

# CHINA'S PROVISION OF TEMPORARY VISAS TO NORTH KOREANS

RECONSIDERING THE PROTECTION OF MIGRANTS IN THE 21<sup>ST</sup> CENTURY

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*Faced with rising levels of illegal immigrants from North Korea, China has implemented a visa program that allows North Koreans to enter China temporarily without granting them refugee status. Cara Cutler suggests that this serves not only China's security and foreign-policy interests, but also the basic needs of North Korean migrants. She argues forcefully that such a temporary visa program is far preferable to current international protocol for dealing with refugees, which serves the needs of neither host-nations nor migrants.*

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After World War II, international human rights law emerged.<sup>1</sup> In time, refugee law developed as a subsection of the field,<sup>2</sup> through implementation of the United Nations Convention Relating to the Status of Refugees in 1951<sup>3</sup> and the United Nations Protocol Relating to the Status of Refugees in 1967.<sup>4</sup> The Refugee Convention required for the first time that a member state not return a person within its borders to a country in which he suffered past or fears future persecution on account of his race, religion, nationality, political opinion, or membership in a particular social group.<sup>5</sup>

In recent years, the aforementioned mechanisms for approaching and defining international human rights, especially the rights of "refugees," have come under sharp criticism by nations, international human rights groups, and scholars.<sup>6</sup> Many countries ignore their obligations under the Refugee Convention and 1967 Protocol, all apply it inconsistently, and many have suffered adverse national security consequences as a result of attempts to properly apply it.<sup>7</sup>

Beginning in the mid-1990s, China has experienced a mass influx of North Koreans illegally

entering the country.<sup>8</sup> Arguing that North Korean migrants constitute refugees under the Refugee Convention and 1967 Protocol, the international human rights community and nations worldwide have called upon China to grant North Koreans refugee status.<sup>9</sup> China has declined.<sup>10</sup>

In late 2001, China implemented a visa program through which North Koreans may legally enter China temporarily.<sup>11</sup> China's visa program allows it to protect its national security,<sup>12</sup> preserve national and regional stability,<sup>13</sup> and preserve its diplomatic relations with North Korea by avoiding the political ramifications associated with granting refugee status to citizens of an ally nation.<sup>14</sup> At the same time, the visa program allows North Koreans to enter China legally to work and buy provisions, enabling them to meet their basic needs.<sup>15</sup>

This paper will argue that the current refugee law scheme does not effectively meet the needs of migrants and nations, and that a policy of allowing workers to temporarily enter a nation to work legally better meets the needs of nations and migrants than does the refugee law scheme, as is demonstrated by the success of China's policy of providing temporary

employment visas, but not refugee status, to North Koreans. Part I will discuss the core instruments of refugee law from shortly after World War II to the present, the Refugee Convention and 1967 Protocol, and argue that they are in need of remodeling. Part II will discuss North Korean migration to China, and China's implementation of its visa program for North Koreans, arguing that this implementation has allowed China to preserve its national and regional stability, national security, and diplomatic relations with North Korea, while simultaneously meeting the needs of North Korean migrants. Part III will argue that, as a matter of public international law, the use of temporary visas will better meet the needs of migrants, the nations receiving migrants, and the nations migrants come from than does the current refugee law scheme. Part IV concludes the paper.

*I. The Refugee Convention and 1967 Protocol:  
Migrants in the 20<sup>th</sup> Century*

*A. The Refugee Law Instruments*

The Refugee Convention and 1967 Protocol require that, "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."<sup>16</sup> The Refugee Convention only obligates nations to protect persons who were present in the member state as a result of events that occurred prior to January 1, 1951.<sup>17</sup> The Protocol Relating to the Status of Refugees was adopted by the United Nations in 1967, for the purpose of removing a stipulation found in the 1951 Convention, which "limited the definition of 'refugee' to those who had fled as a result of events occurring before January 1, 1951."<sup>18</sup>

The United Nations High Commissioner on

Refugees (UNHCR) oversees the Convention and Protocol.<sup>19</sup> There is no mechanism for sanctioning a nation that does not comply with its obligations under the Convention and Protocol, though the UNHCR, international human rights non-governmental organizations, and nations promote enforcement through public embarrassment.<sup>20</sup> Historically, the Refugee Convention and 1967 Protocol have been relatively effective in protecting those individuals contemplated by the instruments, including political dissidents and religious, ethnic, and other minorities that have been subject to past harm or fear future harm in their home country and that have found their way to a member state.<sup>21</sup> In recent years, however, the current refugee law scheme has been described as suffering from "erosion"<sup>22</sup> and "in a state of disarray" ... [that] ... "could possibly [result in] 'fragmentation,' or worse disintegration."<sup>23</sup> Many believe the Refugee Convention is an outdated "Cold War" document,<sup>24</sup> and that the Refugee Convention and 1967 Protocol are no longer effective.

Given its many shortcomings, many have suggested that the current refugee law scheme is in need of change.<sup>25</sup> Some efforts have been made to change the scheme. For example, the "asylum or exile-oriented approach of the Cold War period is giving way to the preventive or root-causes oriented approach."<sup>26</sup> Under such an approach, rather than refugees being permitted to enter another country, aid workers enter the nation and work to protect internally displaced persons (IDPs).<sup>27</sup> In practice, this and other variations on the refugee law scheme have proved unsuccessful.<sup>28</sup>

*B. Critique of the Current Refugee Law Scheme*

Two criticisms based on philosophy of government are of particular significance. First, under the Refugee Convention and 1967 Protocol,

civil and political rights, which are of an individual nature, are given priority over economic, social and cultural rights related to subsistence,<sup>29</sup> which are of a collective nature.<sup>30</sup> While the Refugee Convention and Protocol protect those who fear affirmative harm on account of an enumerated ground of race, religion, nationality, membership in a particular social group, or political opinion, it does not provide any protection to those who fear harm as a result of generalized violence such as war or lack of sustainability due to starvation or lack of medicine.<sup>31</sup>

Debate over defining human rights as individual or collective has been a pervasive source of tension in the implementation of international human rights law instruments after World War II, as socialism and communism stress collective rights, while Western-style democracies stress individual rights.<sup>32</sup> Because civil and political rights are the only rights protected by the Refugee Convention and 1967 Protocol, a member state can return a person to a nation in which he will likely starve or die from lack of medical care without violating the Convention or Protocol. Such migrants, widely referred to as “economic migrants,” are awarded no protection by the Refugee Convention and 1967 Protocol.<sup>33</sup>

Second, the Refugee Convention and 1967 Protocol have been often negatively received because they encroach upon national sovereignty and therefore have not been enforced by nations.<sup>34</sup> They are international instruments that impose an obligation on member nations not to refool refugees present within their states, even when such refugees have violated their laws in order to enter their states.<sup>35</sup>

Intertwined with the philosophical issues of individual versus collective rights and the notion of state sovereignty lie numerous problems associated

with the efforts of member nations to comply with the Refugee Convention and 1967 Protocol. One such problem is that compliance with the Refugee Convention can put a strain on diplomatic relations. If a nation grants refugee status to a person, this can harm relations between the nation that the person is from and the granting nation.<sup>36</sup>

Additionally, as the Refugee Convention and 1967 Protocol only obligate nations to protect refugees present within their borders, those seeking protection as refugees often use clandestine modes of entry into member nations, resulting in negative consequences for those seeking protection as refugees, their nations of exit, and their nations of entry.<sup>37</sup> Those seeking protection as refugees often employ smugglers to help them enter member nations in order to lodge their claims.<sup>38</sup> This puts them at risk of physical, sexual and emotional abuse.<sup>39</sup> The use of smugglers by those claiming refugee status harms stability and national security in nations of exit and entry, as it results in an increase in the movement of people across borders without travel and identity documents or inspection, and an increase in profits and power for the organized crime rings that move them.<sup>40</sup>

Posing another problem, Article 1A of the Refugee Convention requires member states to process asylum claims on a case-by-case basis.<sup>41</sup> This requires that nations implement “sophisticated and costly procedures to determine the refugee claims.”<sup>42</sup> Furthermore, it is difficult for nations to differentiate between *bona fide* refugees and those who are claiming to be refugees but are not. This results in inconsistent treatment of refugee claims.<sup>43</sup>

Lastly, the difficulty of successfully determining which refugee claims are valid and which are not creates a risk to national security, especially when such determinations must be made even when those

claiming to be refugees lack travel and identity documents. The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, which represents the United Nations High Commissioner on Refugees' interpretation of the Refugee Convention and 1967 Protocol, states that if a person seeking refugee status states his claim with consistency, he should be given the benefit of the doubt that he is being truthful, including that he is being honest about his identity.<sup>44</sup> The Refugee Convention and Protocol provide a mechanism through which a person who lies convincingly may gain legal status in a member nation. A lying person may pose a security risk, as is demonstrated by the fact that at least three participants in acts of terrorism in the U.S. since 1993 had filed false asylum claims.<sup>45</sup>

In addition to the problems associated with compliance, the Refugee Convention and 1967 Protocol also suffer the problem of increasing non-compliance. Increasing non-compliance has been attributed to the end of the Cold War stripping refugees of their "ideological or geopolitical value"<sup>46</sup> and increases in the number of refugee claims being lodged,<sup>47</sup> in addition to being attributed to the problems with compliance outlined above.<sup>48</sup> As a result, *bona fide* refugees who seek protection in member states are failing to receive it.<sup>49</sup>

### *III. China's Visa Program for North Koreans*

#### *A. North Korean Migration to China*

With famine in the Democratic People's Republic of Korea (North Korea) during the mid-1990s came the beginning of a continuous stream of North Korean migrants over the porous border into northeastern provinces of the People's Republic of China (China).<sup>50</sup> The vast majority of these

migrants were men who stayed in China temporarily from May to October, raising money to bring back to North Korea through farm work and logging.<sup>51</sup> Initially, while neither China nor North Korea authorized this migration, both tolerated it.<sup>52</sup> The famine peaked in 1997.<sup>53</sup> By 1999, access to food in North Korea had increased significantly.<sup>54</sup> Still, North Koreans continued to pour into China.<sup>55</sup>

While North Koreans continued to enter China after the food shortage became less severe, the intentions of those entering China began to change. Starting in 1999, North Koreans no longer entered China nearly exclusively for short-term visits.<sup>56</sup> Instead, approximately 10 to 15 percent of North Koreans entered China with the intent to reside outside of North Korea permanently.<sup>57</sup> Additionally, greater numbers of North Koreans entered China each day.<sup>58</sup>

With these changes, and the emergence of unwanted attention directed at North Koreans migrating to China by the United Nations High Commissioner for Refugees, the policies of the North Korean and Chinese governments changed.<sup>59</sup> North Korea, likely fearing a loss of control over its citizens as a result of the migration,<sup>60</sup> called on China to enforce a bilateral treaty between the nations by deporting North Korean citizens living in China illegally, as nearly all North Koreans living in China were.<sup>61</sup> Citing its obligation to deport North Koreans illegally within its borders under the bilateral treaty, China complied with North Korea's request.<sup>62</sup>

Additionally, North Korea began to enforce its criminal law governing illegal exit.<sup>63</sup> Under North Korean law, "A person who crosses a frontier of the Republic without permission shall be committed to a reform institution for up to three years."<sup>64</sup> Additionally, those arrested for illegal exit, may

be subjected to “long interrogation and torture, imprisonment under extremely harsh conditions [and] forced labor at camps.”<sup>65</sup>

In 2002, “daring group dashes into embassies in Beijing...[put] the international spotlight” on North Korean migration to China.<sup>66</sup> As the plight of North Koreans began to gain international attention, international human rights organizations and other nations began to vigorously condemn China for its practice of refouling North Koreans illegally within its borders.<sup>67</sup> Still, migration continued. In April of 2004, it was estimated that 300,000 North Korean migrants were living in northeast China.<sup>68</sup>

### *B. The Treaty*

The mass influx of North Korean migrants to China has put China in a difficult position. On the one hand, China seeks to protect its national security,<sup>69</sup> preserve national and regional stability,<sup>70</sup> and preserve its diplomatic relations with North Korea by avoiding the political ramifications associated with granting refugee status to citizens of an ally nation.<sup>71</sup> On the other hand, in order to preserve its relations with other nations, to demonstrate to other nations and international organizations that it will adhere to international treaties to which it has acceded, and to protect North Koreans from suffering harm upon returning to North Korea after visiting China, it is advantageous to China to reduce the deportation of North Koreans.<sup>72</sup> China has been able to balance these objectives by making temporary visas available to North Koreans.

Since late 2001,<sup>73</sup> by agreement with North Korea, China has permitted North Koreans to legally enter China temporarily.<sup>74</sup> The text of the North Korea-China agreement is not available. It has been described by an expert on the Korea Peninsula as being unavailable because it is a secret treaty.<sup>75</sup> At

least three independent sources have attested to the existence of the North Korea-China visa program.<sup>76</sup> The ability of legal North Koreans in China to secure employment without facing prosecution for violating North Korean or Chinese law has been confirmed.<sup>77</sup>

Two types of visas are available to North Koreans. First, all North Koreans are eligible for short duration visitor visas, which allow them to enter China temporarily for the purpose of buying groceries and other items.<sup>78</sup> Second, North Koreans with family in China are eligible for visas which allow them to enter China for up to one year.<sup>79</sup> Given the fact that forty percent of the population of the Autonomous Korean Prefecture of Yanbian in Jilin province, China is ethnic Korean,<sup>80</sup> it is not surprising that a significant minority of North Koreans have relatives in China.<sup>81</sup> As a result of the treaty, tens of thousands of North Koreans have been allowed to enter China legally.<sup>82</sup>

The visa program is not without flaws. As most North Koreans do not have family in China, most North Koreans continue to be unable to legally enter China for significant periods of time.<sup>83</sup> China continues to fail to abide by its obligation under the Refugee Convention and 1967 Protocol to the small minority of North Koreans who do leave for the purpose of defecting due to their political dissension by refouling North Koreans who are present in China illegally and who will likely face persecution if forced to return to North Korea.<sup>84</sup> Finally, cost has prohibited many North Koreans from taking advantage of the visa program. Those within North Korea must apply for and receive exit and entry visas.<sup>85</sup> While there is no official charge for these visas, without adequate money to pay bribes obtaining these visas is nearly impossible.<sup>86</sup> The fact that many North Koreans continue to be unable to

secure visas allowing them to legally enter China for significant periods of time is demonstrated by the continued presence of illegal North Koreans in China.<sup>87</sup>

Still, the benefits of the visa program outweigh its failures. The visa program helps China protect its national security as it encourages lawful and documented entry into China, improving China's ability to keep track of who is present within its borders.<sup>88</sup> China's visa program promotes stability within the northeastern region of China as it works to reduce the total number of North Koreans in China at any given time by limiting lawful presence within China to limited durations of time.<sup>89</sup> The visa program allows China to preserve its diplomatic relations with North Korea by avoiding the political ramifications associated with granting refugee status to citizens of an ally nation.<sup>90</sup> The visa program allows China to preserve its relations with other nations, demonstrate to other nations and international organizations that it will adhere to international treaties it has acceded to, and reduce the number of North Koreans it deports by providing North Koreans a mechanism for being present in China without violating North Korean law and thus without their presence triggering fear of harm from persecution upon return to North Korea.<sup>91</sup>

### *III. Temporary Visas: Protecting Migrants into the 21<sup>st</sup> Century*

As was discussed above, the current refugee law scheme is rife with problems.<sup>92</sup> The result is that few migrants' needs are being met. Protection of migrants can be better achieved by amending public international law to allow nations to meet their obligations to migrants through the use of measures other than those contemplated by the Refugee

Convention and 1967 Protocol. Specifically, public international law should permit nations to meet their obligations to migrants by issuing temporary visas to persons from nations in which their economic and social rights are threatened. Such revision of public international law would benefit migrants, nations accepting migrants, and the nations that migrants come from.

Provision of temporary visas is less invasive of national sovereignty than is the current refugee law scheme, as nations are not obligated to provide any benefit to migrants who illegally enter. Additionally, issuance of temporary visas to migrants from nations in which their economic and social rights are threatened provides migrants who are faced with a threat to their economic and social rights a mechanism for alleviating that threat.

Provision of temporary visas to migrants in which persons face threats to their economic and social rights promotes the protection of the national security of nations receiving refugees, as it encourages documented entry and presence within receiving nations.<sup>93</sup> Issuance of temporary visas promotes national and regional stability,<sup>94</sup> as receiving nations limit mass influxes of non-citizens seeking to settle permanently through the granting of lawful temporary status rather than immigration.

The use of temporary visa programs to promote migration from nations in which economic and social rights are threatened allows receiving nations to preserve their diplomatic relations with nations from which migrants are arriving by bypassing the need to judge internal situations of other nations in order to determine whether or not to grant refugee status to a citizen of an ally nation.<sup>95</sup> It should be noted that this could also have the potential negative consequence of enabling nations to avoid addressing human rights issues in other states altogether.

Provision of temporary visas to migrants from countries in which their economic and social rights are threatened allows nations to demonstrate that they are willing to take on their share of the burden of accepting migrants in need without putting their national security, national and regional stability, and diplomatic relations with the nations from which migrants are entering at risk. Similarly, it allows nations to avoid appearing unwilling to uphold their commitments under treaties.

Finally, presence of non-citizens temporarily within a country's borders, filling labor gaps and serving as consumers of the nation's products, is often more palatable for its citizens than is the subsidized permanent resettlement of people from other countries permitted by the current refugee law scheme.<sup>96</sup> Thus, countries would likely be more amenable to providing an increased number of temporary employment visas than providing an increased number of people from other countries refugee status.

While protection of migrants can be better achieved by amending public international law to allow nations to meet their obligations to migrants through the use of measures other than those contemplated by the Refugee Convention and 1967 Protocol, and specifically, to permit nations to meet their obligations to migrants by issuing temporary visas to persons from nations in which their economic and social rights are threatened, amending public international law is difficult. Such amendment would require revision through Protocol or abandonment of the Refugee Convention and 1967 Protocol, by nations party to those instruments. A new convention or

protocol outlining nations' obligations in relation to the new temporary visa program would need to be drafted and ratified, a process that would require much worldwide support. This would likely prove difficult.

#### *IV. Conclusion*

China has received criticism for failing to perform its obligations under the Refugee Convention and 1967 Protocol with regards to North Korean migrants. However, China has made available to North Koreans a legal right to remain in China temporarily. The use of temporary visas allows China to avoid strain on its diplomatic relations with North Korea, avoid harm to national security, help migrants to meet their needs, and implicitly meet its obligations under the Refugee Convention and 1967 Protocol by preventing China from returning North Koreans to persecution.

As demonstrated by China's employment of its temporary visa program, protection of migrants can be better achieved by amending public international law to allow nations to meet their obligations to migrants through the use of measures other than those contemplated by the Refugee Convention and 1967 Protocol. Specifically, public international law should permit nations to meet their obligations to migrants by issuing temporary visas to persons from nations in which their economic and social rights are threatened. Such revision of public international law would benefit migrants, nations accepting migrants, and the nations that migrants come from.



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