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## Systemizing the Fate of the Stateless North Korean Migrant: A Legal Guide to Preventing the Automatic Repatriation of North Korean Migrants in China

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NOTE

SYSTEMIZING THE FATE OF THE STATELESS  
NORTH KOREAN MIGRANT: A LEGAL GUIDE TO  
PREVENTING THE AUTOMATIC REPATRIATION  
OF NORTH KOREAN MIGRANTS IN CHINA

*Jeanyoung Jeannie Cho \**

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### *INTRODUCTION*

For decades, everyday life for a North Korean has been a fight to survive a seemingly everlasting food shortage, widespread starvation, and economic collapse under a repressive regime.<sup>1</sup> Among the struggling North Koreans was Ms. Mi-sun Bang, a former actress and a widowed mother of three.<sup>2</sup> Having

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1. See Amartya Sen, *Foreword* to STEPHAN HAGGARD & MARCUS NOLAND, *FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM* xvi–xviii (2007) [hereinafter *FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM*] (discussing the effects of North Korea’s authoritative and repressive regime in the North Korean famine and widespread starvation among the North Korean people); RALPH C. HASSIG & KONGDAN OH, *THE HIDDEN PEOPLE OF NORTH KOREA: EVERYDAY LIFE IN THE HERMIT KINGDOM* 67 (2009) [hereinafter *HIDDEN PEOPLE*] (referring to the collapse of North Korea’s economy in the 1990s in its discussion of North Korea’s economic policies); DAVID HAWK, U.S. COMM. FOR HUMAN RIGHTS IN N. KOR., *THE HIDDEN GULAG: THE LIVES AND VOICES OF “THOSE WHO ARE SENT TO THE MOUNTAINS”* 31 (2d ed. 2012) [hereinafter *LIVES AND VOICES*] (noting widespread food shortage in North Korea in the 1990s); HUMAN RIGHTS WATCH, *WORLD REPORT 2013: EVENTS OF 2012*, at 341–42 (2013) (stating that “North Korea “continues to face serious food insecurity in 2012” and discussing the various reasons that caused the food shortages).

2. *LIVES AND VOICES*, *supra* note 1, at 93 (providing Mrs. Mi-sun Bang’s testimony of her experiences in North Korea, China, and North Korean prison camps); see Jansovocmf, *04-29-09 North Korean Defector Interviews Bang Mi Sun*, YOUTUBE (May 27, 2009), <http://www.youtube.com/watch?v=L3ZFRewLCi8> (displaying Mi-sun Bang

lost her husband to the grips of a merciless famine and driven to ensure her children's survival, Ms. Bang fled to China.<sup>3</sup> In 1998, on the heels of the Great Famine in North Korea, Ms. Bang, her nineteen year old daughter, and her sixteen year old son crossed the Sino-North Korean border, an act unlawful in both nations.<sup>4</sup> Unable to contact her daughter who was studying dance and acting in Pyongyang, Mi-sun had no choice but to leave her behind.<sup>5</sup>

Upon arriving in China, human traffickers captured the Bang family and threatened to inform Chinese authorities of their illegal border crossing.<sup>6</sup> Fearing repatriation of her family, Mi-sun conceded to a "brokered marriage," through which a disabled Chinese farmer purchased her for 7,000 yuan, or US\$1,000.<sup>7</sup> Now separated from her children, Mi-sun was kidnapped and trafficked on three separate occasions while in China.<sup>8</sup> Though Ms. Bang escaped her third husband's menacing grasp, as bitter fate would have it, Chinese officials ultimately repatriated her to North Korea.<sup>9</sup>

Back in North Korea, Mi-sun was convicted of illegal border crossing and detained in several North Korean hard labor prison

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speaking in Korean about her experiences); *see also* *N.Korean Defector Recalls Being Tortured in Camp*, CHOSUN ILBO (Seoul), May 1, 2009, 11:02 AM, [http://english.chosun.com/site/data/html\\_dir/2009/05/01/2009050100328.html](http://english.chosun.com/site/data/html_dir/2009/05/01/2009050100328.html) [hereinafter *N.Korean Defector Recalls Being Tortured*].

3. LIVES AND VOICES, *supra* note 1, at 93.

4. *Id.*; *see* HIDDEN PEOPLE, *supra* note 1, at 118, 230–31 (noting 1998 as the end of the three year long North Korean famine of the 1990s, providing the North Korean Criminal Code, and discussing China's practice of repatriating North Korean migrants); *see also* FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM, *supra* note 1, at 225 (discussing China's repatriation policy regarding North Korean migrants).

5. LIVES AND VOICES, *supra* note 1, at 93 (explaining why Ms. Bang was unable to leave North Korea with all three of her children).

6. *Id.* ("Apprehended by a gang of traffickers who threatened to turn over her children to the Chinese police for repatriation, Ms. Bang agreed to a 'brokered marriage' . . .").

7. *Id.* at 93–94 (stating that because of the traffickers' threats, Ms. Bang entered into a "brokered marriage" with a handicapped Chinese farmer); *see* FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM, *supra* note 1, at 225 (explaining that China repatriates all North Korean migrants in China).

8. LIVES AND VOICES, *supra* note 1, at 94 (stating that Ms. Bang was kidnapped and trafficked a total of three times and indicating later in her testimony that she was separated from her children).

9. *Id.* (detailing abuse by Ms. Bang's third "husband" and her eventual repatriation to North Korea).

camps.<sup>10</sup> These prison camps were establishments whereby prison guards were authorized to carry out brutal methods of punishment.<sup>11</sup> When prison guards discovered that Mi-sun was deteriorating under the pressure of forced labor, they violently beat her head and body.<sup>12</sup> The beatings to her legs were so severe that Ms. Bang would continue to walk with a limp ten years later.<sup>13</sup> In addition to her permanently mangled leg and weakened physical state, prison guards apportioned food rations so small that Mi-sun's weight plummeted to eighty-eight pounds.<sup>14</sup>

One especially unsettling punishment technique was the practice of forced abortions.<sup>15</sup> With no regard to whether they were voluntary pregnancies or the product of rape or involuntary marriage, prison guards aborted all pregnancies of repatriated women suspected of carrying children of Chinese descent.<sup>16</sup> During her imprisonment, Mi-sun witnessed prison guards force two unsuspecting male inmates to jump up and down on a board placed over a pregnant woman's womb.<sup>17</sup> As one might conclude, neither the child nor the mother

10. *Id.* at 94–96 (describing Ms. Bang's experience in North Korean prison camps).

11. See HIDDEN PEOPLE, *supra* note 1, at 207–09 (detailing the human rights abuses in North Korean prison camps); Marcus Noland, *North Korea: The Tyranny of Deprivation*, in WORST OF THE WORST: DEALING WITH REPRESSIVE AND ROGUE NATIONS 91 (Robert I. Rotberg ed., 2007).

12. LIVES AND VOICES, *supra* note 1, at 95 (testifying that Ms. Bang was severely beat when she became physically too weak).

13. *Id.* (“Her leg became infected to the bone, . . . which caused her to limp pronouncedly ten years later.”); see *N. Korean Defectors Recalls Being Tortured*, *supra* note 2 for a photograph of Bang and her injured leg.

14. LIVES AND VOICES, *supra* note 1, at 96 (stating that Ms. Bang's weight dropped to eighty-eight pounds); see *N. Korean Defector Recalls Being Tortured*, *supra* note 2 (providing a photograph of Bang's injured leg).

15. LIVES AND VOICES, *supra* note 1, at 95 (detailing the forced abortions Mrs. Bang witnessed). “[A]long with the . . . high levels of deaths in detention . . . a particularly reprehensible phenomenon of repression is the gender-based sexual violence and racially motivated forced abortion and infanticide perpetrated against forcibly repatriated pregnant women.” *Id.* at 122.

16. *Id.* at 122–23 (discussing racially motivated forced abortions in North Korean prison camps). “It makes no difference if the pregnancies resulted from trafficking, or coerced or voluntary marriages between Korean women and Han Chinese men in China.” *Id.* at 123.

17. *Id.* at 95 (“The guards put her on the floor on her back and placed a board over her swollen womb, and pistol-whipped two male prisoners until they agreed to jump up and down on the board.”).

survived.<sup>18</sup> At the completion of an unrelated abortion, a prison guard offered an explanation to the deplorable practice, declaring that North Korean women “who got Chinese sperm . . . brought this on themselves.”<sup>19</sup>

In a fortunate turn of events, Mi-sun successfully defected to South Korea following her release from imprisonment, reunited with her children, and married another North Korean defector.<sup>20</sup> Regrettably, the same cannot be said for countless repatriated North Koreans who witness similar horrors, as many will never experience Ms. Bang’s change in luck.<sup>21</sup> A byproduct of North Korea’s criminalization of unauthorized border crossing and China’s obstinate denial of lawful entry is a prolonged, if not constant, fear of institutionalized oppression.<sup>22</sup> Manifested in Ms. Bang’s testimony, the ramifications of life for North Korean migrants in China are the risks of endangerment to their lives, personal safety, and liberty.<sup>23</sup>

18. *Id.* at 95 (testifying that both the infant and the mother died from the forced abortion).

19. *Id.* at 153 (detailing the testimony of a former detainee who witnessed multiple forced abortions through injections of the drug ravenol).

20. *Id.* at 98 (describing events following Ms. Bang’s release from imprisonment and her subsequent successful defection to South Korea).

21. See *id.* at 123–47 for first-hand former detainees’ testimonies of human rights violations in North Korean prison camps; see also HUMAN RIGHTS WATCH, *THE INVISIBLE EXODUS: NORTH KOREANS IN THE PEOPLE’S REPUBLIC OF CHINA* 24–28 (2002) [hereinafter *INVISIBLE EXODUS*] (detailing accounts of former detainees).

22. See Tsuneo Akaha, *Cross-Border Human Flows in Northeast Asia*, MIGRATION INFO. SOURCE (Oct. 1, 2004), <http://www.migrati oninformation.org/feature/print.cfm?ID=257> (noting that North Korean migrants are “under [the] constant fear of exposure and arrest” while in China); Nicholas Eberstadt & Christopher Griffin, *Saving North Korea’s Refugees*, N.Y. TIMES (Feb. 19, 2007), [http://www.nytimes.com/2007/02/19/opinion/19eberstadt.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/02/19/opinion/19eberstadt.html?pagewanted=all&_r=0) (“As illegal immigrants in China . . . they live in constant fear and at terrible risk.”); JACQUES L. FUQUA, JR., *KOREAN UNIFICATION: THE INEVITABLE CHALLENGES* 83 (2007) (explaining that “saeteomin live in constant fear that Chinese authorities or North Korean agents will apprehend and repatriate them back to North Korea”). *Saeteomin* is a Korean term for North Korean migrants or refugees, and literally translates to “new settler.” YOUNG-YOON KIM, *KOR. INST. FOR NAT’L UNIFICATION, A STUDY ON THE REALITY AND PROSPECT OF ECONOMIC REFORM IN NORTH KOREA: TASKS FOR SUCCESSFUL TRANSFORMATION OF THE NORTH KOREAN SYSTEM 2* (March 2007).

23. See, e.g., U.S. COMM. FOR HUMAN RIGHTS IN N. KOR., *LIVES FOR SALE: PERSONAL ACCOUNTS OF WOMEN FLEEING NORTH KOREA TO CHINA* 28–29 (2009) [hereinafter *LIVES FOR SALE*] (detailing personal accounts of the mistreatment North Korean migrant women in China were forced to suffer); *INVISIBLE EXODUS*, *supra* note 21, at 2 (“[T]he migrants remain hidden [in China] for fear of discovery, repatriation, and harsh punishment in North Korea . . .”); Kaitlin Brush, *East Asia*, 18 *HUM. RTS.*

North Korean migrants are systematically barred from crossing the Sino-North Korean border into Chinese territory.<sup>24</sup> At the outset, enforced by the North Korean Criminal Code, North Korean citizens do not enjoy the freedom to leave the nation for China.<sup>25</sup> Accompanying the North Korean law is China's policy of automatically repatriating all North Korean migrants.<sup>26</sup> Since North Korean migrants are not authorized to cross the Sino-North Korean border, the North Korean regime will punish the repatriated migrant by imprisonment, torture, or death.<sup>27</sup> Additionally, China denies the United Nations, nongovernmental organizations ("NGO"), and other human rights organizations access to North Korean migrants in China and penalizes persons discovered harboring or providing assistance to the migrants.<sup>28</sup>

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BRIEF 38, 39 (2010) (stating that "repatriated individuals face imprisonment, torture, and death"); Alison Carrinski, Note, *The Other North Korean Dilemma: Evaluating U.S. Law Towards North Korean Refugees*, 31 SUFFOLK TRANSNAT'L L. REV. 647, 662-64 (2008) (noting illegal sex trafficking in China as a significant risk to North Korean women in China due to the illegal economic migrant status); Elisa Gahng, Note, *North Korean Border-Crossers in Yanbian: The "Protection Gap" Between the Economic Migrant and Refugee Regime*, 24 GEO. IMMIGR. L.J. 361, 367 (2010) (stating that Chinese officials often beat North Korean migrants when discovered).

24. See INVISIBLE EXODUS, *supra* note 21, at 2 ("To reach China, [North Korean migrants] have defied their government's criminal prohibition on illegal exit and China's rigorous border controls."); see also Gahng, *supra* note 23, at 368 (noting China's view that all North Korean migrants in China are economic migrants, and thus China's claim that it has a duty to North Korea to repatriate the migrants).

25. See INVISIBLE EXODUS, *supra* note 21, at 20-21 for the North Korean Criminal Code prohibiting unauthorized border crossing; see also AMNESTY INTERNATIONAL, NORTH KOREA: FREEDOM OF MOVEMENT, OPINION AND EXPRESSION (2009) [hereinafter NORTH KOREA: FREEDOM OF MOVEMENT]; LIVES FOR SALE, *supra* note 23, at 14 (stating that North Korean guards have been ordered to "shoot-to-kill" those attempting to cross North Korean borders).

26. See *Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas*, NKFREEDOM, [http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral\\_treaty.pdf](http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral_treaty.pdf), at art 4, (last visited Nov. 13. 203) [hereinafter Repatriation Treaty] (purporting to be an English translation of the agreement, which is not available in official form) (agreement signed Aug. 12, 1986) (providing the text of a Sino-North Korean bilateral treaty through which China promised to repatriate all unauthorized North Korean migrants in China); Gahng, *supra* note 23, at 361, 366-68 (discussing the Sino-North Korean bilateral treaty and China's repatriation policy to forcibly deport all illegal North Korean migrants).

27. See INVISIBLE EXODUS, *supra* note 21, at 20-21 (providing Article 47 and 117 of the North Korean Criminal Code, punishing illegal border-crossing and defection by imprisonment or death); Brush, *supra* note 23.

28. See LEONARD LEO, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT TO CONGRESS: 2010, at 115 (2010); Alyce S. Ahn, Note, *Prosecution or*



China is a contracting party to the United Nation's 1951 Convention relating to the Status of Refugees and its 1967 Protocol (collectively the "Refugee Convention"), an international treaty governing refugee rights.<sup>29</sup> In accordance with the Refugee Convention, China is prohibited from the forcible deportation of a "refugee."<sup>30</sup> Nevertheless, China maintains that its policy to repatriate North Korean migrants does not contravene the Refugee Convention.<sup>31</sup>

First, although the motives for leaving North Korea vary per migrant from economic reasons to political persecution, China concludes that all North Korean migrants in China are "economic migrants."<sup>32</sup> Since the Refugee Convention does not

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*Persecution: Contradiction Between U.S. Foreign Policy & the Adjudication of Asylum Claims Involving the Harboring of North Korean Refugees*, 24 *GEO. IMMIGR. L.J.* 311, 312, 316 (2010) (describing China's policy of refusing third parties access to North Korean migrants in China); *INVISIBLE EXODUS*, *supra* note 21, at 17 (discussing China's practice of arresting those who provide North Korean migrants in China humanitarian aid).

29. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention] for the text of the Convention Relating to the Status of Refugees ("1951 Refugee Convention"); *Status Table for the Convention Relating to the Status of Refugees*, U.N. TREATY COLLECTION (last visited Nov. 12, 2012), [http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOnline&mtdsg\\_no=V~2&chapter=5&Temp=mtdsg2&lang=en](http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSOnline&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en) [hereinafter U.N. Treaty Collection 1951 Refugee Convention] (showing the date China became a signatory party to the Convention Relating to the Status of Refugees, or the "1951 Refugee Convention"); *Status Table for the Protocol relating to the Status of Refugees*, U.N. TREATY COLLECTION (last visited Oct. 12, 2012), [http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=V-5&chapter=5&lang=en#Participants](http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=V-5&chapter=5&lang=en#Participants) [hereinafter U.N. Treaty Collection 1967 Protocol] (showing the date China became a signatory to the 1967 Protocol, a supplementing treaty to the 1951 Refugee Convention, collectively the "Refugee Convention").

30. See 1951 Refugee Convention, *supra* note 29, arts. 1, 33 (defining the term "refugee" in Article 1 and prohibiting repatriation of refugees in Article 33).

31. See *INVISIBLE EXODUS*, *supra* note 21, at 20 (discussing China's "economic migrants" classification of North Korean migrants); Ahn, *supra* note 28, at 316; *INVISIBLE EXODUS*, *supra* note 21, at 16; Gahng, *supra* note 23, at 370-72 (explaining that China labels North Korean migrants as "economic migrants" as a justification for its repatriation policy).

32. See HOUSE OF COMMONS FOREIGN AFFAIRS COMM., *GLOBAL SECURITY: JAPAN AND KOREA*, 2007-8 H.C. 449, para. 192 (U.K.) (Nov. 12, 2008) [hereinafter *GLOBAL SECURITY*] ("The diversity of North Koreans in China means that no single term is appropriate for the whole population; the FCO notes that those involved are referred to variously as 'defectors', refugees', 'escapees' or 'border-crossers.'"); see also CONG.-EXEC. COMM'N ON CHINA, 112TH CONG., *ANNUAL REP. 2011*, at 28 (1st Sess. 2011) [hereinafter *CECC ANNUAL REPORT 2011*] (stating that China repatriates North Korean migrants under its "economic migrant" classification); Jane Kim, Note, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 15 *VA.*

extend its protection to those outside their home countries for purely economic reasons, the migrants fall outside the treaty's scope.<sup>33</sup> Second, China contends that it is bound by a 1986 bilateral agreement with North Korea whereby China promised to repatriate all unauthorized North Korean migrants within its territory.<sup>34</sup> China argues that its bilateral treaty obligations to North Korea preempt its treaty obligations to the United Nations.<sup>35</sup>

This Note analyzes China's justifications for its repatriation policy and determines if North Korean migrants in China are "refugees" under the Refugee Convention. It explores whether China's repatriation policy concerning North Korean migrants constitutes a breach of its duties to the Refugee Convention, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), and China's Extradition Law.<sup>36</sup> The Note's purpose is to determine the legality of China's repatriation policy under international law, emphasize China's obligations to the United Nations, and

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J. INT'L L. 443, 457 (2011) (noting that many women also flee North Korea, not only for economic reasons, but because of gender, class, and political discrimination); Kyu Chang Lee, *Protection of North Korean Defectors in China and the Convention Against Torture*, 6 REGENT J. INT'L L. 139, 139 (2008) (examining the difference in opinions of whether North Korean migrants are "refugees" under the Refugee Convention's definition).

33. See K.M. GREENHILL, *WEAPONS OF MASS MIGRATION: FORCED DISPLACEMENT, COERCION, AND FOREIGN POLICY* 237 (2010) ("Beijing has found a loophole to avoid its obligations, insisting that the North Koreans are illegal migrants, not refugees."); Kyu Chang Lee, *supra* note 32, at 140–42 (noting that "refugees" who are provided protection under the Refugee Convention are limited and do not necessarily include migrants who are outside their home country for economic reasons); see also CECC ANNUAL REPORT 2011, *supra* note 32, at 28–29 ("[China] continue[s] [its] policies of classifying all North Koreans in China as 'illegal' economic migrants and repatriating North Korean refugees in China . . .").

34. Repatriation Treaty, *supra* note 26; see Carrinski, *supra* note 23, at 650 (referring to China's bilateral treaty with North Korea to repatriate all unauthorized North Korean migrants in China).

35. See INVISIBLE EXODUS, *supra* note 21, at 16 ("[China] maintains . . . that its primary obligation lies under a 1986 agreement with North Korea on the repatriation of migrants."); see also Gahng, *supra* note 23, at 370.

36. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 [hereinafter CAT] (providing the text of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or "CAT"); Extradition Law of the People's Republic of China art. 8 (Order No. 42/2000) [hereinafter PRC Extradition Law], available at [http://english.gov.cn/laws/2005-09/22/content\\_68710.htm](http://english.gov.cn/laws/2005-09/22/content_68710.htm).

recommend a pragmatic solution to China's incongruent obligations to the United Nations and to North Korea.

First, Part I of the Note introduces the political and social structure of the North Korean regime and the demanding conditions of North Korean life. Part I also describes the Chinese government's treatment of North Korean migrants and the risks the migrants face once within China. Second, Part II examines the Refugee Convention, the CAT, and China's Extradition Law, laws that require China to protect the individuals that conform to the legally defined "refugee" and migrants at risk of subjection to torture if repatriated. Part II then analyzes China's respective duties to its multilateral treaties with the United Nations, its bilateral agreement with North Korea, and its domestic law. Finally, Part III asserts that China's repatriation policy is a transgression from international law and proposes that China remove its "economic migrants" blanket categorization. Part III recommends that China implement individual assessment procedures, in conformance with the Refugee Convention, to determine the refugee status of North Korean migrants in China.

*I. THE BACKGROUND CHECK: THE ISOLATED AND  
MYSTERIOUS NORTH KOREA AND ITS ENDURING KINSHIP  
WITH CHINA*

First, Part I.A offers a look inside the secretive State, summarizing North Korea's political history and philosophy, social class structure, and penal system. Then, Part I.B discusses recent events in North Korea that have required the international community's involvement and attention. Part I.B explores the conditions in North Korea that galvanized mass North Korean migration into China and briefly discusses several recent headlines surrounding the ruling dynastic family. Finally, Part I.C examines China's relationship with North Korea and the treatment of North Korean migrants inside Chinese borders. Part I.C presents China's repatriation policy with respect to North Korean migrants and discusses the policy's effects on the migrants.

A. *The Hermit Kingdom of the East: A Glimpse into the Democratic People's Republic of Korea*

According to the North Korean government, Kim Il Sung was the first official leader in 1948 of the newly established one-party totalitarian state, the Democratic People's Republic of Korea ("DPRK"), commonly known as North Korea.<sup>37</sup> North Korea's official history credits Kim Il Sung as the founder of the nation's only political party, the Workers' Party of Korea ("WPK").<sup>38</sup> Kim Jong-il, Kim Il Sung's eldest son, inherited supreme leadership of North Korea upon his father's death in 1994 and led the nation until 2011.<sup>39</sup> As of 2013, under the rule of Kim Il Sung's grandson, Kim Jong-un, North Korea has maintained its single-party polity.<sup>40</sup> A totalitarian leader of the

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37. See Socialist Constitution of the Democratic People's Republic of Korea [DPRK Constitution] Apr. 2009, pmbl., available at [http://www.servat.unibe.ch/icl/kn00000\\_.html](http://www.servat.unibe.ch/icl/kn00000_.html) (last visited Feb. 20, 2013) (showing the text of the North Korean Constitution and naming Kim Il Sung as the founder of the Democratic People's Republic of Korea, or DPRK); RACHEL A. KOESTLER-GRACK, KIM IL SUNG AND KIM JONG IL 104 (2004) (stating that Kim Il Sung's reign began in 1948); BRADLEY K. MARTIN, UNDER THE LOVING CARE OF THE FATHERLY LEADER: NORTH KOREA AND THE KIM DYNASTY 430 (St. Martin's Griffin ed. 2006) (explaining that Kim Il Sung's regime was "more totalitarian than Hitler's" because it was a one-party regime). It is debated if Kim Il Sung was, in fact, the first leader of North Korea, as some sources claim Kim Yong Bom was the first official leader. See Ilpyong J. Kim, *Kim Jong Il's Military-First Politics, in NORTH KOREA: THE POLITICS OF REGIME SURVIVAL* 71 (Young Whan Kihl & Hong Nack Kim eds., 2006) (arguing that Kim Yom Bong was the first leader of North Korea).

38. *Workers' Party of Korea*, NAENARA, <http://www.naenara.com.kp/en/great/political.php> (last visited Mar. 31, 2013). Naenara is the North Korean government's official web portal. NAENARA, <http://www.naenara.com.kp/en/> (last visited Mar. 31, 2013); Kyungmin Ko et al., *The Internet Dilemma and Control Policy: Political and Economic Implications of the Internet in North Korea*, 21 KOR. J. DEF. ANALYSIS 279, 295 (2009) (stating that Naenara is the North Korean government's official web portal). See also PATRICK MCEACHEM, INSIDE THE RED BOX: NORTH KOREA'S POST-TOTALITARIAN POLITICS 84 (2010) (providing the history of the North Korea Communist Party).

39. See RANDY WOOD & CARMINE DELUCA, DICTATOR'S HANDBOOK: A PRACTICAL MANUAL FOR THE ASPIRING TYRANT 64 (2012) (showing that Kim Jong-il ruled North Korea from 1994 to 2011); David E. Sanger, *Kim Il Sung Dead at Age 82; Led North Korea 5 Decades; Was Near Talks with South*, N.Y. TIMES (July 9, 1994), <http://www.nytimes.com/1994/07/09/world/kim-il-sung-dead-at-age-82-led-north-korea-5-decades-was-near-talks-with-south.html?pagewanted=all&src=pm>; see also Koestler-Grack, *supra* note 37 (dating the birth of Kim Il Sung's first child, Kim Jong-il, in 1944).

40. See STATE OF TERRORISM AND HUMAN RIGHTS: INTERNATIONAL RESPONSES SINCE THE END OF THE COLD WAR i (Gillian Duncan et al. eds., 2013) [hereinafter STATE OF TERRORISM] (stating that today, North Korea still exists as a "totalitarian one-party state"); *Notice to All Party Members, Servicepersons and People*, KOREAN CENTRAL

WPK serves as the head of state and presides as the nation's supreme leader.<sup>41</sup> The North Korean military is a ruling class and the "supreme commander of the state, party, and society."<sup>42</sup> Kim Il Sung's leadership also outlived his death and he remains as the "eternal President of the Republic."<sup>43</sup>

North Korea embraces a political philosophy called *Juche*, a derivative of Marxism-Leninism.<sup>44</sup> Simply translated, *Juche* means self-reliance or self-determination.<sup>45</sup> This uniquely North Korean political philosophy is based on three principles: political sovereignty, economic independence, and military self-

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NEWS AGENCY (Pyongyang) (Dec. 19, 2011), <http://www.kcna.co.jp/item/2011/201112/news19/20111219-04ee.html> [hereinafter *Notice to All Party Members*] (announcing Kim Jong-un as the new leader of North Korea); *North Korea Declares Kim Jong Un As Country's New 'Supreme Leader,'* NBCNEWS.COM (Dec. 29, 2011, 3:07 PM), <http://www.nbcnews.com/id/45813667/#.UVeM5av5lcM> (reporting that Kim Jong-un, Kim Jong-il's son, is the new successor and "supreme leader" of North Korea).

41. See YONHAP NEWS AGENCY, NORTH KOREA HANDBOOK 87, 379 (2003) [hereinafter NORTH KOREA HANDBOOK] (describing North Korea as a single-party dictatorship and noting that the "population is one part of a giant, unified 'socialist organism' . . . created by [a] . . . merging of the supreme leader, party and the people"). See generally STATE OF TERRORISM, *supra* note 40.

42. See Ilpyong J. Kim, *supra* note 37, at 59, 61 ("Kim Jong Il has successfully transformed North Korea from a party-state system to a military-first political system."); see also BRUCE BUENO DE MESQUITA & JONGRYN MO, HOOVER INSTITUTION ON WAR, REVOLUTION AND PEACE, NORTH KOREAN ECONOMIC REFORM AND POLITICAL STABILITY 2 (1996).

43. DPRK Constitution, pmbl. (declaring Kim Il Sung as the "eternal President of the Republic" in the North Korean Constitution). As of 2013, the North Korean Constitution has been amended a total of six times, the most recent amendment being in May 2012. MARY BETH NIKITIN, CONG. RESEARCH SERV., RL34256, NORTH KOREA'S NUCLEAR WEAPONS: TECHNICAL ISSUES 17 (2013) ("In May 2012, North Korea changed its constitution to say that it was a 'nuclear-armed state.'"); *N. Korea Calls Itself 'Nuclear-Armed State' in Revised Constitution*, YONHAP NEWS AGENCY (Seoul) (May 30, 2012, 8:52 PM), <http://english.yonhapnews.co.kr/northkorea/2012/05/30/76/0401000000AE N20120530005200315F.HTML>; see also *Political System*, DEMOCRATIC PEOPLE'S REPUBLIC KOREA, <http://www.korea-dpr.com/political.html> (last visited Mar. 31, 2013) (stating on North Korea's official website that Kim Il Sung is the "eternal President of the Republic").

44. See PAUL FRENCH, NORTH KOREA: THE PARANOID PENINSULA: MODERN HISTORY 30 (2d. ed. 2007) (describing *Juche* as a derivative of Marxism-Leninism); Patricia Goedde, Note, *Law "Of Our Own Style": The Evolution and Challenges of the North Korean Legal System*, 27 *FORDHAM INT'L L.J.* 1265, 1272 (2004) (noting that North Korea's *Juche* ideology is a reflection of Marxism-Leninism).

45. See Goedde, *supra* note 44 (translating *Juche* to mean "self reliance" or "self determination"); see also French, *supra* note 44, at 117 (describing North Korea as "a country with a guiding philosophy of self-reliance and planned self-sufficiency").

defense.<sup>46</sup> The North Korean government's unwillingness to participate in foreign affairs has led many to describe the nation as a "hermit kingdom."<sup>47</sup>

### 1. The North Korean Class Structure and Institutionalized Repression

North Korean citizens are primarily divided into three classes, which are ranked by loyalty to the regime: the core class (*haek-sim kyechung*), the wavering class (*tong-yo kyechung*), and the hostile class (*jok-tae kyechung*).<sup>48</sup> In a population of roughly twenty-three million people, the core class (i.e. elite members of the government and ruling party) represents twenty-five to thirty percent of the people.<sup>49</sup> Fifty percent of the population embodies the wavering class, which are those who defected from South Korea after the Korean War, technicians, teachers, enlisted soldiers, farmers, and former merchants.<sup>50</sup> The remaining twenty to twenty-five percent is the hostile class.<sup>51</sup> The hostile class members are those whose family members fled to

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46. *Juche Ideology*, DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, [http://www.korea-dpr.com/juche\\_ideology.html](http://www.korea-dpr.com/juche_ideology.html) (last visited Mar. 31, 2013) [hereinafter OFFICIAL DPRK: JUCHE] (providing on North Korea's official website that the guiding principles of *Juche* are "independence, self-reliance and self-defence"); see Goedde, *supra* note 44, at 1273 (discussing the three principles of North Korea's political philosophy).

47. See HIDDEN PEOPLE, *supra* note 1, at 4, 172–75 (explaining why North Korea is nicknamed "the Hermit Kingdom," as well as discussing the *Juche* ideology and its effect on North Korean foreign relations); see also RON FRIDELL, *DICTATORSHIP* 104 (2007) (describing North Korea as a highly secretive nation that rarely allows foreign citizens into the country).

48. See HIDDEN PEOPLE, *supra* note 1, at 198 (describing the North Korean class system); see also KONGDAN OH & RALPH C. HASSIG, *NORTH KOREA THROUGH THE LOOKING GLASS* 133 (2000) [hereinafter THROUGH THE LOOKING GLASS] (listing the three classes of North Korean society); French, *supra* note 44, at 42.

49. See HIDDEN PEOPLE, *supra* note 1, at 198 (stating that thirty percent of the North Korean population belongs to the core class); see also French, *supra* note 44, at 42 (stating that twenty-five percent of the North Korean population falls within the core class).

50. See HIDDEN PEOPLE, *supra* note 1, at 198 (describing the wavering class as almost the majority of the North Korean population and that it consists of primarily those who do not belong to the core class or hostile class); see also French, *supra* note 44, at 42.

51. See HIDDEN PEOPLE, *supra* note 1, at 198, 202 (noting that twenty percent of the North Korean population belongs to the hostile class); THROUGH THE LOOKING GLASS, *supra* note 48, at 133 (estimating that twenty-eight percent of the North Korean population belongs to the hostile class); see also French, *supra* note 44, at 42 (claiming that twenty-five percent of the North Korean population belongs to the hostile class).

South Korea during the Korean War, defectors, relatives of defectors, landowners, and any others who carry “political taint.”<sup>52</sup> Hostile class members are refused certain rights, such as rights to obtain education, employment, and medical services.<sup>53</sup>

Human rights organizations consistently rank North Korea as one of the worst human rights violators in the world.<sup>54</sup> North Korea does not afford its citizens freedom of expression, movement, or organization.<sup>55</sup> Opposition to the supreme leader or to the regime is severely punished and the government meticulously controls and limits access to media and information.<sup>56</sup> The regime offers virtually no due process, trial, or judicial review.<sup>57</sup> Crimes ranging from murder to mere

52. See HIDDEN PEOPLE, *supra* note 1, at 198, 202 (describing the hostile class); HUMAN RIGHTS WATCH, *A MATTER OF SURVIVAL: THE NORTH KOREAN GOVERNMENT’S CONTROL OF FOOD AND THE RISK OF HUNGER* 6 (2006) [hereinafter *A MATTER OF SURVIVAL*] (“Those labeled members of the ‘hostile’ class, such as former landowners, collaborators during the Japanese occupation of the Korean peninsula, and families of defectors and escapees who made their way to South Korea, are at the bottom of the state’s priorities.”).

53. See KOR. INST. FOR NAT’L UNIFICATION, *WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA* 2005, at 108 (2005) [hereinafter *KINU WHITE PAPER 2005*] (describing the rights denied to hostile class members in North Korea); see also JIYOUNG SONG, *HUMAN RIGHTS DISCOURSES IN NORTH KOREA: POST-COLONIAL, MARXIST AND CONFUCIAN PERSPECTIVES* 103 (2011).

54. See, e.g., *North Korea*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/freedom-world-2013> (last visited Jan. 20, 2013, 3:00 PM) (noting that in its 2013 publication of *Freedom in the World*, North Korea was included as one of the nine out of forty seven countries considered as “not free” to have the lowest possible rating for political rights and civil liberties); see also GLOBAL SECURITY, *supra* note 32, para. 175 (“We conclude that the North Korean regime is one of the worst human rights abusers in the world . . .”).

55. See *N. Kor. Human Rights: An Update: Hearing Before the Subcomm. on Asia, the Pacific, and the Global Env’t of the Comm. on Foreign Affairs*, 110th Cong. 6 (2007) (statement of Eni Faleomavaega, Chairman, Subcomm. on Asia, the Pacific, and the Global Env’t) [hereinafter *Hearing: North Korean Human Rights*] (stating “North Koreans have no freedom of expression or movement”); see also NORTH KOREA: FREEDOM OF MOVEMENT, *supra* note 26.

56. See RHODA MARGESSON et al., CONG. RESEARCH SERV., *RL34189, NORTH KOREAN REFUGEES IN CHINA AND HUMAN RIGHTS ISSUES: INTERNATIONAL RESPONSE AND U.S. POLICY OPTIONS* 8 (2007) [hereinafter *CRS INTERNATIONAL RESPONSE*] (discussing the ban on any dissent of the supreme leader, the lack of access to media, and the “severe physical abuse meted out to citizens who violate laws and restrictions”); see also ANDREW SCOBELL, *KIM JONG IL AND NORTH KOREA: THE LEADER AND THE SYSTEM* 30 (2006) (discussing the North Korean government’s restrictions on North Korean access to media sources and information).

57. See PAOLO CAMMAROTA ET AL., *LEGAL STRATEGIES FOR PROTECTING HUMAN RIGHTS IN NORTH KOREA* 16 (2007) (“Government security forces routinely arrest and

familial relations with a defector will result in incarceration in a hard labor prison camp.<sup>58</sup> The State often arbitrarily detains persons and imposes sentences as severe as lifetime imprisonment and death.<sup>59</sup>

## 2. The North Korean Penal System

The North Korean prison system is divided into four categories of hard labor penal facilities, or gulags.<sup>60</sup> *Kwan-li-so* prison camps, or long-term political penal colonies, imprison political dissidents, together with up to three generations of the relatives of political offenders.<sup>61</sup> *Kyo-hwa-so* penitentiaries are long-term institutions that detain individuals charged with criminal and political felonies.<sup>62</sup> *Jip-kyeol-so* facilities are short-

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imprison persons, holding them incommunicado without any possibility of a fair trial or judicial review.”); *see also* JOYCE HART, *KIM JONG IL: LEADER OF NORTH KOREA* 103 (2008) (noting the absence of due process in North Korea’s penal system); HUMAN RIGHTS WATCH, *WORLD REPORT 2012: EVENTS OF 2011*, at 356 (2012) (listing arbitrary arrest and detention and the lack of due process as some of North Korea’s violations of basic human rights); Ibp Usa, *NORTH KOREA: GENERAL SECRETARY KIM JONG IL HANDBOOK* 89 (2011) (explaining that the North Korean Central Court does not have the power of judicial review over executive and legislative actions).

58. Imprisonment as a result of the individual’s familial relations to the defector is known as “guilt-by-association.” IAN JEFFRIES, *NORTH KOREA: A GUIDE TO ECONOMIC AND POLITICAL DEVELOPMENTS* 18 (2006) (noting that thousands of North Koreans have been imprisoned solely for a relative’s violation of a law under the theory of guilt-by-association); *see also* MIKE KIM, *ESCAPING NORTH KOREA: DEFIANCE AND HOPE IN THE WORLD’S MOST REPRESSIVE COUNTRY* 113 (2010); Cammarota, *supra* note 57, at 17 (explaining that “guilt-by association” is “the idea of ‘collective responsibility’ whereby multiple generations of the offender’s family are also imprisoned”); *INVISIBLE EXODUS*, *supra* note 21, at 24.

59. *See* PAUL CLOSE & DAVID ASKEW, *ASIA PACIFIC AND HUMAN RIGHTS: A GLOBAL POLITICAL ECONOMY PERSPECTIVE* 4 (2004) (listing the North Korean regime’s usage of torture, the death penalty, and arbitrary detention and imprisonment as “serious human rights violations”); Cammarota, *supra* note 57, at 16 (noting that the North Korean government often arrests prisoners absent any judicial process or explanation and then imposes lifetime sentences in hard labor camps).

60. *See* LIVES AND VOICES, *supra* note 1, at xi, 9 (describing the North Korean penal system as a “gulag system” and distinguishing the different North Korean prison facilities); *see also* Kita Choa Ch Kikokusha no Seimei to Jinken o Mamoru Kai, *LIFE & HUMAN RIGHTS IN NORTH KOREA, SOCIETY TO HELP RETURNEES TO NORTH KOREA*, 34–36 (2003) (providing an in-depth discussion on the North Korean detention systems); Cammarota, *supra* note 57, at 16–19; *INVISIBLE EXODUS*, *supra* note 22, at 23–24.

61. *See* LIVES AND VOICES, *supra* note 1, at 9 (describing *Kwan-li-so* prison camps); *see also* Cammarota, *supra* note 57, at 17–18.

62. *See* LIVES AND VOICES, *supra* note 1, at 9 (describing *Kyo-hwa-so* penitentiary camps); *see also* Cammarota, *supra* note 58, at 19.



term prison centers that incarcerate those who have committed criminal and political misdemeanors.<sup>63</sup> *Ro-dong-dan-ryeon-dae* “mobile labor brigades” are short-term labor camps instituted to accommodate the overcrowding of repatriated individuals within the other prisons.<sup>64</sup>

The type of offense committed is used to further identify the varying degrees of punishment to follow.<sup>65</sup> Particularly, the regime distinguishes political offenses as especially contemptible.<sup>66</sup> For example, irrespective of the detainee’s initial motives for border crossing, subsequent contact with a South Korean citizen or a religious organization is perceived as an anti-state act and a political offense.<sup>67</sup> A repatriated migrant charged as a non-political offender is incarcerated in the short-term *jip-kyeol-so* or *ro-dong-dan-ryeon-dae* facilities.<sup>68</sup> A repatriated

63. See LIVES AND VOICES, *supra* note 1, at 9, 121 (providing an alternate spelling to *jip-kyeol-so* and stating that “*jip-kyul-so* shorter-term detention facilities” detain individuals for misdemeanor-level offenses, both criminal and political); see also Cammarota, *supra* note 57, at 19.

64. See LIVES AND VOICES, *supra* note 1, at 9, 121 (describing *ro-dong-danryeon-dae* “mobile labor brigades”); see also Cammarota, *supra* note 57, at 19.

65. See LIVES AND VOICES, *supra* note 1, at 120–47 (detailing the different types of detention centers for those repatriated from China and providing testimony from former detainees); see also STEPHAN HAGGARD & MARCUS NOLAND, WITNESS TO THE TRANSFORMATION: REFUGEE INSIGHTS INTO NORTH KOREA 92 (2011) [hereinafter WITNESS TO THE TRANSFORMATION] (providing a table that illustrates the North Korean prison system).

66. See DAVID HAWK, U.S. COMM. FOR HUMAN RIGHTS IN N. KOR., EXPOSING NORTH KOREA’S PRISON CAMPS: PRISONERS’ TESTIMONIES AND SATELLITE PHOTOGRAPHS 12 (2003) [hereinafter EXPOSING NORTH KOREA’S PRISON CAMPS] (explaining that North Korea views contact with a South Korean as a political offense); LIVES AND VOICES, *supra* note 1, at 119–20 (detailing North Korean penal system procedures in detaining repatriated North Koreans believed to have committed a political offense); see also Cammarota, *supra* note 58, at 62 (noting North Korea’s implementation of capital punishment for political offenders).

67. See LIVES AND VOICES, *supra* note 1, at 8, 25, 86, 120–22 (explaining that contact with South Koreans, Korean-Americans, or religious institutions is considered “hostile” to the regime and an “anti-state” act); see also INVISIBLE EXODUS, *supra* note 21, at 2 (“Migrants who . . . have any contact with South Koreans or other non-Chinese foreigners, including missionaries and humanitarian workers . . . are liable to severe punishments, even including death, if discovered and returned to North Korea.”).

68. See LIVES AND VOICES, *supra* note 1, at 120–21 (explaining that repatriated migrants from China who are charged with only the crime of illegal border crossing with no political component are imprisoned at the short-term prison facilities); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 98 (“[L]egal treatment of border crossing . . . was demoted from the equivalent of treason to a misdemeanor offense for those showing no political motives.”).

North Korean migrant charged with one of the ideological offenses, however, is imprisoned in a long-term *kwan-li-so* or *kyo-hwa-so* prison.<sup>69</sup>

To determine the level of punishment, North Korean officials first interrogate the repatriated upon their arrival.<sup>70</sup> North Korean authorities extensively inquire into the migrant's motives for departure and conduct in China to establish if the individual committed any political offenses.<sup>71</sup> These interrogation centers employ methods of physical abuse and public humiliation to compel repatriated migrants to confess to political crimes.<sup>72</sup> Once the authorities are content with the detainee's confessions, the migrant is sent to the appropriate prison facility based on the type and level of the crime committed.<sup>73</sup>

The North Korean government has never admitted to the existence of these hard labor prison facilities.<sup>74</sup> In fact, North

69. See LIVES AND VOICES, *supra* note 1, at 120 (explaining that repatriated individuals who are found to have come into contact with a South Korean or Christian will be sent to a *kwan-li-so* or *kyo-hwa-so* prison facility); see also INVISIBLE EXODUS, *supra* note 21, at 24; WITNESS TO THE TRANSFORMATION, *supra* note 65, at 92–93 (illustrating in a table and discussing the North Korean prison system).

70. See LIVES AND VOICES, *supra* note 1, at 119–20 (describing the process of interrogation of the repatriated North Koreans); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 29, 92–93.

71. See LIVES AND VOICES, *supra* note 1, at 119–20 (describing North Korea's interrogation procedures to determine if the migrant's reason for leaving or conduct in China had a political component); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 29, 92–93 (“A defector who is sent back to North Korea is subject to interrogation and investigation . . . . If the [National Security Agency] concludes that the defector crossed the border for economic reasons, the new code stipulates sentences of up to two years of ‘labor correction.’”).

72. See *supra* note 71 and accompanying text (detailing North Korean interrogation techniques).

73. See LIVES AND VOICES, *supra* note 1, at 120 (“If the case has a political component—if the person admits to having met South Koreans or watched South Korean TV or movies, or sometimes having gone to a Korean-Chinese church, the . . . police retain detainee.”); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 29, 92–93 (providing a chart illustrating the detention centers and sentences for prisoners detained for political offenses).

74. See Chico Harlan, *South Korean Report Details Alleged Abuses at North Korea's Prison Camps*, WASH. POST, (May 9, 2012), [http://www.washingtonpost.com/world/south-korean-report-details-alleged-abuses-at-north-koreas-prison-camps/2012/05/09/gIQA794LDU\\_story.html](http://www.washingtonpost.com/world/south-korean-report-details-alleged-abuses-at-north-koreas-prison-camps/2012/05/09/gIQA794LDU_story.html) (stating that “North Korea officially denies the existence of such camps”); Stephanie Nebehay, *North Korea Blurs Lines Between Prison Camps, Villages: Amnesty*, REUTERS, (Mar. 6, 2013, 10:14 PM), <http://www.reuters.com/article/2013/03/07/us-korea-north-amnesty-idUSBRE92600820130307>.

Korea adamantly rejects such allegations.<sup>75</sup> Despite the regime's denial of a state-run network of gulags, numerous witness and former prisoner testimonies and satellite images indicate that the North Korean regime has created a nationwide gulag system consisting of at least six political penal camps.<sup>76</sup> In 2012, the Korea Institute for National Unification ("KINU") estimated that about 150,000 to 200,000 prisoners were currently detained in one of the six North Korean hard labor gulags.<sup>77</sup> The 2012 KINU report further states, "[t]he South Korean government reported to the National Assembly Foreign Affairs Committee that there were 'an estimated 154,000 political prisoners detained in six Political Concentration Camps' throughout North Korea."<sup>78</sup>

### 3. A Look Inside North Korea's Secret Gulags

Within the North Korean penal camps, prison guards assign prisoners to forced labor under formidable conditions.<sup>79</sup> These

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75. See *supra* note 75 and accompanying text for the reports of the North Korean government's denial of the existence of the hard labor prison camps.

76. See generally LIVES AND VOICES, *supra* note 1 (offering an in-depth report on North Korean gulags, with first-hand testimonies by witnesses and former gulag inmates, computer-generated images of the hard labor prison facilities originally hand-drawn by former prison inmates, and satellite images of the locations); see also UN 'to Investigate N.Korean Prison Camps,' CHOSUN ILBO (Seoul) (Mar. 26, 2013, 9:45 AM), [http://english.chosun.com/site/data/html\\_dir/2013/03/26/2013032600604.html](http://english.chosun.com/site/data/html_dir/2013/03/26/2013032600604.html) ("It's possible to take [North Korean leader] Kim Jong-un to the [International Criminal Court] just through analysis of various data including satellite images and interviews with some 25,000 defectors in South Korea.") (quoting Ha Tae-kyoung, South Korean lawmaker of the Saenuri Party, a major political party of the South Korean government).

77. The Korea Institute for National Unification ("KINU") is a South Korean research institute funded by the South Korean government, "the hub of research on North Korea[,] and unification and a locus for the international network on Korean peninsula issues." *Mission & History*, KOREA INST. NAT'L UNIFICATION, [http://www.kinu.or.kr/eng/about/about\\_02\\_01.jsp](http://www.kinu.or.kr/eng/about/about_02_01.jsp) (last visited Apr. 4, 2013); KOR. INST. FOR NATIONAL UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2012, at 147 [hereinafter KINU WHITE PAPER 2012].

78. KINU WHITE PAPER 2012, *supra* note 77, at 148; see Jeffries, *supra* note 58, at 163 ("North Korea holds some 154,000 political prisoners in six large camps across the country, according to South Korean government estimates.").

79. See LIVES AND VOICES, *supra* note 1, at xi, 162 (discussing some methods of torture and punishment executed by guards onto prisoners as "causing great suffering and injury to . . . mental health" and describing the labor camps as a "gulag system"). "The severe working conditions imposed on deliberately underfed prisoners, particularly in the mining and lumber processing sectors of the labor camps (which

hard labor gulags expose prisoners to high risks of mental harm, physical injury, and death.<sup>80</sup> Further, prison food ration systems allocate to each prisoner portions of food, such as corn powder or cabbage-based gruel, that fall far below subsistence level.<sup>81</sup> The US Committee for Human Rights in North Korea (“HRNK”) found that the prison camps intentionally implement “the regimen of chronic semi-starvation provid[ing] only enough food to [keep prisoners] perpetually on the verge of starvation” in order to “generate[] large numbers of informants among the prisoners, leading to a prison-camp culture of extreme distrust and hostility.”<sup>82</sup>

Grueling labor requirements and meager food portions compel prisoners to scavenge for rats, tree bark, snakes, and grass to stave off starvation, illness, and death.<sup>83</sup> Critically

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lead to a large number of industrial accidents and deaths) could also be deemed ‘other inhuman acts.’” *Id.* See also Jeffries, *supra* note 58, at 90 (reporting that in North Korean prison camps “hundreds of thousands of prisoners work, often to their deaths”); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 95 (stating that in North Korean prison camps, the “conditions in the facilities . . . even have a psychological impact, in effect terrorizing those who are detained”).

80. See *supra* note 79 and accompanying text (discussing the physical and psychological impact of the North Korean prison camps).

81. See LIVES AND VOICES, *supra* note 1, at 86 (explaining that prisoners are fed very small meals, keeping prisoners constantly on the verge of starvation). “Former Prisoner #37 was given boiled corn husks, corn powder gruel and some soybeans in a dirty plastic bowl.” *Id.*; see also *North Korean Prison Camps Are ‘Like Hitler’s Auschwitz’*, BUSINESS INSIDER (Feb. 20, 2013, 6:59 AM), <http://www.businessinsider.com/survivors-likened-north-korean-prison-camps-to-holocaust-2013-2> (providing one former prisoner’s description of prison camp meals as “tiny rations of mainly cabbage-based gruel”).

82. The U.S. Committee on Human Rights in North Korea (“HRNK”) is a nongovernmental organization (“NGO”) comprised of “a distinguished group of foreign policy and human rights specialists” whose purpose is to advocate for human rights in North Korea. *About HRNK*, COMM. FOR HUMAN RIGHTS IN N. KOR., <http://www.hrnk.org/about/about-hrnk.php> (last visited Apr. 1, 2013). LIVES AND VOICES, *supra* note 1, at 31, 33; see also NANCY DZIEDZIC, WORLD POVERTY 59 (2006) (“[F]eeding prisoners the absolute bare minimum creates an atmosphere of distrust and suspicion among [the prisoners], making them fight each other for extra scraps of food and the clothing of those who have died.”); Martin, *supra* note 37, at 567 (discussing the extremely small meal rations and stating that a former North Korean labor camp prisoner believed that “in a state-operated prison camp, I guess the authorities try to keep the prisoners eating barely enough to sustain life”); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 97 (showing that many North Korean detainees witnessed forced starvation within the prison camps).

83. See Cammarota, *supra* note 57, at 18 (explaining how North Korean prison inmates supplement their diets in order to survive); HIDDEN PEOPLE, *supra* note 1, at 207.

malnourished and ill equipped for extreme working conditions, many prison inmates exhibit physical deformities, such as emaciated physiques, hunched backs, and missing limbs.<sup>84</sup> Electric shock, rape, water torture, forcing prisoners to severely beat up on one another, medical experimentation, forced abortions, and infanticide are some methods of punishment used within the North Korean penal camps.<sup>85</sup> One HRNK report revealed that inmates caught attempting to escape were publicly executed and guards often forced other prisoners to participate in the execution.<sup>86</sup>

Moreover, state-perpetuated gender-based violence, often propelled by racially motivated discrimination, is commonplace in the North Korean penal system.<sup>87</sup> Former prisoners reported that guards perform abortions by kicking a woman in the stomach, pinning a pregnant woman to the ground and jumping directly onto her stomach, placing wooden planks on top of the mother's stomach and forcing male prisoners to jump up and down on the plank, and injecting women's wombs with concentrations of the drug ravenol.<sup>88</sup> Others have witnessed guards commit infanticides by wrapping several premature babies in newspaper and burying them alive, beating infants to

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84. See HIDDEN PEOPLE, *supra* note 1, at 207 (describing detainees as “walking skeletons”); Jeffries, *supra* note 58, at 28 (“Many prisoners are stunted and deformed from back-breaking work, twelve hours a day, seven days a week . . . .”); LIVES AND VOICES, *supra* note 1, at 31 (describing physical harm to prisoners caused by the conditions of North Korean penal camps).

85. See U.S. DEP'T OF STATE, COUNTRY REPS. ON HUMAN RIGHTS PRACTICES FOR 2008, S. PRT. 111-60, at 865 (2d Sess. 2010) (“Defectors continued to report that many prisoners died from torture, disease, [and] starvation . . . .”); Cammarota, *supra* note 57, at 16, 22 (describing North Korean prison camp punishment techniques); LIVES AND VOICES, *supra* note 1, at 4, 33, 94–5, 124, 126, 142, 152–54 (discussing the harsh punishments imposed for relatively minor rule infractions); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 96–97.

86. Cammarota, *supra* note 57, at 18; see LIVES AND VOICES, *supra* note 1, at 33 (discussing an instance where prison guards forced other prisoners to participate in the public execution of another prisoner).

87. LIVES AND VOICES, *supra* note 1, at 122–23 (discussing racially motivated gender-based violence inside North Korean prison camps); see also CITIZENS' ALLIANCE FOR NORTH KOREAN HUMAN RIGHTS, THE BATTERED WHEEL OF THE REVOLUTION: BRIEFING REPORT ON THE SITUATION OF VIOLENCE AGAINST NORTH KOREAN WOMEN 50–54 (2011) (discussing State perpetuated gender-based violence in North Korean prison camps).

88. See LIVES AND VOICES, *supra* note 1, at 94, 152–54 for first-hand testimony by former inmates; see also INVISIBLE EXODUS, *supra* note 22, at 23–24.

death, using forceps to stab newborns in the skull, and throwing newborn infants into plastic boxes and leaving them to die.<sup>89</sup>

*B. North Korea in the International Spotlight: The Great Famine of the 1990s and the Kim Family Dynasty*

Despite North Korea's isolationist policies under *Juche* thought, the nation has found itself increasingly entwined in foreign relations.<sup>90</sup> Economic collapse and successive natural disasters have necessarily required foreign aid.<sup>91</sup> Moreover, North Korea's recent militant threats and unpredictable behavior have called for heightened international intervention and involvement.<sup>92</sup>

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89. See LIVES AND VOICES, *supra* note 1, at 4, 124, 126, 152–53 for first-hand testimony by former inmates; see also James Brooke, *N. Koreans Talk of Baby Killings*, N.Y. TIMES (June 10, 2002), <http://www.nytimes.com/2002/06/10/world/n-korean-s-talk-of-baby-killings.html?pagewanted=all&src=pm>.

90. See, e.g., STEPHAN HAGGARD, MARCUS NOLAND, & ERIK WEEKS, NORTH KOREA ON THE PRECIPICE OF FAMINE 3 (2008) [hereinafter NORTH KOREA ON THE PRECIPICE OF FAMINE] (“North Korea is critically dependent at the margin on external sources of supply... [and North Korea’s] pursuit of self-sufficiency has always been fundamentally misguided.”); HELGA TURKU, ISOLATIONIST STATES IN AN INTERDEPENDENT WORLD 74, 122–23 (2009) (recognizing North Korea’s isolationist policies, but also observing that North Korea had received “substantial humanitarian aid” from the European Union, negotiated with the United States, South Korea, and Japan “to receive up to half a million tons” of fuel, and attempted to “normalize [international] relations” by “promising a range of changes in exchange for aid and international recognition”); see also HIDDEN PEOPLE, *supra* note 1, at 250 (noting North Korea’s “policy of isolation”); OFFICIAL DPRK: JUCHE, *supra* note 46 (emphasizing on the North Korean official website the importance of political and economic self-reliance and independence under the *Juche* ideology).

91. See MARK E. MANYIN & MARY BETH NIKITIN, CONG. RESEARCH SERV., R40095, FOREIGN ASSISTANCE TO NORTH KOREA 2–3 (2012) (discussing a United States humanitarian aid program provided to North Korea from 1995 to 2003 and stating that it was reinstated in 2007); *North Korea Blames Global Warming for Natural Disasters*, RELIEFWEB (Aug. 21, 2002), <http://reliefweb.int/report/democratic-peoples-republic-korea/north-korea-blames-global-warming-natural-disasters> (reporting on the repeated natural disasters beginning in the 1990s); HIDDEN PEOPLE, *supra* note 1 (discussing the subsequent collapse of North Korea’s economy following the mid 1990s famine); NORTH KOREA ON THE PRECIPICE OF FAMINE, *supra* note 90 (noting North Korea’s “critical dependence” on foreign aid).

92. See Press Release, Bureau of Int’l Sec. & Nonproliferation, United States Sanctions Individuals Linked to North Korean Weapons of Mass Destruction Programs (Mar. 8, 2013), available at <http://www.state.gov/t/isn/205879.htm> (last visited Mar. 31, 2013) (discussing UN Security Council sanctions imposed on North Korea in 2006, 2009, and 2013 following three missile and nuclear tests in each of the respective years); Louis Charbonneau & Michelle Nichols, *US, China Agree on UN Sanctions Draft on North Korea*, NBCNEWS (Mar. 5, 2013, 6:30 PM), <http://worldnews.nbcnews.com/>

## 1. The Great Famine in North Korea

During the 1990s, large numbers of individuals crossed North Korean borders into China to flee a persistent and deadly famine.<sup>93</sup> The mid-1990s national food crisis was partly caused by structural issues starting in the early 1980s with North Korea's food rationing system, the 1991 collapse of the Soviet Union that caused North Korea to lose forty percent of all its imports, decline in trade with China following normalization of Sino-South Korean relations in the early 1990s, and successive calamitous natural disasters in North Korea between 1994 and 1997.<sup>94</sup> North Korea's Great Famine, which resulted in a death toll of massive scale, is recognized to be one of the worst famines of the twentieth century.<sup>95</sup>

Numerical estimates of the total deaths caused by the Great Famine vary greatly.<sup>96</sup> While North Korean officials contend that

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[\\_news/2013/03/05/17194138-us-china-agree-on-un-sanctions-draft-on-north-korea?lite](#) (reporting that "the United States and China reached a deal that 'significantly expands' U.N. sanctions on North Korea for its third nuclear test").

93. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-691, HUMANITARIAN ASSISTANCE: STATUS OF NORTH KOREAN REFUGEE RESETTLEMENT AND ASYLUM IN THE UNITED STATES 1 (2010) (stating that famine in North Korea in the 1990s "compelled a large number . . . to leave"); RÜDIGER FRANK, *KOREA 2010: POLITICS, ECONOMY AND SOCIETY* 161 (2010); *North Korea 'Loses 3 Million to Famine'*, BRITISH BROADCASTING CORP. (Feb. 17, 1999, 11:20 AM), <http://news.bbc.co.uk/2/hi/281132.stm> [hereinafter *North Korea Loses 3 Million*] (reporting on the estimated massive death toll resulting from the North Korean famine of the mid 1990s).

94. See AMNESTY INTERNATIONAL, *STARVED OF RIGHTS: HUMAN RIGHTS AND THE FOOD CRISIS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA (NORTH KOREA)* 6 (2004) [hereinafter *STARVED OF RIGHTS*] (discussing the causes of the Great Famine in North Korea); STEPHAN HAGGARD & MARCUS NOLAND, *HUNGER AND HUMAN RIGHTS: POLITICS OF FAMINE IN NORTH KOREA* 14 (2005) [hereinafter *POLITICS OF FAMINE IN NORTH KOREA*] (discussing the collapse of North Korea's Public Distribution System in the late 1980s and the early 1990s); *KOREA: THE EAST ASIAN PIVOT* 124 (Jonathan D. Pollack ed., 2004) (stating that the "fall in imports [to North Korea] from Russia in 1991 was equivalent to 40 percent of all [North Korean] imports" and that "a disillusioned China reduced its exports to North Korea," which it claims to be "the single proximate trigger to the North Korean famine").

95. See LEE ALLYN DAVIS, *NATURAL DISASTERS* 130 (2008) (stating that the North Korean famine of the 1990s was "one of the worst famines of modern times"); *FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM*, *supra* note 1, at 17 (describing the North Korean famine in the 1990s as ranking "among the most destructive of the twentieth century"); Manyin, *supra* note 91, at 13 ("A severe famine in the mid-1990s killed an estimated 600,000 to 3 million North Koreans.").

96. See SUK LEE, *THE GREAT FAMINE OF 1994-2000: EXISTENCE AND IMPACT* 21 (2005) (discussing the greatly differing numerical estimates of the total deaths

the Great Famine claimed a total of 220,000 lives between 1995 and 1998, the US House of Representatives' International Relations Committee estimates that 300,000 to 800,000 people died per year, totaling 900,000 to 2.4 million famine deaths.<sup>97</sup> In contrast to Western reports, South Korean officials revealed a lower figure of 270,000 total famine casualties between 1995 and 1998.<sup>98</sup> Further, some research institutes and notable experts calculate an approximate range of 600,000 to 1 million Great Famine fatalities.<sup>99</sup>

The food shortages, mass starvation, disease, and deaths that began with the Great Famine lingered on well after 1998 and into the 2000s, forcing North Korea to continue to rely heavily on foreign aid.<sup>100</sup> Still today, the nation has yet to fully

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resulting from the Great Famine); *see also* POLITICS OF FAMINE IN NORTH KOREA, *supra* note 95, at 9.

97. *See* Andrew Natsios, *The Dangers of the Coming North Korean Famine*, U.S. NEWS (Nov. 12, 2012), <http://www.usnews.com/opinion/blogs/world-report/2012/11/12/the-political-consequences-of-famine-in-north-korea> (stating that as many as 2.5 million people were killed from famine during the Great Famine of the 1990s); Jeffries, *supra* note 58, at 452 (discussing North Korea's contention that a total of 220,000 people died between 1995 and 1998 from famine); *see also* Henry Chu, *U.S. Officials Report Horror of N. Korea Famine*, L.A. TIMES, Aug. 20, 1998, <http://articles.latimes.com/1998/aug/20/news/mn-14860> (stating, in 1998, that US officials reported that 300,000 to 800,000 North Koreans died each year starting in 1995); FAMINE IN NORTH KOREA: MARKETS, AID, AND REFORM, *supra* note 1, at 73 (stating that the North Korean government estimated a total 220,000 Great Famine deaths between 1995 and 1998); Jeffries, *supra* note 58, at 58 (discussing the US House of Representatives' International Relations Committee's estimate that 300,000 to 800,000 North Koreans died each year between 1995 and 1998).

98. *See* Lee Soo-Jeong, *270,000 North Koreans Have Died From Famine, Says South*, RELIEFWEB (Aug. 27, 1999), <http://reliefweb.int/report/democratic-peoples-republic-korea/270000-north-koreans-have-died-famine-says-south> (reporting South Korea's official estimate of 270,000 total Great Famine deaths); *Report: 270,000 North Koreans Killed by Famine From 1995 to 1998*, AMARILLO (Aug. 27, 1999), [http://amarillo.com/stories/082799/usn\\_LA0783.001.shtml](http://amarillo.com/stories/082799/usn_LA0783.001.shtml) (reporting on South Korea's official estimate of total North Korean famine casualties between 1995 and 1998).

99. *See* KINU WHITE PAPER 2012, *supra* note 77, at 345 (providing KINU's estimate of 580,000 to 1,120,000 total deaths from the Great Famine); POLITICS OF FAMINE, *supra* note 94, at 18 (providing Stephan Haggard's and Marcus Noland's belief that more "plausible" studies by analysts "suggest between 600,000 and 1 million excess deaths"); Suk Lee, *supra* note 96, at 46-47 (providing the analysis used to determine the estimated 600,000 to 1 million famine death toll range); *see also* A MATTER OF SURVIVAL, *supra* note 52, at 9 (stating that "demographic and economic experts use one million as a reasonable estimate" of North Korea's Great Famine).

100. *See* KINU WHITE PAPER 2012, *supra* note 100, at 335 (explaining that, although foreign aid to North Korea and grain production increased in 2000 and 2001, respectively, "chronic food shortages within North Korea persisted"); MANYIN &



recover.<sup>101</sup> In 2012, Japanese and South Korean media reported that a large-scale famine in North Korea had resurfaced, though to what extent remains speculative.<sup>102</sup>

## 2. North Korean President Kim Jong-un

On December 17, 2011, enigmatic supreme leader Kim Jong-il died of a heart attack at sixty-nine years of age, officially ending his seventeen-year reign over North Korea.<sup>103</sup> Immediately following his passing, Kim's youngest son and designated heir to the dynastic regime, Kim Jong-un, presided as North Korea's new supreme leader.<sup>104</sup> Since the leadership shift,

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NIKITIN, *supra* note 91, at 13 (explaining that the United States provided North Korea with food aid from 1995 to 2003, which resumed again in 2007); POLITICS OF FAMINE IN NORTH KOREA, *supra* note 94, at 15 (illustrating a chart showing North Korean food imports and aids from 1990 to 2003).

101. See *Korea, Democratic People's Republic (DPRK)*, WORLD FOOD PROGRAMME, <http://www.wfp.org/countries/korea-democratic-peoples-republic-dprk> (last visited Dec. 1, 2012) ("In July 2012, WFP resumed its 'Nutrition Support to Women and Children in the [DPRK]' operation, which seeks to combat continued hunger and under-nutrition among children and their mothers . . ."); MANYIN & NIKITIN, *supra* note 91, at 13 ("Since 1995, the international community has donated over 12 million MT of food aid to North Korea to help North Korea alleviate chronic, massive food shortages that began in the early 1990s."); POLITICS OF FAMINE IN NORTH KOREA, *supra* note 100 (demonstrating that foreign food imports to North Korea continued into the 2000s).

102. See *Aid Worker Says North Korea May Be Facing New Food Crisis*, ASAHI SHIMBUN (Osaka), Aug. 30, 2012, [http://ajw.asahi.com/article/asia/korean\\_peninsula/AJ201208300106](http://ajw.asahi.com/article/asia/korean_peninsula/AJ201208300106) ("North Korea could be heading towards a crisis similar to the 1990s when a million people are thought to have died . . ."); *N. Korean Famine 'Worst in Over 20 Years'*, CHOSUN ILBO (Seoul), Oct. 15, 2012, [http://english.chosun.com/site/data/html\\_dir/2012/10/15/2012101501435.html](http://english.chosun.com/site/data/html_dir/2012/10/15/2012101501435.html); *N. Korean Farmer Cites Grave Drought; Aid Unlikely*, Korea Herald (Seoul) (May 29, 2012, 8:02 PM), <http://www.koreaherald.com/view.php?ud=20120529000957>; *Report: Famine Hit N.Korea's Rice Basket in 2012*, ASAHI SHIMBUN (Osaka) (Feb. 7, 2013), [http://ajw.asahi.com/article/asia/korean\\_peninsula/AJ201302070094](http://ajw.asahi.com/article/asia/korean_peninsula/AJ201302070094).

103. *Kim Jong Il Passes Away*, KOREAN CENTRAL NEWS AGENCY (Pyongyang) (Dec. 19, 2011), <http://www.kcna.co.jp/item/2011/201112/news19/20111219-02ee.html> (announcing to North Korean citizens Kim Jong-il's passing); see *Medical Analysis of Kim Jong Il's Demise*, KOREAN CENTRAL NEWS AGENCY (Pyongyang) (Dec. 19, 2011), <http://www.kcna.co.jp/item/2011/201112/news19/20111219-03ee.html> (reporting that the cause of Kim Jong-il's death was a heart attack); see also *North Korean Leader Kim Jong-il Dies 'of Heart Attack'*, BRITISH BROADCASTING CORP. (Dec. 19, 2011, 7:53AM), <http://www.bbc.co.uk/news/world-asia-16239693>.

104. Korean Central News Agency of the DPRK ("KCNA") is a state-run news agency and North Korea's only news agency provided to North Korean citizens. NORTH KOREA HANDBOOK, *supra* note 42, at 416; see also JAMES E. HOARE, HISTORICAL DICTIONARY OF DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 231 (2012). *Notice to All*

Kim Jong-un's regime has kept the world on its toes by developing its nuclear proliferation programs, reneging on the 1953 Korean Armistice Agreement, declaring a "state of war" with South Korea, and threatening the United States with ballistic missile attacks.<sup>105</sup> While the global community's focus remained on North Korea's militaristic and unconventional tactics, North Korea's treatment of its own citizens worsened; the brutality of punishments for attempted border crossing surpassed what was observed during Kim Jong-il's rule.<sup>106</sup>

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*Party Members*, *supra* note 41 (revealing on the same day of announcing Kim Jong-il's death that Kim Jong-un had succeeded leadership over North Korea, and describing Kim Jong-un as the "great successor to the revolutionary cause of Juche and outstanding leader of our party, army and people); see Holly Yan & Atika Shubert, *Kim Jong Un: The 'Great Successor' Remains an Enigma*, CNN (Dec. 19, 2011, 11:32 AM), <http://www.cnn.com/2011/12/19/world/asia/kim-jong-un-profile>; see also Liu Ming, *Changes and Continuities in Pyongyang's China Policy*, in NORTH KOREA IN TRANSITION: POLITICS, ECONOMY, AND SOCIETY 211 (Kyung-Ae Park & Scott Snyder eds., 2013) (stating that during a North Korean party conference, Kim Jong-un was informally designated as Kim Jong-il's heir apparent); Kongdan Oh & Ralph Hassig, *North Korea in 2009: The Song Remains the Same*, 50 ASIAN SURVEY 89, 96 (2010) (describing Kim Jong-un as Kim Jong-il's youngest son); HIDDEN PEOPLE, *supra* note 1, at 2 (describing North Korea as a "dynastic dictatorship").

105. The 1953 Korean Armistice Agreement was a truce signed between North Korea and the People's Republic of Korea (South Korea) to enforce a cease-fire. NATIONAL ARCHIVES, OUR DOCUMENTS: 100 MILESTONE DOCUMENTS FROM THE NATIONAL ARCHIVES 204 (2003). The Korean Armistice Agreement is not a peace treaty and North Korea and South Korea are technically still at war. *Id.*; MARITIME CHALLENGES AND PRIORITIES IN ASIA: IMPLICATIONS FOR REGIONAL SECURITY 13 (Joshua Ho et al. eds., 2013); see, e.g., Masamito Aoki & Mizuho Aoki, *Defiant North Korea Launches Rocket*, JAPAN TIMES (Minato) (Dec. 13, 2012), <http://www.japantimes.co.jp/news/2012/12/13/national/defiant-north-korea-launches-rocket/#.UVe20qv5lcM> (reporting on North Korea's December 2012 rocket launch into the Earth's orbit); *North Korea Says It Is in a 'State of War' with South*, GUARDIAN (London) (Mar. 29, 2013, 9:10 PM), <http://www.guardian.co.uk/world/2013/mar/30/north-korea-state-war-south-korea> (reporting on North Korea declaring a "state of war" with South Korea); *N.Korea: 'Time Has Come to Settle Accounts' with United States*, CHOSUN ILBO (Seoul), Mar. 30, 2013, [http://english.chosun.com/site/data/html\\_dir/2013/03/30/2013033000343.html](http://english.chosun.com/site/data/html_dir/2013/03/30/2013033000343.html) (covering North Korea's March 2013 threats of missile attacks on the United States); *North Korea Conducted an Underground Nuclear Test; South Korea on High Alert*, HAARETZ (Tel Aviv) (Feb. 12, 2013, 8:00 AM), <http://www.haaretz.com/news/world/north-korea-conducted-an-underground-nuclear-test-south-korea-on-high-alert-1.503002> (reporting on North Korea's February 2013 underground nuclear test); *Rocket Launch Fails, North Korea Eyes N-Test*, TIMES OF INDIA (Mumbai) (Apr. 14, 2012, 2:38 AM), [http://articles.timesofindia.indiatimes.com/2012-04-14/rest-of-world/31341715\\_1\\_long-range-rocket-north-korea-founding-president-kim-il-sung](http://articles.timesofindia.indiatimes.com/2012-04-14/rest-of-world/31341715_1_long-range-rocket-north-korea-founding-president-kim-il-sung) (detailing North Korea's failed April 2012 attempted missile launch).

106. See KINU WHITE PAPER 2012, *supra* note 99, at 525 ("It has further been reported that the persecution of defector families has become worse since Kim Jong-un

Foreign media reported that North Korean border officials were now equipped with orders to “shoot-to-kill” attempted border-crossers, that punishments for repatriated North Koreans and their families had increased in severity, and that North Korean prison camps and prison guards had expanded in size and numbers.<sup>107</sup>

*C. The Enduring Kinship: The PRC-DPRK Alliance and Its Implications for North Korean Migrants in China*

For more than a half-century, North Korea has enjoyed a unique kinship with the People’s Republic of China (“PRC”), the isolated nation’s most important ally.<sup>108</sup> Political scientists recognize the PRC-DPRK alliance as one-sided, noting that “China makes all the sacrifices—providing crucial political and diplomatic backing, essential economic assistance, and limited military cooperation.”<sup>109</sup> While relations have not been

emerged as the successor to Kim Jong-il.”); *North Korea’s Kim Jong Un Wages Defector Crackdown*, L.A. Times, Jan. 5, 2012, 4:00 AM, [http://latimesblogs.latimes.com/world\\_now/2012/01/kim-jong-il-death-new-north-korean-leader-kim-jong-un-crackdown-on-defectors.html](http://latimesblogs.latimes.com/world_now/2012/01/kim-jong-il-death-new-north-korean-leader-kim-jong-un-crackdown-on-defectors.html) (claiming that Kim Jong-un has instructed North Korean border authorities to “shoot-to-kill” North Korean border crossers); see also Lee Jong-Heon, *Kim Jong-Un Era Starts with New Landmines on China Border and Shoot-to-Kill Orders to Stop Defections*, WORLDTRIBUNE.COM (Feb. 2, 2012), <http://www.worldtribune.com/2012/02/02/kim-jong-un-era-starts-with-new-landmines-on-china-border-and-shoot-to-kill-orders-to-stop-defections>; *Sharp Drop in North Korea Refugees to South*, INQUIRER (Makati City), Jan. 2, 2013, 3:11 PM, <http://newsinfo.inquirer.net/333847/sharp-drop-in-north-korea-refugees-to-south>.

107. See *supra* note 106 and accompanying text (providing several media news sources reporting on Kim Jong-un’s policy to “shoot-to-kill” North Koreans at North Korean borders); see also Philip Bump, *Satellites Show North Korea’s Prison Camps Expanding Under Kim Jong-Un*, ATLANTIC WIRE (Feb. 26, 2013), <http://www.theatlanticwire.com/global/2013/02/north-korea-prison-camp-satellites/62514/> (reporting that North Korean prison camps have grown in size and that the number of prison guards in camps has doubled).

108. See ANDREW SCOBELL, *CHINA AND NORTH KOREA: FROM COMRADES-IN-ARMS TO ALLIES AT ARM’S LENGTH* iii, 1 (2004) [hereinafter *COMRADES-IN-ARMS*] (noting the Korean War in the 1950s as the start of the Peoples Republic of China-Democratic Peoples Republic of Korea (“PRC-DPRK”) alliance and describing the relationship as “strange” to outsiders); Alexander Zhebin, *A Political History of Soviet-North Korean Nuclear Cooperation*, in *THE NORTH KOREAN NUCLEAR PROGRAM: SECURITY, STRATEGY AND NEW PERSPECTIVES FROM RUSSIA* 35 (James Moltz Clay et al. eds., 2011) (describing China as North Korea’s “last major ally” and its position to North Korea as “unique”).

109. *COMRADES-IN-ARMS*, *supra* note 108, at 4 (describing the PRC-DPRK relationship as “one-sided”); see SAMUEL S. KIM, *NORTH KOREAN FOREIGN RELATIONS IN THE POST-COLD WAR WORLD* 8 (2007) (“Without a doubt, China holds greater

consistently friendly, China has never abandoned the PRC-DPRK alliance.<sup>110</sup> Observers rationalize the dynamic and intimate relationship by pointing to common socialist ideological views, logical geopolitical strategy, and the negative implications for China if the North Korean regime were to collapse.<sup>111</sup>

First, China and North Korea have a common, long-enduring “ideological bond” through their Communist regimes.<sup>112</sup> Since the Korean War and through the Cold War, China and North Korea have fought side-by-side as allies against foreign nations they view as “common ideological enemies,” such as the United States and South Korea.<sup>113</sup> Second, North Korea is an important geopolitical security interest to China.<sup>114</sup>

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importance in North Korea’s foreign policy than the DPRK holds in Chinese foreign policy.”).

110. See RETHINKING FOREIGN POLICY ANALYSIS: STATES, LEADERS, AND THE BEHAVIOR OF INTERNATIONAL RELATIONS 100–01 (Stephen G. Walker et al. eds., 2011) [hereinafter RETHINKING FOREIGN POLICY ANALYSIS] (stating “China-North Korea relations were at odds in the early 1990s” because of China’s newfound diplomatic relations with South Korea, but that “strategically, China never abandoned North Korea”); SCOTT SNYDER, CHINA’S RISE AND THE TWO KOREAS 130 (2009) (discussing “[t]he political estrangement between China and North Korea that followed China’s decision to normalize diplomatic relations with South Korea” in the 1990s).

111. See ALICE MILLER ET AL., BECOMING ASIA: CHANGE AND CONTINUITY IN ASIAN INTERNATIONAL RELATIONS SINCE WORLD WAR II, at 265 (2011) (stating that China wants to prevent the North Korean regime from collapsing to avoid mass migration and “a loss of North Korea as a buffer zone”); COMRADES-IN-ARMS, *supra* note 108, at 1 (naming shared socialist political ideology and geopolitical balance as the “logic of the relationship between the PRC and DPRK”).

112. RUSSELL ONG, CHINA’S SECURITY INTERESTS IN THE 21ST CENTURY 76–77 (2007) (noting that “China and North Korea are currently among the few Communist regimes left in the world” and share an “ideological bond . . . against the US”); see COMRADES-IN-ARMS, *supra* note 108, at 1 (“As fraternal socialist party-states, Beijing and Pyongyang share an ideological affinity.”).

113. See HANKWON KIM, CULTURAL AND STATE NATIONALISM: SOUTH KOREAN AND JAPANESE RELATIONS WITH CHINA 137 (2007) (“Although the Korean War ended in 1953, a Cold War-regional balance of power established between the U.S.-Japan-South Korea side and the Soviet Union-China-North Korea side.”); ONG, *supra* note 112, at 77 (“Both [China and North Korea] also continue to stress the common need to preserve the ruling authoritarian parties’ hold on power by defeating the US-led strategy of peaceful evolution . . . [T]his strategy aims to undermine Communist regimes through non-military means . . .”); COMRADES-IN-ARMS, *supra* note 108, at 1–2 (describing China and North Korea as becoming “brothers-in-arms” starting in the Korean War and that, in 1961, China and North Korea signed a friendship treaty “that committed one country to come to the aid of the other if attacked”).

114. See COMRADES-IN-ARMS, *supra* note 108, at 3 (discussing the geopolitics of the PRC-DPRK alliance); see also NORTH KOREA IN THE WORLD ECONOMY 182 (Eun Kwan

The two Communist nations share an 850-mile border, with North Korea serving as an important “buffer state” from US or South Korean encroachment into China.<sup>115</sup> Third, China understands that without its economic and political backing, the North Korean regime’s survival is unlikely.<sup>116</sup> China postulates that a collapse of the North Korean regime may facilitate a resurgence of the Korean War or a mass North Korean exodus into China.<sup>117</sup> Lastly, though PRC-DPRK relations appear to have cooled following North Korea’s bellicose actions in 2012 and 2013, China has continued to support the State’s policies prohibiting North Korean citizens from straying outside North Korea’s control.<sup>118</sup>

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Choi et al. eds., 2003) (stating that “China currently seems to prefer a divided Korean Peninsula with North Korea as a buffer between South Korea and US troops”).

115. See *supra* note 115 and accompanying text (stating that North Korea serves as a “buffer” zone to China preventing US and South Korean encroachment); MILLER ET AL., *supra* note 111 (noting China’s concern that if it loses North Korea as a “buffer zone” it will result in the “expansion of the American presence to China’s borders”).

116. See ROBERT G. SUTTER, CHINESE FOREIGN RELATIONS: POWER AND POLICY SINCE THE COLD WAR 204 (“[P]revailing Chinese government actions still seemed to strike a balance of support and accommodation of the North Korean regime, which China seeking to avoid the many dangers for its key interests that would follow from major instability or collapse of the North Korean regime.”); see also *supra* note 110 and accompanying text (stating that China provides “crucial” political, economic, and military support to North Korea).

117. See MELANIE KIRKPATRICK, ESCAPE FROM NORTH KOREA: THE UNTOLD STORY OF ASIA’S UNDERGROUND RAILROAD 306 (2012) (“A collapse of North Korea would have huge implications for China: disruption of regional trade, refugees streaming across its border, even war.”); SUTTER, *supra* note 116 (“Chinese leaders showed keen awareness that major instability in or collapse of the North Korean regime would have potentially serious adverse consequences . . . includ[ing] the danger of full-scale war on the Korean peninsula and large-scale refugee flows to China.”).

118. See Roberta Cohen, *China’s Repatriation of North Korean Refugees*, BROOKINGS (Mar. 5, 2012), <http://www.brookings.edu/research/testimony/2012/03/05-china-repatriation-cohen> (stating in a testimony submitted to the US Congressional-Executive Commission on China that China was planning on repatriating thirty to forty North Koreans pursuant to a bilateral agreement with North Korea); Jennifer Lind, *Will China Finally ‘Bite’ North Korea?*, CNN (Mar. 14, 2013, 3:09 PM), <http://www.cnn.com/2013/03/11/opinion/lind-north-korea> (discussing how China agreed to UN sanctions against North Korea, but also why China remains an ally to North Korea); Paula Hancocks, *China Has Repatriated North Korean Defectors, South Korean Official Says*, CNN (Mar. 9, 2012, 11:39 AM) <http://www.cnn.com/2012/03/09/world/asia/china-north-korea> (“Ignoring international protests, China may have repatriated around 30 North Korean defectors[,] . . . a South Korean official said Friday.”); Jane Perlez, *Chinese Editor Suspended for Article on North Korea*, N.Y. Times (Apr. 1, 2013), [http://www.nytimes.com/2013/04/02/world/asia/chinese-suspend-editor-who-questioned-north-korea-alliance.html?\\_r=0](http://www.nytimes.com/2013/04/02/world/asia/chinese-suspend-editor-who-questioned-north-korea-alliance.html?_r=0) (reporting on a claim by Deng Yuwen, the

### 1. China's Repatriation Policy: China's Policy of Automatically Repatriating All North Korean Migrants

Since the 1990s, China observed a considerable influx of North Korean migrants, primarily into the northeastern provinces situated along the Sino-North Korean border.<sup>119</sup> A large ethnic Korean population and the geographic proximity of the provinces make for a convenient stop for the North Korean migrants.<sup>120</sup> China alleges that about 10,000 North Korean migrants reside within its borders.<sup>121</sup> South Korea, however, estimates about 10,000 to 30,000 migrants are in China, while other NGOs estimate the population to be between 100,000 and 300,000 North Korean migrants.<sup>122</sup>

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author of an article published in a British paper, that the Chinese Communist Party suspended him “after writing an article . . . saying that China should abandon its ally North Korea”).

119. See *INVISIBLE EXODUS*, *supra* note 21, at 3 (“[T]he collapse of the North Korean economy in the 1990s . . . provoked the greatest outpouring—starvation and despair prompting hundreds of thousands to seek help across the [Chinese] border.”); *LIVES AND VOICES*, *supra* note 1, at 111 (“The largest number of North Korean ‘border crossers’ were people simply seeking to survive . . . particularly during the acute famine in the 1990s.”); *LIVES FOR SALE*, *supra* note 23, at 11 (“In the mid-to-late 1990s, large numbers of North Koreans began crossing into China as North Korea slipped into famine and North Korea’s control began to fray, particularly in the northeastern provinces bordering China.”); see also *CAMMAROTA ET AL.*, *supra* note 57, at 11.

120. See *LIVES FOR SALE*, *supra* note 23, at 17, 19 (discussing the large ethnic Korean population in China’s northeastern provinces and that “[t]he presence of culturally similar, linguistically connected populations on the other side of the border offers an advantage to the refugees”); see also Frank, *supra* note 93, at 265 (“In sum, geographical proximity to the Sino-Korean border seems to be the dominant explanation for the large share of migrants . . .”); *CRS INTERNATIONAL RESPONSE*, *supra* note 56, at 4–6.

121. See Kyu Chang Lee, *supra* note 32, at 139 (“The Chinese government estimates the number of North Korean defectors residing in China to be about 10,000.”); see also DORIS WASTL-WALTER, *THE ASHGATE RESEARCH COMPANION TO BORDER STUDIES* 508 (2011).

122. Compare CAREN FREEMAN, *MAKING AND FAKING KINSHIP: MARRIAGE AND LABOR MIGRATION BETWEEN CHINA AND SOUTH KOREA* 98 (2011) (noting the South Korean government’s “conservative estimate of 10,000-30,000”), and *INVISIBLE EXODUS*, *supra* note 21, at 2 (describing South Korea’s Ministry of Unification in the Republic of Korea’s estimate of 10,000 North Korean migrants currently in China as a low estimate relative to non-governmental organizations’ estimates), and Kyu Chang Lee, *supra* note 32, at 139, with VICTOR CHA, *THE IMPOSSIBLE STATE: NORTH KOREA, PAST AND FUTURE* 197 (2012) (stating that other governments and organizations estimate about 100,000 to 300,000 North Korean migrants are in China), and *INVISIBLE EXODUS*, *supra* note 21, at 2 (noting that “as many as 300,000 [is] estimated by non-governmental groups”), and WASTL-WALTER, *supra* note 121 (stating that other organizations have estimated that about 150,000 to 300,000 North Korean migrants are within Chinese borders).

China practices the policy of forcibly deporting all unauthorized migrants to North Korea.<sup>123</sup> China justifies repatriating the migrants under two theories.<sup>124</sup> First, China claims that all North Koreans in China are “economic migrants.”<sup>125</sup> This sweeping classification systematically excludes all North Korean migrants in China from the Refugee Convention’s reach.<sup>126</sup> Second, China asserts that it must honor the Mutual Cooperative Protocol Between China and North Korea for National Security and Social Order in the Border Areas (the “Repatriation Treaty”), a PRC-DPRK bilateral treaty.<sup>127</sup> When it entered the 1986 agreement, China promised to repatriate all North Korean migrants who unlawfully crossed the Sino-North Korean border.<sup>128</sup> As a result of China’s repatriation policy, North Koreans are viewed as illegal

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123. See CRS INTERNATIONAL RESPONSE, *supra* note 56, at 11 (explaining that China generally denies North Koreans the opportunity to apply for political asylum and that China maintains that it must repatriate North Korean migrants in China under the bilateral treaty with North Korea); see also *China’s Repatriation of North Korean Refugees: Hearing Before the Cong.-Exec. Comm’n on China*, 112th Cong. 2 (2d Sess. 2012) [hereinafter *Hearing: China’s Repatriation*] (statement of Chris Smith, Chairman, Cong.-Exec. Comm’n on China).

124. See Yeo Hoon Julie Park, Note, *China’s “Way Out” of the North Korean Refugee Crisis: Developing a Legal Framework for the Deportation of North Korean Migrants*, 25 *GEO. IMMIGR. L.J.* 515, 516, 521 (2011) (explaining that China’s “economic migrant” categorization of North Korean migrants and a PRC-DPRK bilateral treaty justify its policy to repatriate North Korean migrants); Gahng, *supra* note 23, at 361.

125. See CECC ANNUAL REPORT 2011, *supra* note 32 (“The Chinese government . . . continues to deport North Korean refugees under the classification of ‘economic migrants . . .’”); Gahng, *supra* note 23, at 372 (“As illegal economic migrants, undocumented North Koreans are subject to being captured, detained, and beaten by Chinese law enforcement.”).

126. See *supra* note 126 and accompanying text (discussing China’s continued practice of repatriating North Korean migrants); see also Greenhill, *supra* note 33.

127. See Repatriation Treaty, *supra* note 27; see also Kyu Chang Lee, *supra* note 32, at 139 (explaining that in the 1960’s, China secretly entered into the Escaped Criminals Reciprocal Extradition with North Korea, and then in 1986, it entered into the Mutual Cooperative Protocol Between China and North Korea for National Security and Social Order in the Border Areas, promising North Korea to repatriate all unauthorized North Koreans); see also INVISIBLE EXODUS, *supra* note 21, at 11 n. 24.

128. See Repatriation Treaty, *supra* note 26, arts. 3–5, 10 (outlining China’s duties to North Korea and demonstrating that China entered into the agreement with North Korea in 1986); see also CRS INTERNATIONAL RESPONSE, *supra* note 56, at 11 (“China indicates it is obliged under a bilateral 1986 repatriation agreement with North Korea to return all border crossers.”); INVISIBLE EXODUS, *supra* note 21, at 11; *supra* note 26 and accompanying text (outlining North Korean laws prohibiting the crossing of the North Korean borders without State authorization).

immigrants and are steadfastly denied institutional humanitarian aid.<sup>129</sup>

Each year, China repatriates approximately 5,000 to 6,000 North Korean migrants.<sup>130</sup> The KINU reported that China repatriated upwards of 15,000 migrants in June 2000 alone.<sup>131</sup> Yet, many migrants have no desire to reside in China permanently.<sup>132</sup> Many migrants use China for temporary transitional purposes to gain entry into other countries, namely South Korea.<sup>133</sup>

After successfully crossing Sino-North Korean borders, North Korean migrants continue to live in perpetual fear of repatriation.<sup>134</sup> In addition to risks of forcible deportation, the migrants are also susceptible to manipulation and mistreatment by residents in China.<sup>135</sup> Since North Koreans in China are

129. See DICK K. NANTO ET AL., CHINA-NORTH KOREA RELATIONS 5 [hereinafter CHINA-NORTH KOREA RELATIONS] (explaining that because China views North Korean migrants as “economic migrants,” it does not allow UN agencies or other NGOs access to North Korean migrants in China); CRS INTERNATIONAL RESPONSE, *supra* note 56, at 9 (noting China’s “unwillingness to view illegal [North Korean] migrants as refugees”); see also LIVES AND VOICES, *supra* note 1, at 113; WITNESS TO THE TRANSFORMATION, *supra* note 65, at 149.

130. See *Hearing: China’s Repatriation*, *supra* note 124, at 38 (“[I]t is estimated that more than 5,000 refugees are deported back to North Korea every year.”); *China to Repatriate ‘Hundreds’ of N.Koreans*, CHOSUN ILBO (Seoul) (Feb. 27, 2012, 12:08 PM), [http://english.chosun.com/site/data/html\\_dir/2012/02/27/2012022701242.html](http://english.chosun.com/site/data/html_dir/2012/02/27/2012022701242.html).

131. KOR. INST. FOR NAT’L UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2002, at 182 (2002); see also Kyu Chang Lee, *supra* note 32, at 140 (discussing the US Committee for Refugees’ finding that in June 2000, China had repatriated 15,000 North Korean migrants).

132. YOONOK CHANG, MIGRATION EXPERIENCES OF NORTH KOREAN REFUGEES: SURVEY EVIDENCE FROM CHINA 2 (2008) (“Relatively few refugees want to remain in China: Most want to permanently resettle in South Korea . . . .”); see, e.g., Cha, *supra* note 122, at 223 (noting that most North Korean defectors “choose to resettle in South Korea”); Jane Kim, *supra* note 32, at 463.

133. YOONOK CHANG, *supra* note 132, at 8 (stating that most North Korean migrants do not wish to reside in China permanently and consider their time in China as a “‘transitional’ stay”); see also Jane Kim, *supra* note 32, at 463; WITNESS TO THE TRANSFORMATION, *supra* note 65, at 33.

134. See INVISIBLE EXODUS, *supra* note 21, at 2 (“[T]he migrants remain hidden for fear of discovery, repatriation, and harsh punishment in North Korea.”); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 39 (“Approximately 67 percent identified fear of arrest and repatriation as their biggest concern.”).

135. See WITNESS TO THE TRANSFORMATION, *supra* note 65, at 39 (stating that North Korean migrants feel extreme anxiety from their lack of legal status in China); see also Morse Tan, *A State of Rightlessness: The Egregious Case of North Korea*, 80 MISS. L.J. 681, 700 (2010) (noting Chinese human traffickers’ exploitation of North Korean



compelled to remain in hiding to avoid detection, the migrants heavily depend on lawful residents for food and shelter.<sup>136</sup> Human traffickers exploit this vulnerability and the majority of North Korean women and children are sold into the Chinese bride and sex industry.<sup>137</sup> Studies suggest that between seventy to over ninety percent of all North Korean women in China fall victim to the Chinese human trafficking trade.<sup>138</sup>

## 2. China's Repatriation Policy: China's Policy of Refusing the United Nations and NGOs Access to North Korean Migrants

Consistent with its repatriation policy, China restricts third-party access to North Korean migrants, a scheme predicated on

migrants in China); Gahng, *supra* note 23, at 367 (“[North Korean migrants] captured by Chinese officials were often beaten and deported.”); *INVISIBLE EXODUS*, *supra* note 21, at 11–15 (detailing accounts of Chinese residents exploiting or mistreating North Korean migrants).

136. See WITNESS TO THE TRANSFORMATION, *supra* note 65, at 34 (“The overwhelming majority (88 percent) reported receiving help from the Korean-Chinese community directly, and three-quarters reported living with Korean-Chinese.”); see also Gahng, *supra* note 23, at 367 (“[Chinese] [o]fficials began actively prosecuting unauthorized migrants and subjected them to unprecedented levels of scrutiny and violence, forcing many to go into hiding.”); *INVISIBLE EXODUS*, *supra* note 21, at 11–12 (“Few refugees speak Chinese, and most rely on the assistance of ethnic Korean residents of China.”).

137. *N. Kor.: Human Rights, Refugees, and Humanitarian Challenges: Joint Hearing Before the Subcomm. on Asia and the Pacific and the Subcomm. on the Int'l Terrorism, Nonproliferation and Human Rights of the Comm. on Int'l Relations*, 108th Cong. 10 (2d Sess. 2004) [hereinafter *Hearing: Human Rights, Refugees, and Humanitarian Challenges*] (statement of James A. Leach, Chairman, Subcomm. of Asia and the Pacific) (“Inside China, North Korean women and girls are particularly vulnerable to trafficking and sexual exploitation.”); U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 115* (10th ed. 2010) (“The lack of access to UNHCR assistance and constant fear of forced repatriation by Chinese authorities leaves North Korean refugees more vulnerable to human traffickers.”); see also Kathleen Davis, *Brides, Bruises and the Border: The Trafficking of North Korean Women into China*, 26 SAIS REV. 131, 133 (“As North Korean women migrate into China . . . they are vulnerable to being trafficked as brides or women for the sex industry.”); LIVES FOR SALE, *supra* note 23, at 7 (“Although seeking opportunities in China, they instead become victims of traffickers and victims of men in China who paid traffickers to purchase a North Korean ‘wife.’”).

138. *Hearing: Human Rights, Refugees, and Humanitarian Challenges*, *supra* note 137, at 76 (statement of Timothy A. Peters, Founder & Dir., Helping Hands/Kor.); see also Kim, *supra* note 32 (noting that seventy to eighty percent of North Korean women in China are trafficked); Tan, *supra* note 135 (stating that seventy to ninety percent of North Korean women in China become a victim to the Chinese trafficking trade).

the illegal migrant status of the North Koreans in China.<sup>139</sup> At the local level, assisting North Korean migrants is unlawful in China.<sup>140</sup> Residents discovered aiding or harboring the migrants risk persecution for violating Chinese law.<sup>141</sup> With respect to the global community, China routinely bars UN agencies, NGOs, and other institutions from monitoring North Korean migrants.<sup>142</sup> The restrictive regulations prevent the United Nations from aiding migrants or screening North Koreans in China to determine their refugee status under international law.<sup>143</sup>

Initially, China permitted the UN High Commissioner for Refugees (the “UNHCR”) to establish a full Branch Office in Beijing in 1995.<sup>144</sup> During this time, while most of the individuals seeking the UNHCR’s aid were Vietnamese migrants, the

139. See CHINA-NORTH KOREA RELATIONS, *supra* note 129 (discussing China’s view of North Korean migrants as “economic migrants” rather than “political refugees,” and therefore does not allow UN agencies or other non-governmental organizations access to North Korean migrants in China); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 149 (explaining that China does not consider North Korean migrants as “refugees” under the Refugee Convention and how China’s steadfast refusal to view the migrants as refugees “has blocked an appropriate international response through the UNHCR”).

140. See Ahn, *supra* note 28, at 311–12 (noting a Chinese law that “[prohibits] the harboring of undocumented migrants”); Carrinski, *supra* note 23, at 660; Leo, *supra* note 28 (“The government also reportedly arrested individuals who organized food, shelter, transportation, and other assistance to North Koreans.”)

141. See Ahn, *supra* note 28, at 312 (detailing a claim in the US Federal Courts of Appeal by an individual who was persecuted by the Chinese government for harboring North Korean migrants in China); Carrinski, *supra* note 23, at 660; Leo, *supra* note 28 (discussing the Chinese government’s actions against those discovered to have provided aid to North Korean migrants).

142. See *supra* note 141 and accompanying text (explaining how China does not permit third party organizations to aid North Korean migrants in China).

143. See Carrinski, *supra* note 23, at 663 (“As of yet, China has not allowed the UNHCR to screen North Koreans for refugee status around the border region where most North Koreans live, despite UNHCR requests and pressure to do so.”); see also Ahn, *supra* note 28; Leo, *supra* note 28.

144. See CRS INTERNATIONAL RESPONSE, *supra* note 56, at 11 (explaining that in 1995, China permitted the UNHCR to open a full Branch Office in Beijing). For the agreement the UNHCR attempted to enter into with China to have full, unimpeded access to all migrants in China seeking asylum, see *Key Provisions of 1995 Treaty Between China and the UNHCR, LIFE FUNDS FOR NORTH KOREAN REFUGEES*, <http://www.northkoreanrefugees.com/unhcr-keyprovisions.html> (last visited Nov. 28, 2012) [hereinafter *Key Provisions of 1995 Treaty*]; see also *About Us*, UNHCR, <http://www.unhcr.org/pages/49c3646c2.html> (last visited, Nov. 21) (providing a description of the UNHCR and its duties).

UNHCR managed to screen some North Korean migrants.<sup>145</sup> China soon discovered that the UNHCR had interviewed North Koreans and that the agency had determined that the migrants were refugees under international refugee law.<sup>146</sup> Seeing the North Korean migrant problem as an internal matter, China vehemently opposed the UNHCR's actions.<sup>147</sup> Thereafter, China denied the UNHCR any further access to North Koreans.<sup>148</sup> Although China had once welcomed the UNHCR's presence, the UNHCR now has "virtually no direct access" to North Koreans in China.<sup>149</sup> Despite the UNHCR's declaration in 2003 that all North Korean defectors were "persons of concern," it has had little success in changing current conditions.<sup>150</sup>

China also actively thwarts the efforts of North Koreans to request refuge at foreign embassy compounds in China.<sup>151</sup> In

145. See JAMES D. SEYMOUR, CHINA: BACKGROUND PAPER ON THE SITUATION OF NORTH KOREANS IN CHINA 19–20 (2005) ("[In 1995], any refugee issues were comparatively minor, involving limited numbers of people mainly from Vietnam."); CRS INTERNATIONAL RESPONSE, *supra* note 56, at 11 (stating that the UNHCR had screened North Korean migrants in China and determined that they were refugees under the Refugee Convention); see also Cha, *supra* note 122, at 198.

146. See CRS INTERNATIONAL RESPONSE, *supra* note 56, at 10–11 (stating that China discovered the UNHCR had screened North Korean migrants and determined that they were refugees); SEYMOUR, *supra* note 145, at 20.

147. See SEYMOUR, *supra* note 145, at 20; see also CRS INTERNATIONAL RESPONSE, *supra* note 56, at 10–11 (stating that China saw the North Korean migrant problem as an internal matter").

148. See SEYMOUR, *supra* note 145, at 19 ("[The UNHCR] is now seen as meddling in what China would prefer to keep as an internal or bilateral matter."); see also CRS INTERNATIONAL RESPONSE, *supra* note 56, at 11.

149. See SEYMOUR, *supra* note 145, at 20; see also CRS INTERNATIONAL RESPONSE, *supra* note 56, at 11 (explaining that after China's discovery that the UNHCR had screened North Korean migrants, it prohibited the UNHCR's direct access to the migrants thereafter).

150. See CONGR.-EXEC. COMM'N ON CHINA, 2005 ANNUAL REP.: NORTH KOREAN REFUGEES IN CHINA, 109TH CONG. 6 (1st Sess. 2005) [hereinafter CECC ANNUAL REPORT 2005] (finding that a "compelling case exists for recognizing North Koreans in China as refugees"); *Hearing: China's Repatriation*, *supra* note 123, at 51 (statement of Roberta Cohen, Non-resident Senior Fellow, Brookings Inst.) ("To UNHCR since 2004, North Koreans in China without permission are deemed 'persons of concern,' meriting humanitarian protection.").

151. See Benjamin Neaderland, Note, *Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis*, 40 STANFORD INT'L L.J. 143, 150 (2004) (detailing the Chinese government's usage of barbed wires around embassy compounds and policemen actively checking for North Korean migrants in surrounding embassy areas to prevent the migrants from reaching the embassies); Carrinski, *supra* note 23, at 663 (stating that many North Korean migrants who have

2002, twenty-five North Korean migrants reached the Spanish Embassy in China and successfully negotiated their transfer to South Korea.<sup>152</sup> Soon after, several more North Korean migrants began to rush towards unguarded embassy gates.<sup>153</sup> China reacted by heavily fortifying the surrounding areas of the embassies with policemen and barbed wire.<sup>154</sup> At present, North Korean migrants apprehended at embassy gates are “dragged out of embassy compounds and repatriated to North Korea.”<sup>155</sup>

## II. CHINA'S REPATRIATION POLICY: INTERNATIONAL LAW AND EXAMINING CONFLICTING PRC-UN AND PRC-DPRK TREATY OBLIGATIONS

Part II analyzes China's incompatible obligations to the United Nations and to North Korea. First, Part II.A introduces the UN treaties and Chinese domestic law governing the rights of refugees and migrants at risk of subjection to torture if deported. Part II.B then explores the definitions of a “refugee,” “economic migrant,” and “refugee *sur place*” under international law. Lastly, Part II.C examines China's conflicting treaty obligations and the principle of *pacta sunt servanda*. Part II.C also considers the last-in-time rule, a procedural custom in

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reached embassy compounds have been “caught and dragged out” and subsequently repatriated).

152. Neaderland, *supra* note 151, at 150–51 (discussing the successful defection of the twenty-five North Korean migrants from China and the subsequent events following the event); see also North Koreans storm Spanish embassy, CNN World (Mar. 14, 2002, 8:35 PM), [http://articles.cnn.com/2002-03-14/world/nkorea.spain.china.2130\\_1\\_point-of-such-desperation-north-korean-refugees-spanish-embassy?\\_s=PM:asiapcf](http://articles.cnn.com/2002-03-14/world/nkorea.spain.china.2130_1_point-of-such-desperation-north-korean-refugees-spanish-embassy?_s=PM:asiapcf).

153. See *supra* note 153 and accompanying text (discussing the attempts of North Korean migrants to reach embassy compounds after the successful transfer of twenty-five North Koreans to South Korea).

154. See *Down to the Wire*, THE ECONOMIST (London) (May 16, 2002), <http://www.economist.com/node/1135535> (“The [Chinese] authorities have lately been scrambling to throw up barbed wire and other unsightly barriers around diplomatic installations, in order to slow the rising tide of North Koreans seeking political asylum by hopping fences and dashing through gates to foreign missions.”); INVISIBLE EXODUS, *supra* note 21, at 30; Neaderland, *supra* note 151, at 150.

155. See *Japan-China Spat Over North Koreans*, BRITISH BROADCASTING CORP. (May 9, 2002, 8:19 AM), [http://news.bbc.co.uk/2/hi/asia-pacific/197\\_6702.stm](http://news.bbc.co.uk/2/hi/asia-pacific/197_6702.stm) (reporting on an incident when China “forcibly removed two North Korean asylum seekers from a Japanese consulate in north-east China”); Mike Kim, *supra* note 58, at 110 (describing the story of a sixteen year old North Korea migrant and nine other North Koreans who attempted to reach a foreign embassy in China but were caught and repatriated to North Korea); see also Carrinski, *supra* note 23, at 663.

international law, and the effect on human rights treaties when enforcing the rule.

*A. The Refugee Convention, the CAT, and China's Extradition Law: The Prohibition on the Refouling of Refugees and Migrants Likely to be Subjected to Torture*

Cognizant of the millions of displaced individuals outside their home countries, the United Nations brought into force the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (collectively the "Refugee Convention"), an international agreement regulating the legal rights of refugees.<sup>156</sup> Through proffering its signature in 1982, China agreed to protect refugees within its borders.<sup>157</sup> North Korea, however, is not a signatory.<sup>158</sup>

Under the Refugee Convention, a "refugee" is "any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality."<sup>159</sup> Article 33 of the Refugee Convention prohibits contracting nations from repatriating, or the refouling of, refugees inside their borders.<sup>160</sup> This key non-refouler provision states, "[n]o 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

156. See generally 1951 Refugee Convention, *supra* note 29; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, art. 1 (removing temporal and geographical limitations initially set in the 1951 Refugee Convention); UNHCR, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL I (2011), available at <http://www.unhcr.org/4ec262df9.html> (explaining that the 1951 Refugee Convention's purpose was to protect the millions of refugees after World War I and World War II forced to resettle as a result of World War II, later amended and broadened by its 1967 Protocol).

157. See U.N. Treaty Collection 1951 Refugee Convention, *supra* note 29 (naming China among one of the contracting parties to the 1951 Refugee Convention); U.N. Treaty Collection 1967 Protocol, *supra* note 29 (naming China as one of the signatories to the 1967 Protocol).

158. See U.N. Treaty Collection 1951 Refugee Convention, *supra* note 29 (listing the contracting parties to the Refugee Convention); UN Treaty Collection 1967 Protocol, *supra* note 29 (showing that North Korea is not a signatory to the 1967 Protocol).

159. 1951 Refugee Convention, *supra* note 29, art. 1.

160. See 1951 Refugee Convention, *supra* note 29, art. 33 (prohibiting the repatriation of refugees).

account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>161</sup>

In 1984, the United Nations adopted the Refugee Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>162</sup> The CAT mandates member nations to protect individuals who are likely to be subjected to torture in a particular country.<sup>163</sup> While North Korea is not a party to the CAT, China entered into the treaty in 1986 and ratified it in 1988.<sup>164</sup>

Like the Refugee Convention, Article 3 of the CAT contains a non-refouler clause, prohibiting member nations from refouling persons “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>165</sup> The CAT defines “torture” as follows:

[A]ny 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.<sup>166</sup>

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161. 1951 Refugee Convention, *supra* note 29, art. 33.

162. CAT, *supra* note 36.

163. *See* CAT, *supra* note 36 (prohibiting parties to the CAT from repatriating individuals, not limited to individuals with refugee status under the Refugee Convention, who are likely to face torture or inhuman treatment upon return to his or her home country); *see also* Richard P. Shafer, *Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*, 184 A.L.R. FED. 385, 385 (2003) (“[The CAT] was enacted in order to make more effective the struggle against torture and other cruel, inhuman, or degrading treatment or punishment throughout the world.”).

164. *See Status Table of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last visited Apr. 21, 2012) [hereinafter U.N. Treaty Collection CAT] (listing the state parties to the CAT).

165. CAT, *supra* note 36, art. 3.

166. CAT, *supra* note 36, art. 1.

To qualify as “torture,” the CAT requires four basic elements: (1) physical or mental pain or suffering; (2) suffered by a person; (3) by or with the consent or acquiescence of a public official; and (4) with the intent to inflict the pain or suffering for the listed purposes.<sup>167</sup>

Domestically, China adopted language akin to the CAT in its Extradition Law of the People’s Republic of China (the “Extradition Law”).<sup>168</sup> Article 8 of the Extradition Law, enacted in 2000, prohibits the extradition of persons who “[have] been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment.”<sup>169</sup> In China’s periodic report to the United Nations’ Committee Against Torture, China affirmed that Article 8 “in essence transfer[red] the provisions in Article 3 of the [CAT] into domestic legal requirements, and [has] an important significance in respect of preventing subjects of extradition requests from being tortured.”<sup>170</sup> As follows, China must reject any requests for extradition if the individual will likely be subjected to torture in the requesting country.<sup>171</sup>

### B. *The Refugee Convention: Legally Identifying North Korean Migrants*

To date, the Refugee Convention is the only universally binding instrument that affords protection to refugees.<sup>172</sup>

167. See *id.*; see also Kyu Chang Lee, *supra* note 32, at 149 (listing the elements of the CAT).

168. See PRC Extradition Law, *supra* note 36 for the text of China’s Extradition Law; see also U.N. Comm. Against Torture, Consideration of Repts. Submitted by States Parties Under Article 19 of the Convention: Fourth Periodic Repts. of States Parties Due in 2004: China, pt. I, art. 2, ¶ 12, U.N. Doc. CAT/C/CHN/4 (June 27, 2007) [hereinafter U.N. CAT Report] (stating that the language in Article 8 in the Extradition Law was taken from Article 3 of the CAT).

169. PRC Extradition Law, *supra* note 36, para 7.

170. U.N. CAT Report, *supra* note 168.

171. See *supra* notes 169–70 and accompanying text for the text of and a discussion on Article 8 of China’s Extradition Law.

172. See UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, at 1, HCR/IP/ENG/REV. 3 (Dec. 2011) [hereinafter UNHCR Handbook] (stating in the UNHCR’s Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, or the “UNHCR Handbook,” that “the 1951 Refugee Convention and its 1967 Protocol are ‘the central instruments underpinning the international refugee protection regime for sixty

Stipulated in the non-refoulement clause in Article 33, all contracting nations are prohibited from repatriating refugees.<sup>173</sup> Citing to the Refugee Convention, some critics question the legality of China's treatment of North Korean migrants.<sup>174</sup> Nonetheless, China argues that the migrants are not "refugees" as defined in the Refugee Convention, but rather are "economic migrants."<sup>175</sup> Thus, China maintains that its repatriation policy is not in contravention of international law.<sup>176</sup>

### 1. "Economic Migrants" or "Refugees?"

The UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (the "UNHCR Handbook") defines an "economic migrant" as one who "is moved exclusively by economic considerations."<sup>177</sup> According to the UNHCR, "[economic migrants] choose to move in order to

years"); *see also* HUMAN RIGHTS MONITORING: A FIELD MISSION MANUAL 432 (Anette Faye Jacobsen ed., 2008) (describing the 1951 Refugee Convention and its 1967 Protocol as "the most important international sources related to refugee protection"); DORIS M. MEISSNER ET AL., INTERNATIONAL MIGRATION CHALLENGES IN A NEW ERA: A REP. TO THE TRILATERAL COMM'N 91 (1993) (explaining that the 1951 Refugee Convention and its 1967 Protocol are "the only legally binding international instruments governing migration matters"); Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y 129, 131 (2001) ("The 1951 Convention was the first, and indeed remains the only, binding refugee protection instrument of a universal character.").

173. *See* 1951 Refugee Convention, *supra* note 29, art. 33 (non-refoulement provision).

174. *See* HUMAN RIGHTS WATCH, DENIED STATUS, DENIED EDUCATION: CHILDREN OF NORTH KOREAN WOMEN IN CHINA 3 (2008) (arguing that China's policy to repatriate all North Korean migrants is a violation of both domestic and international law); *see also* GLOBAL SECURITY, *supra* note 32, para. 199 (listing China's possible violations of international law with regard to its treatment of North Korean migrants).

175. *See* CRS INTERNATIONAL RESPONSE, *supra* note 56, at 10 (explaining that China views North Korean migrants as economic migrants, as opposed to political refugees); *see also* CECC ANNUAL REPORT 2011, *supra* note 32, at 127.

176. *See* Joel R. Charny, *North Koreans in China: A Human Rights Analysis*, 13 INT'L J. KOREAN UNIFICATION STUD. 75, 81 (2004) ("In addition to insisting that all North Koreans are economic migrants, China also justifies its treatment of North Koreans by citing sovereign treaties with the DPRK . . ."); *supra* note 175 and accompanying text (discussing China's use of the "economic migrant" label to justify its repatriation policy with regards to North Korean migrants).

177. UNHCR Handbook, *supra* note 172, at 15. The UNHCR Handbook provides the guidelines to assist in the interpretation of the Refugee Convention. *Id.* at 1. *See* Brush, *supra* note 23, at 39 (noting that the UNHCR provides that "economic migrants" differ from "refugees" in that they are outside their home countries for purely economic reasons); Gahng, *supra* note 23, at 372.



improve the future prospects of themselves” whereas “refugees” are forced “to move if they are to save their lives or preserve their freedom.”<sup>178</sup> As evidenced in a KINU study and interviews conducted by Human Rights Watch (“HRW”) and the HRNK, China is correct in that some North Koreans migrate to China seeking only economic opportunity.<sup>179</sup> Still, North Korean migrants cross the Sino-North Korean border for non-economic reasons, as well.<sup>180</sup> The HRW and HRNK interviews revealed that some fled due to political persecution and loss of class status.<sup>181</sup>

North Korean gulag expert, David Hawk, demonstrates in a HRNK in-depth study on North Korean prison camps, *The Hidden Gulag: The Lives and Voices of “Those Who are Sent to the Mountains* (“*The Lives and Voices*”), the reasons migrants flee

178. *Refugees*, UNHCR, <http://www.unhcr.org/pages/49c3646c125.html> (last visited Apr. 21, 2013).

179. See INVISIBLE EXODUS, *supra* note 23, at 9–10 (discussing North Korean migrants’ decisions to flee North Korea); KINU WHITE PAPER 2005, *supra* note 53, at 334 (providing a table showing that, as of June 2004, about fifty-five percent out of 4,075 North Koreans in China defected to China for economic reasons); LIVES AND VOICES, *supra* note 1, at 111; see also Stephan Haggard et al., *Markets and Famine in North Korea*, 3 GLOBAL ASIA 32, 36 (2008) (“As circumstances deteriorate [for North Koreans], the incentives to move into China rise . . . in search of business opportunities and food.”).

180. See Yoonok Chang, *supra* note 132, at 1 (“Chronic food shortages, political repression, and poverty have drive tens of thousands of North Koreans into China.”); Jane Kim, *supra* note 32, at 457 (pointing out that two-thirds of North Korean migrants in China are women and leave North Korea because of discrimination grounded on gender, class, and political opinion); Kyu Chang Lee, *supra* note 32, at 145–46 (discussing the difficulty in defining all North Korean migrants in China as “economic migrants” due to the fact that some North Korean migrants are actually fleeing from fear of persecution for political opinion, religious beliefs, or membership in a social group).

181. See INVISIBLE EXODUS, *supra* note 21, at 9–12 (providing the interviews conducted by Human Rights Watch, or “HRW,” of North Korean migrants in China and the reasons why they crossed North Korean borders for China); see generally LIVES AND VOICES, *supra* note 1 (providing a detailed report published by the HRNK on the interviews of North Korean migrants); see also Phil Robertson, Deputy Dir., Asia Division, Human Rights Watch at the 2d KINU Chaillot Human Rights Forum 2012: The Problem of North Korean Refugees in China and Possible Solutions (June 14, 2012) (reporting that HRW had interviewed over sixty North Koreans who had fled North Korea in 2010 to 2011 and found being “among the ‘wavering’ classes or even ‘hostile’ class, and fac[ing] discrimination, harassment, arrest, and imprisonment for a wide variety of so-called crimes that involve legitimate rights and activities” as some motives for crossing North Korean borders); Jeffries, *supra* note 58, at 101 (stating that 150,000 to 200,000 political prisoners and their families are detained in one of North Korea’s prison camps); Mike Kim, *supra* note 58.

North Korea.<sup>182</sup> A significant portion of North Korean migrants interviewed for the report indicated that they defected due to fears of persecution grounded on perceived political dissent against the State.<sup>183</sup> Several migrants revealed that they were persecuted for the defections of their relatives, expressing political dissent, and listening to South Korean music.<sup>184</sup>

For example, North Korean migrant Lee Young-kuk's testimony illustrates the experience of a North Korean migrant who defected to China to flee political persecution.<sup>185</sup> In *The Lives and Voices*, David Hawk explains that Lee Young-kuk was Kim Jong-il's former bodyguard who was punished for voicing political opinions that aligned with South Korean democratic views.<sup>186</sup> Lee's testimony disclosed, "[i]n 1994, Lee fled to China hoping to defect to South Korea. However, he was discovered missing, and because of his personal association with the 'Dear Leader,' North Korean security agents chased after him" and arrested him in Beijing.<sup>187</sup> Lee was ultimately imprisoned in a North Korean detention center and brutally punished for fleeing the nation, noting that "[w]hile in Beijing, [Lee] had freely expressed unfavorable opinions about the regime."<sup>188</sup> Thus, in examining these HRW and HRNK interviews, the UNHCR and various organizations have determined that at least some North Koreans in China are qualified refugees under the Refugee Convention.<sup>189</sup>

182. See generally *Lives and Voices*, *supra* note 1, for interviews of North Korean migrants conducted by David Hawk and his team and published by the NGO, HRNK.

183. *Id.* at 51–109 (providing testimonies of former North Korean political penal camp detainees who successfully fled North Korea after facing severe political persecution by the North Korean regime).

184. See *id.* at 54, 60–62, 100 (providing the testimonies of North Korean migrants Kim Young-sun, Kang Chol-hwan, Lee Young-kuk Lee, and Ji Hae-nam as examples of migrants who fear political persecution by the North Korean government).

185. *Id.* at 61–62 (providing Lee Young-kuk's interview conducted by David Hawk).

186. *Id.* at 61 (stating "[Lee] became a bodyguard to Kim Jong-il . . . [and] soon he became disillusioned by the political indoctrination he had been taught").

187. *Id.* at 61–62 (describing Lee Young-kuk's first failed attempt at defection).

188. *Id.* at 62 (stating that Lee had honestly confessed his opinions about the North Korean regime while he was in Beijing and providing Lee's belief that his "torture was solely intended as punishment for having fled to China").

189. See CRS INTERNATIONAL RESPONSE, *supra* note 56, at 10–11 (noting the UNHCR's determination that some of the North Korean migrants in China it had interviewed were refugees); see also *Hearing: China's Repatriation*, *supra* note 123 (statement of Roberta Cohen, Non-resident Senior Fellow, Brookings Inst.) (stating

2. “Refugees *sur place*”

The Refugee Convention recognizes that individuals may qualify as refugees from circumstances that arise both before and after emigration from their home country.<sup>190</sup> An individual who assumes refugee status from ensuing events following his departure is a refugee *sur place*.<sup>191</sup> The UNHCR Handbook elucidates, “[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.”<sup>192</sup>

For example, where a North Korean migrant comes into contact with a South Korean citizen or religious organization while in China, he risks conviction in North Korea for committing a political offense.<sup>193</sup> Former prison camp inmate testimonies evince that repatriated North Koreans are persecuted for the presumed political acts against the North Korean regime and face punishment upon their return.<sup>194</sup> In one HRNK report, Hawk argues, “[m]any more, indeed almost all, North Koreans who flee to China fall within the definition of *refugees sur place* . . . because of the severe persecution [North

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that in 2004, UNHCR declared that North Koreans in China were “persons of concern,” warranting humanitarian aid); CECC ANNUAL REPORT 2005, *supra* note 150 (finding that a “compelling cases exists for recognizing North Koreans in China as refugees”).

190. UNHCR Handbook, *supra* note 172, at 19 (“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*.’”); *see also Refugees and Asylees; Temporary Protected Status*, IMMIGRATION LAW SERVICE, §10:169 (2d ed. 2012) [hereinafter REFUGEES & ASYLEES] (explaining that an individual who does not qualify as a refugee at the time of departure from his home country may still qualify as a refugee if the individual “subsequently qualifies as [a refugee] because of intervening circumstances”).

191. *See supra* text accompanying note 191 (defining “refugees *sur place*”).

192. *See supra* note 190 and accompanying text (providing the UNHCR Handbook’s definition of “refugees *sur place*”).

193. *See supra* notes 66, 70 and accompanying text (explaining the consequences for repatriated North Korean migrants found to have come into contact with South Koreans, South Korean culture, or religious organizations).

194. *See* INVISIBLE EXODUS, *supra* note 21, at 19 (contending that some North Koreans in China qualify as refugees *sur place*); *see supra* notes 66, 779 and accompanying text (describing the treatment of North Korean migrants convicted of political offenses).

Korean migrants will face], as the testimonies . . . indicate, if returned to North Korea against their will.”<sup>195</sup>

C. *The Vienna Convention on the Law of Treaties: Governing China’s Conflicting Treaty Obligations*

China contends that the PRC-DPRK bilateral treaty preempts construing its repatriation policy as a violation of international law.<sup>196</sup> Indeed, China’s argument carries weight.<sup>197</sup> An international legal norm and fundamental dictum in treaty law is *pacta sunt servanda*—nations must fulfill their treaty obligations in good faith.<sup>198</sup> The principle, as codified in Article 26 of the Vienna Convention on the Law of Treaties (“VCLT”), provides, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>199</sup>

At the 24th Committee Against Torture session in May 2000, Mr. Zonghuai Qiao, a member of the Chinese delegation, stated, “China adhered to the principle of *pacta sunt servanda*. Under the Chinese legal system, the international instruments . . . were considered part of Chinese law and legally binding. In the event of conflict between an international

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195. LIVES AND VOICES, *supra* note 1, at 115 (providing David Hawk’s belief that most, if not all, North Korean migrants are refugees *sur place*).

196. See CRS INTERNATIONAL RESPONSE, *supra* note 56, at 11 (explaining that China claims that it is obligated to repatriate North Korean migrants “under a bilateral 1986 agreement with North Korea”); SEYMOUR, *supra* note 145, at 12 (“China’s position is that . . . its first obligation is to uphold its bilateral agreements with North Korea regarding the expulsion of migrants.”); see also Gahng, *supra* note 23, at 370 (“[China] asserts that its bilateral treaty with North Korea trumps any obligations under the Refugee and the 1967 Protocol.”).

197. See Neaderland, *supra* note 151, at 156–57 (contending that China’s justification that it must honor its bilateral treaty commitments to North Korea is “not without merit in international law”); see also Carrinski, *supra* note 23, at 650.

198. See Vienna Convention on the Law of Treaties art. 26, July 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] for the text of *pacta sunt servanda* as codified in the Vienna Convention on the Law of Treaties (“VCLT”); see also Rep. of the Int’l Law Comm’n on the work of its 18th Sess., May 4–July 19, 1966, U.N. Doc. A/6309/Rev.1, GAOR, 21st Sess., Supp. No. 9, at 211 (1966) (“*Pacta sunt servanda* . . . is the fundamental principle of the law of treaties.”); Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT’L L.J. 1550, 1592 (2009).

199. VCLT, *supra* note 198; see Vienna Convention on the Law of Treaties, U.N. Treaty Collection, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en) (last visited Nov. 12, 2012, 7:40PM) (showing China as a party to the treaty).

instrument and a domestic law, the provisions of the international instrument took precedence.”<sup>200</sup> The US Congressional-Executive Commission on China argues that this statement contradicts China’s practice of forcibly deporting North Korean migrants.<sup>201</sup> But, to the extent that the Repatriation Treaty is a PRC-DPRK international instrument, China’s position is not without merit.<sup>202</sup> Under the aegis of *pacta sunt servanda*, China must honor its obligations to North Korea in good faith.<sup>203</sup>

### 1. The Last-in-time Rule and Article 30 of the VCLT

Another prominent maxim in treaty law is *lex posterior derogat priori*, more commonly known as the last-in-time rule, which addresses incongruent treaty obligations involving the same state parties.<sup>204</sup> Under the last-in-time rule, the incompatible provisions of the treaty signed last in time are given force.<sup>205</sup> Framed in the VCLT, Article 30(3) provides, “[when] all the parties to the earlier treaty are parties also to the

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200. Comm. Against Torture Meeting, Geneva, Switz., May 12, 2000, *Summary Record of the 419th Meeting: China, Poland*, CAT/C/SR.419 (May 12, 2000).

201. See Kim Sang Hun, *Remarks before the Congressional-Executive Commission on China*, Apr. 19, 2004, available at <http://www.cecc.gov/pages/roundtables/041904/kim.php> (“The Chinese government indisputably contradicts itself when it arbitrarily applies its national law to a clearly international issue . . . . The Chinese government is clearly obliged to justify its decision against the granting of refugee status to North Koreans by its declaration of Chinese national law as justification for the repatriation of North Korean defectors.”); see also *The Plight of North Koreans in China: A Current Assessment: Roundtable before the Congressional-Executive Commission on China*, 108th Cong., 2d. Sess., 37 (Apr. 19, 2004).

202. See Neaderland, *supra*, note 151, at 156–57; see also Carrinski, *supra* note 23, at 650 (recognizing that China’s repatriation policy “arguably retain[s] merit in international law under the principle of *pacta sunt servanda*”).

203. See Neaderland, *supra* note 151, at 156–57 (contending that China’s arguments with regards to its obligations to the PRC-DPRK treaty may be meritorious).

204. See R. DOAK BISHOP, ET AL., *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY* 346 (2005) (noting that *lex posterior derogat priori* is a “widely recognized principle of treaty construction”); Julie M. Grimes, *Conflicts Between EC Law and International Treaty Obligations: A Case Study of the German Telecommunications Dispute*, 35 *HARV. INT’L L.J.* 535, 559 (1994) (stating that *lex posterior derogat priori* is an “important principle of treaty law”); see also Rijing Ernie Gao, Note, *Between a Rock and a Hard Place: Tensions Between the U.S.-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR*, 33 *FORDHAM INT’L L.J.* 585, 623–624 (2010).

205. VCLT, *supra* note 198, art. 30(3).

later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”<sup>206</sup>

Article 30(4) states that when a conflict arises between a posterior bilateral treaty and an older multilateral treaty to which both nations are parties, the last-in-time rule still applies.<sup>207</sup> Where the concerned nations are not parties to both treaties, then the treaty to which all of the affected nations are parties will govern.<sup>208</sup> That is, if China is a state party to both Treaty A and Treaty B, but North Korea is only a state party to Treaty B, the incompatible provisions of Treaty B would be enforced.<sup>209</sup> Article 30(5) concludes, “Paragraph 4 is without prejudice to . . . any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.”<sup>210</sup> Curiously, by reason of accountability, the fifth clause impliedly gives nations the choice to enforce the provisions of either treaty.<sup>211</sup>

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206. *Id.*; see Rep. of the Ad Hoc Comm. established by General Assembly resolution 51/210 of 17 Dec. 1996, 5th Sess., Feb. 12–23, 2001, U.N. Doc. A/56/37, GAOR, 56th Sess., Supp. No. 37, at 14 (March 27, 2001) (“[T]he ‘last in time’ rule, as expounded in article 30 of the [VCLT] . . . would apply and thereby the comprehensive convention . . . would supersede previous conventions to the extent that it overlapped in substance with such conventions . . .”).

207. VCLT, *supra* note 198, art. 30(4)(a) (providing that when there are different parties to two treaties, “the same rule applies as in paragraph 3” as between states that are parties to both).

208. VCLT, *supra* note 199, art. 30(4)(b) (stating that when the parties to a later treaty are not the same to the earlier one, “as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations”).

209. See *supra* note 209 and accompanying text (providing the applicable text of Article 30(4)).

210. VCLT, *supra* note 199, at art. 30(5).

211. See INTERNATIONAL INVESTMENT LAW AND SOFT LAW 12–13 (Andrea K. Bjorklund et al. eds., 2012) (“[Article 30] leaves the latter party with the choice regarding which treaty to honor and which to breach, and as hinted in 30(5), this party is likely to incur international responsibility *vis-à-vis* the injured party.”); THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 188 (Enzo Cannizaro ed. 2011) [hereinafter LAW OF TREATIES BEYOND THE VCLT] (explaining that Article 30(5) of the VCLT essentially provides nations the choice to “execute one [treaty], violating the other” without considering the last-in-time rule). “Practice generally points in this direction: suffice it to mention the case law of the Commission and the European Court of Human Rights, which have always refused to justify failure to comply with the European Convention on Human Rights by states claiming that the violations they committed arose from their commitment to earlier treaties.”)

## 2. Applying the Last-in-time Rule and Article 30 of the VCLT to Resolve Conflicts Involving Multilateral Human Rights Treaties

Application of the last-in-time rule becomes particularly problematic when a conflicting treaty's objective is to inculcate fundamental human rights and values.<sup>212</sup> Often, a treaty signed last-in-time overrides the provisions of a preceding international treaty affording or protecting an individual's fundamental freedoms.<sup>213</sup> Employing the rule then vitiates the essence of the human rights treaty.<sup>214</sup> For this reason, the last-in-time-rule has been recognized as a significant burden for international human rights treaties, specifically the Refugee Convention.<sup>215</sup> Scholars argue that the rule allows governments to effectively renege on anterior treaty commitments by enacting legislation or entering into new agreements.<sup>216</sup>

In contemplating these conflicts, several nations have carved out exceptions to the last-in-time rule to avoid invalidating critical provisions in human rights treaties.<sup>217</sup> In the

212. Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 394-97 (1988) [hereinafter *Rediscovering the Relationship*] (discussing exceptions to the last in time rule that protect fundamental human rights offered by international treaties); Gao, *supra* note 205, at 624 ("A simple last-in-time rule, moreover, produces particularly unsatisfactory results with human rights treaties; such treaties represent fundamental norms that privilege the rights of the individual human beings."); see 1951 Refugee Convention, *supra* note 30, pmb. (affirming "the principle that human beings shall enjoy the fundamental rights and freedoms without discrimination"); CAT, *supra* note 37, pmb. (providing that the purpose of the CAT is to consider "the obligation of States under the Charter . . . to promote universal respect for, and observance of, human rights and fundamental freedoms").

213. See Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 117 (2001) (providing a "fearsome example of the consequences of Congress' ability to abrogate international human rights norms" through the last-in-time rule); Gao, *supra* note 204, at 624 (discussing how the last-in-time rule can impede on fundamental human rights of individuals when a conflicting treaty is one that protects such rights).

214. See *supra* note 213 and accompanying text (discussing the effect of the last-in-time rule on human rights treaties).

215. See Ramji, *supra* note 213, at 117-18 (discussing the last-in-time rule's effect on the Refugee Convention).

216. See *supra* text accompanying note 213 (observing the last-in-time rule's effect on multilateral treaties).

217. See *Holden v. Joy*, 84 U.S. 211, 247 (1872) (holding that "Congress has no . . . power to settle or interfere with rights under treaties, except in cases purely political"); *Rediscovering the Relationship*, *supra* note 212, 407-09 (noting the 'executed or vested' exception to the last-in-time rule in US Supreme Court jurisprudence); see

United States, for example, the “rights under treaties” exception emerged to prevent the Constitution or Acts of Congress from interfering with former treaty provisions affording individual rights.<sup>218</sup> As defined in the US Supreme Court case, *Holden v. Joy*, under the “rights under treaties” exception, “Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.”<sup>219</sup> Jordan Paust, a law professor and expert in foreign relations law, explains that the holding in *Holden* implies that rights conferred by treaties “remain as rights unaffected by subsequent congressional enactments.”<sup>220</sup> The European Court of Human Rights applied a similar principle when it held that the governing provision between conflicting treaties would be that of the one preserving an individual’s fundamental liberties.<sup>221</sup> As North Korea is not a state party to the Refugee Convention or to the CAT, Article 30(4) commands that the respective provisions of the Repatriation Treaty control.<sup>222</sup> While academics have extensively

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also Robert Delson, *Nationalization of the Suez Canal Company: Issues of Public and Private International Law*, 57 COLUM. L. REV. 755, 761 n.35 (1957) (“Problems arising under the Human Rights Convention concerning prohibition of discrimination, minority rights, and special rights under treaties may constitute an exception” to the general rules about nationalizing privately-held property.”).

218. See *Holden*, 84 U.S. at 247 (stating that Congress does not have the authority to interfere with rights offered by treaties unless the rights are purely political); see also *Rediscovering the Relationship*, supra note 212, at 411–12; Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATHOLIC UNIV. L. REV. 759, 777 (2007).

219. *Holden*, 84 U.S. at 247; see also *Rediscovering the Relationship*, supra note 212, at 412 (“What this language necessarily implies is that a subsequent act of Congress cannot ‘interfere with rights under treaties, except in cases purely political’ and, thus, that such rights remain as rights unaffected by subsequent congressional enactments.”).

220. *Rediscovering the Relationship*, supra note 212, at 412 (discussing the “rights under treaties” exception in the US Supreme Court case, *Holden v. Joy*); see *UH Law Center Faculty*, UNIV. OF HOUS. L. CTR., <http://www.law.uh.edu/faculty/main.asp?PID=34> (last visited Apr. 4, 2013), to learn more about international law professor Jordan Paust.

221. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), for an example of the European Court of Human Rights refusing to apply the last-in-time rule when the treaty signed last in date conflicted with former treaty obligations protecting fundamental human rights. The European Court of Human Rights held that a conflicting treaty would not supersede a human rights treaty when it would interfere with the protection of an individual’s fundamental human rights. *Id.* para. 87.

222. See VCLT, supra note 198, art. 30(4)(b) (expressing that when the parties to a later treaty are not the same to the earlier one, “as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations”); U.N. Treaty Collection 1951



debated these issues, the reality is that the administration of the last-in-time rule is obscured with uncertainty.<sup>223</sup> Thus, it remains unclear if the last-in-time rule would apply to resolve the conflicting provisions in the Repatriation Treaty and the UN treaties.<sup>224</sup>

### 3. The Last-in-time Rule's Maxim on Resolving Inconsistencies in Domestic Law and Treaties

Under the last-in-time rule, resolving China's discordant obligations to the Extradition Law and to the Repatriation Treaty is relatively straightforward.<sup>225</sup> Likewise, the principle applies to contradictions between local legislation and international agreements.<sup>226</sup> The last-in-time rule may be invoked to resolve the discrepancies in China's obligations to its Extradition Law and to the PRC-DPRK bilateral treaty.<sup>227</sup> Since the Extradition Law was enacted in 2000 and the Repatriation

Refugee Convention, *supra* note 30 (listing the state parties to the Refugee Convention); U.N. Treaty Collection CAT, *supra* note 165 (listing the state parties to the CAT).

223. See, e.g., *supra* note 211 and accompanying text (arguing that Article 30 of the VCLT essentially gives nations the choice to enforce either treaty, regardless of which treaty was signed last in date); see also Michael A. Namikas, *Up in Smoke?: The Last in Time Rule and Empresa Cubana del Tabaco v. Culbro Corp.*, 22 ST. JOHN'S J. LEGAL COMMENT. 643, 644–45 (2008) (arguing the rule has become “outdated precedent”).

224. See VCLT, *supra* note 198, art. 30 (providing when the last-in-time rule must be applied to resolve conflicts between treaties); LAW OF TREATIES BEYOND THE VCLT, *supra* note 212 (“It has been said that Article 30 is neither an accurate description of the practice nor a sure guide for those who have to solve conflicts between treaties.”); *supra* notes 211, 224 and accompanying text (describing the problems in applying the last-in-time rule); *supra* notes 217–21 and accompanying text (demonstrating instances when courts have refused to apply the last-in-time rule in the context of human rights treaties).

225. See John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 *FORDHAM INT'L L.J.* 1209, 1329 (2009) (discussing the last-in-time rule's application for conflicts between treaties and federal statutes); Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?*, 30 *FORDHAM INT'L L.J.* 780, 819 (2007) (noting that when the domestic law is enacted later in date “‘under the ‘last-in-time rule’ the legislation would override inconsistent treaty obligations”).

226. See *supra* note 225 and accompanying text (explaining how to apply the last-in-time rule with regard to conflicting statutory and treaty provisions).

227. See *supra* notes 225–26 and accompanying text (discussing application of the last-in-time rule to resolve conflicts between statutes and treaties).

Treaty was adopted in 1986, the Extradition Law would prevail under the last-in-time rule.<sup>228</sup>

III. PROHIBITING THE REFOULEMENT OF NORTH KOREAN  
MIGRANTS IN CHINA: CHINA'S REPATRIATION POLICY  
VIOLATES THE REFUGEE CONVENTION, THE CAT, AND  
CHINA'S EXTRADITION LAW

Part III addresses the issues raised in Part II of this Note. First, Part III.A argues that China's "economic migrants" justification is improper and therefore, the Refugee Convention prohibits China from the automatic repatriation of all North Korean migrants. Notwithstanding international legal conventions, Part III.B maintains that China's duties to the Repatriation Treaty should not supersede its duties to the Refugee Convention. The last-in-time rule should not apply if the end result is the abrogation of provisions protecting fundamental human rights. Finally, Part III.C proposes that China implement screening procedures to provide North Korean migrants individual assessments to determine refugee status under the Refugee Convention.

A. *The Refugee Convention: China's "Economic Migrant" Blanket Classification of North Korean Migrants and Practice of Automatic Repatriation is a Breach of the Refugee Convention*

The fiction of the "economic migrant" blanket categorization is most apparent in first-hand testimonies and interviews conducted by HRW and HRNK of North Korean migrants in China.<sup>229</sup> The HRW and HRNK interviews of the migrants demonstrate that North Koreans reside in China for multifarious reasons that are not limited to economic opportunity.<sup>230</sup> As exemplified in Lee Young-kuk's testimony, some migrants flee North Korea as a result of their fear of

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228. See PRC Extradition Law, *supra* note 36 (showing that China enacted the Extradition Law in 2000); Repatriation Policy, *supra* note 26, art. 10 (showing that China entered into the agreement in 1986).

229. See *supra* note 181 and accompanying text for the interviews conducted by HRW and the HRNK and the varying reasons migrants flee North Korea.

230. See *supra* notes 179, 181, 184–85 and accompanying text (showing that the reasons why North Korean migrants leave for China vary from economic reasons to fleeing political and religious persecution).

persecution for expressions of political opinion, religious belief, and class status in North Korea.<sup>231</sup> These studies and interviews demonstrate that at least some North Korean migrants in China are refugees under the Refugee Convention.<sup>232</sup>

### 1. Some North Korean Migrants in China Are “Refugees” as Defined in the Refugee Convention

North Korean migrant testimonies confirm that North Korean officials scrutinize the motives for departure to convict repatriated migrants of political offenses.<sup>233</sup> This further establishes the truth that not all North Koreans in China are economic migrants.<sup>234</sup> If all North Koreans in China were economic migrants, the interrogation and division of the repatriated individuals would be unnecessary.<sup>235</sup> In such instances, all North Korean migrants would be convicted with a

231. See *INVISIBLE EXODUS*, *supra* note 21, at 9 (documenting the interviews conducted by HRW demonstrating that some North Korean migrants leave for China for reasons other than economic opportunity); Robertson, *supra* note 181, at 2 (noting that many North Korean migrants fled because of their political class and the corresponding discrimination and harassment); *supra* notes 179, 181, 184–85 and accompanying text (providing interviews conducted by HRW and the HRNK of former North Korean penal camp prisoners).

232. See *LIVES AND VOICES*, *supra* note 1, at 20, 120 (stating that North Korean migrants’ testimonies revealed that “virtually any encounter with South Koreans or South Korean culture . . . is regarded as ‘an anti-state act’”); see generally, *supra* notes 190, 194–95 and accompanying text (showing the UNHCR Handbook’s definition of “refugees *sur place*” and contentions by HRW and David Hawk that some North Korean migrants qualify as refugees *sur place*).

233. See *EXPOSING NORTH KOREA’S PRISON CAMPS*, *supra* note 66, at 12 (“Fearing transfer to a *kwan-li-so* or *kyo-hwa-so*, or even execution, repatriated North Koreans typically deny having had any contact with South Koreans or exposure to South Korean radio stations, television programs, movies, or music while in China.”); *LIVES AND VOICES*, *supra* note 1, at 120 (explaining that North Korea sends repatriated migrants who left for China only for food and employment to a different detention-interrogation center than those who are found to have a “political component” in their offense).

234. See *supra* note 60 and accompanying text (describing North Korea’s detention system and that there are different classes of detainees).

235. See *supra* note 71 and accompanying text (illustrating the interrogation techniques and detention centers dividing repatriated North Korean migrants from China). The fact that the North Korean regime divides the detainees into groups of those who it believes to have entered China for purely economic reasons and of those it believes to have been in China for political reasons strongly suggests that not all the migrants are economic migrants. See *supra* notes 68, 71 and accompanying text (discussing North Korea’s extensive efforts to identify the politically-motivated migrants and lower penalties for those migrants who were not politically motivated).

simple non-political offense for illegal border crossing into China and sentenced to one of the short-term prison facilities.<sup>236</sup>

Moreover, the North Korean class structure further supports allegations by numerous North Korean migrants of political persecution.<sup>237</sup> Several North Korean interviewees admitted to fleeing for China because of their class status as a hostile member, a status that in turn denied them specific rights and deprived them of economic opportunities such as education and employment.<sup>238</sup> In addition to the UNHCR's declaration that some North Korean migrants are refugees under the Refugee Convention, North Korea's treatment of repatriated individuals undermines China's "economic migrant" justification.<sup>239</sup> Consequently, China's blanket definition violates international law because it falsely presumes that all North Korean migrants are within its territory for exclusively economic reasons.<sup>240</sup>

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236. See generally *supra* note 68 and accompanying text (explaining that repatriated North Koreans convicted as non-political offenders have a shorter prison sentence).

237. See *supra* notes 48–53 and accompanying text (describing the North Korean class system and explaining that North Koreans who carry "political" taint are within the hostile class and are deprived of certain rights).

238. See *INVISIBLE EXODUS*, *supra* note 21, at 9 ("Often, economic motivations were intertwined with a background of political discrimination."); see also *supra* note 53 and accompanying text (stating that hostile class members are denied education and employment rights). In describing the interviews of North Korean migrants, HRW explains,

Two different women fled to China to survive the famine . . . after each of their families had been expelled from Pyongyang for political reasons. One young man and his family left in 1999 because he could not enter medical school or a teaching background because of family background. . . . An older man, who left in 1998, sought economic help . . . [b]ut his troubles began in 1977, when his family was exiled from Pyongyang and sent to live in an administrative camp for five years because of his father's perceived disloyalty.

*INVISIBLE EXODUS*, *supra* note 21, at 9.

239. See *CRS INTERNATIONAL RESPONSE*, *supra* note 56, at 10 (stating that UNHCR "believes a number [of North Korean migrants] may meet the criteria for qualifying as refugees"); *SEYMOUR*, *supra* note 145, at 20 (explaining that the UNCHR was able to interview some North Koreans in China and determine that they were refugees); *supra* note 189 and accompanying text (noting that North Korean migrants are refugees under the Refugee Convention); *supra* notes 194–95 and accompanying text (arguing that some North Korean migrants in China qualify as refugees *sur place*).

240. See *CRS INTERNATIONAL RESPONSE*, *supra* note 56, at 11 ("During visits to the northeast . . . UNHCR determined that some of the newly arrived North Koreans were refugees."); *SEYMOUR*, *supra* note 145, at 20 (observing UNHCR identified some of the North Korean migrants it interviewed as refugees); see also Carrinski, *supra* note 23, at

2. Some North Korean Migrants in China Involved in Conduct that North Korea Presumes Are “Political Offenses” Are Refugees *Sur Place* under the Refugee Convention

North Korea views contact in China with South Korean citizens or religious organizations as manifestations of political rebellion.<sup>241</sup> To the North Korean regime, these ideological “crimes” are unlawful political expressions and warrant persecution and incarceration.<sup>242</sup> As expressly stated in its text, the Refugee Convention extends protection to individuals at risk of persecution based on religious belief or political opinion.<sup>243</sup> Therefore, some North Korean migrants in China become refugees as a result of their conduct after they have left their home country.<sup>244</sup> These North Korean migrants are qualified refugees *sur place* under the Refugee Convention.<sup>245</sup>

3. North Korean Migrant Women Carrying Children of Chinese Descent Are Refugees *Sur Place*, and Therefore, Are “Refugees” under the Refugee Convention

Interviews of former North Korean prisoners also expose North Korea’s racially motivated treatment of repatriated

663 (explaining that UNHCR “reject[ed] China’s argument that [all North Korean migrants] were only economic migrants”); CECC ANNUAL REPORT 2005, *supra* note 150, at 113 (finding that Chinese forcible repatriation contravenes China’s obligations under the Refugee Convention).

241. *See* EXPOSING NORTH KOREA’S PRISON CAMPS, *supra* note 66, at 12 (explaining that contact with South Koreans or exposure to South Korean culture is punishable by imprisonment or death); LIVES AND VOICES, *supra* note 1, at 120–22 (discussing the North Korean regime’s treatment of repatriated migrants it believes were in contact with “foreign forces”); *see also* INVISIBLE EXODUS, *supra* note 21, at 21 (listing contact with South Koreans as one of the “aggravating factors” that warrant harsher punishments imposed on repatriated North Koreans from China by North Korean authorities).

242. *See* LIVES AND VOICES, *supra* note 1, at 120 (explaining that North Korean migrants who have committed “anti-state” acts are sent to a political prison camp); WITNESS TO THE TRANSFORMATION, *supra* note 65, at 29 (noting the different sentences for non-political border crossing not related to South Korea).

243. 1951 Refugee Convention, *supra* note 29, art. 1(A)(2) (defining refugee as a person who flees “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”).

244. *See supra* notes 194–95 and text accompanying (arguing that some North Korean migrants are refugees *sur place*).

245. *See supra* notes 194–95 and accompanying text (contending in HRW and the HRNK studies that some North Korean migrants are refugees *sur place* under the Refugee Convention).

women carrying children of Chinese descent.<sup>246</sup> North Korea executes severe disciplinary measures on pregnant women repatriated from China and readily conducts abortions and infanticide.<sup>247</sup> Due to the racially motivated gender-based violence, these North Korean migrant women may fear persecution for reasons of race and gender.<sup>248</sup>

The Refugee Convention's text and the UNHCR Handbook articulate that discrimination for reasons of race is generally a sufficient basis for refugee protection.<sup>249</sup> The UNHCR Handbook further states that, although not listed as an enumerated fear, the Refugee Convention "covers gender-related claims."<sup>250</sup> On these grounds, North Korean women in China carrying a child of Chinese descent may qualify as refugees *sur place*.<sup>251</sup>

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246. See LIVES AND VOICES, *supra* note 1, at 122 (discussing racially motivated gender-based violence in North Korean penal camps); see also Mike Kim, *supra* note 58, at 112 (recounting an escapee's recollection of a racially motivated forced abortion).

247. See LIVES AND VOICES, *supra* note 1, at 122–26 for first-hand testimonies by former North Korean prison camp detainees; see also *supra* notes 87, 89 and accompanying text (showing that North Korean prison guards often execute forced abortions and infanticide).

248. See 1951 Refugee Convention, *supra* note 29, art. 1(A) (providing that "refugee" shall apply to any person who . . . owing to well-founded fear of being persecuted for reason[] of race"); UNHCR Handbook, *supra* note 172, at 16 ("Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage."); see LIVES AND VOICES, *supra* note 1, at 122–26 for first-hand testimony of former detainees who suffered or witnessed severe punishment for carrying a child with a Chinese father; see also Mike Kim, *supra* note 59, at 112 for a former North Korean prisoner's recollection of a guard who kicked a pregnant repatriated migrant's stomach when she admitted that she was carrying a Chinese man's baby.

249. See 1951 Refugee Convention, *supra* note 29, art. 1(A)(2) (expressing race as one of the qualifying reasons for protection under the Refugee Convention); see also UNHCR Handbook, *supra* note 172, at 16 ("Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights . . . [and] therefore, represents an important element in determining the existence of persecution.").

250. UNHCR Handbook, *supra* note 172, at 81.

251. See UNHCR Handbook, *supra* note 172, at 16, 19 (defining "refugees *sur place*" and explaining that persecution for reasons of race is a common basis for protection under the Refugee Convention); see also *supra* notes 194–95 and accompanying text (arguing that some North Korean migrants are refugees *sur place* due to the high levels of violence in prison camps).

B. *The Last-in-time Rule: The Primacy of Human Rights Treaties Should Trump International Procedural Norms*

Notwithstanding the last-in-time rule and Article 30 of the VCLT, the Repatriation Treaty should not override conflicting provisions in the Refugee Convention or the CAT. The United States' "rights under treaties" exception and the ECHR's holding demonstrate an awareness that the last-in-time rule renders human rights treaties, such as the Refugee Convention, ineffective.<sup>252</sup> Applying the last-in-time rule to resolve conflicts with international human rights treaties allows governments to nullify key provisions of the multilateral treaties through legislation or posterior agreements.<sup>253</sup> Particularly because the Refugee Convention is the only universally binding instrument protecting refugees, a procedural norm should not be used to resolve the inconsistencies between the Repatriation Treaty and the Refugee Convention.<sup>254</sup> Such action would result in denying North Korean migrants in China the protection of their fundamental human rights.<sup>255</sup>

Even if the last-in-time rule is applied to reconcile PRC-UN and PRC-DPRK treaty conflicts, international law still precludes China from automatically repatriating all North Korean migrants.<sup>256</sup> The Extradition Law forbids China from deporting individuals to nations where there are sufficient grounds to

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252. See *supra* notes 219–21 and text accompanying (discussing the “rights-under-treaties” exception); see also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 7, 13 (1989) (holding that provisions of the bilateral treaty would not supersede the conflicting provisions of the multilateral treaty if it would impede on the individual’s fundamental human rights).

253. See *supra* note 213 and accompanying text (discussing that under the last-in-time rule, governments have the ability to legislate over their obligations to multilateral human rights treaties).

254. See *supra* note 172 and accompanying text (discussing the importance of the Refugee Convention as the only binding agreement between nations protecting refugees); see also *Rediscovering the Relationship*, *supra* note 212 at 410–14 (explaining that the “rights-under-treaties” exception to the last-in-time rule was created so that subsequent treaties or legislations would not supersede individuals’ rights); Gao, *supra* note 204, at 624; Ramji, *supra* note 213.

255. See *supra* note 213 and accompanying text (noting the problems of applying the last-in-time rule with human rights treaties).

256. See *supra* text accompanying note 226 (explaining that the last-in-time rule is applied to resolve conflicting obligations between statutes and treaties, as well).

believe that they will be subjected to torture.<sup>257</sup> While China's Extradition Law does not define "torture," a report to the United Nations submitted by China noted that the language of Article 8 of China's Extradition Law tracks Article 3 of the CAT.<sup>258</sup>

To reiterate, a *prima facie* case for torture under the CAT requires (1) physical or mental pain or suffering; (2) on a person; (3) by the or with the consent or acquiescence of a state official; and (4) with the intent and purpose of the actor.<sup>259</sup> Certainly satisfying the first three elements in virtually all cases, first-hand testimonies corroborate that repatriated individuals imprisoned in North Korea penal camps suffer extreme mental and physical pain at the hands of State prison officials.<sup>260</sup> Prison guards inflict pain and suffering to punish the repatriated migrants for their criminal offenses, political offenses, and for reasons of racial and gender discrimination, thereby meeting the fourth element.<sup>261</sup>

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257. See PRC Extradition Law, *supra* note 36 (prohibiting the extradition of persons who "[have] been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment"); see also CAT, *supra* note 36, art. 3 ("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.").

258. U.N. CAT Report, *supra* note 168 (stating that Article 8 of the Extradition Law essentially transferred "the provisions in Article 3 of the Convention into domestic legal requirements, and ha[s] an important significance in respect of preventing subjects of extradition requests from being tortured").

259. See *supra* notes 166–67 and accompanying text (providing the text of Article 1 of the CAT and the four elements of torture under the CAT).

260. See LIVES AND VOICES, *supra* note 1, at ix, 33, 161 (stating that "virtually all former prisoners' testimonies" revealed that "there has been an extraordinarily high rate of deaths in detention," that almost all the former prisoners had witnessed executions, and that "[t]orture and the cruel, inhuman or degrading punishments experienced or witnessed by virtually all former prisoners in the DPRK forced-labor camps are crimes against humanity"); *supra* text accompanying notes 79–89 (discussing the human rights violations in North Korean prison camps); *supra* text accompanying notes 66–79 (noting that repatriated North Korean migrants are sentenced to one of the detention centers upon return); see also CAT, *supra* note 36, art. 1 (defining "torture"); Kyu Chang Lee, *supra* note 32, at 149 (listing the four elements of "torture" under the CAT).

261. See CAT, *supra* note 36, art. 1 (listing within the definition of torture both punishing the victim for a committed act or any kind of discrimination; Kyu Chang Lee, *supra* note 32, at 160–61; *supra* text accompanying notes 79–89 (describing the torture techniques executed by prison guards in the penal camps and the gender-based violence motivated by racial discrimination)).



China's promise to North Korea to repatriate all illegal border crossers in the Repatriation Treaty contradicts Article 8 of China's Extradition Law.<sup>262</sup> Since China enacted the Extradition Law in 2000, the Repatriation Treaty's conflicting provisions, which were adopted in 1986, must give way to China's own legislation.<sup>263</sup> Therefore, the last-in-time rule effectively prohibits China from the automatic repatriation of all North Korean migrants.<sup>264</sup>

*C. The Solution: Removing Blanket Determinations and the Implementation of Individualized Procedures for North Korean Migrants in China*

An economic powerhouse and UN Security Council member, China is a polarizing and globally powerful figure.<sup>265</sup> China appears unburdened by international outcry over its treatment of North Korean migrants and the accusations that its repatriation policy violates the Refugee Convention and the CAT.<sup>266</sup> Nevertheless, China has a duty to protect the migrants

262. See U.N. Treaty Collection CAT, *supra* note 165 (showing that China ratified the CAT in 1988); Repatriation Treaty, *supra* note 26 (showing that China entered into the Repatriation Treaty with North Korea in 1986); PRC Extradition Law, *supra* note 36 (showing that China enacted the Extradition Law in 2000).

263. See VCLT, *supra* note 198, art. 30(3); see also Parry, *supra* note 225, at 1329 (discussing the last-in-time rule's effect on conflicting provisions between statutes and treaties).

264. See *supra* notes 165–69 and accompanying text (providing the language in the CAT and Extradition Law prohibiting the refoulement of individuals who are likely to be subjected to torture or inhuman treatment upon return).

265. See Richard P. Appelbaum & Rachel Parker, *China's Move to High-Tech Innovation: Some Regional Policy Implications*, in *THE ASIA-PACIFIC, REGIONALISM AND THE GLOBAL SYSTEM* 201 (Christopher M. Dent et al. eds., 2012) (explaining that "China has emerged as a major economic player in recent years" and that "[e]ven as the United States, Europe and Japan are plagued with sluggish economic growth and growing financial strains, China continues with double-digit growth and sizeable surpluses of foreign revenues"); Leo Gross, *The Double Veto and the Four-Power Statement on Voting in the Security Council*, 67 *HARV. L. REV.* 251, 251 (1953) (noting that only the UN Security Council's five permanent members possess the power to veto a resolution).

266. See Hancocks, *supra* note 118 (stating that China may have repatriated about thirty North Korean migrants "[i]gnoring international protest"); *Key Provisions of 1995 Treaty*, *supra* note 144 (detailing China's obligations to the United Nations under the Refugee Convention); *INVISIBLE EXODUS*, *supra* note 21, at 33; *supra* text accompanying notes 146, 150 (explaining how the UNHCR has been denied access to North Korean migrants in China despite having declared that the migrants are "persons of concern"); see also Ellen F. D'Angelo, Note, *Non-Refoulement: The Search for a Consistent Interpretation*

who flee North Korea for the reasons expressed in the Refugee Convention.<sup>267</sup> A pragmatic solution is to urge China to reconcile its duties to the Refugee Convention and the Repatriation Treaty, rather than honoring one at the total expense of the other.<sup>268</sup> This can be achieved if China removes the “economic migrants” blanket categorization and adopts individualized assessments for North Korean migrants seeking refugee asylum.<sup>269</sup>

China may be concerned that creating these individualized procedures might incidentally implicate North Korea for its human rights violations, and thereby stymie the PRC-DPRK alliance.<sup>270</sup> The institutional screening procedures, however, do not require China to abandon the Repatriation Treaty nor do they require the government to publicly condemn North Korea’s reported human rights abuses.<sup>271</sup> Instead, the individualized assessments are justified as China’s compliance with basic UN protocols.<sup>272</sup>

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*of Article 33*, 42 VAND. J. TRANSNAT’L L. 279, 288 (2009) (noting the Refugee Convention’s inability to ensure contracting party’s honoring of obligations of the treaty because the treaty lacks enforcement power).

267. See 1951 Refugee Convention, *supra* note 29, art. 33; *supra* text accompanying note 189 (noting that some North Korean migrants flee North Korea to escape persecution for political opinion, religious beliefs, or membership in a social group or class); see also *supra* note 67 and accompanying text (observing that some North Korean migrants risk persecution for political opinion, religious belief, or nationality as a result of intervening circumstances after leaving North Korea).

268. See VCLT, *supra* note 198, art. 26 (providing a fundamental principle that parties to treaties must perform their obligations in good faith); Neaderland, *supra* note 151, at 156–57 (“Given China’s bilateral treaty commitments, regardless of their generality, the Chinese argument that they are bound to return North Koreans found to be traveling illegally is not without merit in international law.”).

269. See Josh Briggs, *Sur Place Refugees in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 AM. U. L. REV. 433, 446–47 (1993) (discussing individual screening procedures Hong Kong implemented to determine refugee status for Vietnamese migrants); Rachel Settlege, Note, *No Place to Call Home—Stateless Vietnamese Asylum-Seekers in Hong Kong*, 12 GEO. IMMIGR. L.J. 187, 200 (1997) (discussing the UNHCR’s role in screening Vietnamese migrants).

270. See *supra* text accompanying notes 113–17 (discussing the PRC-DPRK alliance and why China provides North Korea with political and economic support).

271. See *supra* note 270 and accompanying text (describing the individualized screening procedures used in Hong Kong to determine refugee status for Vietnamese migrants).

272. *House Passes North Korean Human Rights Act*, INTERPRETER RELEASES 1094 (2004) [hereinafter *House Passes NKHR Act*] (stating that the United Nations requires China to allow the UNHCR to screen North Korean migrants); see also Charny, *supra* note 176, at 97.

### 1. China Should Establish an Administrative Body to Screen North Korean Migrants

First, China should implement an internal administrative body responsible for screening North Korean migrants who wish to apply for governmental protection in China.<sup>273</sup> The administrative body's primary responsibility would be to determine the migrant's motive for departure.<sup>274</sup> This would allow China to repatriate those it considers to be in China for purely economic reasons.<sup>275</sup> The individualized procedures would provide North Korean migrants the opportunity to apply for governmental protection and offer the migrants due process.<sup>276</sup> These case-by-case investigations would also provide China the ability to protect those in serious danger of punishment for political offenses, as required by the CAT and China's Extradition Law.<sup>277</sup> Moreover, safeguarding these individuals from the North Korean regime's persecution for reasons of race, political opinion, or religious belief would be consistent with the Refugee Convention.<sup>278</sup>

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273. See *supra* note 270 and accompanying text (discussing Hong Kong's individualized screening procedure in determining refugee status of Vietnamese migrants).

274. See Briggs *supra* note 270, at 446-47 ("In the screening interviews of asylum applicants, Hong Kong examiners ask questions focusing primarily on the applicant's motive for departing Vietnam."); see also Chan Kwok Bun, *The Vietnamese Boat People in Hong Kong*, in *THE CAMBRIDGE SURVEY OF THE WORLD MIGRATION* 382 (Robin Cohen ed., 1995) (explaining Hong Kong's Vietnamese migrant assessment procedures so it could "screen out" economic migrants and "screen in" political migrants).

275. See Briggs, *supra* note 270 (examining Hong Kong's screening process to determine Vietnamese migrants who are "economic migrants," and therefore denied refugee asylum under the Refugee Convention); Settlege, *supra* note 270, at 189; see also Chan Kwok Bun, *supra* note 276.

276. See *supra* note 270 and accompanying text (describing the process of providing migrants seeking asylum individualized assessments).

277. According to one HNRK report, the North Korean penal code states that defection or attempted defection is a capital crime and returned defectors "shall be committed to a reform institution for not less than seven years. In cases where the person commits an extremely grave concern, he or she shall be given the death penalty." See CRS INTERNATIONAL RESPONSE, *supra* note 56, at 9; see also Brush, *supra* note 23, at 39.

278. See 1951 Refugee Convention, *supra* note 29, art. 1.

## 2. China Should Comply with United Nations' Protocols and Allow the UNHCR to Monitor the North Korean Migrants in China

Second, China should allow the UNHCR access to North Korean migrants to screen for refugee status under the Refugee Convention.<sup>279</sup> The US Congress has made revealed that “China has obligated itself to provide the [UNHCR] with unimpeded access to North Koreans inside its borders by its signature to the 1951 Convention[ and] 1967 Protocol.”<sup>280</sup> Seemingly, the United Nations has marginal influence over China’s conduct with regard to its treatment of North Korean migrants.<sup>281</sup> As a contracting party to the Refugee Convention and the CAT, however, China may not disregard its duties to the multilateral treaties.<sup>282</sup> At a minimum, China should comply with the appropriate procedures imposed by the United Nations.

China should grant the UNHCR access to North Korean migrants seeking refuge, but may regulate the manner in which the procedures take place.<sup>283</sup> That is, China may not deny the UNHCR the opportunity to monitor North Korean migrants, but it may determine the time, place, and the number of migrants screened.<sup>284</sup> China may also require that the North

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279. See Charny, *supra* note 176, at 97 (“China is obliged to allow UNHCR unimpeded access to North Koreans in China to review their overall situation and conduct individual status determinations.”); see also Gahng, *supra* note 23, at 368; Neaderland, *supra* note 151, at 175.

280. *House Passes NKHR Act*, *supra* note 273; see also Charny, *supra* note 176, at 97.

281. See *supra* note 266 and accompanying text (describing China’s authoritative role within the United Nations).

282. See 1951 Refugee Convention, *supra* note 29 (prohibiting the refoulement of migrants at risk of persecution for reasons provided in the Refugee Convention).

283. See W. Courtland Robinson, *The Comprehensive Plan of Action for Indochinese Refugees, 1989–1997: Sharing the Burden and Passing the Buck*, 17 J. REFUGEE STUD. 319, 327 (2004) (providing the roles the UNHCR would perform in determining the refugee status of Vietnamese migrants); see also Yen Tran, *The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws*, 17 HOUS. J. INT’L L. 463, 479 (1995) (“The core of the [Comprehensive Plan of Action] framework is the establishment of a system of region-wise refugee status determination, which was to be implemented ‘in accordance with national legislation and internationally accepted practice.’”).

284. See Robinson, *supra* note 284 (noting that one of the UNHCR’s responsibilities was to observe and advise the “determination process, which was to be carried out by a ‘qualified and competent national authority body,’” which suggests that the nation would retain of control over screening procedures); see also Tran, *supra* note 284, at 483–84.

Korean migrants the UNHCR determines are not refugees under the Refugee Convention be turned over to Chinese authorities.<sup>285</sup> The UNHCR would then have no authority to aid the North Korean economic migrants and China may still honor its duties to the Repatriation Treaty.<sup>286</sup>

#### *CONCLUSION*

Regardless of China's sovereignty and its obligations to North Korea, China's disregard for the Refugee Convention and the CAT should not be permitted. The most attractive solution would be to compel China to uphold its promises to the United Nations at the expense of the Repatriation Treaty. Yet, aspiring to persuade China to abandon its commitments to North Korea is a rather unrealistic objective. Moreover, China's obstinacy in preserving the PRC-DPRK kinship further indicates that this is goal will remain unattainable in the foreseeable future

Imperative to fostering amicable relations with China while protecting the safety of North Korean migrants, the global community should look at methods in terms of practicability not push for immediate drastic changes to China's domestic policies. Progress towards refugee protection for all North Korean migrants in China is the ultimate objective, but not the first step. A meaningful starting point is to persuade China to expunge the "economic migrant" blanket characterization of all unauthorized North Korean migrants. Through providing individualized assessments, North Korean migrants at the greatest risk to their personal safety would be protected from North Korea's draconian laws. As Justice Douglas once famously said, "[i]t is no requirement . . . that all evils . . . be eradicated or none at all."<sup>287</sup>

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285. *See supra* text accompanying notes 202–03 (recognizing China's duty under international law to honor its treaty obligations in good faith).

286. *See supra* text accompanying note 285 (discussing UNHCR screening procedures whereby the nation still retains control).

287. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).