

STUDENT CONTRIBUTION

North Korean Escapees in China: Granting *Prima Facie* Refugee Status Based on a Group Determination

Melissa M. Kim*

For the past twenty years, the UNHCR has faced a complex situation of North Koreans moving illegally across the North Korean border into Chinese territory. Although this mass influx is generally understood to be a 'refugee' crisis, North Korean escapees have not officially been granted refugee status by China, nor are they recognized as such by the UNHCR. In response, academics have argued that North Korean escapees should be granted international refugee status under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. More specifically, academics have claimed that North Korean escapees should be granted refugee status because they meet the criteria outlined in Article 1A(2) of the Convention under the traditional, individualized interpretation of the 'refugee' definition. Whilst the author is in full agreement with the conclusion that North Korean escapees should be considered refugees under the Convention, this article reviews the problems with applying the individualized interpretation of the Convention definition to North Korean escapees, and instead offers an alternative method of establishing refugee status: North Korean escapees should be granted prima facie refugee status based on a group application of the Convention definition. This article is premised on the view that the manner in which countries address refugee flow is not only a matter of international concern and policy, but of international law. Consequently, the focus of this article will be the 1951 Convention and 1967 Protocol, given their primacy as the key legal instruments outlining the definition of a refugee

* B.A.(Hon. Toronto), J.D.(Toronto). The author wishes to thank Professor A. Macklin and Professor Y. Dawood for their encouragement and support at the time this manuscript was written. The author may be contacted at: melissa.kim@utoronto.ca / Address: 50 Commons Drive, Toronto, Ontario, M1T 1E4 Canada.

and countries' obligations towards persons who meet that definition.

Keywords

North Korean Refugees, North Korean Defectors, North Korean Escapees, North Koreans in China, Refugee Status, *Prima Facie* Refugee, Group Determination of Refugee Status, UNHCR, Article 1A(2)

I. Introduction

For the past twenty years, the Office of the United Nations High Commissioner for Refugees¹ (“UNHCR”) has faced a complex situation of North Koreans² moving illegally across the North Korean border into Chinese territory. More recently, this flow of North Korean escapees³ has intensified, resulting in a mass influx of tens of thousands of North Koreans crossing into northeastern China. Characterized as the “North Korean refugee crisis” by the media and international organizations, numerous articles and reports have documented the plight of North Korean escapees in China, detailing the impoverished lives of North Koreans who live in constant fear of being forcibly repatriated back to North Korea, where they will face imprisonment, labour camp detention, or execution upon return.

Although the mass influx situation is generally understood to be a refugee crisis, North Korean escapees have not officially been granted international refugee status by China, nor are they recognized as such by the UNHCR. The main purpose of this article is to evaluate whether North Korean escapees should be granted refugee status, and if so, to determine the most effective approach under international law to award status recognition to North Korean escapees. The recognition or non-recognition of refugee status is central to any discussion concerning the afflictions faced by North Korean escapees since international legal status delineates the rights and protections that the Chinese government, the UNHCR, and the international community must provide to

¹ The UNHCR is the principal United Nations agency mandated to provide assistance and international protection to refugees and other persons of concern.

² The term ‘North Korean’ refers to a ‘national’ of the Democratic People’s Republic of Korea (“DPRK”).

³ Although many writers on the issue have chosen to categorize North Koreans who are illegally in China as “North Korean refugees,” this article will use the alternative term of “North Korean escapees.” As will be discussed in this article, a specific legal definition is attached to the term ‘refugee.’ Reference to North Koreans in China as ‘refugees’ is problematic since they have not yet been awarded international refugee status.

North Koreans in China.

Within the scarcity of academic scholarship on the issue, authors have advanced the argument that North Korean escapees should be granted refugee⁴ status under the 1951 Convention Relating to the Status of Refugees (“the Convention”) and the 1967 Protocol Relating to the Status of Refugees (“the Protocol”).⁵ Traditionally, Article 1A(2) of the Convention was interpreted as an ‘individualized’ definition (i.e. a refugee is a person who meets the definitional characteristics laid out in Article 1A(2)).⁶ Not surprisingly, academics have come to the conclusion that North Korean escapees are refugees under the Convention by arguing that North Korean escapees meet the individualized definition in Article 1A(2) of the Convention.⁷

Whilst the author is in full agreement with the ultimate conclusion that North Korean escapees should be considered Convention refugees and receive the rights and protections guaranteed by the Convention, the author critiques the locating of refugee status of North Korean escapees within the traditional, individualized interpretation of Article 1A(2). Instead, this article offers an alternative argument: North Korean escapees should be granted *prima facie* refugee status based on a group interpretation of the Convention and Protocol definitions.⁸

This article is premised on the view that the protection of refugees is mainly a matter of international law.⁹ In other words, the protection needs of refugees are best addressed by legal frameworks, in which commitments, rights, and obligations are delineated.¹⁰ Consequently, the focus of this article will be the 1951 Convention and 1967 Protocol, given their primacy as the key international instruments which prescribe

⁴ For a definition and discussion of the concept of ‘refugee,’ see GUY S. GOODWIN-GILL & JANE MCDAM, *THE REFUGEE IN INTERNATIONAL LAW* (3rd ED. 2007).

⁵ *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N. TREATY SERIES 137, available at <http://www.unhcr.org/refworld/docid/3be01b964.html> (last visited on Sept. 26, 2010); *Protocol Relating to the Status of Refugees*, Jan. 30, 1967, 606 U.N. TREATY SERIES 267, available at <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html> (last visited on Sept. 26, 2010).

⁶ IVOR C. JACKSON, *THE REFUGEE CONCEPT IN GROUP SITUATIONS* 85 (1999).

⁷ Elim Chan & Andreas Schloenhart, *North Korean Refugees and International Refugee Law*, 19 INT’L J. REFUGEE L. 215, 200 (2007); Benjamin Neaderland, *Quandary on the Yalu: International Law, Politics, and China’s North Korean Refugee Crisis*, 40 STAN. J. INT’L L. 143 (2004). For a different opinion, see Eric Yong Joong Lee, *National and International Legal Concerns over the Recent North Korean Escapees*, 13 INT’L J. REFUGEE L. 142-152 (2001); *Protection of North Korean Escapees under International Law* 1 ASIA PAC. J. HUM. RTS. L. 111-134 (2002).

⁸ The idea of granting *prima facie* refugee status was discussed by Joshua Kurlantzick and Jana Mason. However, this article differs from Kurlantzick and Mason’s approach by linking *prima facie* status recognition with the group interpretation and application of the Convention and Protocol definition. See Joshua Kurlantzick & Jana Mason, *North Korean Refugees: The Chinese Dimension*, in *THE NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE* 35 (M. NOLAND ED. 2006).

⁹ Jean-Francois Durieux & Jane McAdam, *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 1 INT’L J. REFUGEE L. 4 (2004).

¹⁰ *Id.*

the ‘refugee’ definition and countries’ obligations towards persons who meet that definition.¹¹ Hence, the discussion of the international legal status of North Korean escapees will be provided within this context.

This paper is composed of eight parts. Chapter II will provide the necessary context to the analysis by first detailing the conditions in North Korea which have prompted North Koreans to flee, followed by an account of the Chinese, South Korean, and UNHCR stance on the issue of North Korean escapees in China. Chapter III will briefly review why a comprehensive discussion of the situation of North Korean escapees cannot end with the principle of non-refoulement. Chapter IV will introduce the international legal regime for the protection of refugees, focusing on the different interpretations and applications (*e.g.* individual application *v.* group application) of Article 1A(2) of the Convention. Chapter V will discuss the limitations of applying the individualized interpretation of the Convention definition to the situation of North Korean escapees. Chapter VI will advance the main thesis of this article: North Korean escapees should be granted refugee status under a group interpretation of the Convention definition. Chapter VII will discuss the connection between *prima facie* refugee status and the group determination approach under Article 1A(2) and will demonstrate that North Korean escapees should be awarded the full spectrum of protections under the Convention as *prima facie* refugees. Chapter VIII will respond to the ‘dual nationality’ barrier argument and demonstrate that the availability of both North Korean and South Korean citizenship to North Korean escapees should not act as a technical bar to refugee status. This article will conclude with a brief discussion of the importance of granting international legal refugee status to North Korean escapees.

II. Background: The North Korean Crisis

Various NGOs have documented that the flow of North Koreans into China is a mass influx situation.¹² At the end of 2007, the US State Department estimated that 30,000 –

¹¹ *Id.*

¹² The term ‘mass influx’ is not defined in the Convention. However, the term has been defined by an Executive Commission Conclusion. Mass influx situations includes the following characteristics: 1. Considerable number of people arriving over an international border; 2. Rapid rate of arrival; 3. Inadequate absorption or response capacity in host States, particularly during emergency; and/or 4. Individual asylum procedures are unable to deal with the assessment of such large numbers. See UNHCR, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, para.(a), No. 100 (LV) (2004), available at <http://www.unhcr.org/41751fd82.html> (last visited on Sept. 26, 2010).

50,000 North Korean escapees currently live in China.¹³ Some NGOs have estimated that the number is closer to 400,000.¹⁴ Reliable numbers, however, are difficult to ascertain because the UNHCR has been prevented from conducting a systematic survey from North Korea and China along the national border of both sides.¹⁵

A. The Genesis of the Problem: Reasons Underlying Flight

With the collapse of the Soviet Union in 1991, North Korea lost strategic ties upon which the country's economy was heavily dependent. North Korea's economy was further exacerbated by a decrease in trade levels with China following China's strengthened ties with South Korea and its ascension onto the international scene. In addition, the heavy floods in the mid-1990s and the droughts in 2000 and 2001 led to a complete collapse of North Korea's agricultural industry.¹⁶ As a result, North Korea experienced a complete breakdown in the nation's economy and centralized distribution mechanisms. Beginning in 1996, the North Korean population suffered through a serious famine, with food shortages continuing to this day. Reportedly, 2 to 3.5 million North Koreans have died throughout this period.¹⁷ Beginning in the late 1990s, large numbers of North Koreans, in search of food and work, started wading across the shallow Yalu River into China. Directly across the Yalu is the sparsely populated Changbaishan Region of Jilin Province, home to China's ethnic Korean minority.¹⁸

As the famine, economic stagnation, and repression became worse in North Korea, the migration flow not only increased in size, but also changed in purpose. While the earlier escapees originally intended to live in Jilin, the later escapees preferred South Korea as their ultimate destination.¹⁹ Due to the dangers with crossing the heavily fortified demilitarized zone between North and South Korea, the preferred route to getting to South Korea is to pass through China.²⁰

¹³ US Congressional Research Service ("CRS"), *North Korean Refugees in China and Human Rights Issues: International Responses and US Policy Options*, at 2, Order Code RL34189 (Sept. 26, 2007).

¹⁴ Writenet, *China: Background Paper on the Situation of North Koreans in China*, at 19 (Jan. 1 2005), available at <http://www.unhcr.org/refworld/docid/4231d1d4.html> (last visited on Oct. 15, 2010).

¹⁵ Kurlantzick & Mason, *supra* note 8.

¹⁶ Amnesty Int'l, *Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea*, at 9 (Jan. 20, 2004); Neaderland, *supra* note 7, at 145-147.

¹⁷ Chan & Schloenhardt, *supra* note 7, at 220; Neaderland, *supra* note 7, at 146.

¹⁸ Neaderland, *supra* note 7, at 147.

¹⁹ Chang Yoon-ok, Stephan Haggard, & Marcus Noland, *North Korean Refugees in China: Evidence from a Survey*, in *THE NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE* 28 (M. NOLAND ED. 2006).

²⁰ Chan & Scholenhardt, *supra* note 7, at 220.

B. China

In the early years, the border around the Yalu river was not heavily guarded, making it easy for North Koreans to journey into China. However, as the famine continued and the number of North Koreans crossing the border increased, China began to fortify its border.²¹ Demands from North Korea for repatriation of illegal border crossers, combined with Chinese concerns that massive numbers of migrants in an already poor region with high unemployment could be destabilizing, led to a concerted crackdown on unauthorized North Korean border crossing.²²

Although China is a party to the Convention²³ and the Protocol,²⁴ China has continued to violate its international obligations. In addition to tightening its border controls, China has forcibly repatriated North Korean escapees who had already arrived onto Chinese territory, even though Chinese officials were aware that returnees would be regularly beaten or sentenced to long periods of hard labour in prison camps in North Korea.²⁵ Since 1998, China is estimated to have repatriated two thousand North Koreans each month.²⁶ Moreover, China has refused to allow the UNHCR to screen, monitor, or investigate North Koreans in China. It even prevents the Commission from making concrete determinations of eligibility for refugee status.²⁷ China justifies its actions by maintaining that North Koreans entering China are not refugees but are 'economic migrants.'²⁸ As a result, North Koreans in China are denied their right to seek and enjoy asylum from persecution, and are routinely returned to North Korea without being given an opportunity to make a claim for asylum.²⁹

In 2002, the relatively low profile of the North Korean crisis in China changed when twenty North Koreans entered the Spanish embassy in Beijing and demanded political asylum.³⁰ Since then, China has been under pressure by NGOs and refugee advocates to

²¹ Neaderland, *supra* note 7, at 147.

²² *Id.* at 147.

²³ Convention relating to the Status of Refugees, *supra* note 5. The PRC acceded to the Convention on Sept. 24 1982. UNHCR, *State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, available at <http://www.unhcr.org/3b73b0d63.html> (last visited on Sept. 26, 2010).

²⁴ Protocol relating to the Status of Refugees, *supra* note 5. The PRC acceded to the Protocol on Sept. 24 1982. State Parties to the Convention and Protocol, *supra* note 23.

²⁵ Starved of Rights, *supra* note 16, at 32.

²⁶ Alison Carrinski, *The Other North Korean Dilemma: Evaluating US Law Towards North Korean Refugees*, 31 SUFFOLK TRANSNAT'L L. REV. 3, 652 (2007).

²⁷ Chang, *supra* note 19, at 19; Neaderland, *supra* note 7, at 42.

²⁸ The Chinese position was summed up in a December 2000 Foreign Ministry comment: "It is true that there are some DPRK (North Korean) citizens who have made illegal entry into China along the China-DPRK border in recent years. However, they are not refugees from the perspective of international law." See Chan & Scholoenhardt, *supra* note 7, at 238.

²⁹ Chang, *supra* note 19, at 19.

³⁰ This action was carefully orchestrated by Norbert Vollersten, a Western human rights activist, to highlight the North

screen North Koreans before repatriation to ascertain whether refugee status should be granted under the Convention.³¹ Following the international scrutiny of high-profile media events in which North Korean escapees demanded political asylum in foreign embassies,³² China sought to end international attention by demanding that all foreign diplomatic offices in China surrender North Korean asylum seekers currently in their compound and to cease their practice of entertaining asylum applications from North Koreans in the future.³³

While China permits non-North Korean asylum seekers of all nationalities to openly approach the UNHCR offices in China and to receive UNHCR refugee status determination while remaining in China pending resettlement, North Koreans are explicitly excluded from this process.³⁴ This is in direct contradiction to Article 32(2) of P. R. China's Constitution, which provides foreigners with the right to seek asylum from political persecution³⁵ and China's immigration control laws, which provides foreigners the right to reside in China during their request for political asylum.³⁶

C. South Korea

If North Korean escapees manage to make it into South Korea, they are protected by the South Korean government. Under the South Korean Constitution, North Koreans are considered to be South Korean citizens, and therefore are granted the rights and privileges attached with being a South Korean citizen.³⁷ At the end of 2007, approximately 11,700

Korean plight and to help North Korean refugees reach South Korea. After lengthy negotiations, China agreed to let the 20 North Koreans leave China for South Korea. See Neaderland, *supra* note 7, at 143.

³¹ Human Rights Watch, *The Invisible Exodus: North Koreans in the People's Republic of China*, 14 HUMAN RIGHTS WATCH PUBLICATIONS 1, 6 (2002).

³² On May 8, 2002, 5 North Koreans seeking asylums entered the Japanese consulate, only to be followed into the compound by Chinese policeman, who dragged them back out into the street. This resulted in tense exchange between the Chinese and Japanese government. On the same day, 3 more North Koreans entered the US consulate. Three days later, 2 gained entry into the Canadian embassy. A week later, another 3 went to the Seoul diplomat in China. See Neaderland, *supra* note 7, at 143.

³³ Invisible Exodus, *supra* note 31, at 35.

³⁴ Kurlantzick & Mason, *supra* note 8, at 37.

³⁵ Constitution of the People's Republic of China 1982, art. 32, para. 2. It states: "[T]he People's Republic of China may grant asylum to foreigners who request it for political reasons," available at http://english.gov.cn/2005-08/05/content_20813.htm (last visited on Sept. 26, 2010).

³⁶ The Law of the People's Republic of China on Control of the Entry and Exit of Aliens, art. 15. It states: "Aliens who seek asylum for political reasons shall be permitted to reside in China upon approval by the competent authorities of the Chinese Government," available at http://www.gov.cn/english/2005-08/21/content_25035.htm (last visited on Sept. 26, 2010).

³⁷ North Korean defectors are entitled to South Korean citizenship under a combination of provisions in the Constitution of the Republic of Korea, the Nationality Act, and the Protection of North Korean Residents and Support of their Settlement Act. Article 3 of the Constitution of the Republic of Korea states that: "[T]he territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent lands" (thereby, including the territory of North Korea)

North Koreans resided in South Korea.³⁸ By the end of the 1990s, the South Korean government welcomed defectors with remarkable generosity, providing life-long stipends, apartments, and access to education. However, with the increase in migration flow, the South Korean government has been incrementally scaling back its support system.³⁹

D. UNHCR

Despite the mounting international pressure on China, the UNHCR has failed to take a consistent and effective stance on the granting of international refugee status to North Korean escapees in China. At the 54th Executive Committee session in 2003, the UN High Commissioner for Refugees, Mr. Rudd Lubbers, recognized for the first time that “North Korean defectors may well be considered refugees.”⁴⁰ However, in 2006, the newly appointed UN High Commissioner for Refugees, Mr. Antonio Guterres, explicitly held that the situation of North Korean escapees is not “a massive flow of refugees.” Instead, he stated: “[W]e believe that the large majority of people that have been crossing the border from North Korea have done so for economic reasons, – because of economic hardship, because of hunger, and they represent a typical situation of migration.” Mr. Guterres maintained that “some of these people might become refugees, and for different reasons,” but in his statement, he was clear in saying that North Korean escapees as a group were not considered refugees.⁴¹ Essentially, the UNHCR has declared that North Korean escapees are persons of ‘concern’ within the UNHCR, a group that requires the assistance and protection of the UNHCR, but has not declared them as refugees under the Convention.⁴²

III. Moving beyond the Promise of Non-Refoulement

One preliminary issue that needs to be addressed is the principle of non-refoulement,

and Article 2 states that “[n]ationality in the Republic of Korea is prescribed by law.” The Nationality Act defines a ‘Korean national’ as any person “whose father or mother is a national of the Republic of Korea at the time of his or her birth.” Constitution of the Republic of Korea, adopted on July 17, 1948, available at http://korea.assembly.go.kr/res/low_01_read.jsp (last visited on Sept. 26, 2010). See Chan & Scholenhardt, *supra* note 7, at 232.

³⁸ Carrinski, *supra* note 26, at 658.

³⁹ Andrei Lankov, *Bitter Taste of Paradise: North Korean Refugees in South Korea*, in *THE NORTH KOREAN REFUGEE CRISIS: HUMAN RIGHTS AND INTERNATIONAL RESPONSE* 53 (M. NOLAND ED. 2006).

⁴⁰ Nadia Milanova, *Lack of International Protection for North Korean Refugees*, at 2 (2001).

⁴¹ Press Release, Antonio Guterres, *United Nations High Commissioner for Refugees, Statement to Media by High Commissioner on Conclusion of his mission to the People’s Republic of China* (Mar. 23, 2006), available at <http://www.unhcr.org/admin/ADMIN/4427aae04.html> (last visited on Sept. 26, 2010).

⁴² *Supra* note 4.

which prohibits States from returning individuals to a country where their life or freedom may be endangered. The principle of non-refoulement is enshrined in Article 33(1) of the Convention as follows:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁴³

Since China is a party to the Convention and Protocol,⁴⁴ Academics, NGOs, and the UNHCR insist that North Korean escapees should not be repatriated back to North Korea on the basis of non-refoulement, given the possibilities of imprisonment, torture, or execution upon return.⁴⁵ However, the main concern with ending the discussion with the promise of non-refoulement is that it only addresses the early, initial risk of forced repatriation. Professor Goodwin-Gill argues that to pursue an ideal of asylum (in the sense of an obligation imposed on countries to accord lasting solutions), requires a legal determination of status, which sets out rights and obligations.⁴⁶ He notes that: “[S]tates are not prepared to accept an obligation without determinable content or dimension” and therefore, arguments based on the principle of non-refoulement only accord the minimal protection and provide no durable solutions.⁴⁷

Hence, if the discussion on the protection of North Korean escapees simply ends with the promise of non-refoulement, North Korean escapees are still left without a legal status, and therefore, left without any rights or protections guaranteed under the Convention and Protocol. While the prevention of forced repatriation of North Korean escapees is a critical concern, the purpose of this article is to move beyond the principle of non-refoulement and to provide a basis on which North Korean escapees can claim refugee status, thereby receiving all the rights and protections accorded to Convention refugees. Therefore, this article argues that the UNHCR and China should acknowledge

⁴³ Convention relating to Status of Refugees, *supra* note 5, art. 33, para. 1.

⁴⁴ The PRC acceded to the Convention on Sept. 24 1982. The PRC acceded to the Protocol on Sept. 24 1982. State Parties to the Convention and Protocol, *supra* note 23.

⁴⁵ See e.g. Chan & Scholenhardt, *supra* note 7, at 23; Neaderland, *supra* note 7, at 158-160; Vitit Muntarbhorn, *Question of the Violation of Human Rights and Fundamental Freedom in any part of the world: Situation of Human Rights in the Democratic People's Republic of Korea* (2003) chap. IX. - E/CN.4/2003/L.11, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/E.CN.4.RES.2003.10.EN?opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/E.CN.4.RES.2003.10.EN?opendocument) (last visited on Sept. 26, 2010); Milanova, *supra* note 40, at 4; US Congressional Research Service report, *supra* note 13, at 12; US Committee for Human Rights in North Korea, *The North Korean Refugee Crisis: Human Rights and International Response*, at 38 (2006); Life Funds for North Korean Refugees (“LRNKR”), available at <http://www.northkoreanrefugees.com/2009-03-to-obama.htm> (last visited on Sept. 26, 2010).

⁴⁶ *Supra* note 4, at 203.

⁴⁷ *Id.* at 203.

that North Korean escapees are *prima facie* refugees, falling within the Convention framework. Since the content of the Convention obligations is determinate and binding on member states, if refugee status is accorded to North Korean escapees, this would ensure that North Koreans are given the spectrum of protections under the Convention.

IV. Refugee Status under the Convention

The Convention and Protocol are the legal foundations for the protection of refugees under modern international law. These international instruments contain provisions for the treatment and protections afforded to refugees, as well as the binding obligations of states who are party to the Convention and the Protocol.⁴⁸ As of August 2008, 144 States (out of a total United Nations membership of 192) have now ratified either the Convention or Protocol, or both, reflecting a worldwide consensus on the definition of the term ‘refugee’ and the fundamental rights to be granted to refugees.⁴⁹ The Convention and Protocol are the most widely ratified refugee treaties, and therefore, remain central to the international refugee protection regime.⁵⁰ The primary starting point for determining refugee status under the Convention begins with Article 1A(2) of the Convention. Article 1A(2) provides that in order to qualify as a refugee under the Convention, the applicant must be:

1. outside their country of nationality;
2. unable or unwilling to take advantage of the protection of that country, or to return there; and
3. the inability or unwillingness is attributed to a well-founded fear of being persecuted on account of race, religion, nationality, political opinion, or being a member of a social group.⁵¹

⁴⁸ Although the Protocol is often referred to as ‘amending’ the Convention, the Protocol is an independent treaty. States can choose to be a party either to the Convention or Protocol, to both, or to neither.

⁴⁹ Guy S. Goodwin-Gill, *Convention relating to the Status of Refugees and Protocol relating to the Status of Refugees: Introduction*, available at <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html> (last visited on Sept. 26, 2010).

⁵⁰ *Id.*

⁵¹ It is important to note that the Convention imposes a time and geographical limit to the definition, reflecting the post-World War 2 context in which the Convention was framed. The Convention limits the applicability of the refugee regime to events occurring before January 1, 1951 in Europe. The 1967 Protocol, a separate treaty which incorporates the Conventions by reference, extends the Convention protections to all refugees by eliminating the Convention’s temporal and geographical limitations. For the purposes of this paper, “Article 1A(2) of the

Although the text of Article 1, paragraph A(2) imply an ‘individual’ refugee definition (i.e. a refugee is a person who...), it has been generally accepted by the UNHCR, member states, and academics that the Convention definitions are also applicable in group situations.⁵² The common misconception that the Convention does not apply to mass influx situations emerged because the UNHCR and member states first began interpreting Article 1A(2) as an individualized definition when the Convention first came into force. However, over time, the UNHCR and the international community have come to accept the relevance of the Convention in mass influx situations.⁵³ More specifically, in prior instances of mass influx, states and the UNHCR have applied group-based recognition of refugee status on a *prima facie* basis. This *prima facie* status on a group basis approach is the process through which a particular group is presumed to qualify for refugee status based on objective information on the circumstances causing their flight.⁵⁴

At the outset, it is necessary to explain that there are important differences according to whether the Convention definitions are applied individually or on a group basis. In an individual application, a detailed examination of both subjective and objective elements is necessary to establish that a claimant has a “well-founded fear of persecution.” In contrast, in a group application, a more general approach is required involving:

1. An examination of the objective situation in the country of origin giving rise to the mass influx; and
2. A determination as to whether, due to this objective situation, the members of the group may be exposed to danger or other serious consequences, *for reasons relevant to the Convention grounds*, in the event of their returning to their home country.⁵⁵ [Emphasis added]

Convention” refers to the substantive refugee definition with the temporal and geographical limitations removed by the Protocol. See Convention relating to the Status of Refugees, *supra* note 5, art. 1A, para 2; JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES IN INTERNATIONAL LAW* (2005).

⁵² For a detailed discussion of the application of the Convention definition to groups, see Jackson, *supra* note 6. Although some authors have claimed that the Convention definitions can only be applied in individual settings, it is now generally acknowledged that the Convention definitions can be applied to groups. However, there is disagreement as to *how* the Convention definitions apply in group situations of mass influx.

⁵³ See e.g. Jackson, *supra* note 6; Anne F. Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton*, 20-1 J. REFUGEE STUD. 149-151 (2006); Durieux & McAdam, *supra* note 9; UN High Commissioner for Refugees, *UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees* 3 (Feb. 7, 2006), available at <http://www.unhcr.org/refworld/docid/43f48c0b4.html> (last visited on Sept. 26, 2010).

⁵⁴ UNHCR Guidelines on Mass Influx, *supra* note 53.

⁵⁵ *Id.*

The UNHCR has summarized that: “*prima facie* recognition is appropriate where there are grounds for considering that the large majority of those in the group would meet the eligibility criteria set out in the applicable refugee definition.”⁵⁶

This article argues that North Korean escapees should be granted refugee status under the Convention on the basis of the *prima facie* group determination approach. Academics, such as Chan and Schloenhardt, have advanced the claim that North Korean escapees should be granted refugee status on an individual basis under the traditional, individualized interpretation of the Convention definition.⁵⁷ Although in agreement with the ultimate conclusion that North Korean escapees should be afforded Convention refugee status, this article rejects the application of the individual definition, and instead, offers the alternative submission that North Korean escapees should be granted refugee status under a group approach to the Convention definition.

V. Problem with the Individual Approach in Mass Influx Situations

In rejecting the dominant arguments advanced by the majority of authors on this issue, this section will briefly detail the problems with granting refugee status to North Korean escapees under the individualized interpretation of the Convention process. Reports by organizations on this issue have mainly focused on the plight of North Korean escapees in China and the potential for awarding Convention refugee status as a method to provide protection to North Korean escapees.⁵⁸ In the limited academic scholarship on the issue, Chan and Scholenhardt have argued that North Korean escapees should be granted Convention refugee status.⁵⁹ At the core of their arguments is that North Korean escapees meet the requirements in Article 1A (2) of the Convention. However, the current mass influx of North Korean escapees into China cannot be reconciled with the traditional, individualized Convention refugee process. The arguments relying on the traditional interpretation and individualized process of the Convention refugee regime are problematic on a theoretical, substantive, and practical level.

⁵⁶ *Id.*

⁵⁷ Chan & Scholenhardt, *supra* note 7.

⁵⁸ US Congressional Research Service report, *supra* note 13; US Committee for Human Rights in North Korea, *supra* note 45.

⁵⁹ Chan & Scholenhardt, *supra* note 7.

A. Conceptual Limitations of the Individual Approach

Chan and Scholenhardt have argued that North Korean escapees should receive refugee status by analyzing the requirements of Article 1A(2) and demonstrating how North Korean escapees meet the definition.⁶⁰ However, by relying on the traditional, individualized approach towards Article 1A(2), Chan and Scholenhardt's analysis is conceptually problematic. A disconnect between Chan and Scholenhardt's main argument and outcome exists because they analyze North Korean escapees as a group under the traditional rubric of the individualized interpretation of Article 1A(2).

The standard approach for refugee applications under the individualized process requires each individual asylum claimant to demonstrate that s/he meets the requirements of Article 1A(2) of the Convention. Under an individualized approach, each individual claimant must demonstrate that s/he has a subjective fear of persecution should s/he return to her/his home country. Although it is granted that North Korean escapees share a large number of characteristics, academic papers which analyze the objective situation of North Korean escapees as a group, and then which apply that to demonstrate subjective fear of individual claimants (which is required under the individual interpretation of the Convention definition), is problematic on a fundamental conceptual plane.

B. Substantive Limitations of the Approach

Whilst academics, such as Chan and Scholenhardt, have claimed that North Korean escapees do meet the Convention requirements on an individualized basis, the on-the-ground interviews by Amnesty International and other NGOs have consistently reported evidence indicating that North Korean escapees will have difficulty demonstrating that they have a subjective fear of persecution in North Korea.⁶¹ Many sources indicate that the primary reason for leaving North Korea is to search for food, not for fear of persecution. For example, of the thirty-eight North Korean escapees interviewed by Refugees International, none claimed that they had subjectively experienced any persecution for reasons of political opinion or religious belief prior to their departure from North Korea.⁶² Although it will later be demonstrated that objectively, food shortages is linked to one of the Convention grounds, mainly political opinion, the requirement of

⁶⁰ *Id.*

⁶¹ Starved of Rights, *supra* note 16, at 9; Invisible Exodus, *supra* note 31, at 6; DLA Piper & U.S. Committee for Human Rights in North Korea, *Failure to Protect: A Call for the UN Security Council to Act in North Korea* (Oct. 30, 2006); Chang, *supra* note 19.

⁶² Joel R. Charny, *Protection Strategies for North Korean Refugees in China*, at 3, available at <http://www.northkoreanrefugees.com/nk-ref-report.pdf> (last visited on Sept. 26, 2010).

subjective fear of persecution under the individualized approach to the Convention definition will be difficult for North Korean escapees to fulfill.

C. Practical Limitations of the Approach

Even if North Korean escapees could be granted refugee status under the individualized process, this approach fails to address the practical problems of individualized screening during times of mass influx. In such situations, it is impracticable to resort to an examination of each individual comprising the group.⁶³ The difficulties with screening thousands of North Korean escapees is also coupled with the obstacle of China's strict prohibition against allowing UN personnel to monitor and assess North Korean escapees in China. Hence, even if North Korean escapees, in theory, could meet the definition under the individualized interpretation to the Convention definition, the practical effects of that argument are lacking given that North Korean escapees are prevented from accessing the UNHCR to apply for refugee status.

D. Conclusion

Academics and organizations have advanced the argument that North Korean escapees should receive refugee status under the individualized approach to the Convention definition. However, there are theoretical, substantive, and practical limitations of this approach. Hence, this article argues, in the alternative, that a group interpretation of the Convention definition be utilized to support the granting of *prima facie* refugee status to North Korean escapees.

VI. Refugees Status through Group Determination Approach

To date, the majority of reports and articles on the topic have argued for a granting of refugee status to North Koreans by analyzing the mass influx situation through the lens of the individualized process.⁶⁴ An alternative position is submitted in this article. North Korean escapees should be granted *prima facie* refugee status through a group approach

⁶³ Durieux & McAdam, *supra* note 9, at 6.

⁶⁴ Chan & Scholenhardt, *supra* note 7; US Congressional Research Service report, *supra* note 13; US Committee for Human Rights in North Korea, *supra* note 45.

to the determination of Convention refugee status. Since the inception of the Convention regime, group determinations of status on a *prima facie* basis has emerged as one of the main mechanisms to address large-scale influx situations under the Convention framework.⁶⁵ The foremost exposition on this concept comes from Rutinwa's UNHCR Working Paper, titled "*Prima Facie Status and Refugee Protection.*" Rutinwa outlines that a group determination of status on a *prima facie* basis results in "the recognition by a State of refugee status on the basis of the readily apparent, objective circumstances in the country of origin giving rise to exodus."⁶⁶ In other words, under a group determination of refugee status under the Convention, the receiving state and the UNHCR can examine the flow of individuals as a group, focusing on the objective situation in the country of origin giving rise to the mass influx. If the members of the group may be exposed to danger or other serious consequences, for reasons relevant to the Convention grounds, in the event of their returning to their home country, the entire group shall be granted Convention refugee status.⁶⁷ The legal foundation for the group determination of status on a *prima facie* basis is the Convention itself.⁶⁸

There are two main arguments which demonstrate that North Korean escapees, as a group, fall within the Convention definition:

1. Economic deprivation which has prompted North Koreans to flee North Korea is directly tied to political opinion and membership in a social class; and
2. Punishment for defection under the North Korean Criminal Code is tied to political opinion

As will be discussed in greater detail below, North Korean escapees meet the Article 1A(2) definition under a group determination approach since objectively, the economic deprivation of North Koreans is persecution based on political opinion and membership in a social class, and further, criminal prosecution for defection is also persecution based on political opinion.

A. Economic Deprivation Tied to Political Opinion and Membership in a Social Class

The UNHCR Special Rapporteur on North Koreans in China noted that the majority of

⁶⁵ See UNHCR Guidelines on Mass Influx, *supra* note 53, at 3; Bonaventure Rutinwa, *Prima Facie Status and Refugee Protection*, at 1 (2002).

⁶⁶ Rutinwa, *supra* note 65, at 1.

⁶⁷ Jackson, *supra* note 6, at 3.

⁶⁸ *Id.* at 12.

those fleeing North Korea are in search of food during times of crisis.⁶⁹ This is corroborated by Amnesty International, which has documented that the primary motivation of North Koreans crossing into China is either to find a better life in China or to access food and other basic supplies.⁷⁰

This has prompted the Chinese government to invoke the image and language of ‘economic migrant’ to describe North Korean escapees. The Chinese government has used the ‘economic migrant’ narrative to justify their repatriation of North Koreans.⁷¹ The UNHCR has adopted this approach as well. In 2006, the High Commissioner held that North Korean escapees have settled in China for “economic reasons – because of economic hardship, because of hunger, and they represent a typical situation of migration.”⁷² This argument has been utilized as the main justification for denying refugee status to North Korean escapees.

The UN’s approach to this issue is problematic given that the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“Handbook”) provides an explicit recognition of instances where ‘economic migrant’ and the Convention definition of refugee may overlap. The basic distinction between an ‘economic migrant’ and a ‘Convention refugee’ is stated in the Handbook as follows: “[A] migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere... If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.”⁷³ However, the Handbook adds the following qualification to this simplistic distinction:

The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant’s country of origin is not always clear. Behind economic measures affecting a person’s livelihood there may be racial, religious, or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population, the victims may according to the circumstances become refugees on leaving the country.⁷⁴

The Handbook’s qualification has been bolstered by the academic writings of Foster,

⁶⁹ Chan & Scholenhardt, *supra* note 7, at 226.

⁷⁰ Starved of Rights, *supra* note 16, at 18.

⁷¹ Chan & Scholenhardt, *supra* note 7, at 238.

⁷² Antonio Guterres Statement to Media, *supra* note 41.

⁷³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para. 51, U.N.Doc. HCR/1P/4/Eng/Rev.2 (Jan. 1992), available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (last visited on Sept. 26, 2010).

⁷⁴ *Id.* para. 64.

who criticizes the simplistic, binary division between ‘economic migrant’ and ‘refugee.’ Foster suggests that economic-based violations should not lead to an automatic dismissal of a refugee claim. Instead, asylum seekers fleeing economic deprivation may fall within the definition of the Convention ground due to inextricable connections between economic deprivation and one of the five grounds in the Convention.⁷⁵ Foster suggests that an interpretation of the Convention grounds is capable of responding to the phenomenon of migration based on economic rights. More specifically, it can be gleaned from the Handbook that political persecution can take the form of economic punishment or deprivation, demonstrating that the concepts of ‘economic migrant’ and ‘refugee’ should not be held to be mutually exclusive, dichotomous ideas.⁷⁶

In addition, we may consider that economic deprivation is tied to a political element. This criticism of the simplistic distinction between ‘economic migrant’ and ‘refugee,’ however, can find no better fertile ground for its support than the current situation of North Korean escapees. While North Korean escapees may have an economic motivation to flee North Korea, their motivations have a direct nexus with two of the Convention grounds concurrently, political opinion and membership of a social group. Everyone in North Korea is divided into political classes.⁷⁷ The government uses three class labels, Core, Wavering, and Hostile to prioritize access to education, jobs, residence, and food items distributed through the Public Distribution System.⁷⁸ Members of the Core population are those who are considered loyal to the party regime, whereas the other end of the spectrum includes the Hostile group, who are considered to be in political opposition to the regime.⁷⁹ Thus, food is distributed by the North Korean regime based on perceived loyalty and usefulness to the regime, which indicate that economic deprivation has an element of political persecution. In addition, access to education and jobs, which also affects an individual’s ability to feed her/himself, is also dependent on the class the individual belongs to.⁸⁰ To sum up, Refugees International reports that: “[I]n North Korea, access to public goods — food, education, health care, shelter, employment — cannot be separated from the all-pervasive system of political

⁷⁵ MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 14 (2007).

⁷⁶ There have been numerous studies which provide empirical evidence that political and economic factors are inextricably linked, and that it is artificial to distinguish between political and economic refugees in many circumstances. See Foster, *supra* note 75, at 12 - 14.

⁷⁷ International Federation for Human Rights (“FIDH”), *Misery and Terror: Systematic Violations of Economic, Social, and Cultural Rights in North Korea*, at 4 (2003), available at <http://www.fidh.org/MISERY-AND-TERROR-Systematic-Violations-of?envoiamis=1> (last visited on Sept. 26, 2010).

⁷⁸ Starved of Rights, *supra* note 16, at 13.

⁷⁹ *Id.*; Invisible Exodus, *supra* note 31, at 19.

⁸⁰ Starved of Rights, *supra* note 16, at 13.

persecution.”⁸¹ Moreover, there is not only a political element, but also that of persecution by being a member in a social group. This political class of individuals is for life and would be transferred from generation to generation.⁸² International law indicates that persons belonging to caste societies or societies in which there are no methods of changing one’s social status can be held to fall within the Convention definition if they suffer persecution based on their social status.⁸³

In conclusion, members in the hostile class are persecuted through the functioning of the North Korean Public Distribution System. In this context, there is no meaningful way to separate economic deprivation from political persecution.⁸⁴ Hence, due to this inextricable connection between economic deprivation (which motivates North Koreans to flee) and two of the Convention grounds, political opinion and membership in a social class, North Korean escapees as a group should qualify for Convention refugee status.

B. Punishment for Defection under the North Korean Criminal Code

Another source of granting group refugee status to North Korean escapees arises from the potential prosecution and punishment for having left North Korea illegally under the North Korean Criminal Code. All North Korean escapees, irrespective of their motives for having left Korea, will have committed a ‘crime’ under the North Korean Criminal Code. Under Article 47 of the North Korean Criminal Code, any person who escapes to another country or to the enemy in betrayal of his motherland shall be punished by at least seven years or more labour re-education. If it is a serious violation, the person shall be punished by execution.⁸⁵ Moreover, Article 117 of the North Korean Criminal Code provides that any person who crosses the border without permission shall be punished by a sentence of three years or less labour re-education.⁸⁶ Therefore,

⁸¹ Chan & Scholenhardt, *supra* note 7, at 223.

⁸² Starved of Rights, *supra* note 16, at 13.

⁸³ *E.g.*, applicants who were born into a lower Hindu caste were given refugee status because they were persecuted because of “their membership [of] the caste which is a particular social group” given the “unchangeable character of their membership in lower or scheduled caste within their country.” See Foster, *supra* note 75, at 304.

⁸⁴ Chan & Scholenhardt, *supra* note 7, at 223.

⁸⁵ The North Korean Criminal Code, art. 47. It provides that: “[O]ne who escapes to another country or to the enemy in betrayal of his motherland and people, or who commits treacherous acts towards the motherland such as espionage or treason, shall be punished by at least seven years or more labor re-education. If it is a serious violation, he shall be punished by execution and forfeiture of all property.” An official translation of the North Korean Criminal Code was unavailable; for the purposes of this article, the unofficial translation provided by Human Rights Watch has been used: Translation quoted in *Invisible Exodus*, *supra* note 31, at 21.

⁸⁶ The North Korean Criminal Code, art. 117. It provides that: “[O]ne who crosses the border without permission shall

any North Korean escapee, by virtue of having left North Korea without valid permission, will be subject to criminal sanctions when they return. Even those who initially left the country in search of food will be in violation of Article 117 of the North Korea Criminal Law.

Articles 47 and 117 of the North Korea Criminal Law have often been referred to as evidence that China is violating the principle of non-refoulement by forcibly repatriating North Korean escapees, given the possibilities of imprisonment, torture, or execution upon return.⁸⁷ However, the possibility that North Korean escapees will be prosecuted and punished can also be a source of grounding refugee status under the Convention.⁸⁸ The UNHCR has recognized the possibility of prosecution falling within ‘persecution’ :

[T]he legislation of certain States impose severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is a reason to believe that a person, due to his illegal departure... is liable to such severe penalties, his recognition as a refugee will be justified if it can be shown that his motives for leaving... [involve political opinion]⁸⁹

1. ‘Prosecution’ Can Amount to ‘Persecution’: Theory and Jurisprudence

Professor Goodwin-Gill has argued that when unauthorized border crossing attracts severe penalties, the fear of prosecution and punishment can be equated with a well-founded fear of persecution on grounds of political opinion, if the object and purpose of the law treats the act of leaving the country as a political act (either because it reflects an actual political opinion of the claimant, or because the state authorities attribute dissident political opinion to the claimant).⁹⁰ This contention is not merely theoretical conjecture. Adjudication in both senior common law courts and administrative tribunals support the academic writing on the issue.⁹¹ The jurisprudential opinion is nascent, but nonetheless significant, as it reveals that decision-makers are recognizing that ‘persecution’ under the Convention is broad enough to encompass such a claim, where

be punished by a sentence of three years or less labor re-education.” An official translation of the North Korean Criminal Code was unavailable; for the purposes of this article, the unofficial translation provided by Human Rights Watch has been used: Translation quoted in *Invisible Exodus*, *supra* note 31, at 20.

⁸⁷ See Chan & Scholenhardt, *supra* note 7, at 23.

⁸⁸ *Id.* at 227.

⁸⁹ Handbook, *supra* note 73, at 61.

⁹⁰ Goodwin-Gill, *supra* note 49, at 103.

⁹¹ *Valentin v. Canada (Minister of Employment & Immigration)* [1991], 167 N.R. 1 (F.C.A.), Marceau J.A.; *Zheng v. Canada (Minister of Citizenship & Immigration)* [2002] 23 Imm. L. R. (3d) 276, at 31 (F.C.T.), Martineau J; *SI and IA v. The Secretary of State for the Home Department* [2008], UKAIT 00006, Batiste and Taylor J.J.; *Rodriguez-Roman v. I.N.S.*, 98 F.3d 416 (9th Cir. 1996).

appropriate. Generally, courts are not willing to find refugee status if a person manufactures her/his own risk of prosecution and punishment for violating a criminal law of general application.⁹² However, in some situations, the application of a nation's criminal law to an individual can amount to persecution if the claimant can show that the law punishes an individual in relation to Convention grounds.⁹³

In Canada, the leading case on this issue is *Valentin v. Canada*. In the *Valentin v. Canada* case, the Federal Court of Appeal held that where the law is "likely to add to the series of discriminatory measures to which a claimant has been subjected to," prosecution may be equated with 'persecution.'⁹⁴ Similarly, in the *SI and IA v. The Secretary of State for the Home Department* case, the United Kingdom Asylum and Immigration Tribunal addressed a situation in which a claimant argued that he would be subject to prosecution if he were to return to Syria because he had left illegally and his act of leaving could attract imputed political opinion. The Tribunal held that since there was a real risk and possibility of punishment for the combined reasons of ethnicity and imputed political opinion, the claimant was given refugee status.⁹⁵ In the *Rodriguez-Roman v. INS* case, the United States Court of Appeal for the ninth circuit held that punishment for the crime of illegal departure can constitute persecution when the punishment would be severe and the person has fled the country for political reasons, or the state authorities have imputed political opinion to the act of leaving.⁹⁶

2. Application: Prosecution under the North Korean Criminal Code Is Connected to Political Opinion

The academic literature in conjunction with the jurisprudence indicate that in order to demonstrate that North Korean escapees' potential of facing punishment upon return constitutes persecution, the followings must be demonstrated:

1. There must be a real possibility/likelihood of facing punishment upon return⁹⁷
2. Punishment for breach of the law must be serious and disproportionate;⁹⁸ and
3. Punishment for the crime must be linked to one of the Convention grounds, i.e., Political opinion.⁹⁹

⁹² *Valentin*, *supra* note 91.

⁹³ *Zheng*, *supra* note 91.

⁹⁴ *Valentin*, *supra* note 91, at 9.

⁹⁵ *SI and IA*, *supra* note 91.

⁹⁶ *Rodriguez-Roman*, *supra* note 91.

⁹⁷ *SI and IA*, *supra* note 91,

⁹⁸ *Zheng*, *supra* note 91, at 28: "General laws of application must be so serious or disproportionate as to clearly amount to persecution."

According to Amnesty International, the significant risk of imprisonment in inhumane and degrading conditions for North Korean escapees, coupled with the general arbitrariness with which the sanctions are imposed, is sufficient to justify a well-founded fear of persecution.¹⁰⁰ Based on extensive interviews with North Koreans in China and elsewhere, Refugees International notes that “almost all North Koreans face severe punishment upon deportation, regardless of their original motivation for leaving their country.”¹⁰¹ Moreover, North Koreans who cross the border with the purpose of defection or seeking asylum face a high risk of indefinite terms of imprisonment, or even execution.¹⁰² Even though every nation has the sovereignty to enact laws regarding migration, the seriousness of the penalties prescribed under Articles 47 and 117 of the North Korean Criminal Code, in combination with the re-education component of the punishment, suggest that the objective of the provisions is not to maintain effective border control, but rather, to punish ‘disloyal’ nationals who leave the country, which is an indicator of their rejection of the political system. This is, in essence, punishment based on a – real or imputed – political opinion.¹⁰³

In conclusion, if North Korean escapees were to return to North Korea, they face a high risk of serious punishment under the North Korean Criminal Code. According to the above mentioned legal opinion and jurisprudence, when a refugee claimant is prosecuted under criminal legislation that is connected to a Convention ground, such as political opinion, prosecution can amount to persecution.

VII. *Prima Facie* Refugee Status

It has been demonstrated in the preceding section that through a group approach to the Convention, North Korean escapees meet the conditions of Article 1A(2) of the Convention. This sets the necessary background for establishing that North Korean escapees should be given *prima facie* refugee determination, based on the group approach to the Convention definition.¹⁰⁴

⁹⁹ Valentin, *supra* note 91, at 9; Zheng, *supra* note 91, at 31. Although the Handbook seems to suggest that the person must have held that opinion, jurisprudence indicates that state authorities’ perception of a political opinion is sufficient.

¹⁰⁰ Starved of Rights, *supra* note 16, at 36.

¹⁰¹ Chan & Scholenhardt, *supra* note 7, at 223.

¹⁰² Chang, *supra* note 19, at 16.

¹⁰³ Chan & Scholenhardt, *supra* note 7, at 228.

¹⁰⁴ Although it is beyond the scope of this article to discuss the exact parameters of a *prima facie* framework towards North Korean escapees in China, China and the UNHCR can look to past experiences of mass influx and *prima facie* determination approaches to develop an arrangement that best suits the unique circumstances of North Korean

Over the last fifty years, numerous states have used the *prima facie* approach in response to mass influx situations. It was used in the case of Hungarian refugees who fled the failed revolution in their country in 1956.¹⁰⁵ The same approach was also taken in Africa both before and after the adoption of the 1969 OAU Refugee Convention.¹⁰⁶ In Asia, *prima facie* status was accorded to refugees who fled Vietnam after the fall of Saigon until the adoption of the Indochinese Comprehensive Plan of Action.¹⁰⁷ All of these examples of state practice in utilizing the *prima facie* group approach have led the UNHCR to assert that *prima facie* refugee determination is “one of the main mechanisms that has been devised for responding to large-scale influxes.”¹⁰⁸ Moreover, the Handbook provides when the *prima facie* approach is utilized:

Situations have also arisen in which *entire groups have been under circumstances indicating that members of the group could be considered individually as refugees*. In such situations... it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. *Recourse has therefore been had to the so-called ‘group determination’ of refugee status*, whereby each member of the group is regarded *prima facie* as a refugee.¹⁰⁹ [Emphasis added]

In the academic literature, there are two streams, delineating what is required in order for *prima facie* status to be awarded to a group of refugees in mass influx situations. Some authors, such as Rutinwa,¹¹⁰ suggest a broad and liberal approach to granting refugee status. Rutinwa contends that in order for *prima facie* refugee status to apply to groups, an examination of the objective situation in the country of origin must be analyzed. Due to the objective situation, it must be demonstrated that such persons are exposed to danger or other serious consequences, thereby requiring international protection.¹¹¹ The other stream of thought is the one advanced by Jackson.¹¹² Jackson suggests that the *prima facie* determination of refugees requires a link between the exodus and the Convention grounds. Jackson argues that in order for *prima facie* refugee status to be granted to a group of people, there has to be some evidence that the members would fall within the Convention definitions, but due to practical barriers of

escapees in China. A valuable sketch of key characteristics of a functional framework can be found in Rutinwa’s working paper, “Prima Facie Status and Refugee Protection.” See Rutinwa, *supra* note 65.

¹⁰⁵ Rutinwa, *supra* note 65, at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ UNHCR Guidelines on Mass Influx, *supra* note 53.

¹⁰⁹ Handbook, *supra* note 73, at 44.

¹¹⁰ Rutinwa, *supra* note 65.

¹¹¹ *Id.* at 2.

¹¹² Jackson, *supra* note 6.

individual screening in mass influx situations, *prima facie* refugee status is awarded.¹¹³

In this article, Jackson's approach was adopted and utilized to demonstrate that North Korean escapees meet the Convention definition. The basis for declining Rutinwa's approach is that his approach leads to the conclusion that a *prima facie* determination of refugee status does not entail the same spectrum of rights and protections afforded to Convention refugees. Rutinwa's approach is sufficiently disconnected from the Convention definition, and therefore, a group approach which only fulfills Rutinwa's requirements would not lead to a full spectrum of rights.¹¹⁴ Under Jackson's approach, it necessarily flows that *prima facie* refugee status raises a presumption that individual members of the group are refugees within the meaning of the Convention if there is a nexus between the objective circumstances leading to the exodus with the Convention grounds. The underlying appeal for *prima facie* refugee status for North Korean escapees is to ensure that North Koreans are given a legal status that will entitle them to the range of protections under the Convention. If *prima facie* refugee status is not equivalent to Convention refugee status, then, *prima facie* refugee status is not supported by any legal force of rights and obligations.¹¹⁵

In conclusion, North Korean escapees should be granted *prima facie* refugee status, which affords them all of the protections guaranteed under the Convention. Currently, Chinese authorities prevent UNHCR personnel from monitoring and screening the mass influx of North Korean escapees into China. Moreover, even if UNHCR agencies were allowed access to North Korean escapees, the sheer volume of the movement of escapees into China would make it impracticable for individualized assessments and screening. Hence, this article argues that North Korean escapees should be given *prima facie* refugee status since they meet Article 1A(2) of the Convention under a group determination approach. Moreover, if Jackson's approach is adopted, given that a nexus between the North Korean exodus and the Convention grounds exists, a *prima facie* refugee status should be the equivalent of a Convention refugee status under the individualized definition. This would ensure that North Koreans are entitled to the standards of treatment stipulated by the Convention.¹¹⁶

¹¹³ *Id.* at 10.

¹¹⁴ Rutinwa, *supra* note 65, at 2.

¹¹⁵ Durieux & McAdam, *supra* note 9, at 10.

VIII. South Korean Citizenship: Dual Nationality Barrier

Before concluding, a final issue is the ‘dual nationality’ barrier to Convention refugee status. North Korean escapees are technically holders of both North and South Korean citizenship. The Convention is intended to provide international protection to those who do not enjoy any national protection. In the case of claimants who hold dual or multiple nationalities, they will not be granted Convention refugee status if they can be protected by the second country of citizenship.¹¹⁷ This raises a unique problem with respect to North Korean escapees. Despite the historical division of the Korean peninsula into the north and the south in 1948, the South Korean Constitution continues to cover the northern part of the peninsula. Under Article 3 of the South Korean Constitution, North Korean nationals are automatically granted South Korean citizenship.¹¹⁸ Hence, on a strict interpretation of the Convention requirements, this dual nationality is a bar for North Korean escapees from receiving refugee status under the Convention. Although North Koreans have a well-founded fear of persecution in North Korea, their South Korean citizenship implies that South Korea is obliged to admit them and provide national protection. However, the Handbook recognizes that there are instances in which dual or multiple nationalities should not operate as a technical bar: “There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed *ineffective* as it does not entail the protection normally granted to nationals”¹¹⁹ [Emphasis added]. The Handbook’s position has been reinforced by the academic literature and the jurisprudence, which have recognized that a country may deny refugee status and asylum on the basis of a dual nationality *only if* the other nationality is *effective*. Piotrowicz reasons that in assessing an individual’s nationality status, it is necessary “to evaluate if that other nationality is actually *effective* in the sense that *the individual will be able to enter the State and, having been admitted, be safe.*”¹²⁰ [Emphasis added]

¹¹⁶ *Id.* at 14.

¹¹⁷ Convention relating to Status of Refugees, *supra* note 5, art. 1A(2), para 2.

¹¹⁸ Chan & Scholenhardt, *supra* note 7, at 223: Constitution of the Republic of Korea, art. 3. It states that: “[the] territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent lands” (thereby including the territory of North Korea). Given that the territory of the DPRK is included in the definition of the South Korean constitution, this provision effectively provides that nationals of North Korea are automatically granted South Korean citizenship. Constitution of the Republic of Korea, adopted on July 17, 1948, *available at* http://korea.assembly.go.kr/res/low_01_read.jsp (last visited on Sept. 26, 2010).

¹¹⁹ Handbook, *supra* note 73, at 107.

¹²⁰ Ryszard Piotrowicz, *Refugee Status and Multiple Nationality in the Indonesian Archipelago: Is there a Timor Gap?*, 8 INT’L J. REFUGEE L. 332 (1996).

This distinction between effective and ineffective citizenship has also been recognized in refugee law jurisprudence. In Australia, in the late 1990s, the issue of dual nationality became a much debated topic when East Timorese asylum seekers, fleeing persecution in East Timor, sought asylum in Australia. Similar to North Korean escapees, the East Timorese were initially denied asylum on the ground that they held Portuguese citizenship. However, in the *Jong Kim Koe vs. Minister for Immigration and Multicultural Affairs* case, the Federal Court of Australia held that the Portuguese citizenship was not an effective nationality and therefore should be disregarded in any assessment of entitlement to refugee status in Australia.¹²¹

A. Dual Nationality Should Not Be a Barrier to the Convention Status

One preliminary remark is that once in South Korean territory, the South Korean citizenship becomes effective for North Koreans. North Korean escapees are granted automatic South Korean citizenship, and are afforded all of the rights and protections that flow from being a South Korean national. Moreover, there is an extensive resettlement program for North Koreans.¹²² Until North Koreans arrive in South Korean territory, however, their South Korean citizenship is dormant.

The key issue is that in China, the South Korean nationality is ineffective, and therefore, it should not act as a bar for granting refugee status to North Korean escapees in China. While in China, North Korean escapees are not treated as South Korean nationals by the Chinese government. In this situation, their South Korean citizenship garners no protection. This is clearly evidenced by the fact that China does not allow North Korean escapees safe passage to South Korea. China has taken active action to repatriate North Korean escapees back to North Korea, and have prohibited the UNHCR from accessing the China-North Korean border for purposes of monitoring and assessing the status of North Koreans.¹²³

Hence, North Korean escapees in China live in a Catch-22 Scenario; North Korean

¹²¹ *Jong Kim Koe v. Minister for Immigration; Multicultural Affairs*, 306 FCA , Australia: Federal Court, 2 May 1997, available at <http://www.unhcr.org/refworld/docid/3ae6b6eb4.html> (last visited on Oct. 20, 2010).

¹²² See Lankov, *supra* note 39, at 62 - 68: Under the resettlement program, North Koreans are eligible for three kinds of benefits following their arrival in South Korea. First, a defector receives a lump sum of 'settlement money,' and is also given installments over the first two years of the defector's new life in the South. Second, a defector receives monetary assistance with housing. Third, to encourage vocational training, refugees are given opportunity to participate in education and job re-training. However, as the influx of North Koreans to the South begins to grow, the South Korean government has responded by reducing benefits incrementally. Moreover, due to the large and sudden influx of North Koreans into South Korea, there have been a number of problems with respect to resettlement in South Korea, ie. Integration, assimilation, loss of support network, etc.

¹²³ Kurlantzick & Mason, *supra* note 8, at 38.

escapees are not given international refugee status because they have South Korean citizenship, and therefore are not given the rights and protections under the Convention. However, the Convention protection is what will obligate China to enable North Korean escapees to gain safe passage to South Korea, where their South Korean citizenship becomes effective. In conclusion, the dual nationality should not be a bar for granting refugee status to North Korean escapees in China, given that North Korean escapees are not given the protection of their South Korean citizenship while in China.¹²⁴

IX. Conclusion

The mass influx of North Korean escapees into China has reaffirmed the significance and relevance of the 1951 Convention and 1967 Protocol as the key instruments that guarantee protections to refugees. The recognition or non-recognition of refugee status is central to any discussion concerning the afflictions faced by North Korean escapees since international legal status delineates the rights and protections that the Chinese government, the UNHCR, and the international community must provide to North Koreans in China. The Chinese and UNHCR's position that the Convention and Protocol are inapplicable to North Koreans (since they fail to meet the Article 1A(2) definition) have left North Korean escapees in a state of legal ambiguity, without rights or protections. Premised on the view that the protection of refugees are best addressed by legal structures, the purpose of this paper was to first, re-situate the North Korean crisis within a legal framework, and second, to establish that North Korean escapees should be granted *prima facie* refugee status under a group determination of the Convention definition.

China's failure to recognize North Korean escapees as refugees under the Convention has allowed China to abstain from providing the basic protections guaranteed to refugees under the Convention. With the underlying goal of providing

¹²⁴ If North Korean escapees are granted refugee status, what happens if they apply for asylum in a country other than South Korea? In such cases, the argument becomes more challenging because it will be difficult for North Koreans to demonstrate that their South Korean citizenship is 'ineffective' given that North Koreans are entitled to South Korean citizenship once in South Korea. Although the analysis for this question is beyond the scope of the article, it is worthwhile to note that one country's response to this is the United States *North Korean Human Rights Act*. This legislation explicitly provides that North Koreans should not be barred from eligibility for refugee or asylum status in the United States due to any legal claim they may have to South Korean citizenship. See Kurlantzwick & Mason, *supra* note 8, at 46.

protections to the North Koreans in China, this article recommends that China, the UNHCR, and the international community recognize North Korean escapees as refugees under the Convention and grant North Korean escapees *prima facie* refugee status. As with all mass influx situations, the North Korean situation challenges the very structure of the Convention definition, raising new issues in fundamentally novel and intricate ways. How the UNHCR and the international community respond to the North Korean mass influx situation can have broader implications for how future instances of mass influx should be approached. Despite some of the challenges that North Korean escapees, as a group, may face in falling within the Convention definition, this article encourages China and the UNHCR to explore the logical limits of the definition in order to ensure that the Refugee Convention “is seen as a living thing, adopted by civilized countries for a humanitarian end which is constant in motive but mutable in form.”¹²⁵

¹²⁵ Foster, *supra* note 75, at 21.

