well. If China were confident, even without any relevant individual determining procedures, that NKEs were all just illegal economic migrants, there would be no reason why China should deny UNHCR's access to NKEs, and, furthermore, if China were at any rate willing to observe its obligations under the refugee treaties, it would rather cooperate with UNHCR to find out whether there were really any North Korean asylum-seekers who may be recognised as refugees. Since then, however, UNHCR has not been able to exercise its functions with respect to the NKE case, including 'unimpeded access' to its persons of concern, NKEs, because China does not permit any of them.

Consultations on International Protection, Cambridge University Press (2003), pp. 616-617.

[93] China is also a Member of the UNHCR Executive Committee.

[94] See para. 8 (b) of UNHCR Statute.

[95] "Agreement between the Government of the People's Republic of China and the Office of the United Nations High Commissioner for Refugees on the upgrading of the UNHCR Mission in the People's Republic of China to UNHCR branch office in the People's Republic of China", *UNTS*, Vol. 1899, p. 61 (No. 32371), signed on 1 December 1995 and entered into force on the same date.

[96] Stephan Haggard & Marcus Noland (eds.), *supra* note 25, p. 38. Later in October 2003, UNHCR officially concluded that not only many NKEs may well be considered refugees (political refugees or Convention refugees), but also, in view of protection needs, the group of NKEs is of concern to UNHCR (humanitarian refugees or mandate refugees). See *supra* note 66 of Ch. I.

In international refugee law, there is no compulsory means of implementation or adjudication in general. UNHCR has no enforcement authority over States and it can issue only non-binding guidance and conclusions.[97] Given the lack of any specialised international commission or tribunal for the refugee-related legal issues, attention naturally turns to the International Court of Justice (ICJ), which basically deals with general legal disputes between States.[98] The ICJ, however, does not have compulsory jurisdiction.[99] Although, based on Article 38 of the 1951 Convention,[100] any dispute relating to the interpretation or application of the Convention can be referred to the ICJ just at any one side's request, and also any reservations cannot be made to Article 38,[101] the 1951 Convention basically relates only to refugees before 1951 that may remain very few currently. Furthermore, although there is a similar compulsory dispute settlement provision in the 1967 Protocol[102] where there is no time restriction regarding the meaning of refugee, this time making reservations to Article IV (Settlement of Disputes) is permitted.[103]

With respect to the NKE dispute between UNHCR and China, there is a *prima facie* useful settlement mechanism within the framework of the 1995 Special Agreement.[104] Article XVI of the Agreement stipulates for compulsory arbitration as follows:

> Any disputes between the Government and UNHCR arising out of or relating to this Agreement shall be settled amicably by negotiation or other agreed mode of settlement. If this fails, *such a dispute shall be submitted to arbitration at the request of either Party. ..... The arbitral award* shall contain a statement of the reasons on which it is based and

---

[97] Michael Kagan, "The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination", *IJRL*, Vol. 18, No. 1 (2006), pp. 22-23.

[98] See Art. 34.1 of the Statute of the ICJ. So any individual or international organisation cannot be a party in contentious cases before the ICJ. For non-binding advisory opinions of the ICJ, see Art. 96 of the UN Charter. In theory, UNHCR, as a UN subsidiary organ, may request advisory opinions of the ICJ with authorisation of UNGA. See Bruno Simma (ed.), *supra* note 31, pp. 1183-1184.

[99] See Art. 36.1 of the Statute of the ICJ. China did not declare for the so-called 'optional clause' which makes the ICJ have compulsory jurisdiction over the relevant party. See 36.2 of the Statute of the ICJ.

[100] Art. 38 (Settlement of Disputes) of CSR51: "Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute."

[101] See para. 1 of Art. 42 (Reservations) of CSR51.

[102] Art. IV (Settlement of Disputes) of CSRP67.

[103] See para. 1 of VII (Reservations and Declaration) of CSRP67. China made a reservation to Article IV pursuant to this paragraph.

[104] See Sec. 304 of the U.S. North Korean Human Rights Act of 2004, 22 U.S.C. 7844.

shall be accepted by the Parties as the final adjudication of the dispute (emphasis added).

Therefore, if UNHCR requests arbitration, the dispute can be settled by a binding judicial decision, even without any specific agreement of China on the issue of jurisdiction. However, up to now UNHCR has not ever tried to utilise this mechanism. There are several possible reasons, both realistic and legal. Realistically, the invocation of the arbitration clause by UNHCR may, almost certainly, cause a deterioration of UNHCR's relations with China, and it may also result in the termination of the Special Agreement that is possible by any one Party's six month written notice.[105] More generally, except for its administrative expenses covered by the UN budget, UNHCR activities depend on voluntary financial contributions mainly from States, and also its tasks cannot be performed without the goodwill of States that possess sovereignty on their own territory. Therefore, maintaining good relations with governments is a matter of vital importance for carrying out its responsibilities. As a result, UNHCR actually lacks any concrete leverage to change States' behaviour, resorting only to its moral authority.[106]

In regard to the legal reasons, the relevant clauses need to be read with caution. In Article III.5, although the terms 'at all times' and 'unimpeded access' are adopted, their auxiliary verb is not 'shall', or even 'should', but 'may'; and these terms are also conditional on 'in consultation and cooperation with the Government'. The stress on state sovereignty can also be found in the second paragraph of Article III.[107] In addition, previous paragraphs interpreted together[108] or even in the text of paragraph 5 alone, the phrase 'unimpeded access to refugees' seems to be connected with 'UNHCR projects' which may basically be unrelated to NKEs.[109] Although the general context of the Special Agreement surrounding Article III.5 indicates that the issue of NKEs may not be covered by this Agreement, there are some favourable

---

[105] Art. XVII.4 of the 1995 Special Agreement. See Stephan Haggard & Marcus Noland (eds.), *supra* note 25, p. 41.
[106] Atle Grahl-Madsen & Peter Macalister-Smith, "Refugees, United Nations High Commissioner", in Rudolf Bernhardt (ed.), *EPIL*, Vol. IV, Elsevier Science (2000), pp. 79, 83, 87-88; Michael Kagan, *supra* note 97, pp. 22-23.
[107] Art. III.2 of the 1995 Special Agreement: "Full respect for the state sovereignty of the People's Republic of China is the essential basic principle of all stipulations in this Agreement."
[108] See paras. 3 & 4 of Art. III of the 1995 Special Agreement.
[109] See Stephan Haggard & Marcus Noland (eds.), *supra* note 25, pp. 40-41.

provisions, such as paragraph 1 of Article III that acknowledges China's obligation to cooperate with UNHCR under Article 35 of the 1951 Convention, and Article II which stipulates that one of the purposes of the Special Agreement is to help UNHCR to "perform the function of international protection and humanitarian assistance in the interest of refugees in the host country."[110] Considering all these reasons together, it cannot easily be said whether the NKE dispute between UNHCR and China can be solved through the 1995 Special Agreement or not. However, more importantly, it needs to be noted again that neither is the binding arbitration under the Special Agreement likely to be pursued by UNHCR in the near future, nor does the arbitration seem to be advisable given the way UNHCR performs its functions currently.

After all, in spite of the lack of effective implementation mechanism in refugee law, the clearer conclusion is that the refusal of UNHCR's access to NKEs by the Chinese government is in violation of Article 35 of the 1951 Convention.

6. Non-discrimination among Refugees or Asylum-seekers

It has recently been reported that the UNHCR office in Beijing is allowed by China to conduct some refugee status determinations for relatively few asylum-seekers mostly from Pakistan, Somalia, Iran, Afghanistan and so on. However, yet again NKEs are excluded from the limited individual screening opportunity.[111] In addition to this, China has hosted and assisted, in collaboration with UNHCR, about 300,000 ethnically Chinese Vietnamese as *prima facie* refugees since 1979.[112] These two facts draw attention to Article 3 (Non-discrimination) of the 1951 Convention: "[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." Discrimination here means denying one category of refugees or asylum-seekers certain rights and privileges

---

[110] See *ibid*. See generally Marjoleine Zieck, "UNHCR's 'Special Agreements'", in Jan Klabbers & René Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, Kluwer Law International (1998).

[111] Stephan Haggard & Marcus Noland (eds.), *supra* note 25, p. 37.

[112] See *Ibid.*; U.S. Committee for Refugees and Immigrants (USCRI), "Country Updates: China", *World Refugee Survey 2007* (2007), pp. 44-46.

enshrined in the 1951 Convention which are enjoyed by others in identical circumstances.[113] Therefore, China's exclusion of NKEs from any refugee status determination process to which other asylum-seekers can have access, and other differential measures and treatment given by China based on different 'country of origin', here North Korea, or/and 'race', here (North) Korean, are clearly against Article 3 and contravene China's relevant international obligations.[114]

7. Diplomatic Asylum

Since, in June 2001, seven North Koreans managed to enter the UNHCR office in Beijing claiming their lives would be in danger if sent home,[115] many NKEs have entered foreign diplomatic facilities and foreign schools in several Chinese cities to seek asylum. Without recognising their refugee status, they were generally permitted by China to go to South Korea via third countries. This rather welcome practice, however, seems to lack any strong legal basis that supports it. It is because, differently from the case of territorial asylum, the right to grant diplomatic asylum is not recognised by international law in general.[116] The *de facto* asylum provided by the diplomatic premises and the UNHCR office is not based on those relevant States' or organisation's legal right of asylum; it operates as a consequential effect of the inviolability of the premises,[117] combined with China's humanitarian consideration

---

[113] James C. Hathaway, *supra* note 10, p. 245. See Atle Grahl-Madsen, *supra* note 12, pp. 11-13; Paul Weis (ed.), *supra* note 12, pp. 40-41.

[114] Articles 33, 35, 31, 16.1 and many other articles in the 1951 Convention may be related to the discrimination provided for in Article 3. For more of the three listed grounds in Article 3 and their applicability to the NKE case, see and compare James C. Hathaway, *supra* note 10, pp. 239-243, 254-258. See also section 3.1 of Ch. V for a related 'human rights law' debate.

[115] "North Korean asylum seekers arrive in South Korea", UNHCR News Stories (2 July 2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/news>.

[116] See D.P. O'Connell, *International Law (2nd ed.)*, Vol. 2, Stevens & Sons (1970), pp. 734-741; S. Prakash Sinha, *supra* note 13, pp. 207-266. See also James C. Hathaway, *supra* note 10, p. 173. For details of diplomatic asylum, see generally *Asylum (Colombia v. Peru)*, Judgment, I.C.J. Reports 1950, p. 266.

[117] See Arts. 22 & 30 of the 1961 Vienna Convention on Diplomatic Relations (*UNTS*, Vol. 500, p. 95 (No. 7310), adopted on 18 April 1961 and entered into force on 24 April 1964. As of June 2008, 186 States are Parties to the Convention. China acceded to it on 25 November 1975.); Art. 31 of the 1963 Vienna Convention on Consular Relations (*UNTS*, Vol. 596, p. 261 (No. 8638), adopted on 24 April 1963 and entered into force on 19 March 1967. As of June 2008, 171 States are Parties to the Convention. China acceded to it on 2 July 1979.); Art. VIII of the 1995 Special Agreement between China and UNHCR. Although the legal status of foreign schools as diplomatic premises is unclear, the

especially with respect to the permission to exit.[118]

Nonetheless, it is noteworthy that the principle of *non-refoulement* can also be applied to this matter. It is generally submitted that the State in whose embassy or consulate refugees or asylum-seekers are located is bound to respect its obligation of *non-refoulement* relating to them, which is the prohibition of return to territory where the persons concerned would be persecuted; not only to the country of nationality, here North Korea, but also to the host country that may send them back to the country of origin, here China.[119]

8. Diplomatic Protection and Consular Assistance

A State normally tries to protect the interests of its nationals who live or stay in foreign countries and to help or assist them as far as possible, within the limits permitted by international law.[120] A State also has the right in international law to exercise diplomatic protection for its nationals' injury caused by an internationally wrongful act of another State.[121] Both consular assistance and diplomatic protection require that the State be connected with the persons concerned by way of nationality. Therefore, in principle, only North Korea can provide its diplomatic protection and consular assistance to NKEs in China. However, as in most other refugee cases, North Korea instead tries to prosecute and persecute NKEs without any provision of effective protection. Then, can South Korea provide surrogate diplomatic protection or consular assistance for NKEs by contending that they are all South Koreans under

---

cases of the NKEs who entered foreign schools have 'normally' (not always) been treated by China as the cases of diplomatic or consular premises. See Art. 1 (i) of the 1961 Vienna Convention; Art. 1 (j) of the 1963 Vienna Convention.

[118] See generally *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 71.

[119] Sir Elihu Lauterpacht & Daniel Bethlehem, *supra* note 12, p. 122; James C. Hathaway, *supra* note 10, p. 173, note 96; Elim Chan & Andreas Schloenhardt, "North Korean Refugees and International Refugee Law", *IJRL*, Vol. 19, No. 2 (2007), p. 238; Stephan Haggard & Marcus Noland (eds.), *supra* note 25, p. 39. See James C. Hathaway, *supra* note 10, pp. 169-170.

[120] This is so-called 'consular assistance'. See Arts 3.1 (b) & 3.2 of the 1961 Vienna Convention on Diplomatic Relations; Arts. 5 (a) & (e) of the 1963 Vienna Convention on Consular Relations. For a distinction between consular assistance and diplomatic protection, see ILC, "Draft Articles on Diplomatic Protection with Commentaries", *Report of the International Law Commission: Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)*, UN Doc. A/61/10 (2006), para. 50, pp. 27-28.

[121] See Arts. 1-3 of the 2006 ILC Draft Articles on Diplomatic Protection.

its domestic law and jurisprudence? [122] Given the relevant international law (including the genuine link test) and the political situation in the Far East, this contention seems to be really difficult to survive on the international level, especially in China.[123]

Although the 2006 ILC Draft Articles on Diplomatic Protection stipulates in Article 8.2 that

> A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

this stipulation of 'progressive development'[124] cannot, at least currently, be applied to the NKE case.[125] Nevertheless, it is notable that, during the debate on the draft Article 8 above, some ILC members suggested that "[UNHCR] should provide "functional" protection for refugees in the same way that international organizations provided functional protection to their staff members."[126]

9. Conclusion

Mongolia and many Southeast Asian countries such as Vietnam, Myanmar (Burma) and Thailand - although not Parties to either the 1951 Convention or the 1967 Protocol - do not repatriate NKEs against their will to China or North Korea and

---

[122] South Korea acceded to both the 1951 Convention and the 1967 Protocol on 3 December 1992.

[123] For more details, see section 4.9.3 of Ch. II. In addition, relating to the ICJ, China effectively prevents the possibility of compulsory jurisdiction, for example, by making a reservation about it. See *supra* notes 99-103.

[124] See Art. 13.1.a of the UN Charter.

[125] See ILC, "Draft Articles on Diplomatic Protection with Commentaries", *supra* note 120, pp. 47-51. In addition, even if a third country recognises NKEs as refugees and tries to exercise diplomatic protection for them, the exercise of diplomatic protection for refugees cannot be opposed to their country of origin, here North Korea. See Art. 8.3 of the 2006 ILC Draft Articles on Diplomatic Protection.

[126] ILC, *Report of the International Law Commission: Fifty-second session (1 May-9 June and 10 July-18 August 2000)*, UN Doc. A/55/10 (2000), p. 172, para. 493. See also Guy S. Goodwin-Gill & Jane McAdam, *supra* note 10, p. 416. For 'functional protection' of international organisations, see generally *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174.

instead provide temporary protection until they can move to their resettlement country, mainly South Korea.[127] Contrary to the bad memory in 1999,[128] even Russia currently seems to try to observe its obligations under the Refugee Convention, even if not always.[129] On the other hand, China still sticks to its policy of forced repatriation of NKEs, in contravention of its various obligations under the 1951 Convention, for example, the obligation not to return refugees to the place of persecution, the obligation not to impose penalties on account of refugees' illegal entry or presence, the obligation to cooperate with UNHCR, and the obligation not to discriminate among refugees.

Although, under international refugee law, NKEs can be regarded as Convention refugees and are entitled to many protection measures and relevant benefits, they are still in a really vulnerable position. This is partly because norms in refugee law are not strong enough to overcome States' political considerations and their obligations under bilateral treaties, and this is also due to the lack of an effective implementation mechanism in international refugee law. Moreover, if, by any chance, NKEs are not recognised as refugees in any formal procedures which may be established by China in the future, they can face instant return to North Korea where they may face inhumane treatment such as torture. However, it is evident that, even in this case, their basic human rights can never be denied. In consequence, to find out other ways of their protection in international law which may redress those defects in refugee law, this research will further look into related human rights law issues in the second Part.

---

[127] See UNGA, "Situation of human rights in the Democratic People's Republic of Korea: Report of the Special Rapporteur, Vitit Muntarbhorn", UN Doc. A/60/306 (29 August 2005), paras. 55, 63-64; International Crisis Group, "Perilous Journeys: The Plight of North Koreans in China and Beyond", Asia Report No. 122 (26 October 2006), pp. 19-26.

[128] See note 2 of Ch. I.

[129] See International Crisis Group, *supra* note 127, p. 20. Russian Federation acceded to both the 1951 Convention and the 1967 Protocol on 2 February 1993.

PART TWO

INTERNATIONAL HUMAN RIGHTS LAW

Chapter V. Human Rights of NKEs under International Human Rights Law

1. Introduction

"[R]egardless of whether a person is a refugee or an economic migrant, a citizen or a non-citizen, whether he or she is fleeing persecution, armed conflict, threats to his or her life or abject poverty, that person is entitled to minimum human rights and minimum standards of treatment."[1] From a human rights perspective, NKEs are also entitled to a minimum standard of human rights treatment, irrespective of their refugee status and even if they are just illegal immigrants. This fact is really important for their protection because, in addition to the weakness of the implementing system of international refugee law, the main host country of NKEs, China, has constantly contended that no NKEs are refugees. If any rights and benefits stipulated in refugee law can also be found in human rights law, or if other rights applicable to the NKE case are contained in human rights instruments, it will provide NKEs with a new means of legal protection alternative to refugee law, and it will also make clear China's corresponding human rights obligations, for both China itself and the international community which is really concerned about the fate of NKEs.

There are a number of universal and regional human rights instruments and mechanisms which can be employed to enhance the protection of refugees, asylum-seekers and refugee-like escapees. This area of international human rights law is vast and varied, and cannot be fully reviewed in the limited scope of this research. Instead, focusing on the NKE issue, this chapter examines several related rights and obligations contained in the major human rights treaties to which China is a State

[1] UNHCHR (or OHCHR), *Human Rights and Refugees (Fact Sheet No. 20)*, Centre for Human Rights, UN Office at Geneva (1993), p. 17.

Party.[2] Among the so-called six major (or core) international human rights treaties, China ratified or acceded to five treaties, which are the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD66),[3] the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR66), [4] the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW79),[5] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT84)[6] and the 1989 Convention on the Rights of the Child (CRC89).[7] The only remaining major treaty is the 1966 International Covenant on Civil and Political Rights (ICCPR66),[8] which is the most comprehensive and, probably, most important international human rights binding instrument, but China has still not ratified it although China signed it in 1998. Among the five universal human rights treaties binding on China, four Conventions include some notable contents applicable to the NKE case. The contents of ICESCR may also be relevant to the NKE issue, but those economic and social rights embodied in ICESCR are basically not instantly enforceable, but progressively realisable depending on the State Party's available resources, and, furthermore, developing countries such as China may restrict economic rights to their nationals based on Article 2 of ICESCR.[9] Considering also that economic and social rights are

---

[2] The protection 'mechanisms' of the relevant human rights law will be dealt with separately in the following chapter.

[3] *UNTS*, Vol. 660, p. 195 (No. 9464), adopted on 7 March 1966 and entered into force on 4 January 1969. As of June 2008, 173 States are Parties to the Convention. China acceded to it on 29 December 1981.

[4] *UNTS*, Vol. 993, p. 3 (No. 14531), adopted on 16 December 1966 and entered into force on 3 January 1976. As of June 2008, 157 States are Parties to the Covenant. China signed it on 27 October 1997 and ratified it on 27 March 2001.

[5] *UNTS*, Vol. 1249, p. 13 (No. 20378), adopted on 18 December 1979 and entered into force on 3 September 1981. As of June 2008, 185 States are Parties to the Convention. China signed it on 17 July 1980 and ratified it on 4 November 1980.

[6] *UNTS*, Vol. 1465, p. 85 (No. 24841), adopted on 10 December 1984 and entered into force on 26 June 1987. As of June 2008, 145 States are Parties to the Convention. China signed it on 12 December 1986 and ratified it on 4 October 1988.

[7] *UNTS*, Vol. 1577, p. 3 (No. 27531), adopted on 20 November 1989 and entered into force on 2 September 1990. As of June 2008, 193 States are Parties to the Convention. China signed it on 29 August 1990 and ratified it on 2 March 1992.

[8] *UNTS*, Vol. 999, p. 171 (No. 14668), adopted on 16 December 1966 and entered into force on 23 March 1976. As of June 2008, 160 States are Parties to the Covenant. China signed it on 5 October 1998, but still has not ratified it.

[9] Art. 2 of ICESCR66:

"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, **to the maximum of its available resources, with a view to achieving progressively the full realization of the**

secondary for the protection of NKEs in China,[10] this study will not address the contents of ICESCR separately.[11]

In addition to treaties or conventions, customary international law is another good source of international human rights law. Many contents of customary human rights law may be found in the 1948 Universal Declaration of Human Rights (UDHR48)[12] and ICCPR. Several rights stipulated in those documents can be applied to the NKE case, such as the right to seek and enjoy asylum, the right of non-discrimination, the right to life, the right to liberty and security of person, the right to

---

rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. .....

3. **Developing countries**, with due regard to human rights and their national economy, **may determine to what extent** they would guarantee the economic rights recognized in the present Covenant **to non-nationals**" (emphasis added).

See Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3*: The nature of States parties obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23 (E/C.12/1990/8), Annex III (14 December 1990); CESCR, *General Comment No. 9*: The domestic application of the Covenant, UN Doc. E/C.12/1998/24 (3 December 1998); Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law (3rd ed.)*, Oxford University Press (2007), p. 314. For more details of ICESCR66 including its legal character, see generally Asbjørn Eide *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publishers (1995); B.G. Ramcharan (ed.), *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials*, Martinus Nijhoff Publishers (2005).

[10] The main economic and social rights issues regarding NKEs, such as 'the right to food', are basically connected to North Korea, their original country, not to China, their hiding country.

[11] It is, however, notable that the Committee on the Economic, Social and Cultural Rights expressed concern, in its Concluding Observations on the China's initial State Party report, that NKEs were discriminated against with respect to access to the refugee determination procedure and the enjoyment of the Covenant rights, which is as follows:

"14. The Committee is concerned 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 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 the Democratic People's Republic of Korea, who are regarded by the State party as economic migrants and are thus compelled to return to their countries**.

.....

45. The Committee calls upon the State party to undertake necessary measures to ensure that all persons under its jurisdiction enjoy economic, social and cultural rights enshrined in the Covenant without discrimination. In addition, the Committee urges the State party to **ensure that its asylum procedures do not discriminate, in purpose or in effect, against asylum-seekers on the basis of race, colour or ethnic or national origin**, as provided for under article 2, paragraph 2, of the Covenant. The Committee recommends that the State party **consider adopting subsidiary forms of protection to guarantee the right to remain for persons who are not formally recognized as refugees but are seeking asylum and nevertheless require protection during that period, and granting the United Nations High Commissioner for Refugees and humanitarian organizations access to them**. The Committee requests the State party to provide, in its next periodic report, detailed information in this regard, including measurable progress achieved as well as difficulties encountered" (emphasis added).

CESCR, *Concluding Observations*: People's Republic of China (including Hong Kong and Macao), UN Doc. E/C.12/1/Add.107 (13 May 2005), paras. 14, 45.

[12] UN Doc. A/RES/217A (III) (10 December 1948).

physical integrity against torture and ill-treatment, the right to protection from slavery, servitude and forced labour, etc.

As shown in the preceding chapter, the most important question for the protection of NKEs is the prohibition of their forced return to North Korea. This principle of *non-refoulement* is also contained explicitly in the Convention against Torture and this seems to be more useful, in many respects, than that in the 1951 Refugee Convention. The present chapter, therefore, looks into this question firstly and in more detail than others. Then, other related treaties will be examined one by one, and lastly the contents of applicable customary international law will be explored.

2. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

2.1 Principle of *Non-refoulement* in the 1984 Convention against Torture

Article 3 of the 1984 Convention against Torture provides for the principle of *non-refoulement* as follows:

> 1. No 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.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The prohibition of *refoulement* in the 1984 Convention has several merits compared with Article 33 of the 1951 Refugee Convention.[13] First of all, the prohibition in the Torture Convention applies to any 'person', not a 'refugee' (or an 'asylum-seeker'),

[13] Art. 33.1 of CSR51: "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**" (emphasis added).

only if the person can show that he or she would be tortured on expulsion to another country. Even if the person is excluded from refugee status due to his/her involvement in some serious crimes or due to other exclusion reasons,[14] the person is still not barred from the benefit of *non-refoulement* under the 1984 Convention, if there are 'substantial grounds for believing that he would be in danger of being subjected to torture' on return. Secondly, unlike 'persecution' in the 1951 Convention, 'torture' need not be linked to any 1951 Convention grounds, that is, race, religion, nationality, membership of a particular social group and political opinion. This relief may, in the similar context to the first advantage, extend international protection to a person who cannot meet the Convention ground requirement but still faces a danger of persecution, including torture, if returned. Thirdly, in addition to 'expulsion' and 'return (*refoulement*)' stipulated in Article 33 of the 1951 Convention, Article 3 of the 1984 Convention clearly includes 'extradition' as a prohibited act. This is an important point with respect to the relations of the 1984 Convention with bilateral or multilateral extradition treaties. Lastly, in Article 3 there are no such exceptions as laid down in Article 33.2 of the 1951 Convention, which are a danger to the security of the country and a danger to the community of that country.[15] It has been examined in the preceding chapter that the exceptions in Article 33.2 might be the most fatal barrier to the *jus cogens* status of the principle of *non-refoulement* under refugee law. In this context, the same principle in the 1984 Convention against Torture is free from that kind of bar, and therefore its status as a peremptory norm can be argued more strongly than the previous one.

Although the title of the 1984 Convention embraces not only 'torture', but 'other cruel, inhuman or degrading treatment or punishment' (so-called 'ill-treatment') as well, Article 3 refers only to 'torture'. According to Article 16.1 itself,[16] it is not completely impossible for Article 3 to be applied to the case of ill-

---

[14] See sections D, E, F of Art.1 of CSR51.

[15] Art. 33.2 of CSR51: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

[16] Art. 16.1 of CAT84: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. ***In particular*, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for**

treatment also which is, in brief, related to less severe pain and suffering than torture,[17] but it is generally understood that the principle of *non-refoulement* in the 1984 Convention applies only to 'torture', and not to 'ill-treatment'.[18] This was confirmed by the Committee against Torture (CAT) in *B.S. v. Canada* as follows: "the Committee notes that article 3 of the Convention does not encompass situations of ill-treatment envisaged by article 16[.]"[19] By contrast, both in the European[20] and American Human Rights system[21] and in the ICCPR mechanism,[22] ill-treatment is treated the same as torture in relation to the principle of *non-refoulement*, in spite of the lack of any express clause of the principle itself. It is also notable that the Committee against Torture recently expressed its revised opinion on this issue in its General Comment as follows: "[t]he Committee considers that articles 3-15 are likewise obligatory as applied to both torture and ill-treatment."[23] Nevertheless, it does not seem to be clear yet that the interpretation of Article 3 of the 1984 Convention has actually been changed into covering both torture and ill-treatment,

---

references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment" (emphasis added).

[17] See Committee against Torture (CAT), *General Comment No. 2*: Implementation of article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007), paras. 3, 10.

[18] See J. Herman Burgers & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers (1988), pp. 148-150; Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press (2008), pp. 569-575; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 9, pp. 301-302; Kay Hailbronner, "*Nonrefoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?", in David A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s*, Martinus Nijhoff Publishers (1988), p. 143.

[19] *B.S. v. Canada*, Communication No. 166/2000, UN Doc. CAT/C/27/D/166/2000 (14 November 2001), para. 7.4.

[20] See Art. 3 of ECHR50 ("European Convention for the Protection of Human Rights and Fundamental Freedoms", *UNTS*, Vol. 213, p. 221 (No. 2889), *ETS*, No. 5, adopted on 4 November 1950 and entered into force on 3 September 1953): "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."; *Soering v. U.K.*, Case No. 1/1989/161/217, Judgment of 7 July 1989, 11 EHRR 439, para. 91.

[21] See Art. 5.2 of ACHR69 ("American Convention on Human Rights", *UNTS*, Vol. 1144, p. 143 (No. 17955), adopted on 22 November 1969 and entered into force on 18 July 1978): "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 9, p. 302.

[22] See Art. 7 of ICCPR66: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."; Human Rights Committee (CCPR), *General Comment No. 20*: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7) (10 March 1992), para. 9.

[23] CAT, *General Comment No. 2*, *supra* note 17, para. 6. See also Manfred Nowak & Elizabeth McArthur, *supra* note 18, pp. 575-576.

contrary to the traditional position.

At this point it is necessary to examine what is 'torture' under the 1984 Convention. Article 1.1 of the Convention against Torture reads as follows:

> For the purposes of this Convention, the term "torture" means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Firstly, the act of 'torture' in the 1984 Convention is an infliction of 'severe pain or suffering'. This pain or suffering may be physical or mental, and the act can be an action or an omission.[24] Secondly, the infliction must be an 'intentional' act, not just the result of an accident or of negligence. In addition, there must be one of such 'purposes' as obtainment of information or a confession, punishment, intimidation, coercion and discrimination. This list of purposes is not exhaustive, but other possible purposes have to share the common element with the purposes expressly listed, which can be the existence of some connection with the interests or policies of the State and its organs.[25] Thirdly, to be torture, the act must be carried out or acquiesced in by 'a public official or other person acting in an official capacity'. This State or public element in the torture definition is not required in other human rights regimes, neither in the European[26] nor the ICCPR system.[27] Fourthly, the concept of torture in the Convention does not include pain or suffering arising only from, inherent in or incidental to, 'lawful sanctions'. This exclusion, however, should be carefully applied in order that it may not to be used as an excuse for acts of torture - as generally recognised as such at the international level - in the name of 'lawful

---

[24] J. Herman Burgers & Hans Danelius, *supra* note 18, pp. 117-118.
[25] *Ibid.*, pp. 118-119.
[26] See, for example, *Ahmed v. Austria*, Case No. 71/1995/577/663, Judgment of 17 December 1996, 24 EHRR 278, para. 44.
[27] See CCPR, *General Comment No. 20*, *supra* note 22, para. 2; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 9, p. 302.

sanctions' pursuant to States domestic law.[28]

2.2 Application to the NKE Case

2.2.1 General Issues

China, as a State Party to the 1984 Convention, 'shall not expel, return or extradite NKEs to North Korea if there are substantial grounds for believing that they would be in danger of being subjected to torture.' Then, as China seems to believe,[29] are there really no such grounds?

North Korea is notorious for its extremely poor human rights conditions. The international community represented by the UN[30] has constantly expressed its 'very serious concern' about this situation, which clearly includes the issue of torture and other related human rights violations in North Korea, as follows:

> *The General Assembly*,
> .....
> 1. *Expressed its very serious concern* at:
> .....
> (b) *Continuing reports* of *systematic, widespread and grave violations of human rights* in the Democratic People's Republic of Korea, including:
> (i) ***Torture*** *and other cruel, inhuman or degrading treatment or punishment*, public executions, extrajudicial and arbitrary detention, the absence of due process and the rule of law, the imposition of the death penalty for political reasons, *the existence of a large number of prison camps and the extensive use of forced labour*;
> (ii) The situation of refugees expelled or returned to the Democratic People's Republic of Korea and *sanctions imposed on citizens* of the Democratic People's Republic of Korea *who have been*

---

[28] See J. Herman Burgers & Hans Danelius, *supra* note 18, pp. 121-122; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 9, p. 303. See also Rules 31-34 of the "Standard Minimum Rules for the Treatment of Prisoners", adopted on 30 August 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva (UN Doc. A/CONF/6/1, Annex I, A), and approved and amended by ECOSOC respectively by its Resolution 663C (XXIV) (31 July 1957) and Resolution 2076 (LXII) (13 May 1977).

[29] Benjamin Neaderland, "Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis", *Stanford Journal of International Law*, Vol. 40 (2004), p. 160.

[30] There are many other sources of international concern at regional and national level, for example, European Parliament's resolution on North Korean Human Rights Violations in June 2006. Also, many prestigious NGOs such as Amnesty International and Human Rights Watch issued various reports on North Korean human rights in general and NKEs specifically. For details, see Bibliography, 4. Other Documents, *Non-Governmental Organisations & Others*.

repatriated from abroad, such as treating their departure as treason, leading to punishments of internment, ***torture****, cruel, inhuman or degrading treatment or the death penalty*, and urges all States to ensure respect for the fundamental principle of non-refoulement;

.....

(iv) Continuing violation of the human rights and fundamental freedoms of women, in particular the trafficking of women for the purpose of prostitution or forced marriage, *forced abortions, and infanticide of children of repatriated mothers, including in police detention centres and camps*;

..... (emphasis added).[31]

Since 2004, UN Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Vitit Muntarbhorn, has issued several reports on the same issue.[32] The Special Rapporteur pointed out in his reports that "[t]here are continuing reports of acts of violence committed by the State authorities, such as torture, public executions, persecution of political dissidents and substandard prison conditions" and "[t]hose who have left the country report various forms of torture and inhuman and degrading treatment."[33] The Human Rights Committee (CCPR)[34] also expressed its deep concern, in the Concluding Observations in response to North Korea's second periodic report, about "consistent and substantiated allegations of violations, by law enforcement personnel, of article 7 [prohibition of torture and ill-treatment] of the Covenant [ICCPR], to which the delegation has not sufficiently responded."[35]

All these concern, reports and opinions of the 'UN' on the North Korean human rights situation can be a reliable source to show that there exists 'a consistent

---

[31] UNGA Resolution 61/174, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/RES/61/174 (19 December 2006). UN General Assembly adopted its resolution of the same title also in 2005 and 2007: UN Doc. A/RES/60/173 (16 December 2005) and UN Doc. A/RES/62/167 (18 December 2007). Formerly, UN Commission and Sub-Commission on Human Rights had adopted their resolutions of the same title: UN Doc. E/CN.4/RES/2003/10 (16 April 2003), UN Doc. E/CN.4/RES/2004/13 (15 April 2004) and UN Doc. E/CN.4/RES/2005/11 (14 April 2005); UN Doc. E/CN.4/SUB.2/RES/1997/3 (21 August 1997) and UN Doc. E/CN.4/SUB.2/RES/1998/2 (19 August 1998).

[32] The title of the reports is the same as that of resolutions stated above. "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. E/CN.4/2005/34 (10 January 2005); UN Doc. A/60/306 (29 August 2005); UN Doc. E/CN.4/2006/35 (23 January 2006); UN Doc. A/61/349 (15 September 2006); UN Doc. A/HRC/4/15 (7 February 2007); UN Doc. A/62/264 (15 August 2007).

[33] UN Doc. A/62/264 (15 August 2007), para. 22.

[34] Cf. UN Human Rights Council (HRC).

[35] CCPR, *Concluding Observations*: Democratic People's Republic of Korea, UN Doc. CCPR/CO/72/PRK (27 August 2001), para. 15.

pattern of gross, flagrant or mass violations of human rights' in North Korea, including a consistent pattern of torture inflicted on NKEs.[36] Even with only these consistent and reliable sources, it may generally be concluded that 'there are substantial grounds for believing that NKEs would be in danger of being subjected to torture' if forcibly repatriated to North Korea. Furthermore, in *Mutombo v. Switzerland*, the Committee against Torture considered seriously that Zaire,[37] Mutombo's home country, was not a party to the 1984 Convention at that time because, in the Committee's view, this fact would render the applicant more vulnerable to torture.[38] Currently, North Korea is not a party to the Convention against Torture.

This human rights situation alone cannot, however, be sufficient grounds for determining that each NKE would be in danger of being subjected to torture upon his/her return to North Korea; "additional grounds must exist that the individual concerned would be personally at risk."[39] Therefore, as in refugee status determination, each case must, in principle, be determined on its own merits with all relevant background and considerations. Nonetheless, it should be duly considered that, in reality, 'all' returned NKEs face a similar situation. As examined in Chapter I,[40] all NKEs repatriated from China are initially sent to jails or detention centres for interrogation. During the interrogation sessions, various kinds of torture are inflicted on the NKEs in order to obtain from them a confession or information and also to punish them for their act of presumed 'defection' against their State.

> When I was deported to North Korea and detained in prison, they twisted my legs and ordered me to lift a heavy bar with both hands fully extended. If I moved a little they would beat me, and if I uttered a word, they said I was lying or not telling the truth. If I kept quiet, they asked if my lips were frozen. Since I would get beat up either way, the best policy was to keep silent. [Testimony of a man (52) in China in 2001 who was from Onsung County, North Hamgyung Province in North Korea]
>
> They put me up in a 'Kyohwaso [reform institution, namely prison]', beat

---

[36] See *Balabou Mutombo v. Switzerland*, Communication No. 13/1993, UN Doc. CAT/C/12/D/013/1993 (27 April 1994), para. 9.5; Art. 3.2 of CAT84.
[37] Now, Democratic Republic of the Congo.
[38] *Balabou Mutombo v. Switzerland*, *supra* note 36, para. 9.6.
[39] *Ibid.*, para. 9.3. See CAT, *General Comment No. 1*: Implementation of article 3 of the Convention in the context of article 22, UN Doc. A/53/44, Annex IX (21 November 1997), para. 7.
[40] See section 2.3.1 of Ch. I.

> me up and confiscated all my money and belongings. The interrogation began at 5 am. They asked me whom I contacted, and which intelligence agency gave me what mission. All these had nothing to do with me. But, they clubbed me at will and did not give me enough water, so I was unable to wash my face or go to bathroom properly. [Testimony of a woman in South Korea in 2001 who was from Eunduk County, North Hamgyung Province in North Korea]
>
> Two inmates in my room were starved, beaten and frozen to death. With the dead body in front of us, they said they wouldn't blink an eye even if thousands of these lowly beings were to perish, and threatened, 'you guys saw it with your own eyes, didn't you? You will all end up like this.' [Testimony of a person in South Korea in 2001 who was from Gilju County, North Hamgyung Province in North Korea]
>
> At a collection point at Hweryong City, [male policemen] ordered the repatriated female defectors to take off all of their clothes. He was wielding a big club over our bodies, heads, stomachs, waists and chests. So, for fear of clubbing we all had to take off our clothes. While we were there, a 28-year-old man called Choi XX tried to escape and was caught. They beat him for half a day to the extent that he could not even move a finger. At that point, they collected hundreds of detainees and showed them the cruel punishment given to an attempted escape. [Testimony of a person in South Korea in 2001 who was from Chongjin City, North Hamgyung Province in North Korea][41]

In addition to beating, kicking or similar acts with the help of objects like clubs or shovels as shown above, there are many other forms of torture testified by former NKEs, which are water torture, electric torture, rape, forced abortions, infanticide and so on.[42] All these acts cause 'severe physical pain or suffering' to the returned NKEs, and the threats with the dead body and the tortured detainee can inflict 'severe mental pain or suffering' as well. The deprivation of water or food may be a good case of torture as an omission.[43] All of the infliction discussed here are 'intentional' acts carried out by North Korean 'public officials', for the purpose of 'obtaining from NKEs information or a confession, or punishing them for their escape', or 'for any

---

[41] Korea Institute for National Unification, *White Paper on Human Rights in North Korea 2006* (Seoul, May 2006), pp. 47-48. For more details of various types of torture in more recent years, see generally Young-Hwan Lee (translated by Soon Chang Yang), *North Korea: Republic of Torture*, Citizens' Alliance for North Korean Human Rights (Seoul, 2007), available at <http://nkhumanrights.or.kr>.

[42] See Korea Institute for National Unification, *supra* note 41, pp. 44-52; David Hawk, *The Hidden GULAG: Exposing North Korea's Prison Camps*, U.S. Committee for Human Rights in North Korea (22 October 2003), pp. 70-72. See also J. Herman Burgers & Hans Danelius, *supra* note 18, pp. 117-118.

[43] See J. Herman Burgers & Hans Danelius, *supra* note 18, p. 118.

reason based on discrimination of any kind'.[44] Finally, these acts of torture cannot be pain or suffering arising only from, inherent in or incidental to, 'lawful sanctions'. Even North Korea itself denied the lawfulness and presence of these kinds of torture in its territory.[45] Therefore, it can be concluded that the general situation faced by forcefully repatriated NKEs would have a high probability of constituting 'torture' as defined in the 1984 Convention against Torture.

At the end of several weeks of harsh interrogation, there appears another probability of torture during subsequent imprisonment. Most normal NKEs are sent to detention labour facilities or reform institutions, usually not exceeding one year, where, however, there are still all kinds of torture as described above and also a high death rate.[46] Prisoners usually work for between fourteen and eighteen hours a day with only poor food, and also with poor sanitation and no medical care, so just one or two-months-detention is enough to make them become terribly emaciated. Many NKE detainees actually die of malnutrition, disease and heavy labour after three or four months.[47] Even worse, NKEs who are, during interrogation, ascertained by officials to have met any South Korean or any member of religious groups or NGOs, attended Christian church, watched or listened to South Korean TV or radio, or tried to go to South Korea, are believed to have been executed or sent to the notorious North Korean political prison camps.[48]

Although the relevant facts and situation clearly show that 'there are substantial grounds for believing that NKEs would be in danger of being subjected to torture if they are expelled, returned or extradited to North Korea', China has sent all the caught NKEs back to North Korea immediately, without any adequate process to ascertain whether there would be any danger of torture to them. Therefore, apart

---

[44] See Stephan Haggard & Marcus Noland (eds.), *The North Korean Refugee Crisis: Human Rights and International Response*, U.S. Committee for Human Rights in North Korea (2006), pp. 47-48; Benjamin Neaderland, *supra* note 29, pp. 159-160.

[45] See CCPR, "Second periodic report of the Democratic People's Republic of Korea on its implementation of the International Covenant on Civil and Political Rights", UN Doc. CCPR/C/PRK/2000/2 (4 May 2000), paras. 41-48.

[46] See Korea Institute for National Unification, *supra* note 41, p. 275; David Hawk, *supra* note 42, pp. 56-59.

[47] See David Hawk, *supra* note 42, pp. 60-63; Korea Institute for National Unification, *supra* note 41, p. 284.

[48] David Hawk, *supra* note 42, p. 58. If NKEs had left 'several times' and were then forced to return, punishments would also be increased accordingly. UNGA, "Situation of human rights in the Democratic People's Republic of Korea: Report of the Special Rapporteur, Vitit Muntarbhorn", UN Doc. A/62/264 (15 August 2007), para. 35.

from its violations of the obligation of *non-refoulement* under Article 33 of the 1951 Refugee Convention, China also breaches the same commitment under Article 3 of the 1984 Torture Convention by this 'blanket' arrest and return of NKEs to North Korea.

In addition, there can be direct torture violations inflicted by China on NKEs. If Chinese public officials commit acts of torture in any form during NKEs' detention or interrogation before their return to North Korea, this is also a breach of the Chinese obligations under the 1984 Convention.[49] It has actually been reported that NKEs are often tortured by the Chinese police at detention centres before being forcefully repatriated.[50]

> Mr. Kim Young, arrested at the Mongolian border in July 1998, also reported he was beaten with clubs by Chinese border guards when he denied he was a North Korean migrant.[51]

> Chinese authorities raided an underground shelter for North Korean children in November of last year [2002]. Before sending them back to North Korea, Chinese security personnel tortured some of the adolescent boys with electric cattle prods in an attempt to extract information about who had been helping them while they were inside China.[52]

2.2.2 Non-refoulement *versus Extradition: Question of* Jus Cogens

As in the discussions in refugee law,[53] the conflicting relation between China's international obligations under the 1984 Convention and its bilateral obligations with North Korea under their 1986 Mutual Cooperation Protocol is another critical problem to be tackled for the protection of NKEs. In brief, if the principle of *non-refoulement* under the 1984 Convention can be regarded as a rule of *jus cogens* or a peremptory norm, all the other issues around this problem will not need to be mentioned here again.

The prohibition of torture is one of the well-established rules of *jus cogens* in international law. The UN International Law Commission has included the

---

[49] See Art. 2 of CAT84.
[50] See "The Chinese police tortured NKEs", *Yonhap News* (22 April 2003).
[51] HRW, "The Invisible Exodus: North Koreans in the People's Republic of China (North Korea)", Vol. 14, No. 8 (C) (November 2002), p. 16.
[52] Sam Brownback (U.S. Senator), "Report on his trip to the China - North Korea border" (4 January 2003), p. 11, available at Lisa Sleeth & Jim Butterworth, *Seoul Train: A Documentary Film*, Incite Productions (2005).
[53] See sections 3.2.2 & 3.2.3 of Ch. IV.

prohibition of torture in its list of the clearly accepted and recognised peremptory norms, with the prohibitions of aggression, genocide, slavery, racial discrimination and crimes against humanity, and the right to self-determination.[54] The Committee against Torture, while citing Article 2[55] of the 1984 Convention, has placed special emphasis on the 'absolute and non-derogable character' of the prohibition and confirmed that this rule against torture is a 'peremptory *jus cogens* norm'.[56] An international court also confirmed this. The International Criminal Tribunal for the former Yugoslavia (ICTY) held in its 1998 judgment of the *Furundžija* case that "[i]t should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, ... , that the prohibition on torture is a peremptory norm or *jus cogens*."[57] In addition, there is plenty of support from domestic jurisprudence[58] and international law scholars[59] about the *jus cogens* nature of the prohibition.

Although the prohibition of *refoulement* is not expressly pronounced in the

---

[54] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries", *Report of the International Law Commission: Fifty-third session (23 April-1 June and 2 July-10 August 2001)*, UN Doc. A/56/10 (2001), para. 77, pp. 208, 284; ILC, "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Report of the International Law Commission: Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)*, UN Doc. A/61/10 (2006), para. 251, Conclusion (33).

[55] Art. 2 of CAT84

"1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. **No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.**

3. An order from a superior officer or a public authority may not be invoked as a justification of torture" (emphasis added).

Cf. Art. 4 of ICCPR66; Art. 15 of ECHR50; Art. 27 of ACHR69.

[56] CAT, *General Comment No. 2*, *supra* note 17, para. 1.

[57] *Prosecutor v. Anto Furundžija*, Judgement of 10 December 1998, Case No. IT-95-17/1-T, Trial Chamber II, para. 144. See also *ibid.*, paras. 147-157.

[58] See, for instance, *R v. Evans and others, ex parte Pinochet; R v. Bartle and others, ex parte Pinochet*, House of Lords, [2000] 1 A.C. 147, 24 March 1999 (U.K.).

[59] See Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press (1989), p. 23; Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press (2006), pp. 54, 57; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historial Development, Criteria, Present Status*, Finnish Lawyers' Publishing Company (Helsinki, 1988), pp. 499-513; J. Herman Burgers & Hans Danelius, *supra* note 18, p. 12; Kay Hailbronner, *supra* note 18, p. 140; Sibylle Kapferer, "The Interface between Extradition and Asylum", Legal and Protection Policy Research Series (PPLA/2003/05), UNHCR (November 2003), para. 125.

discussion of the *jus cogens* status of the prohibition of torture, the principle of *non-refoulement* should be interpreted as an integral part of the prohibition of torture, considering the content of the former as the core of the protection against torture, and therefore the principle as stipulated in Article 3 of the 1984 Convention should also be regarded as a norm of *jus cogens*.[60] Both in the ICCPR mechanism and in the European and American human rights system, *non-refoulement* is interpreted as an integral part of the prohibition of torture without any explicit clauses.[61] The *jus cogens* character of the principle is also supported by the fact that there are no such exceptions in Article 3 of the 1984 Convention as laid down in Article 33.2 of the 1951 Refugee Convention, which is the fatal barrier to the *jus cogens* status of the principle under international refugee law.[62] In *Furundžija*, ICTY also attached the following statement directly to the confirmation of the *jus cogens* status of the prohibition of torture: "[t]his prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture."[63] For the reasons stated above, it can be concluded that the principle of *non-refoulement* in Article 3 of the 1984 Convention against Torture has priority, as a norm of *jus cogens*, over obligations under extradition treaties, either multinational or bilateral, which thus cover the 1986 Mutual Cooperation Protocol between China and North Korea.

Ironically, however, the issue of *jus cogens* may not be considered so vital to the protection of NKEs in the end. This is because, contrary to what has generally been known to others[64] - which is mainly grounded on its constant practice of forced return of NKEs, China itself has confirmed, in its periodic reports submitted to the Committee against Torture, that the obligation of *non-refoulement* under Article 3 of

---

[60] See Jane McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press (2007), p. 119, note 56; Alexander Orakhelashvili, *supra* note 59, p. 60. See also Sibylle Kapferer, *supra* note 59, paras. 117, 132.

[61] See *supra* notes 20-22. See also Kay Hailbronner, *supra* note 18, pp. 141-143.

[62] See *supra* note 15.

[63] *Prosecutor v. Anto Furundžija*, *supra* note 57, para. 144.

[64] See United Kingdom Foreign & Commonwealth Office, *HUMAN RIGHTS Annual Report 2003*, (September 2003), p. 34, available at <http://www.fco.gov.uk/humanrights>; Benjamin Neaderland, *supra* note 29, notes 24, 41; James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press (2005), p. 285; Stephan Haggard & Marcus Noland (eds.), *supra* note 44, p. 40; HRW, *supra* note 51, p. 16. The sources of this information are many times statements of Chinese officials.

the 1984 Convention takes precedence over the obligation to extradite or return under its bilateral treaties, as follows:

> [W]hen deciding on the appropriateness of *extradition or refoulement*, the judicial authorities consider carefully whether such a measure is *compatible with the general principles of international law and the international obligations* undertaken by China (8 October 1992, emphasis added).[65]

> It is usually stipulated in *extradition treaties* between China and other countries, such as the Extradition Treaty between the People's Republic of China and the Republic of Bulgaria, that these instruments *do not interfere with the obligations* undertaken and rights enjoyed by the two sides *under multilateral treaties*. Therefore, *Sino-foreign extradition treaties do not affect the application of this article [Article 3]* (4 May 1999, emphasis added).[66]

> The Extradition Law, which was passed on 28 December 2000, makes provisions concerning such issues as the conditions and procedures relating to extradition requests made to China, investigation of extradition requests, bodies deciding extradition, and procedures for challenging extradition decisions, and is of important significance in regard to ensuring that extradition are properly carried out, strengthening international cooperation in regard to punishment of criminals, *ensuring that the person extradited is not subject to the threat of torture*, and protecting the legitimate rights and interests of individuals and organizations. As stipulated *in Article 8 of the Extradition Law, if the person sought has ever been subjected to torture or may be subjected to torture or cruel, inhuman or degrading treatment or punishment in the requesting country, then China will refuse extradition. These stipulations meet the needs of Article 3 of the Convention, and hence can prevent and obviate the danger that the person sought may face torture* (14 February 2006, emphasis added).[67]

The content of the Chinese commitment here seems to be even wider than the traditional prohibition of *refoulement* under the 1984 Convention, in that China considers not only any possible 'torture', but also the danger of 'cruel, inhuman or degrading treatment or punishment' to be its non-extraditable grounds.

---

[65] CAT, "Supplementary report to initial reports of States parties due in 1989: Addendum: China", UN Doc. CAT/C/7/Add.14 (18 January 1993), para. 73 (about Art. 3).
[66] CAT, "Third periodic reports of States parties due in 1997: Addendum: China", UN Doc. CAT/C/39/Add.2 (5 January 2000), para. 12 (about Art. 3).
[67] CAT, "Fourth periodic reports of States parties due in 2004: Addendum: China", UN Doc. CAT/C/CHN/4 (27 June 2007), para. 45 (about Art. 3). See Sibylle Kapferer, *supra* note 59, para. 132, note 249.

3. Other Applicable Treaties

3.1 The 1966 International Convention on the Elimination of All Forms of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD), set up to implement the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD66), expressed concern about the differential treatment of China towards NKEs, in its 2001 Concluding Observations on the eight and ninth periodic reports of China, as follows:

> While noting the State party's efforts to facilitate integration and naturalization of Indo-Chinese refugees in mainland China, the Committee is concerned that *different standards of treatment are applied to Indo-Chinese asylum-seekers, on the one hand, and asylum-seekers of other national origins on the other*, notably with regard to the right to work and education. Particular concern is expressed regarding the treatment of *asylum-seekers from the People's Democratic Republic of Korea[sic], who are reportedly systematically refused asylum and returned, even in cases when they have been considered to be refugees by UNHCR*. The Committee recommends that the State party take the necessary measures to *ensure that all refugees and asylum-seekers receive equal treatment*. To this end, the Committee recommends that the State party consider pursuing the adoption of formal legislative or administrative provisions in order to implement objective criteria for the determination of refugee status (emphasis added).[68]

As noted by the ICERD Committee at the first sentence, China has hosted and assisted, in collaboration with UNHCR, about 300,000 ethnically Chinese Vietnamese. Most of them arrived in China in 1979 as a result of the China-Vietnamese border war, and they are still technically in refugee status as *prima facie* refugees.[69] However, the rather generous treatment given to them has not been available to any other group of refugees or asylum-seekers in China, including NKEs. In addition, it has recently been reported that the UNHCR office in Beijing is

---

[68] Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations*: China, UN Doc. A/56/18 (2001), para. 246.

[69] See Stephan Haggard & Marcus Noland (eds.), *supra* note 44, p. 37; USCRI, "Country Updates: China", *World Refugee Survey 2007* (2007), pp. 44-46.

allowed by China to conduct some refugee status determinations for relatively few asylum-seekers, mostly from Pakistan, Somalia, Iran and Afghanistan. As a matter of course, NKEs are again excluded from even this limited individual screening opportunity.[70]

The 1966 Convention defines 'racial discrimination' in its Article 1 as follows:

> 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

According to this definition, China's exclusion of NKEs from any refugee status determination process and its other related restrictions can be 'racial discrimination' under the 1966 Convention, because the 'exclusion' and 'restrictions' seem to be based on 'race' or 'national or ethnic origin', here (North) Korean,[71] and it has the 'purpose', or at least 'effect', of 'nullifying' or 'impairing' their various 'human rights' and 'fundamental freedoms', including their right to seek asylum.[72] The different treatment from that applied to ethnically Chinese asylum-seekers and the exclusion from the individual screening procedure to which other asylum-seekers of different ethnic or national background can have access are clearly against China's international obligations stipulated in Article 2.1 of the Racial Discrimination Convention.[73]

---

[70] Stephan Haggard & Marcus Noland (eds.), *supra* note 44, p. 37.

[71] 'Nationality' may also be added as a relevant ground, considering the content of Article 1.3 of ICERD66: "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, **provided that such provisions do not discriminate against any particular nationality**" (emphasis added). See CERD, *Summary Record of the 1468the Meeting*: Consideration of the eighth and ninth periodic reports of China, UN Doc. CERD/C/SR.1468 (21 May 2003), para. 79. See also UNHCR, *Human Rights and Refugee Protection*, Training Module: RLD 5 (1995), Ch. 8, Analysis of Case Study.

[72] See Art. 5 of ICERD66; CERD, *General Recommendation XX*: Non-discriminatory implementation of rights and freedoms (Art. 5), UN Doc. A/51/18, Annex VIII, A (15 March 1996), para. 1. See also Art. 4 of ICERD66.

[73] Art. 2.1 of ICERD66: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity

Although Article 1.2 provides for the possibility of differentiating between citizens and non-citizens,[74] the Committee has clarified that this differential treatment based on citizenship or immigration status must have a legitimate aim in the light of the objectives and purposes of the 1966 Convention and must be proportional to the achievement of the aim.[75] Based on this principle, the ICERD Committee identifies various measures as also applicable to non-citizens. Among them, the following are what especially seem to be related to asylum-seekers like NKEs: the security against arbitrary detention, proper conditions in detention centres, availability of public educational institutions to children of illegal immigrants, and prevention and redress of serious problems commonly faced by non-citizen domestic workers such as debt bondage, passport retention, illegal confinement, rape and physical assault.[76]

In the context of *non-refoulement*, the ICERD Committee recommends also that "laws concerning *deportation or other forms of removal* of non-citizens from the jurisdiction of the State party *do not discriminate* in purpose or effect *among non-citizens* on the basis of race, colour or ethnic or national origin, and that *non-citizens have equal access to effective remedies*, including *the right to challenge expulsion orders*, and are allowed effectively to pursue such remedies (emphasis added)"[77] and "non-citizens [be] *not returned or removed* to a country or territory where they are *at risk of being subject to serious human rights abuses*, including *torture and cruel, inhuman or degrading treatment or punishment* (emphasis added)".[78] All the points recommended above are applicable to the NKE case.

Like the prohibition of torture, the prohibition of racial discrimination is also a rule of *jus cogens* under international law.[79] Therefore, any rule or obligation that

---

with this obligation; (b) ....."

See CERD, *General Recommendation XXX*: Discrimination Against Non Citizens, UN Doc. A/59/18, para. 469 (1 October 2004), para. 9.

[74] Art. 1.2 of ICERD66: "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."

[75] CERD, *General Recommendation XXX*, *supra* note 73, paras. 1, 4.

[76] *Ibid.*, paras. 19, 30, 34.

[77] *Ibid.*, para. 25.

[78] *Ibid.*, para. 27.

[79] See ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries", *supra* note 54, pp. 208, 283; ILC, "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *supra* note 54, Conclusion (33). See also *Prosecutor v. Anto Furundžija*, *supra* note 57, para. 147.

conflicts with the prohibition of racial discrimination is, in principle, null and void.[80]

3.2 The 1979 Convention on the Elimination of All Forms of Discrimination against Women

As discussed earlier in other chapters,[81] almost three quarters of NKEs in China are women and girls who are particularly vulnerable, and it is frequently reported that many of them are victims of human trafficking for forced marriage or sexual exploitation in China.[82] Most of the victims are believed to be forced into marriage or the sex industry by way of deception, coercion or abduction. Some others, however, cannot help but accept, nominally of their free will, marriage with Korean Chinese or 'Han' Chinese in order to either survive or avoid capture by the Chinese police, or support their family in North Korea. However, very often, even in the last case, the North Korean women cannot choose their husbands and cannot know the true situation of their slavery-like illegal marriage before they actually undergo it.[83]

Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW79) provides that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." As a State Party, China must provide specific preventive and punitive measures to overcome this illegal practice of human trafficking and sexual exploitation perpetrated by private traffickers or organised gangs within its jurisdiction.[84] Relating to this, the Committee on the

---

[80] See Arts. 53 & 64 of VCLT69.

[81] See section 2.3.2 of Ch. I & section 4.5.3 of Ch. II.

[82] See AI, *Report 2002*: Democratic People's Republic of Korea, AI Index: POL 10/001/2002; HRW, "The Invisible Exodus: North Koreans in the People's Republic of China (North Korea)", Vol. 14, No. 8 (C) (November 2002), pp. 12-15. See generally Norma Kang Muico, *An absence of choice: The sexual exploitation of North Korean women in China*, Anti-Slavery International (2005).

[83] Norma Kang Muico, *supra* note 82, pp. 3-9; HRW, *supra* note 82, pp. 12-15.

[84] See Art. 1 of CEDAW79: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." &

Art. 2 of CEDAW79: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: ... (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures,

Elimination of Discrimination against Women (CEDAW) expressed concern and recommended, in its 2006 Concluding Comments in reply to the combined fifth and sixth periodic reports of China, as follows:

> 33. While noting that the State party is also party to the 1951 Convention relating to the Status of Refugees, it is concerned at the lack of laws or regulations for the protection of women refugees and asylum-seekers. The Committee *expresses particular concern at the situation of North Korean women, whose status remains precarious and who are particularly vulnerable to being or becoming victims of abuse, trafficking, forced marriage and virtual slavery.*
>
> 34. The Committee calls upon the State party to adopt laws and regulations relating to the status of refugees and asylum-seekers, in line with international standards, in order to ensure protection also for women. The Committee recommends that the State party fully integrate a gender-sensitive approach throughout the process of granting asylum/refugee status in close cooperation with the Office of the United Nations High Commissioner for Refugees. It specifically encourages the State party to *review the situation of North Korean women refugees and asylum-seekers in the State party and to ensure that they do not become victims of trafficking and marriage enslavement because of their status as illegal aliens* (emphasis added).[85]

What NKEs, either men or women, fear most in China is their forced return to North Korea. If they are caught by the Chinese police, they are all sent back to the fate of well-anticipated persecution or torture. For this reason, NKE women even regard their forced marriage and sexual exploitation as better than risking repatriation or starvation, and are so vulnerable to any threat of a report to the police by traffickers, employers, neighbours, and even their so-called 'husbands' (or 'masters'). Therefore, above all, if China abandons only its policy of forced return of NKEs, many of the above problems regarding forced marriage and sexual exploitation can be resolved to a certain degree. Of course, at the same time, it must punish those traffickers and illegal sex business owners while preventing those acts occurring in

---

including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; ..."

See also Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 19*: Violence against Women (11th session, 1992), paras. 6, 9, 13-15, 24 (g); Stephan Haggard & Marcus Noland (eds.), *supra* note 44, p. 49.

[85] CEDAW, *Concluding Comments*: China, UN Doc. CEDAW/C/CHN/ CO/6 (25 August 2006), paras. 33, 34. See *ibid.*, paras. 19-20.

the Chinese territory.

Lastly, even if China never recognises those NKE victims of trafficking as refugees (or even asylum-seekers), and even if China is confident that there are no substantial grounds for believing that there is any danger of torture in North Korea, some due regard should, at least, be given to the NKE victims of trafficking. Although it is not yet a party to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[86] China may consider the relevant provisions in the Protocol, as a party to its mother treaty,[87] providing for the protection of victims of trafficking as follows:

> **Article 7 Status of victims of trafficking in persons in receiving States**
> 1. ..... each State Party shall consider adopting legislative or other appropriate measures that *permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.*
> 2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give *appropriate consideration to humanitarian and compassionate factors.*
>
> **Article 8 Repatriation of victims of trafficking in persons**
>
> .....
>
> 2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is an national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, *such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.*
>
> ..... (emphasis added).

3.3 The 1989 Convention on the Rights of the Child

Another vulnerable group of NKEs is North Korean orphans in China. They were estimated to number about 20,000 and are a result of either escaping alone when the

---

[86] "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime", UN Doc. A/RES/55/25, Annex II (No. 39574), adopted on 15 November 2000 and entered into force on 25 December 2003. As of June 2008, 116 States are Parties to the Protocol.

[87] "United Nations Convention against Transnational Organized Crime", UN Doc. A/RES/55/25 (No. 39574), adopted on 15 November 2000 and entered into force on 29 September 2003. As of June 2008, 138 States are Parties to the Convention. China signed it on 12 December 2000 and ratified it on 23 September 2003.

family is dispersed in North Korea, or as a consequence of parental deaths or deportations after the family has escaped to China. They are left to engage in begging or theft for survival, without any adequate educational opportunities for their age.[88] If caught, NKE children are also sent back to North Korea as NKE adults, and face severe treatment although it may be less severe than that towards adult NKEs.[89] It is also reported that some North Korean teenage girls were trafficked for forced marriage or sexual exploitation in China.[90] Also, children of NKE women who 'married' Chinese men have special problems, even in the case where their 'marriage' life is more tolerable than the more tragic cases. In addition to their marriage not being recognised as legal by the Chinese authorities, their children cannot officially be registered there. Therefore, the children are not guaranteed the right to any nationality and, even when they reach school age, they cannot receive a proper education.[91]

Article 22.1 of the Convention on the Rights of the Child (CRC89) recognises the special care needs of child refugees and asylum-seekers as follows:[92]

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

In this connection, the Committee on the Rights of the Child (CRC) expressed concern and recommended, in its 2005 Concluding Observations in response to the second periodic report of China, as follows:

---

[88] Korea Institute for National Unification, *White Paper on Human Rights in North Korea 2005* (Seoul, May 2005), pp. 347-348.
[89] Korea Institute for National Unification, *supra* note 41, pp. 226-227.
[90] *Ibid.*, pp. 225-226.
[91] *Ibid.*, p. 227. Their number is estimated to be between a few thousand and several tens of thousands. HRW, *Denied Status, Denied Education: Children of North Korean Women in China* (April 2008), p.2.
[92] See Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects*, Butterworths (2000), p. 38; Committee on the Rights of the Child (CRC), *General Comment No. 6*: Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6 (1 September 2005), paras. 64-78. For more details, see Geraldine Van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers (1995), pp. 360-372. For a general introduction to the 1989 Convention, see Jane McAdam, *supra* note 60, pp. 173-177.

> 80. ..... [The Committee] is further *concerned that children entering mainland China from the Democratic People's Republic of Korea are categorically considered as economic migrants and returned to the Democratic People's Republic of Korea without consideration of whether there are risks of irreparable harm to the child upon return.*
>
> .....
>
> 82. The Committee recommends that the State party extend *all human rights guarantees in its Constitution and in the Convention to all children within its jurisdiction* on both the mainland and the SARs [Hong Kong and Macao], *including refugees, asylum-seekers and other undocumented migrants*. In particular, the Committee recommends that the State party:
>
> (a) .....
>
> (b) Ensure that *no unaccompanied child, including those from the Democratic People's Republic of Korea, is returned to a country where there are substantial grounds for believing that there is a risk of irreparable harm to the child, for instance through disproportionate punishment for violating immigration laws*, in accordance with the Committee's general comment No. 6 (2005) on unaccompanied minors;
>
> (c) ..... (emphasis added).[93]

Like other human rights Committees examined above, the Committee on the Rights of the Child found that human rights, within its mandate, of NKEs, here specially NKE 'children',[94] were violated, and urged China to observe its international obligations under the relevant Convention, here especially the obligation of *non-refoulement* under the 1989 Convention in connection with other refugee and human rights Conventions.[95]

The 1989 Convention provides for the principle of non-discrimination,[96] the best interests of the child[97] and family reunification.[98] All these principles must be

---

[93] CRC, *Concluding Observations*: China (including Hong Kong and Macau Special Administrative Regions), UN Doc. CRC/C/CHN/CO/2 (24 November 2005), paras. 80, 82.

[94] Art. 1 of CRC89: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."

[95] This obligation of *non-refoulement* may be based on Article 22 of the 1989 Convention in conjunction with the 1951 Refugee Convention and the 1984 Torture Convention. In addition, Article 6 (right to life) and Article 37 (prohibition of torture, ill-treatment and arbitrary detention, etc.) of the 1989 Convention can also be relied on. See CRC, *General Comment No. 6*, *supra* note 92, paras. 26-28.

[96] Art. 2 of CRC89.

[97] Art. 3 of CRC89: "1. **In all actions concerning children**, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**" (emphasis added).

[98] Art. 22.2 of CRC89: "For this purpose, States Parties **shall provide**, as they consider appropriate, **co-operation in any efforts** by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations **to protect and assist such a**

taken into account whenever States Parties treat child asylum-seekers such as NKE orphans in China. These NKE orphans shall be accorded special protection and assistance as the children 'deprived of their family environment'.[99] In addition to the protection and assistance under Article 22 and general principles as shown above, the right to life and survival,[100] the right to be free from torture or other ill-treatment and the right to liberty and security of person shall be ensured by China towards the NKE children.[101] The teenage girls shall be protected from abduction, trafficking and sexual exploitation by all appropriate measures of China, as stipulated in the related provisions of the 1989 Convention.[102]

With respect to the children of NKE women engaged in illegal marriage, their 'registration immediately after birth', 'the right from birth to a name' and 'the right to acquire a nationality' are guaranteed by the 1989 Convention.[103] Therefore, it is basically required that all children in China, including NKE children, should, regardless of nationality or personal status, be registered after their birth, either at the China's 'Hukou', its official household register, or through any other birth registration system, for various practical purposes. In addition, even if the NKE children are still unregistered, their access to basic education should be guaranteed

---

child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention" (emphasis added).

Art. 10.1 of CRC89: "In accordance with the obligation of States Parties under article 9, applications by a child or his or her parents to enter or leave a State Party **for the purpose of family reunification shall be dealt with** by States Parties **in a positive, humane and expeditious manner**. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family" (emphasis added).

Art. 9.1 of CRC89: "States Parties **shall ensure that a child shall not be separated from his or her parents against their will**, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence" (emphasis added).

See CRC, *General Comment No. 6*, *supra* note 92, paras. 79-83, 92-93.

[99] Arts. 22.2 & 20 of CRC89. See CRC, *General Comment No. 6*, *supra* note 92, paras. 39-40.

[100] Art. 6 of CRC89. See *supra* note 95.

[101] Art. 37 of CRC89; CRC, *General Comment No. 6*, *supra* note 92, paras. 61-63. See *supra* note 95.

[102] Arts. 34 & 35 of CRC89. See CRC, *General Comment No. 6*, *supra* note 92, paras. 50-53. See also Art. 6 of CRC89; CRC, *General Comment No. 6*, *supra* note 92, paras. 23-24. For the purposes of CRC89, "a child means every human being **below the age of eighteen years**" (emphasis added). Art. 1 of CRC89, *supra* note 94.

[103] Art. 7 of CRC89. See Geraldine Van Bueren, *supra* note 92, pp. 117-118, 366-368.

based on their right to education under the 1989 Convention,[104] and, more generally, China should ensure that all refugee, asylum-seeking or undocumented migrant children in China are able to attend school, 'primarily' considering 'the best interests of the children'.[105]

4. Customary International Law

Traditionally, customary international law played a very important role in the realm of public international law. It is still true to a considerable degree, but, especially after the establishment of the UN system, along with the codification work done by International Law Commission (ILC) [106] and also with innumerable treaties constantly concluded bilaterally, regionally and universally in various subject areas,[107] treaty law seems to have instead taken the predominant role as a 'primary' source of international law. This may sound more plausible in the international human rights law area, considering that the majority of States are currently Parties to major human rights treaties[108] and that the main implementation mechanism of international human rights law is the supervision through the treaties' respective monitoring Committees.[109]

Nevertheless, customary human rights law can still be useful in some cases, for example, where the State concerned is not a party to a related human rights treaty whereas the relevant rule in customary law is already well established. In addition, customary human rights law of similar content may strengthen the authority of the related treaty law, or may compensate for defects or obscurities of the related treaty

---

[104] Art. 28 of CRC89. For more details of these NKE children, see generally HRW, *supra* note 91.
[105] See CRC, *Concluding Observations*: China, *supra* note 93, paras. 81- 82; CRC, *General Comment No. 6*, *supra* note 92, paras. 41-43. See also Arts. 3 & 4 of CRC89.
[106] See Art. 13.1.a of the UN Charter.
[107] Anthony Aust, *Modern Treaty Law and Practice (2nd ed.)*, Cambridge University Press (2007), pp. 1-2.
[108] As of June 2008, the number of States Parties of each treaty is as follows: ICCPR66 (160), ICESCR66 (157), ICERD66 (173), CEDAW79 (185), CAT84 (145), CRC89 (193).
[109] For example, Human Rights Committee, Committee against Torture and Committee on the Elimination of Racial Discrimination, etc. At the regional level, there are also regional human rights courts and commissions such as European Court of Human Rights and Inter-American Court of Human Rights, which are also based on respective regional human rights 'treaties'. For details of international human rights protection mechanisms, see Ch. VI.

norms.[110] In this context, customary international human rights law can also be related to the NKE case. Most, or at least many, articles in the Universal Declaration of Human Rights (UDHR48) and the International Covenant on Civil and Political Rights (ICCPR66) may be regarded as representing rules of customary human rights law.[111] Among them, several clauses can be utilised for the protection of NKEs. They may mostly overlap with what is already discussed above in this chapter, but some others do not, or may have some points of difference.

In addition, it is notable that China, which signed ICCPR but did not ratify it, is anyway under obligation, as a 'signatory' State, to "*refrain* from acts which would defeat the object and purpose of [ICCPR]" (emphasis added).[112] This 'soft' but meaningful obligation remains effective until the signatory State "shall have made its intention clear not to become a party to the treaty", and China has until now made no express intention to reject ICCPR.[113]

4.1 The 1948 Universal Declaration of Human Rights

Among the various human rights contained in the comprehensive list of the 1948

---

[110] See Theodor Meron, *supra* note 59, p. 3; Louis Henkin *et al.*, *Human Rights*, Foundation Press (1999), p. 322.

[111] See Richard B. Lillich, "Civil Rigths", in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford University Press (1984), pp. 116-118; Louis Henkin *et al.*, *supra note*110, pp. 322, 349-355; Henry J. Steiner *et al.*, *International Human Rights in Context: Law, Politics, Morals (3rd ed.)*, Oxford University Press (2008), pp. 135-138, 152-154, 160-161; Christian Tomuschat, *Human Rights: Between Idealism and Realism (2nd ed.)*, Oxford University Press (2008), 37-38, 73-76; Rhona K.M. Smith, *Textbook on International Human Rights (2nd ed.)*, Oxford University Press (2005), pp. 39-41; Javaid Rehman, *International Human Rights Law: A Practical Approach*, Longman (2003), pp. 19-20, 57-61; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press (2002), pp. 29-43; Gudmundur Alfredsson & Asbjørn Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers (1999), pp. xxx-xxxii.

[112] China signed ICCPR on 5 October 1998, but still has not ratified it.

Art. 18 of VCLT69 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force): "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) ....."

See ILC, "Draft Articles on the Law of Treaties with Commentaries", *Yearbook of the International Law Commission*, 1966: Vol. II (1967), p. 202; Ian Sinclair, *The Vienna Convention on the Law of Treaties (2nd ed.)*, Manchester University Press (1984), pp. 42-44; Paul Reuter (translated by José Mico & Peter Haggenmacher), *Introduction to the Law of Treaties*, Pinter Publishers (London, 1989) pp. 52-53; Anthony Aust, *supra* note 107, pp. 117-119, 180.

[113] See Christian Tomuschat, *supra* note 111, p. 75.

Universal Declaration, the right to seek and enjoy asylum in Article 14[114] seems most attractive not only because can it directly be applied to the NKE case, but also no similar reference to 'asylum' can be found in either of the two Covenants or the European Convention.[115] Although Article 14 does not provide for a right to 'receive', 'be granted' or 'obtain' asylum,[116] the right to 'seek' asylum itself may be significant for the protection of NKEs. For instance, as Plender and Mole explained, "a state may violate the right to seek asylum when it returns an applicant to the country whence he or she came without giving him or her an adequate opportunity to present his or her case."[117] This means that the right to seek asylum entails the right to present an asylum claim to the host State. Therefore, it can be argued that NKEs have the right to present their asylum claims to China according to Article 14 of the Universal Declaration as a norm of customary international law and accordingly China should receive and examine their applications.[118]

Several other human rights included in the 1948 Declaration can also be invoked with respect to the NKE issue, such as the right of non-discrimination (Arts. 2 & 7), the right to life, liberty and security of person (Art. 3), the right to protection

---

[114] Art. 14 of UDHR48

"1. Everyone has the right to seek and enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations" (emphasis added).

See generally Gudmundur Alfredsson & Asbjørn Eide (eds.), *supra* note 111, pp. 279-295.

[115] But see Art. 18 (Right to asylum) of the Charter of Fundamental Rights of the European Union (originally proclaimed on 7 December 2000 and adapted for the Treaty of Lisbon on 12 December 2007, not yet in force, *Official Journal of the European Union*, 14 Dec. 2007, C 303/2): "**The right to asylum shall be guaranteed** with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the functioning of the European Union (hereinafter referred to as 'the Treaties')" (emphasis added).

[116] Cf. Art. 22.7 of the American Convention on Human Rights (ACHR69, *UNTS*, Vol. 1144, p. 143 (No. 17955), adopted on 22 November 1969 and entered into force on 18 July 1978): "Every person has **the right to seek and be granted asylum in a foreign territory**, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offenses or related common crimes" (emphasis added).

Art. 12.3 of the African Charter on Human and Peoples' Rights (ACHRP81, adopted on 27 June 1981 and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5): "Every individual shall have **the right**, when persecuted, **to seek and obtain asylum in other countries** in accordance with the law of those countries and international conventions" (emphasis added).

See Colin Harvey, *supra* note 92, pp. 48-50, 52-53.

[117] Richard Plender & Nuala Mole, "Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments", in Francis Nicholson & Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press (1999), p. 82.

[118] See Colin Harvey, *supra* note 92, pp. 53-54.

from slavery or servitude (Art. 4), the right to be free from torture or other cruel, inhuman or degrading treatment or punishment (Art. 5), the right to be free from arbitrary arrest, detention or exile (Art. 9), the right of children to special care and assistance (Art. 25.2)[119] and the right to education (Art. 26).[120] Lastly, the right to equal pay for equal work and other basic workplace protections (Art. 23)[121] may be applied to the male (or female) NKEs who face labour exploitation under constant fear of exposure and arrest just for a meager living in agriculture, construction and housework.[122]

4.2 The 1966 International Covenant on Civil and Political Rights

The right to life in Article 6[123] of ICCPR needs to be given special attention with respect to the NKE case, in that, like the right against torture, the right to life may also entail the obligation of *non-refoulement* upon the host State. As a matter of logic, there is no reason why a risk to life should be treated as less serious than a risk of torture.[124] Actually, in *Judge v. Canada*,[125] the Human Rights Committee found that Canada violated Article 6.1 of ICCPR by deporting a citizen of the U.S., who had been sentenced to death, to his home country where he would be executed. The

---

[119] See Art. 10.3 of ICESCR66.

[120] See Art. 22 of CSR51; Art. 13 of ICESCR66. See also Art. 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW90, *UNTS*, Vol. 2220, p. 93 (No. 39481), adopted on 18 December 1990 and entered into force on 1 July 2003. As of June 2008, 37 States are Parties to the Convention. China is not a Party to the Convention).

[121] See Art. 7 of ICESCR66. See also Art. 25 of ICRMW90.

[122] See Norma Kang Muico, *Forced Labour in North Korean Prison Camps*, Anti-Slavery International (2007), pp. 4-5. For various human rights of illegal or undocumented migrant workers, see generally Part III (& Part II) of ICRMW90. Interestingly, however, among current 37 States Parties to it, there are no developed countries from Europe, North America or East Asia, which are main receiving States of migrant workers. Thus, the author is reluctant to regard it as the 7th 'core' or 'major' international human rights treaty, at least for now.

[123] Art. 6 of ICCPR66

"1. 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.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. ....."

[124] See Jane McAdam, *supra* note 60, pp. 147-148. See also *Mansour Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (15 June 2004), para. 8.1.

[125] *Roger Judge v. Canada*, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (13 August 2003).

Committee currently interprets Article 6 as prohibiting the deportation or extradition of a person to a State where that person's capital punishment is reasonably foreseeable, unless the sending State takes steps to ensure that the person will not be executed in the receiving State.[126] *Prima facie*, this view seems to be directly helpful to many NKE cases. There is, however, one more thing to be made clear: the obligation of *non-refoulement* relating to the death penalty is basically imposed on the States that have already abolished the death penalty within their jurisdiction, such as Canada.[127] Given the fact that China is one of the notorious retentionist States, the advanced view of the Human Rights Committee may not be utilised for the NKE case. However, the implicit obligation in the right to life in Article 6 of ICCPR may still be relevant to NKEs in other ways. The reasonably foreseeable execution or death in North Korea that many NKEs fear is not from a death sentence passed by a judge.[128] Their fear is mostly caused by possible extrajudicial executions or deaths, during interrogation and detention, due to various kinds of torture, maltreatment and heavy labour without proper food and other basic necessities. The executions and deaths of this kind cannot be regarded as a lawful exception to the right to life, namely the 'lawful' death penalty, as laid down in Article 6.2. Therefore, the high death rate during interrogation and detention in various North Korean detention centres and prison camps, where all repatriated NKEs have to go, should be carefully taken into account and duly regarded as 'arbitrary deprivation of life' stipulated in Article 6.1. In this connection, the prohibition of *refoulement* grounded on the right to life may be applied to the NKE case.

Secondly, the right to physical integrity against torture and ill-treatment in

---

[126] See Sarah Joseph *et al.* (eds.), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (2nd ed.)*, Oxford University Press (2004), pp. 175-181, 193; Guy S. Goodwin-Gill & Jane McAdam, *supra* note 9, pp. 307-309. See also *Mansour Ahani v. Canada*, *supra* note 124, para. 10.7; *A.R.J. v. Australia*, Communication No. 692/1996, UN Doc. CCPR/C/60/D/692/1996 (11 August 1997), para. 6.9; CCPR, *General Comment No. 15*: The position of aliens under the Covenant (11 April 1986), para. 5.

[127] *Roger Judge v. Canada*, *supra* note 125, para. 10.4.

[128] Even in the case of seemingly lawful execution, it may actually not be based on its applicable law. For example, according to a video footage obtained by a Japanese NGO, there were public executions in North Hamgyong Province of North Korea in March 2005 for those who were charged with 'illegal border crossing' and 'human trafficking', and any of the applied provisions of the Criminal Code there, including Article 233 (but not including Article 62 which has the death penalty in it), do not contain the death penalty, but three of them were executed by firing squad in front of a large crowd probably numbering several thousand, immediately after the sentences were announced. JIN-NET (Japan Independent News Net), "Jin-Net Releases Video Footage of Public Executions in North Korea" (17 March 2005) <http://northkoreanrefugees.com/dvd/statement.htm> (last accessed on 23 June 2008).

Article 7[129] of ICCPR can also be applied to the NKE case, as in the cases of other instruments.[130] As discussed above, however, it is notable that the scope of Article 7, with respect to *non-refoulement*, is wider than Article 3 of the Convention against Torture, encompassing not only torture, but also cruel, inhuman or degrading treatment or punishment.[131] Also, compared with Article 3 of the 1984 Convention, no State or public element in the definition of torture is necessary in Article 7 of ICCPR.[132] This wider scope may be beneficial to NKEs.

There are several more rights in ICCPR applicable to the NKE case, which are, *inter alia*, the right of non-discrimination (Arts. 2.1 & 26), the right to protection from slavery and servitude (Art. 8), the right to liberty and security of person, including the right to be free from arbitrary arrest and detention (Art. 9) and the rights of the child, including the right to immediate registration after birth and to a name (Art. 24).[133]

5. Conclusion

This chapter has found various international human rights treaty provisions applicable to the NKE case. If NKEs can be recognised as refugees, rights and benefits both in refugee law and human rights law may be applied. Even if NKEs cannot, the norms of human rights law found in this chapter are still available to them.

With respect to the rights and benefits available for the NKE case, there are many similarities and also differences between refugee law and human rights law. In general, it can be said that human rights law may provide more comprehensive and varied protection options. For instance, the principle of *non-refoulement* in the 1984 Convention (or also in ICCPR as a rule of customary law) provides wider and more powerful protection coverage than that in the 1951 Refugee Convention although they basically share the same name. There are also many other special human rights

---

[129] See *supra* note 22.
[130] Art. 3 of CAT84, Art. 37 of CRC89 and Art. 5 of UDHR48.
[131] See CCPR, *General Comment No. 20*, *supra* note 22, para. 9.
[132] See *ibid.*, para. 2.
[133] See Arts. 7, 11, 16 and 29 of ICRMW90 respectively. See also Arts. 9 & 10 of ICRMW90.

treaties specialising in areas such as racial discrimination, women and children. As shown above, all these Conventions contain some useful provisions that can be invoked by NKEs.

Even among provisions of similar content in human rights law instruments themselves, there are some differences in regard to the details. In this case and the above case between refugee law and human rights law, there is a good guiding principle in the field of human rights law as follows: "the provision which is most generous should prevail."[134] Therefore, if two or more provisions of similar content are simultaneously applicable to the NKE case, the more or most favourable provision should always apply to the case.

While the substantive human rights applicable to the NKE case are being discussed in this chapter, it can also be noted that, interestingly, most treaty monitoring bodies confirmed that China has violated its obligations relating to NKEs under respective human rights treaties. This implementation system is surely another merit of international human rights law, considering that there is no corresponding international body in international refugee law, and that decisions of domestic bodies and courts are generally less well-known (and many times difficult to access their information) so naturally less influential in raising international concern and pressure about this issue. However, can the authoritative, though non-binding, opinions of the human rights Committees have actual influence upon China? If so, how would this work out? If not, why? What other supervisory mechanisms are available in international human rights law to protect NKEs' rights? These questions will be addressed in the following chapter.

---

[134] UNHCR, *supra* note 71, Ch. 3, F. This rule arises out of the fact that if a State has undertaken two separate types of obligations concerning a particular human right, it can only meet both obligations (and therefore fully live up to its commitments) by following the provision that gives greater protection to the individual. See Art. 5 of CSR51; Art. 5.2 of ICCPR66; Art. 5.2 of ICESCR66; Art. 1.2 of CAT84; Art. 23 of CEDAW79; Art. 41 of CRC89; Art. 53 of ECHR50; Art. 29 (b) of ACHR69. For more details of the principle, see generally Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, Martinus Nijhoff Publishers (2003), pp. 213-232.

Chapter VI. Protection Mechanisms of International Human Rights Law and NKEs

1. Introduction

As discussed in the previous chapter, China may itself be in violation of many obligations under international human rights treaties and customary law in terms of NKEs. Several human rights Committees have pointed this out. Apart from the actual applicability to the NKE case, China itself generally acknowledges its human rights obligations under various international human rights treaties. Then, how can NKEs' human rights be protected and ensured under the international human rights system? What are the roles of the treaty monitoring bodies and what are their limits? What can be expected from the newly established UN Human Rights Council (HRC)? What about other UN organs and various human rights NGOs? These questions about international human rights protection mechanisms are dealt with in this chapter in the context of the NKE issue.

2. Treaty Monitoring Committees

2.1 Functions and Limits of the Treaty Monitoring Committees

The implementation of international human rights law is generally supervised by two main monitoring systems: the system of '(international human rights) treaty-based bodies' and the system of '(UN) Charter-based bodies'. Firstly, this section addresses the treaty-based bodies, which are committees of independent experts that monitor implementation of the core international human rights treaties. All the six major

human rights treaties have their own monitoring bodies respectively[1]: the Committee on Economic, Social and Cultural Rights (CESCR) for ICESCR66, the Human Rights Committee (CCPR) for ICCPR66, the Committee on the Elimination of Racial Discrimination (CERD) for ICERD66, the Committee on the Elimination of Discrimination against Women (CEDAW) for CEDAW79, the Committee against Torture (CAT) for CAT84, and the Committee on the Rights of the Child (CRC) for CRC89.

The treaty monitoring Committees possess several mechanisms for performing their supervisory duty in accordance with the provisions of their respective treaties. First of all, all the six Committees receive each State Party's regular reports on its implementation of the treaty obligations. After examining the report together with all other relevant information available to them and carrying on a dialogue with the State Party delegation about this matter, the Committees publish their concerns and recommendations in 'Concluding Observations (or Comments)'. On the other hand, the Committees can also publish 'General Comments', as their authoritative interpretation of the content of human rights provisions, on thematic issues or methods of work. Secondly, some Committees have their complaints procedures, which can be regarded as a quasi-judicial process. CCPR, CERD and CAT may receive and consider State-to-State complaints from their States Parties, and those three Committees and CEDAW have competence to receive and consider individual communications from persons within the States Parties' jurisdiction. Thirdly, CEDAW and CAT have the authority to make a confidential investigation or inquiry if they receive reliable information containing well-founded indications of grave or systematic violations of the respective Conventions in their States Parties.[2]

---

[1] There is also the 7th international human rights committee, the Committee on Migrant Workers (CMW), grounded on the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW90). However, the author is reluctant to regard yet ICRMW90 as the 7th 'core' or 'major' international human rights treaty because it seems to lack enough support from States, not only from developed countries but also from China, so the 7th Committee is not dealt with here. See notes 120 & 122 of Ch. V.

[2] For more details of treaty monitoring functions of the human rights Committees, see generally UNHCHR, *The United Nations Human Rights Treaty System: An Introduction to the core human rights treaties and the treaty bodies (Fact Sheet No. 30)*, UN Office at Geneva (2005), Part II; Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, Oxford University Press (1992), II. Organs Monitoring Treaty Compliance; Philip Alston & James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press (2000), A. The UN human rights monitoring system in action.

In addition, the 2002 Optional Protocol to CAT84[3] introduced a new kind of monitoring mechanism: a system of regular visits to places of detention. This preventive system may be carried out by the newly established Sub-Committee on Prevention of Torture and independent national visiting bodies.[4]

Except the last 'preventive' regular visits system, all the other treaty monitoring mechanisms seem to be *prima facie* utilisable for the NKE case. The following table shows all these possible availabilities.

Table 10: Monitoring Mechanisms of the 6 Major International Human Rights Treaties

Treaty	Monitoring Body	Periodic Report	Inter-State Complaint	Individual Communication	Confidential Inquiry
ICESCR66	**CESCR** (ECOSOC Resolution 1985/17)	**YES** (Arts. 16-17)	No	No	No
ICCPR66	**CCPR** (Art. 28)	**YES** (Art. 40)	**YES** (Arts. 41-43, Declaration Required)	**YES** (1st Optional Protocol[5])	No
ICERD66	**CERD** (Art. 8)	**YES** (Art. 9)	**YES** (Arts. 11-13)	**YES** (Art. 14, Declaration Required)	No
CEDAW79	**CEDAW** (Art. 17)	**YES** (Art. 18)	No	**YES** (Optional Protocol[6])	**YES** (Optional Protocol Arts. 8-10)
CAT84	**CAT** (Art. 17)	**YES** (Art. 19)	**YES** (Art. 21, Declaration Required)	**YES** (Art. 22, Declaration Required)	**YES** (Art. 20)
CRC89	**CRC** (Art. 43)	**YES** (Art. 44)	No	No	No

Among others, complaints procedures, either inter-State or individual, may deserve more attention because of their quasi-judicial character. However, considering that

[3] "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (No. 24841), UN Doc. A/RES/57/199 (9 January 2003), Annex, adopted on 18 December 2002 and entered into force on 22 June 2006. As of July 2008, 34 States are Parties to the Protocol. China is not a Party to it.

[4] See UNHCHR, *supra* note 2, pp. 27-28.

[5] "Optional Protocol to the International Covenant on Civil and Political Rights", *UNTS*, Vol. 999, p. 171 (No. 14668), adopted on 16 December 1966 and entered into force on 23 March 1976. As of July 2008, 110 States are Parties to the Protocol.

[6] "Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women", *UNTS*, Vol. 2131, p. 83 (No. 20378), adopted on 6 October 1999 and entered into force on 22 December 2000. As of July 2008, 89 States are Parties to the Protocol.

the 'inter-State' complaints mechanism has never been used in the international level mainly due to the lack of States' interest or belief in using it,[7] the 'individual' complaints mechanism seems to be much more useful in practice. As explained above, four out of six human rights Committees have competence for individual complaints or communications, excluding CESCR and CRC which deal with matters containing economic and social rights. Even among the four Committees, given the relevance to asylum cases (especially relating to the prohibition of torture and the principle of *non-refoulement*) and also the actual record of using the individual complaints mechanism under the Committees,[8] the Committee against Torture and the Human Rights Committee could be more useful forums, in the light of the protection of asylum-seekers such as NKEs.

In relation to the NKE case, however, most useful monitoring mechanisms have effectively been excluded by China in several technical ways. Firstly, no complaints procedures are available to individuals within China's jurisdiction. China is 'not a Party' to ICCPR66, not to mention its first Optional Protocol, and it has 'not made any necessary declarations' to accept the individual complaints systems under ICERD66 and CAT84 to which it is a Party. China is not a Party to the Optional Protocol to CEDAW79 either, which mainly deals with individual communications. Secondly, the confidential inquiry or investigation stipulated in the Optional Protocol to CEDAW79 and CAT84 is also not available because China is not a Party to the 1999 Optional Protocol and has this time 'made a reservation' denying the confidential inquiry under CAT84.

---

[7] UNHCHR, *supra* note 2, p. 28; Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press (2003), pp. 159-160. There are a few regional inter-State cases in Europe and Africa. See *ibid.*, pp. 165, 200-202; Walter Kälin, "Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond", in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), pp. 637-638.

[8] Cases of human rights Committees can be found at the UNHCHR's 'Treaty body document search' <http://tb.ohchr.org> and also at the UNHCR's 'Refworld' <http://www.refworld.org>.

Table 11: Treaty Monitoring Mechanisms and China[9]

Treaty	China (S), (R), (A)	Periodic Report	Inter-State Complaint	Individual Communication	Confidential Inquiry
ICESCR66	(S) 1997 **(R) 2001**	**YES**	N/A	N/A	N/A
ICCPR66	(S) 1998 (R) Not Yet	N/A	N/A	N/A	N/A
ICERD66	**(A) 1981**	**YES**	**YES** (No Declaration Required)	**NO** (No Declaration)	N/A
CEDAW79	(S) 1980 **(R) 1980**	**YES**	N/A	**NO** (Not a Party to the Optional Protocol)	**NO** (Not a Party to the Optional Protocol)
CAT84	(S) 1986 **(R) 1988**	**YES**	**NO** (No Declaration)	**NO** (No Declaration)	**NO** (Reservation)
CRC89	(S) 1990 **(R) 1992**	**YES**	N/A	N/A	N/A

(S) Signature, (R) Ratification, (A) Accession

Thirdly, the possibility of inter-State complaints under CAT84 is easily blocked by the absence of the necessary declaration of acceptance. Interestingly, however, the inter-State complaints mechanism under ICERD66 is not barred by China, which means it is the single currently surviving international human rights complaints procedure available against China. Why and how was this exception made? The following facts may explain it to a degree. As shown in the above table, the first main human rights treaty to which China became a Party is CEDAW79, in 1980. One year later, it became a Party to ICERD66. Since there was originally no complaints system in CEDAW79, the 'first' complaints mechanisms to which China should have paid special attention before it decided to be bound by a treaty were those under ICERD66 in 1981. Moreover, the inter-State mechanism in ICERD66 is really 'unique' compared with not only the individual complaints system in the same 1966 Convention but also any other complaints mechanisms, whether inter-State or individual, under CAT84 and ICCPR66, in that it does 'not require any declaration'

[9] The related information is available at 'United Nations Treaty Collection' <http://untreaty.un.org> or at the website of UNHCHR <http://www.ohchr.org>.

of its acceptance. The inter-State mechanism under ICERD66 is automatically applicable to the States Parties unless they make a reservation to it. No State has actually made one until now, including China. One more interesting thing is that, among the six treaties, only for ICERD66 China has used the one-shot 'accession' process, not the generally used dual process, signature plus ratification. Considering all of these facts, China seems to have made a mistake of going against its presumed blocking policy towards international complaints procedures. Whether it is a mistake or not, the fact is that the State-to-State complaints mechanism under ICERD66 is available in terms of China and NKEs, at least in theory. However, in practice, it may not be a usable policy option, even for South Korea or for the U.S.A.,[10] given the past sterile history of the inter-State mechanism under international human rights law and the easily anticipated high political costs.[11]

In conclusion, no inquiries systems and no complaints mechanisms of human rights monitoring Committees seem feasible for the protection of NKEs. Even if 'individual' complaints are available, it may not be easy for NKEs to utilise the relevant procedures, considering their current delicate situation. Furthermore, the Committees have their fundamental limits, in that their views or decisions on individual complaints are not binding. In the end, the only remaining Committees' mechanism available for the protection of NKEs is the States Parties' periodic reporting system, which is further addressed in the next section.

In addition to the Committees' monitoring system, such Conventions as ICERD66, CEDAW79 and CAT84 provide for compulsory dispute settlement mechanisms for any dispute concerning their interpretation or application between their respective States Parties, through arbitration and referral to the International Court of Justice (ICJ).[12] However, these possibilities are also excluded by China by means of making reservations. This illustrates that one of the China's basic policies towards the international human rights system is to prevent any international judicial or quasi-judicial body from possessing compulsory jurisdiction over China.[13]

---

[10] Both States are Parties to ICERD66 (from 1978 and 1994 respectively) and have made no reservation to the inter-State complaints mechanism.
[11] See *supra* note 7.
[12] See Walter Kälin, *supra* note 7, pp. 635-636.
[13] For the China's reservation to ICJ in international refugee law, see notes 100-103 of Ch. IV.

Table 12: Compulsory Dispute Settlement Mechanisms and China[14]

Treaty	China (S), (R), (A)	Arbitration	China	ICJ	China
ICESCR66	(S) 1997 **(R) 2001**	No	N/A	No	N/A
ICCPR66	(S) 1998 (R) Not Yet	No	N/A	No	N/A
ICERD66	**(A) 1981**	No	N/A	**YES** (Art. 22)	**NO** (Reservation)
CEDAW79	(S) 1980 **(R) 1980**	**YES** (Art. 29)	**NO** (Reservation)	**YES** (Art. 29)	**NO** (Reservation)
CAT84	(S) 1986 **(R) 1988**	**YES** (Art. 30)	**NO** (Reservation)	**YES** (Art. 30)	**NO** (Reservation)
CRC89	(S) 1990 **(R) 1992**	No	N/A	No	N/A

(S) Signature, (R) Ratification, (A) Accession

2.2 Periodic Reporting System and China

The only 'working' mechanism 'common' to all of the Committees and the only currently 'available' mechanism of the Committees for the protection of NKEs is the periodic reporting system, which is to monitor implementation of the relevant treaty by reviewing the reports submitted periodically by States Parties in accordance with the treaty provisions. Within this basic, but primary, mandate, the treaty monitoring Committees have not only scrutinised how far States have met their obligations under the human rights treaties to which they are Parties, but have also encouraged further implementation of the obligations.[15] After the examination of States' reports, usually with constructive dialogues with the States concerned, the Committees issue Concluding Observations or Comments including their concerns and recommendations.[16]

As discussed in the preceding chapter, CERD (2001),[17] CESCR (2005),[18]

---

[14] See *supra* note 9.
[15] UNHCHR, *supra* note 2, p. 17. See *ibid.*, pp. 18-19.
[16] See *ibid.*, pp. 19-23.
[17] CERD, *Concluding Observations*: China, UN Doc. A/56/18 (2001), para. 246.
[18] CESCR, *Concluding Observations*: People's Republic of China (including Hong Kong and Macao),

CRC (2005)[19] and CEDAW (2006)[20] have respectively expressed their specific concern about NKEs in China and recommended that China should observe its Convention obligations with respect to the NKE case. Although their Observations or Comments have basically no binding force, China should at least respond to those recommendations more clearly in each of its next periodic reports.[21] While preparing for them, China may need to assess its related policies, laws and practices in the light of the respective treaties and recommendations.[22] Among the treaty monitoring bodies that have received China's reports, only CAT, probably the most important body for the NKE case, has not yet commented on the NKE issue. However, the last review of China's report by CAT was performed in 2000, and it will be most interesting to see if CAT also follows other Committees' position on this matter when it reviews China's recent periodic report submitted to it in 2007.[23]

No periodic report from China has yet been submitted to any Committees since their Concluding Observations or Comments containing the issue of NKEs. Considering that most Concluding Observations discussed here were issued very recently (2005 and 2006), it may just be necessary to wait and see what kind of reaction will be shown by China in its next reports. Nevertheless, the fact that China has not submitted its tenth periodic report to CERD since 2001 when it last received the Concluding Observations from CERD, which may well be regarded as the first official condemnation relating to NKEs from a treaty monitoring body, negates any optimistic views on progress in the near future. The time limit for the ICERD66 reporting is every two years, whereas other reporting periodicities are usually four[24] or five years.[25] Therefore, if China continues not to submit its report to CERD (or other Committees) considerably beyond the due date, it would be another violation of

---

UN Doc. E/C.12/1/Add.107 (13 May 2005), paras. 14, 45.

[19] CRC, *Concluding Observations*: China (including Hong Kong and Macau Special Administrative Regions), UN Doc. CRC/C/CHN/CO/2 (24 November 2005), paras. 80, 82.

[20] CEDAW, *Concluding Comments*: China, UN Doc. CEDAW/C/CHN/ CO/6 (25 August 2006), paras. 33, 34.

[21] See UNHCHR, *supra* note 2, pp. 23-24.

[22] See *ibid.*, p. 34; Walter Kälin, *supra* note 7, p. 640. See also Christian Tomuschat, *supra* note 7, pp. 154-156.

[23] CAT, "Fourth periodic reports of States parties due in 2004: Addendum: China", UN Doc. CAT/C/CHN/4 (27 June 2007).

[24] ICCPR66, CEDAW79 and CAT84.

[25] ICESCR66 and CRC89.

the related Convention - its legal obligation to report.[26] It is hoped that China's non-reporting to CERD is just an accident (so the reporting process will soon be resumed) and does not adversely affect China's reporting practice towards other Committees. At any rate, China seems to be struggling with its international human rights obligations through the reporting system.

3. UN Human Rights Council (HRC)

One of the purposes of the UN is to promote and encourage 'respect for human rights and for fundamental freedoms for all without distinction',[27] and this aim has currently become a really important subject more than ever after its creation. In 2006, considering the growing importance of human rights, the UN Human Rights 'Council' (HRC) was established by the UN General Assembly as its subsidiary organ,[28] in replacement of the 'Commission' on Human Rights (CHR) that had been supervised by the UN Economic and Social Council.[29] The Human Rights Council, which consists of forty seven Member States of the UN, meets as a quasi-standing body, and its agenda and programme of work provides the opportunity to discuss all thematic human rights issues and situations that require the Council's attention throughout the year.[30] The status of HRC shall be reviewed by UNGA within five years of its establishment (by 2011), including the possibility of its upgrading into one of principal organs of the UN.[31]

The Council basically assumes all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including its so-called 'special procedures' and 'complaint procedure'.[32] In addition to those former mechanisms, HRC undertakes the newly designed 'universal periodic review'.[33] The Sub-

---

[26] See UNHCHR, *supra* note 2, pp. 24-25; Christian Tomuschat, *supra* note 7, pp. 152-154.
[27] Art. 1.3 of the UN Charter.
[28] UNGA Resolution 60/251, "Human Rights Council", UN Doc. A/RES/60/251 (15 March 2006).
[29] UNGA Res. 60/251, para. 1.
[30] HRC, "FACTSHEET: Work And Structure Of The Human Rights Council" (July 2007) <http://www2.ohchr.org/english/bodies/hrcouncil/docs/FACTSHEET_OUTCOMES_FINAL.pdf> (last accessed on 20 February 2008).
[31] UNGA Res. 60/251, para. 1. It may require some relevant amendments to the UN Charter.
[32] UNGA Res. 60/251, para. 6 & 5 (g).
[33] UNGA Res. 60/251, para. 5 (e).

Commission on the Promotion and Protection of Human Rights is also replaced by 'the HRC Advisory Committee' which, as a think tank, provides expert advice and conducts substantive research on thematic issues of interest to the Council at its request.[34] Many of these mechanisms of HRC may be useful for the NKE case.

3.1 Special Procedures of HRC

First, the 'special procedures' may deal with the NKE issue. The 'public' procedures address either specific country situations or thematic issues in all parts of the world, and the procedures are conducted by either an individual ('Special Rapporteur', '(Special) Representative of the Secretary-General' or 'Independent Expert') or a working group usually made up of five persons. After their examination including communications with related governments and, where necessary, country visits, mandate holders publish a report containing their findings and recommendations relating to the respective countries or themes. The specific mandates of the special procedures are determined by the resolution creating them.[35]

As of 2007, there are twenty eight thematic and ten country mandates.[36] Among them, the Special Rapporteur on 'the situation of human rights in the Democratic People's Republic of Korea'[37] is directly connected with the NKE issue. Other thematic Special Rapporteurs such as on 'torture and other cruel, inhuman or degrading treatment or punishment',[38] on 'the human rights aspects of the victims of trafficking in persons, especially women and children'[39] and on 'extrajudicial, summary or arbitrary executions'[40] can also be related to the NKE case. In fact, the Special Rapporteur on North Korea has on several occasions indicated the legal issues relating to NKEs in China.[41] In addition to this, the Special Rapporteurs on

---

[34] See HRC Resolution 5/1, "Institution-building of the United Nations Human Rights Council" (18 June 2007), UN Doc. A/HRC/21 (7 August 2007), Ch. I, A, Annex, paras. 65-84; HRC, "FACTSHEET: Work And Structure Of The Human Rights Council" (July 2007).
[35] See HRC, "FACTSHEET: Work And Structure Of The Human Rights Council" (July 2007).
[36] See HRC Res. 5/1, Annex, Appendix I.
[37] Mr. Vitit Muntarbhorn (Thailand).
[38] Mr. Manfred Nowak (Austria).
[39] Ms. Sigma Huda (Bangladesh).
[40] Mr. Philip Alston (Australia).
[41] See, for example, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/62/264 (15 August 2007), paras. 28-40. See also related parts of the other reports: UN Doc. E/CN.4/2005/34 (10 January 2005); UN Doc. A/60/306 (29 August 2005); UN Doc. E/CN.4/2006/35

'the human rights of migrants',[42] on torture, on victims of trafficking and on 'violence against women, its causes and consequences' [43] jointly sent a communication to China on 19 December 2005 asking about the allegations of trafficking and sexual exploitation of female North Koreans in China, and received its respective responses with almost the same content - that China had basically observed all the relevant international norms relating to NKEs.[44] On 24 March 2006, the Special Rapporteurs on victims of trafficking, on violence against women and on 'the sale of children, child prostitution and child pornography'[45] jointly sent a letter to China asking about the allegation concerning the forced repatriation of a North Korean woman one month before whose two children were left in China. China this time replied that the information provided was not enough for it to trace her, asserting also its observance of international obligations.[46] Although these special procedures are not powerful enough to make China instantly change its policy towards NKEs, the process of exchange of views between the Special Rapporteurs and China may be influential in a positive way in the longer term.

3.2 Complaint Procedure of HRC

The second available mechanism of HRC is the 'complaint procedure'. Based on the previous '1503 Procedure' of CHR, the Council's 'confidential' complaint procedure allows any individual or group who is a victim or has direct and reliable knowledge of alleged violations, including NGOs, to bring to the attention of the Council complaints about "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances".[47] For the complaint procedure, two working groups, the Working Group on Communications (composed of five members of the Advisory

(23 January 2006); UN Doc. A/61/349 (15 September 2006); UN Doc. A/HRC/4/15 (7 February 2007).
[42] Mr. Jorge A. Bustamante (Mexico).
[43] Ms. Yakin Ertürk (Turkey).
[44] UN Doc. E/CN.4/2006/73/Add.1 (27 March 2006), paras. 29-33; UN Doc. A/HRC/4/33/Add.1 (20 March 2007), para. 29; UN Doc. E/CN.4/2006/62/Add.1 (27 March 2006), paras. 22-28; UN Doc. A/HRC/4/23/Add.1 (30 May 2007), paras. 65-67; UN Doc. A/HRC/4/34/Add.1 (19 March 2007), paras. 125-129, 141, 143-144.
[45] Mr. Juan Miguel Petit (Uruguay).
[46] UN Doc. A/HRC/4/23/Add.1 (30 May 2007), paras. 59-64; UN Doc. A/HRC/4/34/Add.1 (19 March 2007), paras. 136-142; UN Doc. A/HRC/4/31/Add.1 (15 March 2007), paras. 217-223.
[47] HRC Res. 5/1, Annex, paras. 85-87.

Committee) and the Working Group on Situations (composed of five representatives of Member States of the Council), are established with the mandate, respectively, to examine the communications mainly about the admissibility issue, and to bring to the attention of the Council the relevant violations of human rights with its recommendations on the measures to take.[48] If the Council finally considers that the situation deserves further action, it may decide to request the State concerned to provide further information, to appoint an independent and highly qualified expert to monitor the situation, to transfer the procedure from confidential to public consideration, or to recommend UNHCHR to provide technical cooperation, capacity-building assistance or advisory services to the State concerned.[49]

In addition to this 'complaint procedure', similar communications can also be submitted by individuals or groups to some 'special procedures' mechanisms. After examining communications received from them, if the relevant special rapporteurs or mandate holders accept the communications as reliable and credible, they are sent to the governments concerned in the name of 'urgent appeals' or 'letters of allegation'. The communications and the replies from the governments are later published in the special rapporteurs' reports to HRC.[50]

Therefore, an NKE, a group of NKEs or, at least, witnesses including related NGOs which have direct and reliable knowledge of violations of NKEs' human rights can submit their communications, through the Office of UNHCHR, either to the complaint procedure of HRC, or to some related mandate holders under the special procedures of HRC, for their consideration. As discussed in the previous section, some NKEs or NKE related NGOs have already submitted their complaints or communications to some relevant Special Rapporteurs, and received Chinese replies about the allegations.[51] This informal individual complaints mechanism under the 'special procedures' may be continuously utilised by NKEs and related groups, along with the recently renovated HRC 'complaint procedure', as long as China sticks to its current policy which violates NKEs' human rights.

---

[48] See HRC Res. 5/1, Annex, paras. 89-99.
[49] HRC Res. 5/1, Annex, para. 109. See *ibid.*, paras. 103-105.
[50] UNHCHR, *Special Procedures of the Human Rights Council: Urgent appeals and letters of allegation on human rights violations* (October 2007). See Rhona K.M. Smith, *Textbook on International Human Rights (3rd ed.)*, Oxford University Press (2007), p. 142.
[51] The identity of the source of information is kept confidential. UNHCHR, *supra* note 50.

3.3 Universal Periodic Review (UPR) of HRC

The third but newly devised mechanism of HRC is the 'universal periodic review'. Through this mechanism, the Council reviews on a periodic basis the fulfilment of the human rights obligations and commitments of all UN Member States. In principle, this mechanism "shall complement and not duplicate the work of treaty bodies".[52] The basis of the review is as follows: the UN Charter, the Universal Declaration of Human Rights, human rights treaties to which each State is a Party, voluntary pledges and commitments made by each State and, where applicable, international humanitarian law.[53] This cooperative mechanism, based on an interactive dialogue, is conducted in one working group, which is composed of the forty eight Member States of the Council and is assisted by a group of three rapporteurs. Observer States and other relevant stakeholders may also take part in the review process in the working group. A national report of each State is reviewed together with the information from other relevant UN bodies and stakeholders.[54] The final outcome is adopted by the plenary of the Council in the form of a report containing its conclusions and/or recommendations.[55]

The first review started in April 2008 and forty eight States are to be reviewed each year by 2011.[56] As a current Member State of the Council, China will be reviewed at the fourth UPR session in 2009. However, considering the broad scope of the review, its strict time limit[57] and the clear emphasis on the States' cooperation and interaction in every stage, it is unlikely that such a specific issue as the NKE case can be dealt with in this general review process. Nevertheless, the fact that there appears another opportunity for raising human rights issues by the UN organs, other States or NGOs against the State concerned is, in itself, a positive development for human rights victims such as NKEs.

---

[52] UNGA Res. 60/251, para. 5 (e); HRC, "FACTSHEET: Work And Structure Of The Human Rights Council" (July 2007).
[53] HRC Res. 5/1, Annex, para. 1.
[54] See HRC Res. 5/1, Annex, paras. 15-22.
[55] See HRC Res. 5/1, Annex, paras. 23-32.
[56] HRC Res. 5/1, Annex, para. 14.
[57] See HRC Res. 5/1, Annex, paras. 22-24.

3.4 Resolutions of HRC

One of the influential ways the UN human rights bodies can do for coping with human rights violations is to adopt their official resolutions condemning the violations. This may be the last action to be taken by the human rights bodies such as HRC. Although the resolutions are not binding in their nature, their adoption has actually been a political burden to the States concerned.[58] In the past, the Commission on Human Rights and its Sub-Commission adopted their resolutions on not only thematic issues, but specific country situations as well. For example, in 1997 and 1998, the Sub-Commission adopted its resolutions entitled "Situation of human rights in the Democratic People's Republic of Korea",[59] and, in 2003, 2004 and 2005, CHR adopted its resolutions of the same title,[60] which all condemned North Korea for its systematic, widespread and grave human rights violations. Although the newly established Advisory Committee of HRC cannot adopt its resolutions or decisions differently from its predecessor, the Sub-Commission,[61] HRC still has the power to issue its resolutions on any human rights matters.[62]

In theory, there is no reason why HRC cannot adopt a resolution on the NKE issue against China. In reality, however, it seems difficult for such a resolution to be fruitful. Considering the political status of China as a 'permanent' Member State of the UN Security Council and also as a current Member of the Human Rights Council, to put the official blame on China at HRC (and other UN organs) can never be easy.[63] In the age of CHR, it has actually happened that two resolutions on the human rights situation in China failed to be finally adopted by the Commission,[64] and one draft resolution on the situation in Tibet was ultimately rejected at the Sub-Commission.[65]

---

[58] See Walter Kälin, *supra* note 7, pp. 644-645.
[59] UN Doc. E/CN.4/SUB.2/RES/1997/3 (21 August 1997) and UN Doc. E/CN.4/SUB.2/RES/1998/2 (19 August 1998).
[60] UN Doc. E/CN.4/RES/2003/10 (16 April 2003), UN Doc. E/CN.4/RES/2004/13 (15 April 2004) and UN Doc. E/CN.4/RES/2005/11 (14 April 2005).
[61] HRC Res. 5/1, Annex, para. 77.
[62] See HRC Res. 5/1, Annex, paras. 111-113, 117-118, 123, 126-127.
[63] See Rhona K.M. Smith, *supra* note 50, p. 52.
[64] See CHR Decision 1993/110, "Situation in China", UN Doc. E/CN.4/DEC/1993/110 (11 March 1993); CHR Decision 1994/108, "Situation of Human Rights in China", UN Doc. E/CN.4/DEC/1994/108 (9 March 1994).
[65] See Sub-Commission Decision 1993/107, "Situation in Tibet", UN Doc. E/CN.4/SUB.2/DEC/1993/107 (20 August 1993).

China had also been a Member State of former CHR from 1982 to 2005.

4. Other UN Bodies

4.1 UN High Commissioner for Human Rights (UNHCHR)

The position of UN High Commissioner for Human Rights (UNHCHR or OHCHR) was created by the General Assembly Resolution 48/141 of December 1993[66] in order to perform its principal responsibility for UN human rights activities under the direction and authority of the Secretary-General. The duties of UNHCHR include coordinating the human rights promotion and protection activities throughout the UN system, providing secretarial and advisory services, technical and financial assistance in the field of human rights, and coordinating human rights education and public information programmes in the UN, etc. To secure respect for human rights and to enhance international cooperation for it, the High Commissioner also engages in a dialogue with relevant governments.[67]

Because the Office of UNHCHR is basically a supporting administrative organ specialising in human rights in the UN, not an implementing or monitoring body, it could have no direct relevance to the solution of the NKE question. Probably, the only available way for the solution through UNHCHR is for it to raise NKE related human rights issues when UNHCHR has a chance to carry on a dialogue with the Chinese authorities. If UNHCHR raises these issues in a rather moderate but firmly constant manner, and with the collaboration of UNHCR and also the UN Secretary-General, the dialogue may lead China to rethink its repatriation policy and other human rights issues relating to NKEs.

4.2 UN Children's Fund (UNICEF)

According to Article 45 of CRC89, the UN Children's Fund (UNICEF) may be

[66] UNGA Resolution 48/141, "High Commissioner for the promotion and protection of all human rights", UN Doc. A/RES/48/141 (20 December 1993).
[67] UNGA Res. 48/141, para. 4; Rhona K.M. Smith, *supra* note 50, pp. 61-62.

involved in the implementation process of CRC89 as follows:

> In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:
> (a) The specialized agencies, *the United Nations Children's Fund*, and other United Nations organs *shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention* as fall within the scope of their mandate. The Committee may invite the specialized agencies, *the United Nations Children's Fund* and other competent bodies as it may consider appropriate *to provide expert advice on the implementation of the Convention* in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, *the United Nations Children's Fund*, and other United Nations organs *to submit reports on the implementation of the Convention* in areas falling within the scope of their activities;
> (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, *the United Nations Children's Fund* and other competent bodies, any reports from States Parties that contain a request, or indicate a need, *for technical advice or assistance*, along with the Committee's observations and suggestions, if any, on these requests or indications;
> ..... (emphasis added).

Within this framework, UNICEF may raise related legal issues surrounding NKE children in an appropriate manner.[68]

4.3 UN General Assembly and Economic and Social Council

All the UN principal organs are generally involved, to some extent, in the protection of human rights. The UN General Assembly (UNGA) may be the most important body in this respect among them. Most formal reports on human rights are ultimately sent to the General Assembly, often by way of the Economic and Social Council (ECOSOC), including reports of the Human Rights Council and of all human rights monitoring committees. Based on these and other available information, the General Assembly can publicly discuss, and accordingly adopt its resolutions on, various

[68] See Rhona K.M. Smith, *supra* note 50, p. 143; Geraldine Van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers (1995), pp. 405-406. But note also that China is a Member State of the UNICEF Executive Board, its governing body.

human rights issues, either thematic or country specific.[69] As shown in previous chapters, UNGA has actually adopted resolutions on the human rights situation in North Korea since 2005.[70] The NKE case, in the context of China, may also be discussed in the UNGA forum and a related resolution may be adopted as well. However, for the same reasons as apply in the context of HRC resolutions,[71] this does not seem to be politically realistic, unless the basic conditions of international politics are fundamentally changed.

The UN Economic and Social Council has also played an important role in the human rights area.[72] Above all, the Commission on Human Rights was established as a functional commission of ECOSOC,[73] although CHR is now replaced by HRC, a subsidiary organ of UNGA. The Economic and Social Council also established the monitoring body for ICESCR (CESCR) by its Resolution 1985/17.[74] ECOSOC receives reports of human rights monitoring committees prior to UNGA. The Council can also adopt resolutions within its competence, including human rights matters, which are at times drafted and recommended by the Commission on the Status of Women (CSW), another functional commission of ECOSOC that still exists however.[75] Similarly to the previous cases, the last option may not be easily applicable to the NKE case. China continues to be a Member of ECOSOC until 2010 (renewable) with other permanent Member States of the Security Council,[76] and it is even a Member of CSW.

---

[69] See Arts. 10 & 13 of the UN Charter. See also Rhona K.M. Smith, *supra* note 50, pp. 49-50, 52-54.
[70] UNGA Resolution 60/173, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/RES/60/173 (16 December 2005); UNGA Resolution 61/174, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/RES/61/174 (19 December 2006); UNGA Resolution 62/167, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/RES/62/167 (18 December 2007).
[71] See section 3.4 of this chapter.
[72] See Art. 62 of the UN Charter. See also Rhona K.M. Smith, *supra* note 50, p. 56.
[73] See Art. 68 of the UN Charter.
[74] ECOSOC Resolution 1985/17 of 28 May 1985, "Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights", ECOSOC Official Records, 1985, Supplement No. 1, UN Doc. E/1985/85, p. 15.
[75] For CSW, see Rhona K.M. Smith, *supra* note 50, pp. 56-57; Javaid Rehman, International Human Rights Law: A Practical Approach, Longman (2003), p. 45; Joan Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures*, Transnational Publishers (2002), pp. 234-235. For more details of CSW, see Philip Alston (ed.), *supra* note 2, Ch. 7.
[76] See Philip Alston (ed.), *supra* note 2, pp. 108-109.

5. Non-Governmental Organisations (NGOs)

Outstanding developments of civil society such as vivid activities of various human rights NGOs are not just a domestic phenomenon, but also a widely observed one regionally and internationally. In relation to the international human rights system, human rights NGOs have dramatically increased both in number and in influence. They are doing their job in several ways.[77]

First of all, NGOs publicly issue their own observations and recommendations on various human rights issues and situations in the form of a regular or special report or in other simpler forms. This may generate popular awareness of or draw international attention to the relevant issue or situation, and may ultimately prompt an international investigation or report about it made by competent regional organs or the UN.[78] With respect to the NKE case, numerous human rights NGOs have publicly expressed their concern about the fate of NKEs and clearly asked China and other actors to react properly in conformity with their respective international human rights obligations. They are Amnesty International (AI),[79] Human Rights Watch (HRW),[80] Anti-Slavery International,[81] International Crisis Group,[82] Refugees International,[83] the U.S. Committee for Refugees and Immigrants,[84] and the U.S. Committee for Human Rights in North Korea,[85] etc.

---

[77] See generally Christian Tomuschat, *supra* note 7, pp. 231-240.
[78] See Rhona K.M. Smith, *supra* note 50, pp. 144-145.
[79] See AI, "Persecuting the Starving: The Plight of North Koreans Fleeing to China (Democratic People's Republic of Korea)", AI Index: ASA 24/003/2000 (15 December 2000); AI, "Crackdown on North Koreans must end (China)", AI Index: ASA 17/024/2002 (21 June 2002); AI, "Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)", AI Index: ASA 24/003/2004 (20 January 2004).
[80] See HRW, "The Invisible Exodus: North Koreans in the People's Republic of China (North Korea)", Vol. 14, No. 8 (C) (November 2002); HRW, "A Matter of Survival: The North Korean Government's Control of Food and the Risk of Hunger (North Korea)", Vol. 18, No. 3 (C) (May 2006); HRW, *Denied Status, Denied Education: Children of North Korean Women in China* (April 2008).
[81] See Norma Kang Muico, *An absence of choice: The sexual exploitation of North Korean women in China*, Anti-Slavery International (2005); Norma Kang Muico, *Forced Labour in North Korean Prison Camps*, Anti-Slavery International (2007).
[82] See International Crisis Group, "Perilous Journeys: The Plight of North Koreans in China and Beyond", Asia Report No. 122 (26 October 2006).
[83] See Joel R. Charny, *Acts of Betrayal: The Challenge of Protecting North Koreans in China*, Refugees International (April 2005).
[84] See, for example, U.S. Committee for Refugees and Immigrants, "Country Updates: China", *World Refugee Survey 2007* (2007), pp. 44-46.
[85] See David Hawk, *The Hidden Gulag: Exposing North Korea's Prison Camps*, U.S. Committee for Human Rights in North Korea (22 October 2003); Stephan Haggard & Marcus Noland, *Hunger and*

In the agora of the UN, many NGOs participate in formal discussions on human rights issues, as observers. The 'consultative status' must be attained for the discussions in ECOSOC,[86] and, as of October 2007, over 3,000 NGOs from around the world enjoy consultative status with ECOSOC. They can generally present written contribution and/or make statements to ECOSOC and its subsidiary bodies.[87] Pursuant to UNGA Resolution 60/251, the Human Rights Council under UNGA also grants NGOs basically the same consultative status as practised by its predecessor CHR under ECOSOC.[88] In addition, human rights NGOs, irrespective of the formal status, have actually participated in the monitoring process of human rights committees.[89] With respect to the NKE case, any interested NGOs may raise NKE-related issues, in particular, at the Universal Periodic Review system of HRC[90] and at the State periodic reporting system of treaty monitoring bodies. In both procedures, information and views provided by NGOs in connection with States' periodic reports are seriously considered by the Council and the Committees.

Last but not least, as discussed above, NGOs may use the complaint procedure of HRC and also send communications to mandate holders under the HRC special procedures. Some of the complaining procedures have already been utilised by either NKEs (unconfirmed) or NKE-related NGOs,[91] and may well attract more attention from the relevant NGOs in the future.

Human Rights: The Politics of Famine in North Korea, U.S. Committee for Human Rights in North Korea (2005); Stephan Haggard & Marcus Noland (eds.), *The North Korean Refugee Crisis: Human Rights and International Response*, U.S. Committee for Human Rights in North Korea (2006).

[86] See Art. 71 of the UN Charter; ECOSOC Resolution 1996/31 of 25 July 1996, "Consultative relationship between the United Nations and non-governmental organizations", ECOSOC Official Records, 1996, Supplement No. 1, UN Doc. E/1996/96, p. 53.

[87] There are 136 NGOs in 'general consultative status', 1,955 in 'special consultative status' and 960 on the 'Roster'. Only the former two kinds enjoy actual consultative status with some minor differences. ECOSOC, "List of non-governmental organizations in consultative status with the Economic and Social Council as of October 17, 2007", UN Doc. E/2007/INF/4 (17 October 2007).

[88] UNGA Res. 60/251, para. 11.

[89] Christian Tomuschat, *supra* note 7, pp. 150-152, 237; Thomas Buergenthal *et al.*, *International Human Rights in a Nutshell (3rd ed.)*, West Group (2002), pp. 408-410; Rhona K.M. Smith, *supra* note 50, pp. 144-145.

[90] See HRC Res. 5/1, Annex, paras. 3 (m), 15 (c), 18 (c) and 31.

[91] See section 3.2 of this chapter.

6. Asian Regional Human Rights System?

Europe, America and Africa each have their regional human rights system, including their own human rights commission or/and court mechanism. However, in Asia, there is no corresponding regional system which could be useful for the protection of human rights victims such as NKEs. If Asia is too wide for the regional system to be established, as regards not only geography but also culture, religion, politics and economy[92] - from the Western Asia or Middle East (Saudi Arabia, Iran, etc.), through the Southern Asia (India, Pakistan, etc.), the Central Asia (Kazakhstan, Uzbekistan, etc.), the Southeast Asia (Thailand, Vietnam, Indonesia, the Philippines, etc.) to the Eastern Asia or Far East (China, Korea, Japan, etc.), and maybe including Oceania (Australia, etc.) - a sub-regional organisation may be more realistic. However, it seems that even this faint hope will not be realised easily for the time being, given that there still exist various divergences also within many sub-regions: for example, in the Eastern Asia, although China, Mongolia, North and South Korea and Japan share some common culture, there are many internal conflicts of values, such as communism versus capitalism, dictatorship versus democracy, underdeveloped versus developing and developed economy, collectivism versus individualism, irreligion versus Buddhism and Christianity, cultural relativism versus universalism, economic rights versus political rights, and acute historic rivalries among one another.

7. Conclusion

This chapter has examined various protection mechanisms of international human rights law, in the context of the NKE case. Although the mechanisms are far from being perfect, the overall implementation system of international human rights law offers certain advantages, compared with that of other areas of international law generally. On the other hand, it is also notable that China has effectively blocked

---

[92] See Christian Tomuschat, *Human Rights: Between Idealism and Realism (2nd ed.)*, Oxford University Press (2008), pp. 36-37; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press (2002), pp. 82-83.

most complaint and inquiry procedures under the treaty monitoring system. This, however, shows not a weakness of international human rights law itself, but a weakness of international law in general. At any rate, there still remains the State periodic reporting system under the treaty mechanism. Furthermore, the special procedures and the complaint procedure of the former Commission on Human Rights are still maintained by the newly established Human Rights Council, and, additionally, the Universal Periodic Review system was also established together with HRC. Not only in the State reporting system under the treaty regime, but also in the special procedures under the HRC system, the NKE issues have actually been raised and discussed several times, as examined in this and the preceding chapter. NKEs and related NGOs, therefore, should be well informed of what kinds of procedures are available to them and how to use the protection mechanisms of international human rights law by themselves. In spite of the limits of the implementation mechanisms of international human rights law, the fact is that the mechanisms are more varied and effective than those of international refugee law and many other areas of international law, and all the available procedures need to be properly utilised by, or on behalf of, human rights victims including NKEs, at least until more advanced mechanisms are adopted in this area.

Chapter VII. Conclusion: Interaction and Co-action of International Refugee Law and Human Rights Law

During the course of the research for this thesis, more North Koreans have escaped from their hopeless country, been caught and sent back to North Korea by the Chinese police, and tortured, imprisoned and, in some cases, executed by the North Korean authorities after the forced return. Although the ultimate solution to the North Korean Escapee (NKE) crisis is to remove the root causes in North Korea - for instance, the improvement of food supply and the economic situation and also of political and human rights conditions there, the current situation of NKEs in the neigbouring countries such as China requires an urgent response by the international community in regard to both humanitarian assistance and legal protection. In this context, this study has focused on whether there are any applicable 'positive' norms under international law to protect the desperate NKEs, not only under refugee law but also human rights law. The detailed examination and analysis of these areas of international law conducted in this thesis is useful and necessary because most States in Eastern and Southeast Asia, which are closely connected to the NKE case, do not seem to be so familiar with the detailed contents of refugee law and human rights law applicable to asylum-seekers such as NKEs. Also the thesis offers insights of broader application to international refugee law more generally. As mentioned in the beginning, the exploration of human rights law issues, in addition to refugee law issues, in terms of the NKE case is the particular strength of this research and may also offer useful legal implications for other cases of asylum-seekers.

The first conclusion of this study is that NKEs can be recognised as political or Convention refugees. North Korea is one of the last remaining notorious Stalinist countries in the world. Even after the demise of the Cold War, it has tried to tighten its restrictive totalitarian policies towards its population. Because it observed the reunification of Germany (East and West) at that time,[1] North Korea still sticks to its

[1] The German reunification can be regarded as the absorption or incorporation of East Germany by

much more restrictive policies on the flow of information and domestic and overseas travels, than the former East Germany. Therefore, the German legal term 'Republikflucht (crime of flight from the republic)', which was developed and utilised during the Cold War era, is also still valid and meaningful in the context of the NKE case. This 'reviving' concept is not outside the legal definition of refugee under the 1951 Convention, but it can be properly interpreted as being connected with 'imputed' political opinions. The unique situation in North Korea also suggests that seemingly economic sufferings can be closely related to political conditions, for example the connection between food access and the 'hostile' class. This argument based on the 'hostile' class as a particular social group is another strong case for the refugee status of NKEs. There are also other possibilities to establish refugee status in relation to the family of defectors and victims of trafficking as particular social groups, and to religious persecution and ethnically-motivated forced abortions. In order to widen the protection possibilities under refugee law, this study additionally examined the concept of 'humanitarian refugee' and its applicability to the NKE case. In brief, it concluded that the expanded concept of refugee cannot be considered to be legally binding (universally) for now, and some related contents of humanitarian protection are actually grounded on human rights law, not refugee law itself. Therefore, the argument based on the humanitarian refugee concept does not seem to be viable in the legal discussion of NKEs. As asylum-seekers or prospective (Convention) refugees, NKEs are entitled to the protection deriving from the principle of *non-refoulement* (and also from several other provisions) under the 1951 Refugee Convention. Although the 1986 bilateral Protocol between China and North Korea actually hinders the application of the principle to the NKE case, these two treaties should, in principle, be interpreted harmoniously as not being in conflict with each other, and therefore the matter of extradition should also be interpreted as being included in the coverage of the principle of *non-refoulement*. However, the practice made by China has not followed this way, so the actual conflict between two treaties arose, and this has made the NKE case more difficult to resolve.

Human rights law appeared at this point in this research to compensate for the several deficiencies in refugee law. First, it is applicable irrespective of the refugee

---

West Germany.

status of NKEs, whether political refugees, humanitarian refugees, asylum-seekers, economic migrants or illegal immigrants: human rights are common to all human beings, naturally including NKEs. Secondly, human rights law may provide more strong, comprehensive and varied protection measures than refugee law. For instance, the principle of *non-refoulement* in the 1984 Convention (and also in ICCPR as a rule of customary law) provides more powerful and wider protection than that in the 1951 Convention, especially in that the former can be regarded as a rule of *jus cogens* that is a crucial factor in defeating the argument based on Chinese bilateral obligations with North Korea under the 1986 Protocol. There are also many other special human rights treaties specialising in areas such as racial discrimination, women and children. All these Conventions contain some useful provisions that can be invoked by NKEs. Thirdly, the various implementation mechanisms of human rights law are an apparent advantage. As examined in Part One, even when China, like now, denies any possibilities of refugee status of NKEs without any proper determination procedure and forcefully repatriates all of the caught NKEs to the high probability of persecution, there is no effective way to take action against it under international refugee law. Given the special situation of refugees and asylum-seekers, their home country can never be their protester or protector against their residing State. On the other hand, under international human rights law there are various implementing mechanisms securing the participation of the victims themselves and related NGOs. State reporting systems of several treaty monitoring bodies and the UN Human Rights Council can also be useful tools for the protection of NKEs.

While endeavouring to find out how to protect NKEs under international law, this study has led to some general observations on the positive interaction between refugee law and human rights law. Firstly, human rights law, as a 'complement', provides useful contents for refugee law in interpreting the latter's undefined or ambiguous language. For example, the term 'persecution' is not expressly defined under refugee law, so, to give more concrete content to it, reference needs to be made to human rights law.[2] Secondly, outstanding developments of human rights law since the adoption of the 1951 Convention have actually widened the scope of the refugee

[2] See generally Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation*, Cambridge University Press (2007), 2. A human rights framework for interpreting the Refugee Convention.

definition under the 1951 regime. In interpreting provisions in the 1951 Convention, related human rights developments should be properly considered.[3] In this vein, 'membership of a particular social group' has been interpreted as including more varied groups than before according to these developments. For instance, the recognition of the female victims of human trafficking as a particular social group can be regarded as a result of the influence of human rights law developments on gender-related exploitation and trafficking.[4] Thirdly, also outside the Geneva Convention regime, human rights law supports its sister law. The extended mandate of UNHCR, the 1984 Cartagena Declaration and the 2001 EU Directive on Temporary Protection (plus the 2002 ILA Guidelines on it) all include, within their protection coverage, people at risk as a result of 'systematic or widespread violations of their human rights'. To find out the concrete contents of the so-called 'humanitarian refugees', proper reference to human rights law should inevitably be made.[5] On the other hand, human rights law can also function independently as an 'alternative' to refugee law. As discussed above, the principle of *non-refoulement* in human rights law can offer vital protection to refugees or asylum-seekers, independent of refugee law. Also, 'subsidiary or humanitarian protection' in many domestic laws and the 2004 EU Council Directive on Qualification for International Protection is, in principle, based on the principle of *non-refoulement* under human rights law, although it is normally located in the asylum (or refugee) section. In addition, many specialised human rights treaties contain useful provisions applicable to refugees or asylum-seekers. Finally, as discussed, the implementing mechanisms of human rights law not only complement or substitute for those of refugee law, but also strengthen the general protection system for refugees and asylum-seekers under international law to a considerable degree.

Contrary to the structural division of this study into international refugee law (Part One) and international human rights law (Part Two), which is required for effective research, the final conclusion of this study is that, taking into account the positive 'interaction' between refugee law and human rights law just stated above,

---

[3] See Art. 31.3 (c) of VCLT69.
[4] See generally Michelle Foster, *supra* note 1, Ch. 2.
[5] In contrast, refugee law has also influenced human rights law in some respects, for example, regarding the principle of *non-refoulement* which originated from refugee law.

the 'co-action' of both laws should be pursued and supported for the protection of refugees and asylum-seekers such as NKEs.[6] Whether as a complement or an alternative, international human rights law deserves more attention in terms of the protection of asylum-seekers. And when international refugee law and human rights law try to fulfil their respective promises 'simultaneously', another synergy effect may be gained relating to both refugee protection and human rights protection. In the longer term, it may be necessary for refugee law itself to be strengthened more effectively and for the relationship between refugee law and human rights law to be arranged more clearly.[7] However, at least for the time being, the co-action of international refugee law and human rights law will be the most effective way under international law to protect the most vulnerable people in the world such as refugees, asylum-seekers and refugee-like escapees, and this is also applicable to the case of the desperate North Koreans currently hiding and suffering in adjacent countries.

[6] In this case, the principle of the 'more favourable provision' must be applied. See note 134 of Ch. V.
[7] International refugee law may be considered *lex specialis* of international human rights law. See Jane McAdam, *Complementary Protection in International Refugee Law*, Oxford University Press (2007), pp. 5, 29-33, 209. Cf. For the relationship between international humanitarian law and human rights law, see Anthony E. Cassimatis, "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", *International & Comparative Law Quarterly (ICLQ)*, Vol. 56, Part 3 (2007), pp. 623-639; Alexander Orakhelashvili, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?", *European Journal of International Law (EJIL)*, Vol. 19, No. 1 (2008), pp. 161-182.

TABLE OF CASES

International Courts & Committees

Permanent Court of International Justice

Nationality Decrees issued in Tunis and Morocco, Advisory Opinion, P.C.I.J., Series B, No. 4 (1923), p. 7. 80n

International Court of Justice

Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 174. 134n

Asylum (Colombia v. Peru), Judgment, I.C.J. Reports 1950, p. 266. 132n

Haya de la Torre (Colombia v. Peru), Judgment, I.C.J. Reports 1951, p. 71. 133n

Nottebohm (Liechtenstein v. Guatemala), Second Phase, Judgment, I.C.J. Reports 1955, p. 4. 80-81

North Sea Continental Shelf (Germany v. Denmark & Netherlands), Judgment, I.C.J. Reports 1969, p. 3. 104n

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Anto Furundžija, Judgement of 10 December 1998, Case No. IT-95-17/1-T, Trial Chamber II. 150-151, 155n

Human Rights Committee

A.R.J. v. Australia, Communication No. 692/1996, UN Doc. CCPR/C/60/D/692/1996 (11 August 1997). 166n

Roger Judge v. Canada, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (13 August 2003). 165-166

Mansour Ahani v. Canada, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (15 June 2004). 165n, 166n

Committee against Torture

Balabou Mutombo v. Switzerland, Communication No. 13/1993, UN Doc. CAT/C/12/D/013/1993 (27 April 1994). 146

B.S. v. Canada, Communication No. 166/2000, UN Doc. CAT/C/27/D/166/2000 (14

November 2001). 142

Regional Court

European Court of Human Rights

Soering v. U.K., Case No. 1/1989/161/217, Judgment of 7 July 1989, 11 EHRR 439. 142n

Ahmed v. Austria, Case No. 71/1995/577/663, Judgment of 17 December 1996, 24 EHRR 278. 143n

National Courts

Canada

Roberto Martinez Castaneda v. Canada (MEI) (1993), 69 F.T.R. 133 (F.C.T.D.). 54n, 65

Re Song Dae Ri, Immigration & Refugee Board of Canada (Refugee Protection Division), 2003 WL 17583 (2003 CarswellNat 4527), 12 September 2003. 69, 78, 84n

Germany (including West Germany)

Bundesverwaltungsgericht, 26 October 1971, I C 30/68, BVerwGE 39, 27 (West Germany). 54, 56n

Bundesverwaltungsgericht, 4 December 1990, 9 C 93.90, BVerwGE 87, 187. 63n

Bundesverwaltungsgericht, 29 September 2005, BVerwG 1 B 98.05, VGH A 8 S 139/05. 80n

Bayerischer Verwaltungsgerichtshof, 1991, Az. 24 B 91.31349. 63n

Verwaltungsgerichtshof Baden-Württemberg, 31 August 1992, A 16 S 1055/92. 56, 62

Verwaltungsgerichtshof Baden-Württemberg, 14 January 1994, A 16 S 1748/93, InfAuslR 1994, 161. 57, 63

Verwaltungsgerichtshof Baden-Württemberg, 3 June 2005, A 8 S 199/04. 80, 84n

Republic of Korea (South Korea)

Supreme Court of Korea, 12 November 1996, 96Nu1221, Collection of Supreme Court Decisions, Vol. 44, No. 2 (Special), p. 703. 81

Constitutional Court of Korea, 31 August 2000, 97Hun-Ka12, 12-2 KCCR 167. 82

United Kingdom

R v. Evans and others, ex parte Pinochet; R v. Bartle and others, ex parte Pinochet, House of Lords, [2000] 1 A.C. 147, 24 March 1999. 150n

R v. Secretary of State for the Home Department, ex parte Jensath, Queen's Bench Division, [2000] Imm AR 330, 5 November 1999 (England/Wales). 54n

R v. Secretary of State for the Home Department, ex parte Velpiyasslan, Court of Appeal (Civil Division), unreported (transcript available at LexisNexis), 31 March 2000 (England/Wales). 54n

R v. Immigration Officer at Prague Airport, ex parte European Roma Rights Centre and others, House of Lords, [2004] UKHL 55, 9 December 2004. 122

United States

Matter of Janus and Janek, 12 I&N Dec. 866 (BIA 1968). 63

Francisco Lucas Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996). 54-56, 62-63, 65

Fengchu Chang v. INS, 119 F.3d 1055 (3rd Cir. 1997). 55n

Naseem Salman Al-Harbi v. INS, 242 F.3d 882 (9th Cir. 2001). 55n

BIBLIOGRAPHY

1. Books

Akehurst, Michael, *A Modern Introduction to International Law (6th ed.)*, Allen & Unwin (1987).

Aleinikoff, T. Alexander & Chetail, Vincent (eds.), *Migration and International Legal Norms*, T.M.C. Asser Press (The Hague, 2003).

Aust, Anthony, *Handbook of International Law*, Cambridge University Press (2005).

_____, *Modern Treaty Law and Practice*, Cambridge University Press (2000).

_____, *Modern Treaty Law and Practice (2nd ed.)*, Cambridge University Press (2007).

Alfredsson, Gudmundur & Eide, Asbjørn (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers (1999).

Alston, Philip (ed.), *The United Nations and Human Rights: A Critical Appraisal*, Oxford University Press (1992).

Alston, Philip & Crawford, James (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press (2000).

Boulesbaa, Ahcene, *The U.N. Convention on Torture and the Prospects for Enforcement*, Martinus Nijhoff Publishers (1999).

Boyle, Alan & Chinkin, Christine, *The Making of International Law*, Oxford University Press (2007).

Brownlie, Ian, *Principles of Public International Law (5th ed.)*, Oxford University Press (1998).

_____, *Principles of Public International Law (6th ed.)*, Oxford University Press (2003).

_____, *Principles of Public International Law (7th ed.)*, Oxford University Press (2008).

Brownlie, Ian & Goodwin-Gill, Guy S. (eds.), *Basic Documents on Human Rights (4th ed.)*, Oxford University Press (2002).

Buergenthal, Thomas *et al.*, *International Human Rights in a Nutshell (3rd ed.)*, West Group (2002).

Burgers, J. Herman & Danelius, Hans, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel,*

Inhuman or Degrading Treatment or Punishment, Martinus Nijhoff Publishers (1988).

Carlier, Jean-Yves *et al.* (eds.), *Who is a Refugee?: A Comparative Case Law Study*, Kluwer Law International (1997).

Chimni, B.S. (ed.), *International Refugee Law: A Reader*, Sage Publications (New Delhi, 2000).

Cholewinski, Ryszard *et al.* (eds.), *International Migration Law: Developing Paradigms and Key Challenges*, T.M.C. Asser Press (The Hague, 2007).

Chung, Il-Young & Park, Choon-Ho (eds.), *Issues on Korean Chinese and North Korean Refugees*, Baeksang Foundation (Seoul, 2003) (in Korean).

Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press (2002).

Eide, Asbjørn *et al.* (eds.), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publishers (1995).

Evans, Malcolm D. (ed.), *International Law (2nd ed.)*, Oxford University Press (2006).

Feller, Erika *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection*, Cambridge University Press (2003).

Fitzpatrick, Joan (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures*, Transnational Publishers (2002).

Foster, Michelle, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge University Press (2007).

Gilbert, Geoff, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, Martinus Nijhoff Publishers (1998).

Gomian, Donna, *Short guide to the European Convention on Human Rights (2nd ed.)*, Council of Europe Publishing (1998).

Goodwin-Gill, Guy S., *International Law and the Movement of Persons between States*, Oxford University Press (1978).

_____, *The Refugee in International Law*, Oxford University Press (1983).

_____, *The Refugee in International Law (2nd ed.)*, Oxford University Press (1996).

Goodwin-Gill, Guy S. & McAdam, Jane, *The Refugee in International Law (3rd ed.)*, Oxford University Press (2007).

Gowlland-Debbas, Vera (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, Martinus Nijhoff Publishers (1996).

Grahl-Madsen, Atle, *Commentary on the Refugee Convention 1951: Articles 2-11, 13-37*, Division of International Protection of the UNHCR (1997).

_____, *The Status of Refugees in International Law*, Vol. I: Refugee Character, A.W.Sijthoff (Leyden, 1966)

_____, *The Status of Refugees in International Law*, Vol. II: Asylum, Entry and Sojourn, A.W.Sijthoff (Leiden, 1972).

_____, *Territorial Asylum*, Oceana Publications (1980).

Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, Finnish Lawyers' Publishing Company (Helsinki, 1988).

Hannum, Hurst, *The Right to Leave and Return in International Law and Practice*, Martinus Nijhoff Publishers (1987).

Hannum, Hurst (ed.), *Guide to International Human Rights Practice (3rd ed.)*, Transnational Publishers (1999)

_____, *Guide to International Human Rights Practice (4th ed.)*, Transnational Publishers (2004)

Haggard, Stephan & Noland, Marcus, *Famine in North Korea: Markets, Aid, and Reform*, Columbia University Press (2007).

Harvey, Colin, *Seeking Asylum in the UK: Problems and Prospects*, Butterworths (2000).

Hathaway, James C., *The Law of Refugee Status*, Butterworths Canada (1991).

_____, *The Rights of Refugees under International Law*, Cambridge University Press (2005).

Hathaway, James C. & Dent, John A., *Refugee Rights: Report on a Comparative Survey*, York Lanes Press (Toronto, 1995).

Hegarty, Angela & Leonard, Siobhan (eds.), *A Human Rights: An Agenda for the 21st Century*, Cavendish Publishing (1999).

Henckaerts, Jean-Marie, *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff Publishers (1995).

Henkin, Louis *et al.*, *Human Rights*, Foundation Press (1999).

Henkin, Louis & Hargrove, John Lawrence (eds.), *Human Rights: An Agenda for the Next Century*, The American Society of International Law (1994).

Jackson, Ivor C., *The Refugee Concept in Group Situations*, Martinus Nijhoff Publishers (1999).

Janis, Mark W. *et al.*, *European Human Rights Law: Text and Materials*, Oxford University Press (1995).

Jayawickrama, Nihal, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press (2002).

Jennings, Robert & Watts, Arthur (eds.), *Oppenheim's International Law (9th ed.)*, Vol. I: Peace, Longman (1992).

Joseph, Sarah *et al.* (eds.), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (2nd ed.)*, Oxford University Press (2004).

Kang, Chol-hwan & Rigoulot, Pierre (translated by Yair Reiner), *Aquariums of Pyongyang: Ten Years in the North Korean Gulag*, Basic Books (New York, 2001).

Klabbers, Jan & Lefeber, René (eds.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, Kluwer Law International (1998).

Kourula, Pirkko, *Broadening the Edges: Refugee Definition and International Protection Revisited*, Martinus Nijhoff Publishers (1997).

Malanczuk, Peter, *Akehurst's Modern Introduction to International Law (7th Revised ed.)*, Routledge (1997).

Martin, David A. (ed.), *The New Asylum Seekers: Refugee Law in the 1980s*, Martinus Nijhoff Publishers (1988).

Meron, Theodor (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford University Press (1984).

Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, Oxford University Press (1989).

McAdam, Jane, *Complementary Protection in International Refugee Law*, Oxford University Press (2007).

McGoldrick, Dominic, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford University Press (1994).

Muntarbhorn, Vitit, *The Status of Refugees in Asia*, Oxford University Press (1992).

Nash, Alan E. (ed.), *Human Rights and the Protection of Refugees under International Law: Proceedings of a conference held in Montreal November 29 - December 2, 1987*, Canadian Human Rights Foundation / The Institute for Research on Public Policy (1988).

Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N. P. Engel Publisher (Kehl am Rhein, 1993).

_____, *U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd revised ed.)*, N. P. Engel Publisher (Kehl, 2005).

Nowak, Manfred & McArthur, Elizabeth, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press (2008).

Nicholson, Frances & Twomey, Patrick (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press (1999).

O'Connell, D.P., *International Law (2nd ed.)*, Vol. 2, Stevens & Sons (1970).

Orakhelashvili, Alexander, *Peremptory Norms in International Law*, Oxford University Press (2006).

Pak, Chi Young, *Korea and the United Nations*, Kluwer Law International (2000).

Parliamentary Assembly, *Asylum: Debates*, Council of Europe Publishing (1995).

Pauwelyn, Joost, *Conflict of Norms in Public International Law, How WTO Law Relates to other Rules of International Law*, Cambridge University Press (2003).

Perruchoud, Richard & Tömölová, Katarína (eds.), *Compendium of International Migration Law Instruments*, International Organization of Migration & T.M.C. Asser Press (The Hague, 2007).

Plender, Richard, *International Migration Law (Revised 2nd ed.)*, Martinus Nijhoff Publishers (1988).

Provost, René, *International Human Rights and Humanitarian Law*, Cambridge University Press (2002).

Ramcharan, B.G. (ed.), *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials*, Martinus Nijhoff Publishers (2005).

Rehman, Javaid, *International Human Rights Law: A Practical Approach*, Longman (2003).

Reuter, Paul (translated by José Mico & Peter Haggenmacher), *Introduction to the Law of Treaties*, Pinter Publishers (London, 1989).

_____, *Introduction to the Law of Treaties (2nd English ed.)*, Kegan Paul International (London, 1995).

Robertson, A.H. & Merrills, J.G., *Human Rights in the World: An introduction to the study of the international protection of human rights (4th ed.)*, Manchester University Press (1996).

Robinson, Nehemiah, *Convention relating to the Status of Refugees: Its History, Significance and Contents*, Institute of Jewish Affairs (New York, 1952).

Sadat-Akhavi, Seyed Ali, *Methods of Resolving Conflicts between Treaties*, Martinus Nijhoff Publishers (2003).

Shaw, Malcolm N., *International Law (5th ed.)*, Cambridge University Press (2003).

Shelton, Dinah, *Remedies in International Human Rights Law*, Oxford University Press (1999).

_____, *Remedies in International Human Rights Law (2nd ed.)*, Oxford University Press (2005).

Simma, Bruno (ed.), *The Charter of the United Nations: A Commentary (2nd ed.)*, 2 Vols., Oxford University Press (2002).

Sinclair, Ian, *The Vienna Convention on the Law of Treaties (2nd ed.)*, Manchester University Press (1984).

Sinha, S. Prakash, *Asylum and International Law*, Martinus Nijhoff (1971).

Sitaropoulos, Nicholas, *Judicial Interpretation of Refugee Status: In Search of a Principled Methodology Based on a Critical Comparative Analysis, with Special Reference to Contemporary British, French and German Jurisprudence*, Ant. N. Sakkoulas Publishers (Athens, 1999).

Smith, Rhona K.M., *Textbook on International Human Rights (2nd ed.)*, Oxford University Press (2005).

_____, *Textbook on International Human Rights (3rd ed.)*, Oxford University Press (2007).

_____, *Texts & Materials on International Human Rights*, Routledge-Cavendish (2007).

Steiner, Henry J. & Alston, Philip, *International Human Rights in Context: Law, Politics, Morals (2nd ed.)*, Oxford University Press (2000).

Steiner, Henry J. *et al.*, *International Human Rights in Context: Law, Politics, Morals (3rd ed.)*, Oxford University Press (2008).

Takkenberg, Lex, *The Status of Palestinian Refugees in International Law*, Oxford University Press (1998).

Tomuschat, Christian, *Human Rights: Between Idealism and Realism*, Oxford University Press (2003).

_____, *Human Rights: Between Idealism and Realism (2nd ed.)*, Oxford University Press (2008).

United Nations High Commissioner for Refugees, *The State of the World's Refugees 1997-98: A Humanitarian Agenda*, Oxford University Press (1997).

Van Bueren, Geraldine, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers (1995).

von Sternberg, Mark R., *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared*, Martinus Nijhoff Publishers (2002).

Vernant, Jacques, *The Refugee in the Post-War World*, George Allen & Unwin (1953).

Wallace, Rebecca M.M., *Refugees and Asylum: A Community Perspective*, Butterworths (1996).

_____, *Companion to the European Convention on Human Rights*, Vol. I: The Convention, Trenton Publishing (1999).

_____, *Companion to the European Convention on Human Rights*, Vol. II: The Cases, Trenton Publishing (1999).

_____, *International Human Rights: Text and Materials (2nd ed.)*, Sweet & Maxwell (2001).

_____, *International Law (5th ed.)*, Sweet & Maxwell (2005).

Weis, Paul (ed.), *The Refugee Convention, 1951: The Travaux Preparatoires Analysed, with a Commentary by the late Dr Paul Weis*, Cambridge University Press (1995).

Wolfrum, Rüdiger & Philipp, Christiane (eds.), *United Nations: Law, Policies and Practice (New, Revised English ed.)*, 2 Vols., Martinus Nijhoff Publishers (1995).

Won, Jae Chun (ed.), *A New Phase of North Korean Refugees Issues: Problems and Solutions*, Korea Institute for Maritime Strategy (Seoul, 2003).

2. Articles

Allain, Jean, "The *jus cogens* Nature of *non-refoulement*", *International Journal of Refugee Law*, Vol. 13, No. 4 (2002), pp. 533-558.

Andrysek, Oldrich, "Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures", *International Journal of Refugee Law*, Vol. 9, No. 3 (1997), pp. 392-414.

Arboleda, Eduardo, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism", *International Journal of Refugee Law*, Vol. 3, No. 2 (1991), pp. 185-207.

Aust, Anthony, "The procedures and practical problems of MOUs, confidential treaties and other special agreements", *The Trend and Practice of International Law*, Vol. 3, No. 1, Treaties Bureau, Ministry of Foreign Affairs and Trade (Republic of Korea) (2004), pp. 119-122.

Bernhardt, Rudolf, "Customary International Law", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I, Elsevier Science Publishers (1992), pp. 898-905.

Beyani, Chaloka, "Introduction", in Paul Weis (ed.), *The Refugee Convention, 1951:*

The Travaux Preparatoires Analysed, with a Commentary by the late Dr Paul Weis, Cambridge University Press (1995), pp. xiii-xix.

Buckingham, Donald E., "A Recipe for Change: Towards an Integrated Approach to Food under International Law", *Pace University Law Review*, Vol. 6 (1994), pp. 285-321.

Cassimatis, Anthony E., "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", *International & Comparative Law Quarterly*, Vol. 56, Part 3 (2007), pp. 623-639.

Chan, Elim & Schloenhardt Andreas, "North Korean Refugees and International Refugee Law", *International Journal of Refugee Law*, Vol. 19, No. 2 (2007), pp. 215-245.

Choi, Hee-deok, "The Legal Status of North Korean Escapees in China and Russia with Special Emphasis on the Problem of Refugee Status", MA (in Legal Studies) thesis, Department of Law, University of Bristol (April 2001).

Clarance, William, "Field Strategy for the Protection of Human Rights", *International Journal of Refugee Law*, Vol. 9, No. 2 (1997), pp. 229-254.

Cooper, Jessica B., "Environmental Refugees: Meeting the Requirements of the Refugee Definition", *New York University Environmental Law Journal*, Vol. 6 (1998), pp. 480-529.

Demir, Jenna Shearer, "The trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?", New Issues in Refugee Research: Working Paper No. 80, UNHCR (March 2003).

Dugard, John & Van den Wyngaert, Christine, "Reconciling Extradition with Human Rights", *American Journal of International Law*, Vol. 92, No. 2 (1998), pp. 187-212.

Edwards, Alice, "Human Rights, Refugees, and The Right 'To Enjoy' Asylum", *International Journal of Refugee Law*, Vol. 17, No. 2 (2005), pp. 293-330.

Fitzpatrick, Joan, "Taking Stock: The Refugee Convention at 50", *World Refugee Survey 2001*, U.S. Committee for Refugees (2001) <http://www.refugees.org/world/articles/takingstock_wrs01.htm>.

Fong, Chooi, "Some Legal Aspects of the Search for Admission into other States of Persons leaving the Indo-Chinese Peninsula in Small Boats", *The British Year Book of International Law*, 1981: Vol. LII, Oxford University Press (1982), pp. 53-108.

Forcese, Craig, "The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'", *European Journal of International Law*, Vol. 17, No. 2 (2006), pp. 369-394.

Fullerton, Maryellen, "The International and National Protection of Refugees", in Hurst Hannum (ed.), *Guide to International Human Rights Practice (3rd ed.)*, Transnational Publishers (1999), pp. 227-245.

Gil-Bazo, María-Teresa, "Refugee status, subsidiary protection and the right to be granted asylum under EC law", New Issues in Refugee Research: Research Paper No. 136, UNHCR (November 2006).

Goodwin-Gill, Guy S., "Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute", in Guy S. Goodwin-Gill & Stefan Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, pp. 199-223.

Gorlick, Brian, "Human rights and refugees: enhancing protection through international human rights law", New Issues in Refugee Research: Working Paper No. 30, UNHCR (October 2000).

_____, "Common burdens and standards: legal elements in assessing claims to refugee status", New Issues in Refugee Research: Working Paper No. 68, UNHCR (October 2002).

Grahl-Madsen, Atle, "International Refugee Law Today and Tomorrow", *Archiv des Völkerrechts*, 20 Band, 4 Heft, J.C.B. Mohr (Paul Siebeck) (Tübingen, 1982), pp. 411-467.

Grahl-Madsen, Atle & Macalister-Smith, Peter, "Refugees, United Nations High Commissioner", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, Elsevier Science (2000), pp. 78-91.

Hailbronner, Kay, "*Nonrefoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?", in Martin, David A. (ed.), *The New Asylum Seekers: Refugee Law in the 1980s*, Martinus Nijhoff Publishers (1988), pp. 123-158.

Harvey, Colin J., "Dissident Voices: Refugees, Human Rights and Asylum in Europe", *Social and Legal Studies: An International Journal*, Vol. 9, No. 3 (2000), pp. 367-396.

Hathaway, James C. & Harvey, Colin J., "Framing Refugee Protection in the New World Disorder", *Cornell International Law Journal*, Vol. 34, No. 1 (2001), pp. 257-320.

Heckman, Gerald P., "Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?", *International Journal of Refugee Law*, Vol. 15, No. 2 (2003), pp. 212-253.

Helton, Arthur C., "Harmonizing Political Asylum and International Extradition: Avoiding Analytical Cacophony", *Georgetown Immigration Law Journal*,

Vol. 1 (1986), pp. 457-494.

_____, "Refugees: An Agenda for Reform", in Louis Henkin & John Lawrence Hargrove (eds.), *Human Rights: An Agenda for the Next Century*, The American Society of International Law (1994), pp. 49-72.

Higgins, Rosalyn, "A Babel of Judicial Voices? Ruminations from the Bench", *International & Comparative Law Quarterly*, Vol. 55, Part 4 (2006), pp. 791-804.

Hope of Craighead, "Asylum Seekers and Immigration", *The Juridical Review*, 2004, Part 1, W. Sweet & Son Ltd. (2004), pp. 45-54.

Jaeger, Gilbert, "On the history of the international protection of refugees", *International Review of the Red Cross*, Vol. 83, No. 843 (2001), pp. 727-737.

Jahn, Eberhard, "Refugees", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, Elsevier Science (2000), pp. 72-76.

Jung, Kyung-Soo, "The Reform of the UN Human Rights System: Problems and Prospects", *Korea International Law Review*, Vol. 24 (Seoul, 2006), pp. 1-22 (in Korean).

Kagan, Michael, "The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination", *International Journal of Refugee Law*, Vol. 18, No. 1 (2006), pp. 1-29.

Kälin, Walter, "Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond", in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), pp. 613-666.

Kapferer, Sibylle, "The Interface between Extradition and Asylum", Legal and Protection Policy Research Series (PPLA/2003/05), UNHCR (November 2003).

Kearns, Anthony Paul, "The Right to Food Exists via Customary International Law", *Suffolk Transnational Law Review*, Vol. 22 (1998), pp. 223-257.

Khan, Sadruddin Aga, "Legal Problems relating to Refugees and Displaced Persons", *Recueil des Cours (Collected Courses of the Hague Academy of International Law)*, 1976-I: Tome 149 de la collection (1977), pp. 287-352.

Kim, Chan-kiu, "Forceful repatriation of NKEs in violation of international law", *Korea International Law Review*, Vol. 25 (Seoul, 2007), pp. 212-214 (in Korean).

Kim, Il-soo, "Freedom of residence and movement and North Korean crime of escape from the State", *North Korea's Law and Practice Review*, Vol. 2, North Korea Law Society (Seoul, 1998), pp. 71-82 (in Korean).

Kim, Tae Chun, "The Responses to Situations of a Mass Influx of Residents Escaping from North Korea in the Context of International Law", *Korean Yearbook of International Law*, Vol. 2, International Law Association Korean Branch (1998), pp. 199-242.

Kjærum, Morten, "Refugee Protection between State Interests and Human Rights: Where is Europe Heading?", *Human Rights Quarterly*, Vol. 24, Johns Hopkins University Press (2002), pp. 513-536.

Lambert, Hélène, "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", *International Journal of Refugee Law*, Vol. 11, No. 3 (1999), pp. 427-450.

_____, "The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law", *International & Comparative Law Quarterly*, Vol. 55, Part 1 (2006), pp. 161-192.

Lauterpacht, Elihu & Bethlehem, Daniel, "The scope and content of the principle of *non-refoulement*: Opinion", in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), pp. 87-177.

Lee, Eric Yong-Joong, "National and International Legal Concerns regarding Recent North Korean Escapees", *International Journal of Refugee Law*, Vol. 13, No. 1/2 (2001), pp. 142-152.

Lee, Shin-wha, "Rescuing North Korean Defectors", *Korea Focus: On Current Topics*, Vol. 10, No. 2, Korea Foundation (2002), pp. 13-15.

Lewis, Corinne, "UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution", *International Journal of Refugee Law*, Vol. 17, No. 1 (2005), pp. 67-90.

Lillich, Richard B., "Civil Rigths", in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford University Press (1984), pp. 115-170.

Mandal, Ruma, "Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")", Legal and Protection Policy Research Series (PPLA/2005/02), UNHCR (June 2005).

Marx, Reinhard, "The Criteria for Determining Refugee Status in the Federal Republic of Germany", *International Journal of Refugee Law*, Vol. 4, No. 2 (1992), pp. 151-170.

McAdam, Jane, "Complementary protection and beyond: How states deal with human rights protection", New Issues in Refugee Research: Working Paper No. 118, UNHCR (August 1995).

Neaderland, Benjamin, "Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis", *Stanford Journal of International Law*, Vol. 40 (2004), pp. 143-177.

Noll, Gregor, "Seeking Asylum at Embassies: A Right to Entry under International Law?", *International Journal of Refugee Law*, Vol. 17, No. 3 (2005), pp. 542-573.

Okojie, Paul, "Migration and the Refugee Question", in Angela Hegarty & Siobhan Leonard (eds.), *A Human Rights: An Agenda for the 21st Century*, Cavendish Publishing (1999), pp. 379-400.

Orakhelashvili, Alexander, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?", *European Journal of International Law*, Vol. 19, No. 1 (2008), pp. 161-182.

Park, Choon-ho, "Legal Status of North Korean Loggers", *Korea Focus: On Current Topics*, Vol. 2, No. 3, Korea Foundation (1994), pp. 133-135.

Park, Ki-Gab, "Protection Measures for North Korean Escapees in International Human Rights Law", in Il-Young Chung & Choon-Ho Park (eds.), *Issues on Korean Chinese and North Korean Refugees*, Baeksang Foundation (Seoul, 2003) (in Korean).

Piotrowicz, Ryszard, "The UNHCR's Guidelines on Human Trafficking", *International Journal of Refugee Law*, Vol. 20, No. 2 (2008), pp. 242-252.

Plender, Richard & Mole, Nuala, "Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments", in Francis Nicholson & Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press (1999), pp. 81-105.

Rankin, Micah Bond, "Extending the limits or narrowing the scope?: Deconstructing the OAU refugee definition thirty years on", New Issues in Refugee Research: Working Paper No. 113, UNHCR (April 2005).

Rutinwa, Bonaventure, "Prima facie status and refugee protection", New Issues in Refugee Research: Working Paper No. 69, UNHCR (October 2002).

Simma, Bruno & Alston, Philip, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles", *The Australian Year Book of International Law*, 1988-1989: Vol. 12 (1992), pp. 82-108.

Starke, J.G., "The Concept of Opposability in International Law", *The Australian Year Book of International Law*, 1968-1969: Vol. 4, Butterworths (Sydney, 1971), pp. 1-4.

Stoltenberg, Thorvald, "Human Rights and Refugees", in Asbjørn Eide & Jan

Helgesen (eds.), *The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address: Essays in Honour of Torkel Opsahl*, Norwegian University Press (1991), pp. 145-154.

Storey, Hugo & Wallace, Rebecca, "War and Peace in Refugee Law Jurisprudence", *American Journal of International Law*, Vol. 95, No. 2 (2001), pp. 349-366.

Sztucki, Jerzy, "Who is a refugee? The Convention definition: universal or obsolete?", in Francis Nicholson & Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press (1999), pp. 55-80.

Tierney, Stephen, "Beyond Cultural Relativism: Re-thinking the Human Rights Debate", *The Juridical Review*, 2004, Part 1, W. Sweet & Son Ltd. (2004), pp. 75-102.

Trindade, A.A.C., "Protection of the Environment and International Refugee Law", in A.A.C. Trindade (ed.), *Human Rights, Sustainable Development and the Environment (2nd ed.)*, Instituto Interamericano de Derechos Humanos & Banco Interamericano de Desarrollo (1995), pp. 153-158.

Tsamenyi, B. Martin, "The "Boat People": Are They Refugees?", *Human Rights Quarterly*, Vol. 5, Johns Hopkins University Press (1983), pp. 348-373.

Türk, Volker, "The role of UNHCR in the development of international refugee law", in Frances Nicholson & Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press (1999), pp. 153-174.

Türk, Volker & Nicholson, Frances, "Refugee protection in international law: an overall perspective", in Erika Feller *et al.* (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press (2003), pp. 3-45.

Vranes, Erich, "The Definition of 'Norm Conflict' in International Law and Legal Theory", *European Journal of International Law*, Vol. 17, No. 2 (2006), pp. 395-418.

Wallace, Rebecca M.M., "Refugee Law - particular social group - family as particular social group - membership thereof - female genital mutilation: *Secretary of State for the Home Department (Respondent) v K (FC) (Appellant); Fornah (FC) (Appellant) v Secretary of State for the Home Departmetn (Respondent) Appellate Committee 2006 UKHL 46*", *South African Yearbook of International Law*, 2006: Vol. 31.

Weissbrodt, David & Hörtreiter, Isabel, "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties", *Buffalo Human Rights Law Review*, Vol. 5 (1999), pp. 1-73.

Zieck, Marjoleine, "UNHCR's 'Special Agreements'", in Jan Klabbers & René Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, Kluwer Law International (1998), pp. 171-187.

"North Koreans Seeking Asylum at Diplomatic Compounds in China", *American Journal of International Law*, Vol. 96, No. 3 (2002), pp. 718-719.

3. UN Documents

United Nations, *Treaty Series* (also League of Nations, *Treaty Series*).

United Nations General Assembly

- *Resolution*, "International Bill of Human Rights: A. Universal Declaration of Human Rights", UN Doc. A/RES/217A (III) (10 December 1948).
- *Resolution*, "Refugees and Stateless Persons", UN Doc. A/RES/319A (IV) (3 December 1949).
- *Resolution*, "Statute of the Office of the United Nations High Commissioner for Refugees", UN Doc. A/RES/428 (V) (14 December 1950), Annex.
- *Resolution*, "Declaration on Territorial Asylum", UN Doc. A/RES/2312 (XXII) (14 December 1967).
- *Resolution*, "High Commissioner for the promotion and protection of all human rights", UN Doc. A/RES/48/141 (20 December 1993).
- *Resolution*, "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", UN Doc. A/RES/57/199 (18 December 2002).
- *Resolution*, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/RES/60/173 (16 December 2005).
- *Resolution*, "Human Rights Council", UN Doc. A/RES/60/251 (15 March 2006).
- *Resolution*, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/RES/61/174 (19 December 2006).
- *Resolution*, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/RES/62/167 (18 December 2007).
- *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*: *Summary Record* of the Sixteenth Meeting, UN Doc.

A/CONF.2/SR.16 (1951).

- *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*: *Summary Record* of the Thirty-fifth Meeting, UN Doc. A/CONF.2/SR.35 (1951).
- *Report of the United Nations Conference on Territorial Asylum*, UN Doc. A/CONF.78/12 (21 April 1977).
- *Report of the Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees*, UN Doc. A/41/324 (13 May 1986), Annex.
- *Report of the fifty-fourth session of the Executive Committee of the High Commissioner's Programme*, UN Doc. A/AC.96/987 (10 October 2003).
- *Report of the Special Rapporteur* (Vitit Muntarbhorn), "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/60/306 (29 August 2005).
- *Report of the Special Rapporteur* (Vitit Muntarbhorn), "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/61/349 (15 September 2006).
- *Report of the Special Rapporteur* (Vitit Muntarbhorn), "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/62/264 (15 August 2007).
- "Standard Minimum Rules for the Treatment of Prisoners", adopted on 30 August 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Geneva, UN Doc. A/CONF/6/1, Annex I, A.

Economic and Social Council

- *Resolution* 663C (XXIV) of 31 July 1957, "Recommendations of the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders", ECOSOC Official Records, 24th Session, Supplement No. 1, UN Doc. E/3048 (1957), p. 11.
- *Resolution* 2076 (LXII) of 13 May 1977, "Extension of the Standard Minimum Rules for the Treatment of Prisoners to persons arrested or imprisoned without charge", ECOSOC Official Records, 62nd Session, Supplement No. 1, UN Doc. E/5988 (1977), p. 35.
- *Resolution* 1985/17 of 28 May 1985, "Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of

the International Covenant on Economic, Social and Cultural Rights", ECOSOC Official Records, 1985, Supplement No. 1, UN Doc. E/1985/85, p. 15.

- *Resolution* 1996/31 of 25 July 1996, "Consultative relationship between the United Nations and non-governmental organizations", ECOSOC Official Records, 1996, Supplement No. 1, UN Doc. E/1996/96, p. 53.
- "List of non-governmental organizations in consultative status with the Economic and Social Council as of October 17, 2007", UN Doc. E/2007/INF/4 (17 October 2007).

International Law Commission

- "Draft Articles on the Law of Treaties with Commentaries", *Yearbook of the International Law Commission*, 1966: Vol. II (1967), pp. 187-274.
- *Report of the International Law Commission: Fifty-second session (1 May-9 June and 10 July-18 August 2000)*, UN Doc. A/55/10 (2000).
- "Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries", *Report of the International Law Commission: Fifty-third session (23 April-1 June and 2 July-10 August 2001)*, UN Doc. A/56/10 (2001), para. 77, pp. 59-365.
- "Draft Articles on Diplomatic Protection with Commentaries", *Report of the International Law Commission: Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)*, UN Doc. A/61/10 (2006), para. 50, pp. 22-100.
- "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Report of the International Law Commission: Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)*, UN Doc. A/61/10 (2006), para. 251, pp. 407-423.
- *Report of the Study Group* of the International Law Commission (Finalized by Martti Koskenniemi), "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", UN Doc. A/CN.4/L.682 (13 April 2006).

Human Rights Council

- *Report of the Special Rapporteur* (Vitit Muntarbhorn), "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. A/HRC/4/15 (7 February 2007).

- *Report of the Special Rapporteur* (Juan Miguel Petit), "Sale of children, child prostitution and child pornography, Addendum", UN Doc. A/HRC/4/31/Add.1 (15 March 2007).
- *Report of the Special Rapporteur* (Yakin Ertürk), "Violence against women, its causes and consequences, Addendum", UN Doc. A/HRC/4/34/Add.1 (19 March 2007).
- *Report of the Special Rapporteur* (Manfred Nowak), "Torture and other cruel, inhuman or degrading treatment or punishment, Addendum", UN Doc. A/HRC/4/33/Add.1 (20 March 2007).
- *Report of the Special Rapporteur* (Sigma Huda), "Human rights aspects of the victims of trafficking in persons, especially women and children, Addendum", UN Doc. A/HRC/4/23/Add.1 (30 May 2007).
- *Resolution* 5/1, "Institution-building of the United Nations Human Rights Council" (18 June 2007), UN Doc. A/HRC/21 (7 August 2007), Ch. I, A.
- *Factsheet*: Work and Structure of the Human Rights Council (July 2007) <http://www2.ohchr.org/english/bodies/hrcouncil/docs/FACTSHEET_OUTCOMES_FINAL.pdf> (last accessed on 20 February 2008).

Commission on Human Rights

- *Resolution*, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. E/CN.4/RES/2003/10 (16 April 2003).
- *Resolution*, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. E/CN.4/RES/2004/13 (15 April 2004).
- *Resolution*, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. E/CN.4/RES/2005/11 (14 April 2005).
- *Decision*, "Situation in China", UN Doc. E/CN.4/DEC/1993/110 (11 March 1993).
- *Decision*, "Situation of Human Rights in China", UN Doc. E/CN.4/DEC/1994/108 (9 March 1994).
- *Report of the Representative of the Secretary-General* (Mr. Francis M. Deng), "Internally displaced persons", UN Doc. E/CN.4/1995/50 (2 February 1995).
- *Report of the Representative of the Secretary-General* (Mr. Francis M. Deng), Addendum, "Guiding Principles on Internal Displacement", UN Doc. E/CN.4/1998/53/Add.2 (11 February 1998).
- *Report of the Special Rapporteur* (Vitit Muntarbhorn), "Situation of human

rights in the Democratic People's Republic of Korea", UN Doc. E/CN.4/2005/34 (10 January 2005).

- *Report of the Special Rapporteur* (Vitit Muntarbhorn), "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. E/CN.4/2006/35 (23 January 2006).
- *Report of the Special Rapporteur* (Sigma Huda), "Human rights aspects of the victims of trafficking in persons, especially women and children, Addendum", UN Doc. E/CN.4/2006/62/Add.1 (27 March 2006).
- *Report of the Special Rapporteur* (Jorge G. Bustamante), "Human rights of migrants, Addendum", UN Doc. E/CN.4/2006/73/Add.1 (27 March 2006).

Sub-Commission on Prevention of Discrimination and Protection of Minorities

- *Resolution*, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. E/CN.4/SUB.2/RES/1997/3 (21 August 1997).
- *Resolution*, "Situation of human rights in the Democratic People's Republic of Korea", UN Doc. E/CN.4/SUB.2/RES/1998/2 (19 August 1998).
- *Decision*, "Situation in Tibet", UN Doc. E/CN.4/SUB.2/DEC/1993/107 (20 August 1993).

Sub-Commission on the Promotion and Protection of Human Rights

- *Resolution*, "The right to seek and enjoy asylum", UN Doc. E/CN.4/SUB.2/RES/2000/20 (18 August 2000).
- *Resolution*, "International protection for refugees and displaced persons", UN Doc. E/CN.4/SUB.2/RES/2001/16 (16 August 2001).
- *Resolution*, "International protection for refugees", UN Doc. E/CN.4/SUB.2/RES/2002/23 (14 August 2002).
- *Final Report of the Special Rapporteur* (David Weissbrodt), "The rights of non-citizens", UN Doc. E/CN.4/SUB.2/2003/23 (26 May 2003).

International Human Rights Instruments

- *Core Documents* Forming Part of the Reports of States Parties: China, UN Doc. HRI/CORE/1/Add.21/Rev.2 (11 June 2001).

Human Rights Committee

- *General Comment No. 6*: The right to life (Article 6) (30 April 1982).
- *General Comment No. 8*: Right to liberty and security of persons (Article 9) (30 June 1982).
- *General Comment No. 15*: The position of aliens under the Covenant (11 April 1986).
- *General Comment No. 17*: Rights of the Child (Article 24) (7 April 1989).

- *General Comment No. 18*: Non-discrimination (10 November 1989).
- *General Comment No. 20*: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7) (10 March 1992).
- *Second periodic report* of the Democratic People's Republic of Korea on its implementation of the International Covenant of Civil and Political Rights, UN Doc. CCPR/C/PRK/2000/2 (4 May 2000).
- *Concluding Observations of the Human Rights Committee*: Democratic People's Republic of Korea, UN Doc. CCPR/CO/72/PRK (27 August 2001).
- *Replies* submitted by the Government of the Democratic People's Republic of Korea, UN Doc. CCPR/CO/72/PRK/Add.1 (5 August 2002).

Committee on Economic, Social and Cultural Rights

- *General Comment No. 3*: The nature of States parties obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23 (E/C.12/1990/8), Annex III (14 December 1990).
- *General Comment No. 9*: The domestic application of the Covenant, UN Doc. E/C.12/1998/24 (3 December 1998).
- *General Comment No. 12*: The right to adequate food (Art. 11), UN Doc. E/C.12/1999/5 (12 May 1999).
- *List of issues* to be taken up in connection with the consideration of the initial report of the People's Republic of China, UN Doc. E/C.12/Q/CHN/1 (7 June 2004).
- *Summary Record of the 7th Meeting*: Consideration of the initial report of China, UN Doc. E/C.12/2005/SR.7 (3 May 2005).
- *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 (13 May 2005).

Committee against Torture

- *General Comment No. 1*: Implementation of article 3 of the Convention in the context of article 22, UN Doc. A/53/44, Annex IX (21 November 1997).
- *General Comment No. 2*: Implementation of article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (23 November 2007).
- *Supplementary report to initial reports* of States parties due in 1989: Addendum: China, UN Doc. CAT/C/7/Add.14 (18 January 1993).

- *Third periodic reports* of States parties due in 1997: Addendum: China, UN Doc. CAT/C/39/Add.2 (5 January 2000).
- *Conclusions and Recommendations*: China, UN Doc. A/55/44 (2000), pp. 24-27.
- *Fourth periodic reports* of States parties due in 2004: Addendum: China, UN Doc. CAT/C/CHN/4 (27 June 2007).

Committee on the Elimination of Racial Discrimination

- *General Recommendation XI*: Non-citizens (Art. 1), UN Doc. A/48/18, pp. 112-113 (19 March 1993).
- *General Recommendation XIV*: Definition of discrimination (Art. 1, par. 1), UN Doc. A/48/18, p. 114 (22 March 1993).
- *General Recommendation XX*: Non-discriminatory implementation of rights and freedoms (Art. 5), UN Doc. A/51/18, Annex VIII, A (15 March 1996).
- *General Recommendation XXII*: Article 5 and refugees and displaced persons, UN Doc. A/51/18, Annex VIII, C (24 August 1996).
- *General Recommendation XXIX*: Article 1, paragraph 1, of the Convention (Descent), UN Doc. A/57/18, Ch. XI, F (1 November 2002).
- *General Recommendation XXX*: Discrimination Against Non Citizens, UN Doc. A/59/18, para. 469 (1 October 2004).
- *Summary Record of the 1468th Meeting*: Consideration of the eighth and ninth periodic reports of China, UN Doc. CERD/C/SR.1468 (21 May 2003).
- *Concluding Observations*: China, UN Doc. A/56/18 (2001), pp. 44-47.

Committee on the Elimination of Discrimination against Women

- *General Recommendation No. 19*: Violence against Women (11th session, 1992).
- *Summary Record of the 743rd Meeting (Chamber B)*: Consideration of the fifth and sixth periodic reports of China, UN Doc. CEDAW/C/SR.743 (B) (13 September 2006).
- *Summary Record of the 744th Meeting (Chamber B)*: Consideration of the fifth and sixth periodic reports of China, UN Doc. CEDAW/C/SR.744 (B) (24 August 2006).
- *Concluding Comments of the Committee on the Elimination of Discrimination against Women*: China, UN Doc. CEDAW/C/CHN/CO/6 (25 August 2006).

Committee on the Rights of the Child

- *General Comment No. 5*: General measure of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5 (27 November 2003).
- *General Comment No. 6*: Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6 (1 September 2005).
- *Summary Record of the 1064th Meeting*: Consideration of the second periodic report of China, UN Doc. CRC/C/SR.1064 (3 October 2005).
- *Concluding Observations*: China (including Hong Kong and Macau Special Administrative Regions), UN Doc. CRC/C/CHN/CO/2 (24 November 2005).

United Nations High Commissioner for Human Rights

- *Human Rights and Refugees (Fact Sheet No. 20)*, Centre for Human Rights, UN Office at Geneva (1993).
- *The United Nations Human Rights Treaty System: An Introduction to the core human rights treaties and the treaty bodies (Fact Sheet No. 30)*, UN Office at Geneva (2005).
- *Special Procedures of the Human Rights Council: Urgent appeals and letters of allegation on human rights violations* (October 2007).

United Nations High Commissioner for Refugees

- Executive Committee of the High Commissioner's Programme, *Conclusions*.
- *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.1 (Reedited, Geneva, January 1992).
- "The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees" (April 2001).
- "*Guidelines on International Protection*: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", UN Doc. HCR/GIP/02/01 (7 May 2002).
- "*Guidelines on International Protection*: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of

Refugees", UN Doc. HCR/GIP/02/02 (7 May 2002).
- "*Guidelines on International Protection*: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)", UN Doc. HCR/GIP/03/03 (10 February 2003).
- "*Guidelines on International Protection*: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", UN Doc. HCR/GIP/03/05 (4 September 2003).
- "*Guidelines on International Protection*: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees", UN Doc. HCR/GIP/04/06 (28 April 2004).
- "*Guidelines on International Protection*: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked", UN Doc. HCR/GIP/06/07 (7 April 2006).
- "The Cessation Clauses: *Guidelines* on their Application" (April 1999).
- "*Note* on the Cessation Clauses", UN Doc. EC/47/SC/CRP.30 (30 May 1997).
- "*Note* on the Cancellation of Refugee Status" (22 November 2004).
- *Determination of Refugee Status*, Training Module: RLD 2 (1989).
- *Human Rights and Refugee Protection*, Training Module: RLD 5 (October 1995).
- *Global Report 2006* (2007).
- *UNHCR Manual on Refugee Protection and the European Convention on Human Rights*, Regional Bureau for Europe, Department of International Protection (April 2003) (Updated August 2006).
- "2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR" (9 June 2006).
- "The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984", Discussion Document (November 2004), in *IJRL*, Vol. 18, No. 1 (2006), pp. 252-270.
- "North Korean asylum seekers arrive in South Korea", UNHCR News Stories (2 July 2001).

Food and Agriculture Organization

- "North Korea urgently needs food aid: millions of people at risk", FAO Newsroom (30 October 2003).

World Food Programme

- "WFP/FAO Rapid Food Security Assessment - June/July 2008" (2008).

4. Other Documents

Regional Organisations

Asian-African Legal Consultative Organization

- *Report of the Fortieth Session (New Delhi, 2001).*

Council of Europe, *European Treaty Series*.

European Union (European Communities), *Official Journal*.

European Parliament

- *Resolution* on North Korea: Human Rights Violations (15 June 2006).

Organization of American States

- *Annual Report of the Inter-American Commission on Human Rights 1984-1985*, OAS Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1 October 1985).
- Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum-seekers within the Canadian Refugee Determination System*, OAS Doc. OEA/Ser.L/V/II.106, doc. 40, rev. (28 February 2000).

Governments

People's Republic of China Ministry of Foreign Affairs

- "Foreign Ministry Spokeswoman Zhang Qiyue's Remarks on Recent Intrusions into Foreign Diplomatic Missions and Schools" (27 October 2004) <http://www.fmprc.gov.cn/eng/xwfw/s2510/t167965.htm> (last accessed on 7 June 2008).
- "Foreign Ministry Spokesman Liu Jianchao's Press Conference on 28 June 2005" (29 June 2005) <http://www.fmprc.gov.cn/eng/xwfw/s2510/t201684.htm> (last accessed on 28 September 2007).

Republic of Korea Ministry of Foreign Affairs and Trade

- "The Republic of Korea's Position on the North Korean Refugees Issue" (26 May 2002).
- "The Republic of Korea's Position on the Issue of North Korean Refugees"

(26 September 2003).

Republic of Korea Ministry of Justice

- *Refugee (Law Materials No. 100)*, Office of Legal Affairs (Seoul, June 1988) (in Korean).
- *Materials on Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Law Materials No. 104)*, Office of Legal Affairs (Seoul, December 1988) (in Korean).

Republic of Korea Ministry of Unification

- *Overview of Intra-Korean Exchanges & Cooperation* (monthly).
- *Unification White Paper* (yearly).

Korea Institute for National Unification, *White Paper on Human Rights in North Korea* (yearly).

United Kingdom Foreign & Commonwealth Office

- *HUMAN RIGHTS Annual Report 2003* (September 2003).
- *HUMAN RIGHTS Annual Report 2006* (October 2006).

United States Department of State

- *Country Reports on Human Rights 2000* (February 2001).

Non-Governmental Organisations & Others

Amnesty International

- *Report 2002*, AI Index: POL 10/001/2002.
- *Report 2003*, AI Index: POL 10/003/2003.
- "Persecuting the Starving: The Plight of North Koreans Fleeing to China (Democratic People's Republic of Korea)", AI Index: ASA 24/003/2000 (15 December 2000).
- "Crackdown on North Koreans must end (China)", AI Index: ASA 17/024/2002 (21 June 2002).
- "Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)", AI Index: ASA 24/003/2004 (20 January 2004).

Anti-Slavery International

- Muico, Norma Kang, *An absence of choice: The sexual exploitation of North Korean women in China* (2005).
- _____, *Forced Labour in North Korean Prison Camps* (2007).

Brownback, Sam (U.S. Senator), "Report on his trip to the China - North Korea border" (4 January 2003), available at Lisa Sleeth & Jim Butterworth, *Seoul*

Train: A Documentary Film, Incite Productions (2005).

Citizens' Alliance for North Korean Human Rights

- Citizens' Alliance for North Korean Human Rights *et al.*, *The 6th International Conference on North Korean Human Rights & Refugees: Seoul, Korea* (St. Ignatius House / Sogang University, February 14-16, 2005).
- Lee, Young-Hwan (translated by Soon Chang Yang), *North Korea: Republic of Torture* (Seoul, 2007).

Human Rights Watch

- "The Invisible Exodus: North Koreans in the People's Republic of China (North Korea)", Vol. 14, No. 8 (C) (November 2002).
- "A Matter of Survival: The North Korean Government's Control of Food and the Risk of Hunger (North Korea)", Vol. 18, No. 3 (C) (May 2006).
- *Denied Status, Denied Education: Children of North Korean Women in China* (April 2008).

International Crisis Group

- "Perilous Journeys: The Plight of North Koreans in China and Beyond", Asia Report No. 122 (26 October 2006).

International Law Association

- "Committee on Refugee Procedures: Interim Report on Temporary Protection (Walter Kälin)", *Report of the Sixty-Eighth Conference (Taipei, 1998)*, pp. 407-426.
- "Committee on Refugee Procedures: Final Report and Draft Guidelines on Temporary Protection (Walter Kälin)", *Report of the Seventieth Conference (New Delhi, 2002)*, pp. 433-458.
- "Refugee Procedures: Guidelines on Temporary Protection", ILA Resolution 5/2002, *Report of the Seventieth Conference (New Delhi, 2002)*, pp. 42-51.

JIN-NET (Japan Independent News Net)

- "Jin-Net Releases Video Footage of Public Executions in North Korea" (17 March 2005) <http://northkoreanrefugees.com/dvd/statement.htm>.

Refugees International

- Charny, Joel R., *Acts of Betrayal: The Challenge of Protecting North Koreans in China* (April 2005).

Seymour, James D., *China: Background Paper on the Situation of North Koreans in China*, A Writenet Report (commissioned by UNHCR) (January 2005).

U.S. Committee for Human Rights in North Korea

- Hawk, David, *The Hidden Gulag: Exposing North Korea's Prison Camps* (22 October 2003).
- Haggard, Stephan & Noland, Marcus, *Hunger and Human Rights: The Politics of Famine in North Korea* (2005).
- DLA Piper (US LLP) & U.S. Committee for Human Rights in North Korea, *Failure to Protect: A Call for the UN Security Council to Act in North Korea* (30 October 2006).
- Haggard, Stephan & Noland, Marcus (eds.), *The North Korean Refugee Crisis: Human Rights and International Response* (2006).
- Cammarota, Paolo *et al.*, *Legal Strategies for Protecting Human Rights in North Korea*, Skadden, Arps, Slate, Meagher & Flom LLP & U.S. Committee for Human Rights in North Korea (28 November 2007).

U.S. Committee for Refugees

- "Country Reports: China", *World Refugee Survey 2003* (2003), pp. 115-118.
- "Country Reports: North Korea", *World Refugee Survey 2003* (2003), pp. 129-130.

U.S. Committee for Refugees and Immigrants, "Country Updates: China", *World Refugee Survey 2007* (2007), pp. 44-46.

Jimenez, Marina, "N. Korean defector can stay", *Globe and Mail* (4 March 2004).

Sheridan, Michael, "Refugees shot fleeing North Korea", *The Sunday Times* (29 June 2008).

"One North Korean approved as a refugee in Mexico", *Radio Free Asia* (8 September 2005).

"Belgium accorded six North Koreans refugee status", *Radio Free Asia* (13 January 2006).

"Rev. Chun said the second group of NKEs including two children will arrive in the U.S.A. within this month", *Radio Free Asia* (8 May 2006).

"The success rate of asylum for NKEs in the U.K. is 75%", *Radio Free Asia* (16 January 2008).

"The Chinese police tortured NKEs", *Yonhap News* (22 April 2003).

"UNHCR estimates the number of NKEs in China at 100,000", *Yonhap News* (16 June 2003).

"Three NKEs, who had entered the U.S. Consulate General in Shenyang, China, went to the U.S.A.", *Yonhap News* (24 July 2006).

"China forcefully returned 4,809 NKEs to North Korea in 2002", *Yonhap News* (8

June 2007).

5. CD-Rom & DVD

UNHCR, *RefWorld2004: Information on Refugees and Human Rights*, Issue 13 (2004), CD-Roms.

_____, *RefWorld2005: Information on Refugees and Human Rights*, Issue 14 (2005), CD-Roms.

Sleeth, Lisa & Butterworth, Jim, *Seoul Train: A Documentary Film* (http://www.seoultrain.com), Incite Productions (2005), DVD.