

North Korea: Human Rights Ground Zero: Suzanne Scholte Additional Submission: China's Legal Duty Toward North Korean Refugees

Tarik Radwan, Lawyer with Jubilee Campaign, USAAs part of Testimony of Suzanne ScholtJanuary 27, 2004 Question: What is China's legal obligation toward North Korean refugees in China? Answer: As a Party to the Convention Relating to the Status of Refugees, China is obliged to extend the following protections to North Korean refugees: Convention protection without discrimination on account of race, religion or nationality. (Article 3). Freedom of religion as accorded to its own nationals. (Article 4). Right of association as accorded to other aliens. (Article 15). Free access to the courts of law. (Article 16). Right to work as accorded to other aliens. (Article 17). Right to housing as accorded to other aliens. (Article 21). Right to primary education as accorded to its own nationals and beyond that as accorded to other aliens. (Article 22). Right to public relief and assistance as accorded to its own nationals. (Article 23). Freedom to choose place or residence and to move within the territory as accorded to other aliens. (Article 26). Right to an identity paper. (Article 27). Right to travel documents. (Article 28). Immunity from penalties for illegal entry or presence for certain refugees who came directly from a territory where their life or freedom was threatened (Article 31). Protection from expulsion from the country (Article 32). Protection from "refoulement," which is the forcible return of a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion. (Article 33).

Question: China maintains that all North Koreans cannot even qualify as refugees. Is that possible? Answer: Not according to the law. Article 3 of the Convention obligates China to apply the provisions of the Convention to all of its refugees, without discrimination as to race, religion or country of origin. It is obvious to the world that China does indeed discriminate against ethnic Korean refugees. How else can one explain that China protects close to 300,000 Indo-Chinese refugees, but not one of the approximately 300,000 Korean refugees. The United Nations Committee on the Elimination of Racial Discrimination formally recorded this discrimination in its annual conclusion in August 2001.¹ Regrettably nothing has changed.

Question: China repeatedly declares North Koreans en masse as "irregular migrants" or "economic migrants." What is the legal significance of that declaration with respect to China's obligations under the Refugee Convention? Answer: There is no legal significance to such statements. First of all, the statement is further evidence of prohibited discrimination on the basis of race and national origin. Beyond that, it is a nullity. It has no legal effect. Refugee law requires an individual adjudication of refugee eligibility. There is an exception for what is known as prima facie refugees. That is, a state party to the Convention can provide refugee protection to a mass of people similarly situated, without requiring individual adjudications. In that case, they all retain refugee protection until such time as an individual adjudication determines that some are not. However, there is no principle in refugee law that does what China purports to do; which is to declare an entire people as prima facie not refugees. That simply does not exist.

Question: If China maintains that a particular North Korean asylum seeker is not entitled to refugee protection, is that binding on the UNHCR? Answer: No. There are two types of refugees: "Convention refugees," and "mandate refugees." Convention refugees are those who have been recognized as refugees by a State Party to the Convention Respecting the Status of Refugees and/or the Protocol by the same name. Mandate refugees are those who have received the protection of the UNHCR under its mandate, given to it by the United Nations. China's denying someone convention refugee protection does not in any way prevent the UNHCR from extending mandate refugee protection to that person.

Question: China has consistently denied the UNHCR access to North Korean asylum seekers on the grounds that it does not consider them refugees. Is that lawful? Answer: Not at all. China has obligations towards the UNCHR, just as it has towards refugees. In its bilateral agreement with the United Nations, China has agreed that "... UNHCR personnel may at all times have unimpeded access to refugees."² This bilateral agreement is in furtherance of China's obligation under the Refugee Convention and Protocol to cooperate with the UNHCR in the latter's exercise of its functions.³ The Executive Committee of the UNCHR, which includes China, has issued numerous annual conclusions on point. It has "... stressed the importance of UNHCR's being granted access to asylum applicants and refugees in order to enable the Office to carry out its protection functions in an effective manner."⁴ It has called attention to "... the need for rapid, unimpeded and safe UNHCR access to persons of concern to the High Commissioner."⁵ It has also "[r]ecommended that refugees and asylum-seekers who are detained be provided with the opportunity to contact the office of the UNHCR."⁶ This principle of ensuring that the UNHCR have unimpeded access to refugees or persons of concern to it has been enforced by Security Council resolutions, of which China sits as a veto member. In resolutions passed on November 9, 1995, and December 21, 1995, the U.N. Security Council demanded that the "...Bosnian Serb party give immediate and unimpeded access to representatives of the United Nations High Commissioner for Refugees ..." to displaced, detained and missing persons.⁷ This is significant, because China's bilateral agreement with the UNHCR, ensuring the UNHCR's right to unimpeded access to refugees in China, was signed on December 1, 1995; right in between these two Security Council resolutions. The Security Council has continued to demand unimpeded access by the UNHCR in various situations.⁸ Of note, the Chinese-UNHCR bilateral Agreement of 1995 permits either one to invoke binding arbitration in the event that they are unable to resolve their disputes. The UNCHR has been denied access to North Koreans since 1999. All of its requests have been denied or ignored. The High Commissioner's declaration concerning North Koreans in China at the most recent Executive Committee session actually perfects the case for arbitration.⁹ If China persists in denying the UNHCR access to North Koreans in China, the UNHCR has a legal and moral mandate to invoke binding arbitration.

Question: China maintains that its conduct towards displaced North Koreans is in keeping with international law, national

law and humanitarian principles. Is this accurate? Answer: Nothing could be further from the truth. To comply with international law, China needs to comply with the Convention and Protocol Respecting the Status of Refugees. It needs to make available fair and efficient asylum adjudication to North Korean asylum seekers. It needs to stop "refoulement" of North Koreans. It needs to permit the UNHCR unimpeded access to persons of concern to the UNHCR. China does not even comply with its own national laws. Its own constitution at article 32 gives aliens a right to apply for asylum. China maintains to the United Nations that once it affirms an international treaty, its obligations become binding as Chinese law.¹⁰ In the event of a conflict with national law, the international treaty takes precedence.¹¹ Significantly, it is the official Chinese position that international treaties that China has ratified are binding on Chinese law enforcement and judicial organs.¹² They may be invoked in Chinese courts as Chinese law.¹³ In addition to the Convention and Protocol Respecting the Status of Refugees, China has also ratified the Convention Against Torture, or Other Cruel, Inhuman or Degrading Punishment. This Convention prohibits repatriating anyone to a territory where it is likely that he or she will be tortured, regardless of the motivation for the torture. Based on China's position before the United Nations Committee Against Torture, all that is required is for Chinese officials to prosecute those in China who have violated the Convention Against Torture by repatriating North Koreans to a country that is likely to torture them. Perhaps when China extends to ethnic Korean asylum-seekers the same protection that it has extended to Indo-Chinese refugees, the world might begin to believe China's claim that it observes "humanitarian principles."

 * Forum Questions & Answers, published in "Life & Human Rights in North Korea" quarterly journal, Vol. 30, Winter 2003 edition. On-line version available at www.nkhumanrights.or.kr. §1 A/56/18, paragraph 246: While noting the State party's efforts to facilitate integration and naturalization of Indo-Chinese refugees in mainland China, the Committee is concerned that different standards of treatment are applied to Indo-Chinese asylum-seekers, on the one hand, and asylum-seekers of other national origins on the other, notably with regard to the right to work and education. Particular concern is expressed regarding the treatment of asylum seekers from the People's Democratic Republic of Korea, who are reportedly systematically refused asylum and returned, even in cases when they have been considered to be refugees by UNHCR. The Committee recommends that the State party take the necessary measures to ensure that all refugees and asylum-seekers receive equal treatment. To this end, the Committee recommends that the State party consider pursuing the adoption of formal legislative or administrative provisions in order to implement objective criteria for the determination of refugee status.² Article III, paragraph 5 of the "UNITED NATIONS (UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES) and CHINA Agreement on the upgrading of the UNHCR Mission in the People's Republic of China to UNHCR branch office in the People's Republic of China." Signed at Geneva on 1 December 1995. UN Treaty Series, Vol. 1898/1899, I-32371, pages 61-71.³ 1951 Convention Respecting the Status of Refugees, Article 35; and 1967 Protocol Respecting the Status of Refugees, Article II.⁴ EXCOM Conclusions, (XXXV), No. 33(h), 1984.⁵ EXCOM Conclusions, (XLVII), No. 82(d)(iv), 1997.⁶ EXCOM Conclusions, (XXXVII), No. 44, 1986.⁷ S/RES/1019, 9 Nov. 1995 at operative paragraph 2, and S/RES/1034, 21 Dec. 1995 at operative paragraph 5.⁸ See for instance: S/RES/1199, 23 Sep. 1998 at operative paragraph 4(c); and S/RES/1441, 8 Nov. 2002.⁹ "In China, the plight of North Koreans who leave their country illegally remains a serious concern. For a number of years UNHCR has been making efforts to obtain access to them, but this has consistently been denied. An analysis of currently available information recently carried out by our Department of International Protection concludes that many North Koreans may well be considered refugees. In view of their protection needs, the group is of concern to UNHCR. For those in need of assistance, UNHCR is ready to work with partners in meeting their needs. Above all, the principle of non-refoulement must be respected." (Sept. 29, 2003, High Commissioner's Statement to the UNHCR Executive Committee).¹⁰ HRI/CORE/1/Add.21/Rev.2, 11 June 2001. China's Core Document that it has filed at the United Nations. Paragraph 51: 51. To render international human rights agreements consistent with domestic law and make them a part of the domestic legal system, under article 67, subsection 14, of the Constitution, accession by China to an international human rights agreement must be approved by the Standing Committee of the National People's Congress. Once approved, the instrument is binding under Chinese law and China must honour the corresponding obligations: no further special legal transformation is required to turn it into domestic law. (Emphasis added).¹¹ HRI/CORE/1/Add.21/Rev.2, 11 June 2001. China's Core Document that it has filed at the United Nations. Paragraph 52 and 53: 52. Can an international convention cause a conflict with domestic law? Simply stated, when China concludes or becomes party to an international treaty, it pays very close attention to the question of harmony between the treaty and domestic law, and no conflict of principle can arise. In the event of a discrepancy between the international treaty and domestic law on any specific provision, the treaty takes precedence unless China entered a reservation upon ratifying or acceding to it. This is clearly stated in a number of pieces of legislation. As regards punishment, where an international human rights instrument makes no specific provision a domestic law corresponding in purpose to the treaty is used for guidance in such a manner as to preserve the thrust of the human rights agreement. (Emphasis added).

53. In China, any international human rights agreement, after approval by the legislature, establishes obligations which China must comply with. The judicial and executive authorities and all public associations concerned then apply the agreement within their respective spheres of competence. To resolve specific questions of penalties for which an agreement makes no provision, the overwhelming majority of treaties have to be enforced by means of domestic laws corresponding in purpose. In the event of discrepancies between domestic law and an international human rights agreement ratified or acceded to by China, the international agreement will take precedence unless China has entered a reservation to it. (Emphasis added).¹² CAT/C/SR.419, 12 May 2000. Summary of the 419th Meeting of the U.N. Committee Against Torture. Verbatim excerpt follows: At the invitation of the Chairman, the delegation of China took places at the Committee table.

The CHAIRMAN invited the delegation of China to present its replies to the questions put by Committee members.

Mr. QIAO Zonghuai (China) said his delegation would do its best to clarify the questions raised. Answers that could not be provided immediately would be forwarded to the Committee at a later date.

Replying to a question raised by Mr. Mavrommatis, he said that China adhered to the principle of *pacta sunt servanda*. Under the Chinese legal system, the international instruments to which that country was party were considered part of Chinese law and legally binding. In the event of conflict between an international instrument and a domestic law, the provisions of the international instrument took precedence, unless contrary reservations applied. The Convention against Torture, having been ratified by the Standing Committee of the National People's Congress, was binding on Chinese law enforcement and judicial organs. Special domestic measures nevertheless had to be taken to give effect to the provisions of international treaties. (Emphasis added).

Since the Convention against Torture was part of Chinese law, the definition of torture contained in that instrument applied. In practice, the Convention could be invoked before the Chinese courts. China's Criminal Law contained a detailed description of what constituted an act of torture, including the extortion of a confession under torture, the extraction of testimony by the use of force, and mistreating or abusing a person in custody. Any direct or indirect act of physical abuse, and any act involving intimidation, threats or the infliction of mental suffering, committed by a judicial officer for the purpose of extorting a confession was a crime. Illegal search, illegal detention and humiliation were also seen as torture related crimes, whether carried out by a public official or a non-public person. (Emphasis added).

The regulations of the Supreme People's Procuratorate on filing a case were merely an interpretation of the Criminal Law, and in no way restricted the scope of the crime of torture. The Criminal Law established a distinction between a crime and an unlawful act; a minor offence that did not constitute a crime was nevertheless subject to administrative or disciplinary sanctions.

Under Chinese law, any law enforcement officer who committed an act of torture or other cruel, inhuman or degrading treatment or punishment was severely sanctioned. If the perpetrator invoked the order of a superior as justification, the criminal responsibility of both would be investigated. 13 Ibid.