

**<sup>H</sup>RESPONSIBILITY TO PREVENT UNDER R2P:  
CHINA'S RESPONSIBILITY TO NOT  
RETURN INDIVIDUALS FLEEING NORTH KOREA**

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**Abstract**

*The purpose of this article is to answer to what extent can the principle of non-refoulement be strengthened using the responsibility to prevent pillar under responsibility to protect doctrine in the case of forcible repatriation of North Korean individuals by China. The article argues that under the newly emerging Responsibility to Protect doctrine, -particularly through its first pillar, responsibility to prevent- China ought to accept the individuals and respect the principle of non-refoulement, regardless of the disagreement on the refugee-status of North Korean individuals. This article does not suggest that every North Korean individual who crosses the international border must be recognized as a refugee or should directly be entitled to the refugee rights. It only argues that contemporary international refugee law does not address the needs of North Korean individuals and make them more vulnerable. The application of Responsibility to Protect doctrine to the current case may clear the gray area and strengthen the principle of Non-Refoulement.*

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**Keywords**

*Dprk, north korea, china, forced repatriation, non-refoulement, responsibility to protect, refugee law, responsibility to prevent, intervention, international refugee law*

**KORUMA SORUMLULUĞU DOKTRİNİNİN  
ÖNLEME SORUMLULUĞU UNSURU:  
ÇİN'İN KUZEY KORE'DEN KAÇAN BİREYLERİ  
GERİ GÖNDERMEME SORUMLULUĞU**

**Öz**

*Bu metnin amacı “Kuzey Kore vatandaşlarının Çin tarafından Kuzey Kore’ye zorla geri gönderilmesi vakası üzerinden, Geri Göndermeme (non-refoulement) ilkesi ne şekilde Koruma Sorumluluğu doktrininin unsurları arasında bulunan Önleme Sorumluluğu kapsamında güçlendirilebilir?” sorusunu yanıtlamaktır. Metin yeni gelişmekte olan Koruma Sorumluluğu doktrininin -özellikle ilk aşaması olan Önleme Sorumluluğu- kapsamında Çin Halk Cumhuriyeti’nin, Kuzey Kore’den kaçan bireyleri kabul etmesini ve mülteci statüsüne bakmaksızın Geri Vermeme ilkesini uygulaması gerektiğini savunuyor. Bu demek değildir ki, her uluslararası sınırı geçen Kuzey Kore vatandaşı otomatik olarak mülteci olarak tanınmalı ya da aynı haklara doğrudan sahip olmalı. Metinde savunulan, modern uluslararası mülteci hukuku Kuzey Kore vatandaşlarının vakalarında eksik kalıyor ve onları daha da müdafaasız bırakıyor. Koruma Sorumluluğu Doktrininin bu alanda uygulanabilmesi gri alanları azaltabilir ve Geri Vermeme ilkesini güçlendirebilir.*

**Anahtar Kelimeler**

*Kuzey Kore, Kore Demokratik Halk Cumhuriyeti, Çin, zorla geri gönderme, geri vermeme, non-refoulement, geri göndermeme ilkesi, koruma sorumluluğu, mülteci hukuku, önleme sorumluluğu, müdehale, uluslararası mülteci hukuku*

## **Introduction**

Last century was the 'age of extremes'. The world faced terror, discrimination and extermination in concentration camps, war crimes, crimes against humanity, ethnic cleansing and genocide... The international community said "never again" to these horrific acts. It created the Charter of the United Nations and proclaimed the universal human rights as the common heritage of the human beings. Here we are in the 21<sup>st</sup> century and yet another terrible scourge of humanity is being reigned. The conscience of the world needs to be shocked again by the cruelty of Kim Dynasty and the unintended contributions of the international community should be recognized. The Article will discuss the unintended contributions of China.

On 21 March 2013, United Nations Human Rights Council passed the Resolution A/HRC/RES/22/13<sup>1</sup> which created the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (hereinafter; COI) and mandated this body to examine the systematic, widespread and grave violations of human rights in DPRK, "*with a view to ensuring full accountability, in particular for violations which may amount to crimes against humanity*".<sup>2</sup>

The COI Report<sup>3</sup> was published in Geneva on 17 March 2014. In his statement on behalf of the Commission, Mr. Micheal Kirby, the Chair of the COI stated that the ongoing crimes against humanity happening in DPRK must be tackled by our generation "*urgently and collectively*".<sup>4</sup> The

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<sup>1</sup> United Nations Human Rights Council, Resolution on Situation of Human Rights in the Democratic People's Republic of Korea, A/HRC/RES/22/13, 9 April 2013.

<sup>2</sup> United Nations Human Rights Council, Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, Latest News: Launch of the report of the Commission of Inquiry on human rights in DPRK, <<http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx>> (accessed 20 January 2016).

<sup>3</sup> United Nations Human Rights Council, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (hereinafter: the Report), A/HRC/25/CRP.1, 7 February 2014.

<sup>4</sup> Ohchr.org, "Statement by Mr Michael Kirby Chair of The Commission of Inquiry on Human Rights in the Democratic People's Republic Of Korea to the 25th Session of the

conducted Report divided various crimes against humanity into sections. One of the sections is for “the crimes against humanity targeting the persons who try to flee the country.”<sup>5</sup> In this particular Section and under the Chapter on the “ensuring accountability, in particular for crimes against humanity”<sup>6</sup> the COI required to allocate China’s possible culpability for aiding crimes against humanity towards persons who try to flee the DPRK<sup>7</sup> and get forcibly repatriated by China.

Although it would not be correct to state that the world has become comfortably numb towards the crimes occurring on the borders of DPRK, the plight has been occurring since 1990s and an effective solution has still not been found. China’s violation of normative laws such as international human rights and refugee conventions<sup>8</sup> has been repeatedly addressed by various UN bodies and academia. China continuously rejects UN’s accusations of aiding North Korean human rights abuses.<sup>9</sup> It perceives many

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Human Rights Council, Geneva, 17 March 2014” (hereinafter: Statement by Mr Kirby) (2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14385&LangID=E>> (accessed :31 January 2016).

<sup>5</sup> COI Report (n 3) 335-339.

<sup>6</sup> *Ibid* 352-363.

<sup>7</sup> *Ibid* 335.

<sup>8</sup> *See eg.* UN Convention relating to the Status of Refugees (1951 Convention), 28 July 51 by UN Conference of Plenipotentiaries on the Statute of Refugees and Stateless Persons convened under the General Assembly resolution 429(V) of 14 December 50, arts. 1, 31-33; UN Protocol Relating to the Status of Refugees (1967 Protocol), adopted by UN General Assembly Resolution A/RES/2198 of 16 December 66, entry into force 4 October 67; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly resolution 39/46 of 10 December 84, entry into force 26 June 87, art. 3; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN TIP Protocol), supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification, and accession by General Assembly resolution A/RES/55/25 of 15 November 2000, entry into force 25 December 03, art. 7; UN Convention on the Rights of the Child, adopted by the UN General Assembly resolution 44/25 of 20 November 89, entry into force 2 September 90, art. 9.

<sup>9</sup> NK News, “China Rejects U.N. Accusation Of Aiding N. Korean Rights Abuse” (2014) <<http://english.yonhapnews.co.kr/northkorea/2014/02/18/79/0401000000AEN20140218008300315F.html>> accessed 30 January 2016.

of the North Korean individuals who cross borders as economic migrants.<sup>10</sup> The Refugee Convention<sup>11</sup> addresses the grounds for exclusion of refugee status and also the rights that refugees are entitled to. If the determining state concludes that the individual does not satisfy the eligibility requirements for refugee status or falls under one of the elements eligible for exclusion, then the individual becomes irregular and would need to find a different category to legalize his/her status.<sup>12</sup> Majority of individuals fleeing DPRK are determined by China as irregulars.

The traditional interpretation of refugee law justifies China's repatriation policy towards North Koreans and allows China to avoid collective responsibility towards refugees. There have been some attempts to assign responsibility to China through "burden sharing", so-called "collective responsibility" towards refugees. However, the allocation of duty to protect refugees is not regulated by the Refugee Convention, and the only indirect reference to collective responsibility is made on the preamble of the Refugee Convention;<sup>13</sup> *"the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem [...] cannot therefore be achieved without international co-operation."*<sup>14</sup> Therefore, it is possible to state that the norm of collective responsibility to protect refugees has weak legal basis.<sup>15</sup> Hence, it is foreseeable that China will not accept the norm of "collective responsibility" (or, "responsibility sharing") to protect refugees any time soon in regards to North Korean individuals.

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<sup>10</sup> Text to n 33 in Chapter I.

<sup>11</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 and UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

<sup>12</sup> Elspeth Guild, *Security And Migration in the 21st Century* (Polity 2009) 70.

<sup>13</sup> Catherine Phuong, *Identifying States' Responsibility Towards Refugees And Asylum Seekers* (2nd edn, Global Commission on International Migration 2005) <<http://www.esil-sedi.eu/sites/default/files/Phuong.PDF>> (accessed 31 January 2016) 7.

<sup>14</sup> Refugee Convention (n 11) Preamble; see eg. Agnès G Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009) 183.

<sup>15</sup> Phuong 'Identifying States' Responsibility towards Refugees and Asylum Seekers' (n 13) 8.

However the issue still remains; many North Korean individuals fall into the gray area of international refugee law and become even more vulnerable. The UN bodies recognize the circumstance as *sui-generis* and has concluded an agreement with China in 1995 for “UNHCR to conduct refugee status determination for asylum-seekers” in China.<sup>16</sup> However, China continues to refuse UNHCR access to areas where North Korean refugees are believed to reside.<sup>17</sup> While China and various actors of international community argue with each other, the North Korean individuals continue to be the victims in this situation. The issue will remain until China endorses its obligation to protect North Korean individuals who arrive to its territory and refrains from returning them to DPRK where their lives are at stake irrespective of when the fear for life started.

This article intends to tackle the issue from a different angle where enforcement is possible. The main question of this article is: to what extent can the principle of non-refoulement be strengthened using the responsibility to prevent pillar under responsibility to protect doctrine in the case of forcible repatriation of North Korean individuals by China. It argues that under the newly emerging Responsibility to Protect doctrine, -particularly through its first pillar, responsibility to prevent- China ought to accept the individuals and respect the principle of non-refoulement, regardless of the disagreement on the refugee-status of North Korean individuals.

The first Chapter of the Article will elaborate on the factual issues and will provide the positions of the key actors which are; DPRK, China and the international community. The balance of evidence<sup>18</sup> makes it difficult to argue that North-Korean nationals who left DPRK without permission and were forcibly returned back by China face severe consequences.<sup>19</sup> However, there are still differing opinions on the status of the North Korean individuals who flee. Are they traitors, criminals, economic migrants, refugees or victims?

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<sup>16</sup> COI Report (n 3) Annex to the Report-Correspondence with China, 7 February 14, A/HRC/25/63.

<sup>17</sup> *Ibid* Annex to the report-Correspondence with China, 7 February 14, A/HRC/25/63.

<sup>18</sup> Text to n 125 in Chapter III.

<sup>19</sup> COI Report (n 3) section IV.C.2.

The second Chapter will introduce the contemporary international refugee law with specific focus on the principle of non-refoulement. As Mr Kirby articulated in his statement; it is important that all countries “*including China [...] respect the principle of non-refoulement, and, accordingly, [...] abstain from forcibly repatriating any persons to the Democratic People’s Republic of Korea, given the fearful evidence that we have heard and recorded. There should be no forced return to DPRK by any State unless the treatment in DPRK, as verified by international human rights monitors, markedly improves. Asylum and other means of durable protection should be extended to persons fleeing the Democratic People’s Republic of Korea who need international protection.*”<sup>20</sup> The principle of non-refoulement is crucial for this article since the North Korean individuals who are forcibly repatriated by China face crimes against humanity.

The second part of the second Chapter will then introduce the Responsibility to Protect doctrine with particular focus on the first pillar; the responsibility to prevent. The UN Secretary General Ban Ki-Moon introduced the idea that Responsibility to protect should be “narrow and deep”; narrow in terms of the specific crimes to which it responds, but deep in the sense of a wide array of responsibilities, institutions, organs and actions to *prevent*, respond, and rebuild from those specific crimes.<sup>21</sup> The ICISS Report<sup>22</sup> introduced the core values of Responsibility to Protect. The following statement was made under the ‘priorities’ section: “*Prevention is the single most important dimension of the responsibility to protect: [...] and more commitment and resources must be devoted to it.*”<sup>23</sup> The 2005 World Summit Outcome<sup>24</sup> indicated that “*the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI*

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<sup>20</sup> Statement by Mr Michael Kirby (n 4).

<sup>21</sup> United Nations General Assembly, Report of the Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, A/63/677, 12 January 2009.

<sup>22</sup> International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect (hereinafter ICISS Report), December 2001.

<sup>23</sup> *Ibid* synopsis.

<sup>24</sup> United Nations General Assembly, 2005 World Summit Outcome : Resolution, 24 October 2005, A/RES/60/1.

*and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”*<sup>25</sup> The notion of duty to prevent is recognized as undividable part of the responsibility to protect doctrine. By not returning the North Korean individuals, China would prevent further crimes against humanity to be committed in the territory of DPRK.

The third Chapter will discuss application of the responsibility to prevent under the R2P to China in respect to protection of North Korean individuals. Allocation of responsibility is not defined properly in any recognized legal sources. Therefore, this Article argues that there are two ways of defining it: (a) influence and (b) hands-on-point of view. The criteria for influence will be discussed in lengthy manner in the relevant Chapter. From a hands-on point of view, the states in the region where the plight is happening have the major responsibility to assist and provide immediate physical protection to the individuals, whereas other states should bear the duty to provide practical means. In this particular situation, China’s responsibility on behalf of the international community derives simply from the fact that North Korean individuals enter the territory of China, as it is the bordering state.

This Article does not suggest that every North Korean individual who crosses the international border must be recognized as a refugee or should directly be entitled to the refugee rights. It only argues that contemporary international refugee law does not address the needs of North Korean individuals and make them more vulnerable. Rwanda and the “safe heavens” in Former Yugoslavia can be perceived as the proof of need to provide protection to the potential victims. The application of Responsibility to Protect doctrine to the current case may clear the gray area and strengthen the principle of non-refoulement.

### **Chapter I – 3 Key Actors: 3 Perspectives**

Chapter I will discuss the factual issues and different positions held by the actors. The research does not extensively cover the political reasons

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<sup>25</sup> *Ibid* para 139.



behind the discrepancy on the status of the North Korean individuals who cross the border. Mr. Kirby stated that “*what is important is how the international community now acts on the report. What is most important is immediate action to improve the lives, and fulfil the human rights, of the ordinary citizens of the DPRK. A compelling report and wide media coverage are good. But they are woefully insufficient.*”<sup>26</sup> In order to act upon the violations occurring in relation to DPRK, it is crucial to have concrete information on the positions of the key players and sufficient background knowledge. This Chapter intends to introduce the three key players’ positions; DPRK, China and the international community. The first part will provide DPRK’s horrendous regulations towards repatriated individuals; the second part will detail Chinese laws and practice toward the North Korean individuals who flee to Chinese territory, and the final part will discuss the position of the international community and the actions that have been taken by it.

The term international community mainly intended to address the UN bodies, particularly UNHCR and UNHRC. The various states and academia are parts of the international community and will be part of the discussion if necessary. However since UNHCR and UNHRC have the ability to be on field and have the mandate to monitor, their opinions have higher weight.

### **I. Government of North Korea’s laws towards individuals who leave the country**

The prohibition of freedom of movement for North Korean citizens is applicable for both movements within the territory and outside of the territory. The citizens cannot move within the territory or leave the country without Government’s permission.

Article 47 of the 1987 North Korean Penal Code sets out the act of leaving the state territory as defection and any defection or attempted defection is considered as a capital crime. It states “*A citizen of the Republic who defects to a foreign country or to the enemy in betrayal of the country and the people [...] shall be committed to a reform institution for not less*

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<sup>26</sup> Statement by Mr Michael Kirby (n 4).

than 7 years. In cases where the person commits an extremely grave offense, he or she shall be given the death penalty.”<sup>27</sup> The term “grave offense” is vague and not properly defined. Article 63 of Criminal Code of North Korea regarding treason states that; “In cases of extremely grave offenses, he or she shall be committed to lifetime reform through labor or subjected to death penalty and confiscation of his or her property.”<sup>28</sup> Article 117 of the Criminal Code articulates that; “One who crosses the border without permission shall be punished by a sentence of three years or less labor re-education.”<sup>29</sup>

Furthermore, in 2010, North Korea’s Ministry of People’s Security passed a decree which made defection a crime of “treachery against the nation” – punishable by death.<sup>30</sup> Article 32 of the Court Sentence and Decision Implementation Law provides death sentences to be carried out by firing squad, with nine shots normally fired. Nevertheless, hanging is also practiced.<sup>31</sup>

The Government of DPRK could argue that its limitations on the freedom of movement are not violation of ICCPR since the limitations exist to protect national security, public order, public health and morals.<sup>32</sup> However, this argument would fail since restrictions that impair the essence of the right are not proportional to the directed end result.

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<sup>27</sup> Jack Rendler, *The Last Worst Place On Earth: Human Rights In North Korea, Planning for a Peaceful Korea* (2nd edn, The Strategic Studies Institute 2001) <[http://www.globalsecurity.org/military/library/report/2001/ssi\\_sokolski.pdf](http://www.globalsecurity.org/military/library/report/2001/ssi_sokolski.pdf)> (accessed 27 February 2017)119.

<sup>28</sup> International Federation for Human Rights (FIDH), “The Death Penalty in North Korea: In the Machinery of a Totalitarian State”, 15 April 2012, 20.

<sup>29</sup> The North Korean Criminal Code, art. 117 (An official translation of the North Korean Criminal Code was unavailable).

<sup>30</sup> Human Rights Watch, “China: Don’t Return Nine North Korean Refugees”, 21 November 2015, <<https://www.hrw.org/news/2015/11/21/china-dont-return-nine-north-korean-refugees>> (accessed 20 January 2016).

<sup>31</sup> FIDH Report (n 28) 23.

<sup>32</sup> Morse Tan, “*North Korea: International Law and Dual Crises: Narrative and Constructive Engagement*”, Routledge, (2015) 158.

## **II. China's laws towards North Korean individuals who cross the border seeking refuge**

China has been repatriating North Korean individuals for over two decades. China justifies its forced deportation of North Korean individuals with two main arguments: (a) by categorically labeling them as “illegal” economic migrants, rather than refugees,<sup>33</sup> this way the individuals do not fall under the scope of the Refugee Convention of 1951 and its 1967 Protocol to which China is a state party,<sup>34</sup> and (b) by stating that the bilateral treaties with DPRK trump its obligation under the Refugee Convention.

The position of Chinese Government was summarized in 2000 with the 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.”*<sup>35</sup>

China bases its recognition of “refugees” applying the most widely accepted definition, which can be found in the 1951 Geneva Convention Relating to the Status of Refugees<sup>36</sup> and its 1967 Protocol<sup>37</sup> (hereinafter; the Refugee Convention). “Refugee” status is applicable to any person who, *“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such*

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<sup>33</sup> North Korea Now, “Those Who Flee: North Korean Refugees”, (2010), <<http://www.northkoreanow.org/the-crisis/those-who-flee-north-korean-refugees/>> (accessed 20 January 2016).

<sup>34</sup> Human Rights Watch, “World Report 2015: North Korea”, January 2014, Country Summary, <<https://www.hrw.org/world-report/2015/country-chapters/north-korea>> (accessed 20 January 2016).

<sup>35</sup> E. Chan and A. Schloenhardt, “North Korean Refugees And International Refugee Law” (2007) 19 *International Journal of Refugee Law*, 238.

<sup>36</sup> Refugee Convention (n 11).

<sup>37</sup> *Ibid* Protocol to the Refugee Convention.

*fear, is unwilling to return to it.*”<sup>38</sup> The examination of refugee status is regulated by state parties that are free to institute procedures as they consider appropriate for that purpose.<sup>39</sup> It is examined on case-by-case basis and both subjective and objective elements matter.<sup>40</sup> Subjective elements can be the reason of persecution while the objective elements can be the contention of fear. For many North Korean individuals, “well-founded fear of being persecuted” starts after they cross the border.

Furthermore, China claims that forced deportations are essential to maintain the national security, social order and border controls. Albeit China is a party to the Refugee Convention, the policies are based on the bilateral agreements between DPRK and China. The first special bilateral agreement on the matter was established in 1960s due to China’s concern about its citizens fleeing to DPRK during the famine.<sup>41</sup> Later, the border restrictions started focusing on DPRK nationals fleeing to China. In 1986, second special bilateral agreement between China and DPRK, Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order and the Border Areas<sup>42</sup> was signed. It ensured the cooperation between the two states and recognized individuals crossing into each other’s territory without permission as criminals.<sup>43</sup> The scope of both bilateral cooperation agreements includes extradition, deportation and information sharing on the individuals who might agitate national security. To illustrate, article 4 of the

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<sup>38</sup> *Ibid*, Article 1(A)(2).

<sup>39</sup> Hurtwitz, “The Collective Responsibility to Protect Refugees” (n 14) 14.

<sup>40</sup> *Ibid* 23.

<sup>41</sup> Stephan Haggard, Sources: ‘Hazel Smith Dossier on Migration’, 1 November 2012, Peterson Institute for International Economics, <<http://blogs.piie.com/nk/?p=7953>> (accessed: 30 January 2016).

<sup>42</sup> Ministry of Foreign Affairs of the PRC, Compilation of Treaties on Border Affairs of the PRC, Sino-North Korea Volume, paragraphs 388-389, see eg. COI Report (n 3) 451, also see; Democratic People’s Republic of Korea Ministry of State Security People’s Republic of China Ministry of Public Security, Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas, August 12, 1986 <[http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral\\_treaty.pdf](http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral_treaty.pdf)> (accessed: 10 May 2017).

<sup>43</sup> COI Report (n 3) 131.

first Protocol states that; *“illegal border crossers will be returned to the other side with information on their identity and specific situation”*.<sup>44</sup> This article allows China to return the North Korean individuals to DPRK without examining their asylum claims.

The former Chinese national law on the Entry and Exit of Aliens stated that; *“Aliens who seek asylum for political reasons shall be permitted to reside in China upon approval by the competent authorities of the Chinese Government.”*<sup>45</sup> Therefore, it is possible to state that the forced repatriation practice of Chinese authorities is not only in contradiction with contemporary international refugee law, but it also contradicts the national laws of China. Furthermore, the Administration Law on Entry and Exit which entered into force in 2013 in China, article 46 of the law provides protection to the refugees; *“[...] foreigners applying for refugee status, during the screening period of refugee status, may stay temporarily in Chinese territory by provisional identity cards signed and issued by public security bodies. Foreigners identified as refugees may remain and reside in China by refugee status certificates signed and issued by public security bodies.”*<sup>46</sup> However, since the law entered into force, the provision was never applied to the North Korean individuals. Although, China has never officially provided any reason to not apply this provision to North Korean individuals, above-mentioned bilateral treaties may justify the reason.

The COI wrote a letter to China on 16 December 2013, summarizing their concerns in relations to China's policies and practice towards the North Korean individuals. The COI articulated their specific concern about the cooperation of Chinese officials on providing particular information to DPRK authorities. Furthermore, the COI kindly urged the Government of

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<sup>44</sup> Protocol between the PRC Ministry of Public Security and the DPRK Social Safety Ministry for Mutual Cooperation in Safeguarding National Security and Social Order in Border Areas, June 9, 1964, Archive 106-01434-04, para 4(2).

<sup>45</sup> People's Republic of China, “Control Of The Entry And Exit Of Aliens” (2010), art. 15, <[http://www.gov.cn/english/2005-08/21/content\\_25035.htm](http://www.gov.cn/english/2005-08/21/content_25035.htm)> (accessed: 20 January 2016).

<sup>46</sup> United Nations Committee on the Rights of the Child, Response Of the Chinese Government To Questions Concerning the Combined 3<sup>rd</sup> and 4<sup>th</sup> Periodic Reports on the Implementation of the Convention on the Rights of the Child, 10 September 2013, 25.

China to warn the officials since such conduct could amount to aiding and abetting crimes against humanity, if the information exchange between DPRK, Chinese officials and forced deportations have the facilitating purpose.<sup>47</sup> Kirby's letter to Chinese Ambassador stated the following; "*The Commission would urge your Excellency's Government to caution relevant officials that such conduct on their part could amount to the aiding and abetting crimes against humanity where repatriation and information exchanges are specifically directed toward (or have the purpose of) facilitating the commission of crimes against humanity in the DPRK.*"<sup>48</sup>

The response of Chinese Ambassador<sup>49</sup> to these allegations is that "illegal entry" to the territory of China violates Chinese national laws and "undermines China's border controls". Furthermore, the Ambassador admitted that "Chinese public security and border guard authorities have seized some DPRK citizens who have repeatedly entered China illegally" however the priority of China is to protect its "national sovereignty and fundamental interest, bearing in mind the stability of the Korean Peninsula." He further argued that repeated returns of some North Korean individuals prove that they were not tortured. In other words, China's interest in "stability" on the Korean Peninsula overrules its obligations under refugee laws.

### III. International Community's Perspective and Policies

The COI gathered evidence of crimes against humanity towards the North Korean individuals who were forcibly repatriated from China. It further explained; "*[...] violations committed outside the DPRK that*

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<sup>47</sup> United Nations Human Rights Council, Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea (hereinafter: Summary Report), A/HRC/25/63, 7 February 2014, 9-10.

<sup>48</sup> COI Report (n 3) Letter of Mr. Michael Kirby, Chair Of the COI on Human Rights In the DPRK, to Ambassador Wu Haitao, Permanent Mission Of China To the United Nations Office At Geneva, 16 December 2013, In COI report, Annex II, 30-35.

<sup>49</sup> *Ibid* Letter of Wu Haitao, Ambassador, Permanent Mission of China to the United Nations Office At Geneva, To Mr. Michael Kirby, Chair Of the COI On Human Rights In the DPRK, 30 December 2013, In COI Report, Annex II, 36-37.

*causally enable or facilitate subsequent human rights violations in the DPRK, or are the immediate consequence of human rights violations that take place in the DPRK, are also within its mandate.*<sup>50</sup> Therefore, it examined the role of China while carrying out its work on DPRK. Among 300 witnesses that the COI interviewed while preparing its report, more than 100 of the witnesses directly experienced the forced deportation from China and were subjected to various inhumane treatments, whereas others who did not directly experience it, saw or heard of the matter.<sup>51</sup>

UNHCR recognized that the prosecution of the North Korean individuals upon their return to the territory of DPRK may fall within the definition of “persecution”. It stated that “*the 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 [...]*”.<sup>52</sup> As detailed in the first Chapter, the policies of DPRK impose severe penalties on individuals who leave the country.

UNHCR created a special term for individuals who are not refugees when they leave their country, but become refugees after crossing the territorial border of their home state due to a valid fear of persecution upon return.<sup>53</sup> The term UNHCR uses is *refugee sur place*. The *refugee sur place* is entitled to same rights and protection as the refugee defined under the Refugee Convention. The term emerged to address current century's issues.

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<sup>50</sup> COI Report (n 3) para 20.

<sup>51</sup> Statement by Roberta Cohen, Co-Chair, Committee for Human Rights In North Korea, Before the UN Commission of Inquiry on North Korea's Political Prisoners: The Gender Dimension, October 30, 2013.

<sup>52</sup> *Handbook: Lives For Sale: Personal Accounts Of Women Fleeing North Korea To China* (1st edn, Committee for Human Rights in North Korea 2009) <[https://www.hrnk.org/uploads/pdfs/Lives\\_for\\_Sale.pdf](https://www.hrnk.org/uploads/pdfs/Lives_for_Sale.pdf)> (accessed 27 February 2017) para 61.

<sup>53</sup> UNCHR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees”, Geneva, 1979, para. 94.

According to UNHCR many North Korean individuals fall under the category of *refugee sur place*. In other words, UNHCR recognizes the unique situation of North Korean individuals<sup>54</sup> who leave their country and recognize that even if the individuals leave their country for economic reasons, they still can be *refugee sur place* since North Korean government deems leaving the territory without permission as a criminal offence upon the return of the individual.

According to the Commission, North Korean individuals who flee to China fall under one of the three main categories: (a) individuals who flee direct persecution; (b) individuals who are members of a low social class, *songbun*, which face severe socioeconomic deprivation due to political persecution and (c) individuals who are *refugees sur place*. The COI urges all three categories to be recognized as refugee and the applicable protections to be guaranteed as soon as possible.

Furthermore, the certainty of inhumane treatment towards North Korean individuals upon repatriation has directed many actors in the international community to dispute that all North Koreans fleeing into China should be recognized *refugees sur place*. In addition, the regular restriction of access of the UNHCR staff to North Korean individuals in China by the authorities of Beijing<sup>55</sup> certainly made the international community more curious.

The former UN High Commissioner Antonio Guterres pointed out the concept of *refugees sur place* to Chinese officials in regards to the forced repatriation of North Korean individuals when he visited China in 2006. He stated that the forcible deportation of North Korean individuals without any examination process<sup>56</sup> on whether these individuals could face persecution upon their arrival to DPRK is in violation with Refugee Convention.<sup>57</sup>

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<sup>54</sup> *Ibid* paras 56-59.

<sup>55</sup> Human Rights Watch “World Report 2015: North Korea” (n 34).

<sup>56</sup> Text to n 44 in Chapter I.

<sup>57</sup> Interview with UNHCR staff, 2010; and Statement to media by UN High Commissioner for Refugees Antonio Guterres on conclusion of his mission to the People’s Republic of China, Beijing, 23 March 2006 <<http://www.unhcr.org/admin/hcspeeches/4427aae04/statement-media-mr-antonio-guterres-united-nations-high-commissioner-refugees.html>> (accessed: 10 May 2017).



Furthermore, since 2004, UNHCR identified North Korean individuals in China as “*persons of concern*”<sup>58</sup> who should not be deported to their home country without a proper determination of their status and a guarantee that they will not be harmed upon their return to home country.

Other bodies of UN address this issue as well. In the annual report to the General Assembly on North Korean human rights, the UN Secretary-General expressed his wish to remind “[...] *neighboring countries and the international community in general of their obligations, under the 1951 Convention relating to the Status of Refugees, to provide protection to those fleeing the Democratic People’s Republic of Korea in order to seek asylum.*”<sup>59</sup> Also, many of the UN treaty bodies, which monitor the situation between DPRK and China, have articulated that China violates its treaty obligations by returning the North Korean individuals.<sup>60</sup> The body that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment urged China in 2008 to comply with Article 3 of the Convention<sup>61</sup> which affirms: “*No state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.*” Similar actions have been taken by the Committees for the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

#### **IV. Conclusion of the Chapter**

Chapter I provided the perspectives of three key players on the matter. While the opinions of DPRK and China are similar to each other,

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<sup>58</sup> UNHCR, September 2004, the High Commissioner announced before EXCOM, UNHCR’s Executive Committee, that North Koreans in China are “persons of concern.”

<sup>59</sup> Roberta Cohen, “China’s Forced Repatriation Of North Korean Refugees Incurs United Nations Censure” (2014) Summer/Fall Edition *International Journal of Korean Studies*, International Council on Korean Studies <[http://www.icks.org/data/ijks/1482467285\\_add\\_file\\_4.pdf](http://www.icks.org/data/ijks/1482467285_add_file_4.pdf)> (accessed 31 January 2016) 2, also see; UN General Assembly, Report of the Secretary-General, Situation of Human Rights in the DPRK, A/65/391, 24 September 2010, para. 88.

<sup>60</sup> *Ibid* 5.

<sup>61</sup> Convention Against Torture (n 10).

international community, mainly UNHCR, continues to disagree with the current policies and practices towards the North Korean individuals who flee DPRK. It could be said that all the key players raise some valid points in line with their interests. North Korean individuals who flee may be traitors, criminals, economic migrants or refugees but what is undeniable is that they are vulnerable. The treatment of the North Korean individuals and possible crimes against humanity will be discussed elaborately in the third Chapter of the Article. To sum up the Chapter; DPRK restricts the freedom of movement, China does not recognize the individuals as “refugees” and international community urges for these individuals to be recognized.

## **Chapter II – 2 Principles: 2 Approaches**

“Today’s human rights abuses are tomorrow’s refugee movements.”<sup>62</sup> Mass atrocities are large scale, severe human rights violations. One major issue lies in the great inconsistency within international community about application of Responsibility to Protect doctrine in refugee plight. Some nations claim that rejection of North Korean individuals is clearly a crime against humanity, whereas others argue that the denial of entry might be aggravating the problem; however, the states are under no obligation to accept these individuals. The focus of the Article is to attribute “obligation” to states to accept North Korean individuals to prevent crimes against humanity from occurring.

The main question of this article involves two main doctrines: non-refoulement and responsibility to protect. In order reach a conclusion, it is utterly essential to understand these two doctrines. Therefore, the first part of the upcoming Chapter will focus on the protection of refugees under the principle of non-refoulement, specifically highlighting the shortcomings of the principle. The second part of the Chapter will introduce the Responsibility to Protect doctrine -specifically its first pillar; responsibility to prevent- and will discuss possible extension of the doctrine to the refugee protection.

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<sup>62</sup> United Nations High Commissioner for Refugees (UNHCR), 1995, *The State of World’s Refugees 1995: In Search of Solutions*, Oxford University Press, 57.

### **I. The Principle of Non-Refoulement under the Protection of Refugees**

The contemporary understanding of sovereignty is the descendent of Westphalian system. It is built upon the supposition that every individual is assigned to both a territory and a state, and is protected as a citizen. A refugee, nonetheless, can be perceived as a victim of segregation in the state of origin, and crossing an internationally recognized border does not automatically provide inclusion on the other side. If the host state accepts the individual then it secures safety; if the access is rejected then it becomes a hindrance. In the case of North Korean individuals fleeing to China, they are repatriated back to DPRK. Hence, it is a hindrance, rather than safe haven.

The right to seek and enjoy asylum is safeguarded in many international human rights documents.<sup>63</sup> If the individual is in his/her country of origin and protection is not guaranteed, then the individual is entitled to seek asylum. Contrarily there is no legal duty to grant asylum to any refugee who seeks it. This type of movement of an individual can be seen as a result of failure by the state of origin to protect the individual. As discussed in the previous Chapter, Article 1 of the Refugee Convention provides the cumulative requirements to be fulfilled in order for an individual to be recognized as a refugee: (a) the individual must be outside of their country of nationality; (b) unable or unwilling to take advantage of the protection or that country, or to return and (c) inability and unwillingness attributed to a well-founded fear of being persecuted.<sup>64</sup>

Although the traditional definition applies only to individuals, international community has come to recognize and accept the importance of applying the definition to groups, in certain cases of mass influx.<sup>65</sup> The cases that fall under this category are the situations of large-scale movements of individuals fleeing areas affected by political developments marked by

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<sup>63</sup> E.g. United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 14.

<sup>64</sup> Refugee Convention (n 11) art. 1.

<sup>65</sup> UNHCR, 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).

serious human rights violations.<sup>66</sup> In these situations, the host country and the UNHCR recognize the non-practicability of determining refugee status individually and apply group-based recognition; refugee status on a *prima facie* basis.<sup>67</sup> The recognition is based on the objective information gathered on the circumstances causing the flee. In other words, when interpreting eligibility for refugee status in a broader sense, generalized violence in a specific state can also be a legitimate ground to identify an individual as a refugee or provide temporary protection.<sup>68</sup>

Unfortunately, it is almost impossible to ascertain the number of North Korean individuals who flee to China due to China's policies on providing very limited access to UNHCR to monitor and because of China's practice of forcible repatriation towards North Korean individuals.<sup>69</sup> Nevertheless, China alleges that approximately 10,000 North Korean individuals reside within its borders whereas South Korea estimates about 10,000 to 30,000 individuals and NGOs estimate the number to be between 10,000 and 30,000.<sup>70</sup> Furthermore, according to Korean Institution for National Unification, only in June 2000, approximately 15,000 North Korean individuals were repatriated.<sup>71</sup> The massive numbers provided by various sources may allow this case to be considered as a mass influx, however the issue remains. In most cases, China does not even allow individuals to be examined; it repatriates them directly to DPRK due to bilateral treaties.<sup>72</sup>

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<sup>66</sup> *Ibid* 1.

<sup>67</sup> *Ibid* 4.

<sup>68</sup> *Ibid* 5.

<sup>69</sup> Text to n 48 in Chapter I, *see eg.* Haenyong Cho, "Systemizing The Fate Of The Stateless North Korean Migrant: A Legal Guide To Preventing The Automatic Repatriation Of North Korean Migrants In China" (*Fordhamilj.org*, 2013) <<http://fordhamilj.org/articles/systemizing-the-fate-of-the-stateless-north-korean-migrant-a-legal-guide-to-preventing-the-automatic-repatriation-of-north-korean-migrants-in-china/>> (accessed 27 February 2017)206.

<sup>70</sup> *Ibid* Haenyong Cho, 'Systemizing the Fate of the Statelessness North Korean Migrant: A legal Guide to Preventing the Automatic Repatriation of North Korean Migrants in China' 203.

<sup>71</sup> Korean Institution for Unification, *White Paper on Human Rights in North Korea*, (1st edn, Korean Institution for Unification 2002) 182.

<sup>72</sup> Text to n 42 in Chapter I.

The COI advised all states to respect the principle of non-refoulement and to adopt a victim-centric -human rights-based approach- by providing victims with the right to stay in the country and access to legal protection and basic services.<sup>73</sup> The victim-centered approach is applicable once the individual arrives to the territory of another state.

It is important to further elaborate on the principle of non-refoulement which means that an individual cannot be returned, “*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>74</sup> Refoulement includes summary refusal of admission at the state border.<sup>75</sup> Goodwin suggests that “*the principle of non-refoulement is a norm of customary international law based on a consistent practice combined with recognition on the part of nations that the principle has a normative character.*”<sup>76</sup> Furthermore, some UN documents has referred to the principle of non-refoulement as not being subject to any derogations.<sup>77</sup> This could be seen as a step towards acknowledgment of the principle of non-refoulement as a *jus cogens norm*.

According to the commentary on the Refugee Convention, the principle of non-refoulement under article 33 of the Refugee Convention is applicable to refugee who is physically present in the territory of a Contracting State, regardless of whether the individual's presence in the territory is lawful or unlawful and irrespective of individual's entitlement to benefit from the provision of article 31 of the Refugee Convention or not.<sup>78</sup> Therefore, it is

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<sup>73</sup> UNHCR, news on North Korea: UN Commission documents wide-ranging and ongoing crimes against humanity, urges referral to ICC, 17 February 2014, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14255&LangID=E>> (accessed 20 January 2016).

<sup>74</sup> Refugee Convention (n 11) art 33; also see Convention Against Torture (n 61) art 3.

<sup>75</sup> Hurwitz, ‘The Collective Responsibility to Protect Refugees’ (n 14) 174.

<sup>76</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee In International Law* (Oxford University Press 2007) 345-355.

<sup>77</sup> United Nations General Assembly, A/RES/51/75, 12 February 1997, para. 3, also see United Nations General Assembly A/RES/52/132, 12 December 1997, para 12.

<sup>78</sup> United Nations High Commissioner for Refugees, UNHCR Note on the Principle of Non-Refoulement, November 1997.

possible to state that the principle of non-refoulement does not only protect individual from being returned to a country where individual can be in danger, but also ensures individual is not prevented from being able to request protection. This includes situations where individual entered to the territory unlawfully. Thus, China violates the principle of non-refoulement in two ways; first by not providing them access to refugee status determination and second by forcibly returning them back to DPRK where they face persecution. Nevertheless, it must be acknowledged that similar practices can be experienced in other parts of the world. The absence of will and the inability of international cooperation on finding a solution for refugees cause the increasing attention to be given to the ways and means to prevent individuals from arriving at borders of the state or even from leaving their state of origin.

The principle of non-refoulement became a broader principle of human rights.<sup>79</sup> It is reaffirmed in the 1984 Convention against Torture<sup>80</sup>, the 1966 ICCPR<sup>81</sup> and the 1950 ECHR<sup>82</sup>. The non-refoulement principle is applicable to all refugees, not all individuals whose situations apply to the non-refoulement principle are refugees. The principle of non-refoulement is widely recognized as a principle of customary international law. Therefore, it binds all states not only the signatories to the treaties.<sup>83</sup>

Hurwitz argues that the non-refoulement principle may establish a de facto right to asylum even if the person does not satisfy the criteria to be recognized as a de jure refugee due to fear for his life and freedom.<sup>84</sup> The problem with such de facto recognition is that the individual would not be entitled to receive all the protections specified under Refugee Convention. Nevertheless, UNHCR states: “*State presented with an asylum request, at its*

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<sup>79</sup> Goodwin and McAdam, ‘The refugee in international law’ (n 76) 354.

<sup>80</sup> Convention Against Torture (n 61).

<sup>81</sup> United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>82</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>83</sup> Hurwitz, ‘The Collective Responsibility to Protect Refugees’ (n 14) 204.

<sup>84</sup> *Ibid* 190.

*borders or on its territory, has and retains the immediate refugee protection responsibilities relating to admission, at least on a temporary basis. This responsibility extends to the provision of basic reception conditions and includes access to fair and efficient asylum procedures.*<sup>85</sup> China does not provide any of these rights to the North Korean individuals.

## **II. Responsibility to Protect**

Former Secretary General of the United Nations Boutros Ghali wrote in his 1992 Agenda for Peace: “*the theory of sovereignty never matched reality.*”<sup>86</sup> The decade of 1990s made international community understand that some consequences of pure interstate conflicts such as internal armed conflict affect the international community as a whole.<sup>87</sup> Therefore, the state border is no longer enough to keep international community out.

The events in the 1990s, such as incident which occurred in Rwanda and Yugoslavia, formed the understanding that non-interference in the international affairs cannot be absolute. For instance where the state commits grave human rights violations in its territory. It also meant that international community could no longer shut its eyes when such situations occur in non-international context. With that in mind, Responsibility to Protect doctrine emerged in 2005.<sup>88</sup> The 2005 World Summit Outcome essentially reaffirms the existing obligations of sovereign states towards their populations and strives for strengthening the international community's commitment, both with consensual and non-consensual measures, to stop mass atrocities occurring or preventing them before they occur.

Former Secretary General of the UN, Kofi Annan, claimed that there are two approaches attached to “sovereignty”: the traditional approach, which involves right to self-determination, and the second approach, which interprets sovereignty as responsibility, whereas a state is sovereign as long

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<sup>85</sup> UNHCR, Convention Plus Issues Paper on addressing irregular secondary movements of refugees and asylum-seekers, FORUM/CG/SM/03, 11 March 2004, 7.

<sup>86</sup> Thomas G Weiss, *Humanitarian Intervention* (1st edn. Polity Press, Cambridge and Malden 2007) 12.

<sup>87</sup> Goodwin and McAdam, ‘The refugee in international law’ (n 76) 3.

<sup>88</sup> 2005 World Summit Outcome (n 24).

as it fulfills its state responsibilities towards its populations.<sup>89</sup> In 2001, the International Commission on State Sovereignty (ICISS) created a report<sup>90</sup> which states that “*the responsibility to protect, reflecting the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe [...] and if they are unable or unwilling to do so, that responsibility must be borne by the broader community of states*”.<sup>91</sup> The Report has been criticized due to its over-focus on the principle of non-intervention and lack of addressing on the grounds of international responsibility to protect.<sup>92</sup> The 2005 World Summit Outcome recognized the international responsibility to protect populations from war crimes, ethnic cleansing, genocide and crimes against humanity.

As agreed upon during the 2005 World Summit, the interpretation of R2P allows the international community to stand ready to react rather than wait mass atrocities to occur. The UN Security Council reaffirmed the R2P in various instances.<sup>93</sup> According to 2005 World Summit Outcome, R2P doctrine has three pillars: (a) The State bears the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; “*Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means*”<sup>94</sup> (b) The international community has a responsibility to encourage and assist States in fulfilling this responsibility; “*We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise*

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<sup>89</sup> Alex Bellamy, “Responsibility to Protect, the Global Effort to End Mass Atrocities” (1st edn, Polity Press, Cambridge and Malden 2009) 17-19.

<sup>90</sup> ICISS Report (n 22)

<sup>91</sup> *Ibid* Foreword.

<sup>92</sup> Jennifer Welsh and Maria Banda, “International Law And The Responsibility To Protect: Clarifying Or Expanding States’ Responsibilities?” (2010) 2 *Global Responsibility to Protect*, (Martinus Nijhoff Publishers) Koninklijke Brill NV, Leiden, Netherlands, 217.

<sup>93</sup> 2005 World Summit Outcome (n 24).

<sup>94</sup> 2005 World Summit Outcome (n 24) para 138.



*this responsibility and support the United Nations in establishing an early warning capability*”<sup>95</sup> and (c) the international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes; “*The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner.*”<sup>96</sup> If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

At first glance, it may seem like R2P attempts to enforce a legal obligation only over the states to protect their civilians while the international community’s responsibility is more of a moral nature, however, there are legal obligations for the international community such as in international humanitarian law.<sup>97</sup> So in the case of North Korean individuals who cross the border without receiving appropriate permission from DPRK; it is beyond reasonable doubt that they will be subjected to persecution following their forced repatriation. What is the legality of forcibly returning the individuals to their homeland while knowing that they will face severe punishments and crimes against humanity might be committed? This particular question introduces the importance of the first pillar of R2P; Responsibility to Prevent.

#### ***a. Responsibility to Prevent***

Stronger human rights protection at state of origin might lessen the individual’s need for crossing international borders. The gap between theory and practice of international human rights and the examination of whether

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<sup>95</sup> *Ibid* para 138.

<sup>96</sup> *Ibid* para 139.

<sup>97</sup> Alex Bellamy and Ruben Reike, “The Responsibility To Protect And International Law” (2010) 2 *Global Responsibility to Protect*, (Martinus Nijhoff Publishers), Koninklijke Brill NV Leiden, 275-276.

states are unwilling or unable to guarantee compliance are still common problems. In cases where sovereign states are either unwilling or unable to protect the fundamental freedoms of their citizens, sovereignty and human rights come into conflict.<sup>98</sup>

Responsibility to Prevent is the first of the three pillars of Responsibility to Protect doctrine. The other two pillars are responsibility to react and responsibility to rebuild. The focus of this article is on the first pillar because it is essential to stop human suffering at all levels before waiting for mass atrocity to happen.<sup>99</sup>

The Responsibility to Prevent can be recognized as the responsibility that lies in the sovereign state itself to prevent mass atrocities from occurring. The international community also has such duty. ICISS Report stipulates that “[...] *conflict prevention is not merely a national or local affair. The failure of prevention can have wide international consequences and costs. Moreover, for prevention to succeed, strong support from the international community is often needed, and in many cases may be indispensable. Such support may take many forms. It may come in the form of development assistance and other efforts to help address the root cause of potential conflict; or efforts to provide support for local initiatives to advance good governance, human rights, or the rule of law; or good offices missions, mediation efforts and other efforts to promote dialogue or reconciliation. In some cases international support for prevention efforts may take the form of inducements; in others, it may involve a willingness to apply tough and perhaps even punitive measures.*”<sup>100</sup> It evidently follows from the citation that the international community also has the responsibility to prevent. It is important to state that the scope of duty to prevent has never been established and is open for interpretation. Nevertheless, the creation of responsibility to protect is already a signal, even though it’s a tentative signal, that extension of the responsibilities states have contains the prevention of mass atrocities.<sup>101</sup>

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<sup>98</sup> Bellamy, ‘Responsibility to Protect, the Global Effort to End Mass Atrocities’ (n 89) 8.

<sup>99</sup> ICISS Report (n 22) 19.

<sup>100</sup> *Ibid* 24.

<sup>101</sup> Sheri Rosenberg, “Responsibility to Protect: A Framework for Prevention” (2009) 1 *Global Responsibility to Protect*, 9 July 2009, 474.

The language that is used while describing the collective responsibility under R2P on the 2005 World Summit Outcome is similar to the positive duty of cooperation articulated under articles 40 and 41(1) of the International Law Commissions' draft articles on the state responsibility.<sup>102</sup> The draft articles suggest that grave breaches of international law may trigger a positive duty to cooperate among states to halt the grave breaches. The grave breaches are identified as “*gross or systematic failure by the responsible state*” to implement “*an obligation arising under a peremptory norm of general international law.*”<sup>103</sup> R2P also imposes duty on the UN member states to not contribute to mass atrocities occurring outside of their borders by using a particular language such as; “*encourage and help*” other states to exercise their duties to prevent and use all “*necessary and appropriate*” means while assisting. In other words, the 2005 World Summit Outcome, at least, suggests that individual state should refrain from fueling the atrocity crimes of other states.<sup>104</sup> China's repatriation policy towards North Korean individuals exacerbates the mass atrocities occurring in the territory of DPRK since DPRK has official policies towards these individuals that are in violation with human rights law.

Over the past decades there have been burgeoning number of institutional bodies created to facilitate the prevention of mass atrocities; such as in 2004, when the UN established the Special Advisor's Office of the Prevention of Genocide. Furthermore, only four years later, the initiation to create an International Convention on the Prevention and Punishment of Crimes Against Humanity<sup>105</sup> was established. Currently it is an ongoing project carried out by Whitney R. Harris World Law Institute.<sup>106</sup> On July 18,

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<sup>102</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56<sup>th</sup> Session, UN Doc A/56/10 (2001); see eg. *Ibid* Rosenberg ‘Responsibility to Protect: A Framework for Prevention, Global Responsibility to Protect’ 449-450.

<sup>103</sup> *Ibid* Draft Articles on State Responsibility art. 40.

<sup>104</sup> Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’ (n 101) 449.

<sup>105</sup> Washington University School of Law, Whitney R. Harris World Institute, Crimes Against Humanity, Initiative, August 2010, Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity.

<sup>106</sup> Washington University School of Law, Whitney R. Harris World Institute, Crimes Against Humanity Initiative, Facts about the Crimes Against Humanity Initiative,

2014, UN International Law Commission voted to add the drafting of a treaty on crimes against humanity to its agenda.<sup>107</sup> It is possible to state that the international community has realized the shortcoming of contemporary international law. They are in the process of developing a new approach where the norms focus on prevention of mass atrocities occurring.

### ***b. Responsibility to Protect and Refugee Protection***

The 2005 World Summit Outcome does not make any direct reference to refugees and it was suggested that the only way to trigger R2P is in the cases of murder or extermination being committed as a part of widespread or systematic attack against the civilians.<sup>108</sup> This allows only most severe and extensive violations to reach the threshold of R2P.<sup>109</sup>

The four mass atrocities that are mentioned are recognized as international crimes and entail accountabilities under both customary international law and treaty law for nations to prevent and punish such crimes. In the case of genocide, the states have the duty to take peaceful measures to prevent it from happening as soon as they receive relevant information.<sup>110</sup> The characteristics of the crimes can be connected to the refugee plight and some overlaps can be observed.

The ICC Statute is only binding upon the state parties and it does not provide a duty to prevent the crimes from occurring. It, however, creates a responsibility to refrain from committing the crimes.<sup>111</sup> The definition of

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<[http://law.wustl.edu/harris/crimesagainsthumanity/?page\\_id=1301](http://law.wustl.edu/harris/crimesagainsthumanity/?page_id=1301)> (accessed 20 January 2016).

<sup>107</sup> Washington University School of Law, Whitney R. Harris World Institute, Crimes Against Humanity Initiative, News, UN International Law Commission to Elaborate New Global Convention on Crimes Against Humanity Following Experts Meeting in Geneva, <<http://law.wustl.edu/news/pages.aspx?id=10225>> (accessed 28 January 2016).

<sup>108</sup> 2005 World Summit Outcome (n. 24) para 139.

<sup>109</sup> Bellamy and Reike, 'The Responsibility to Protect and International Law, Global Responsibility Project' (n. 97) 277.

<sup>110</sup> *Ibid* 281, e.g. Official Website of Outreach Programme on the Rwanda Genocide and the United Nations, <<http://www.un.org/en/preventgenocide/rwanda/about/bgpreventgenocide.shtml>> (accessed: 10 May 2017).

<sup>111</sup> *Ibid* 279.

crimes against humanity under 1998 Rome Statute of International Criminal Court contains; “*persecution against any identifiable group or collective on political, racial, national, ethnic, cultural, religious, gender [...], but as such must be part of systematic or widespread attack which is directed against a civilian population.*”<sup>112</sup> As stated above the definition of refugee derives from well-established *individual* fear of persecution on grounds of race, religion, nationality, political opinion or social group. The ICC Statute contains these elements, moreover, it has one additional element. The element is the requirement of violation to be on a wider scale or to occur in case on armed conflict. The additional element of “large scale” is the same element that triggers responsibility to protect doctrine. The ICC Statute’s article brings two principles together.

Individual refugees should not always be perceived as part of a bigger refugee plight or as a signal of occurrence of mass atrocities, and protecting a refugee might not have a direct or imminent effect on ending such violations. However, if mass atrocities are occurring, then refugee protection might mitigate the consequences and allow vulnerable individuals to receive protection. Therefore it is possible to argue that protection of refugees is part of R2P doctrine since it is a step towards halting the mass atrocities.

### **III. Conclusion of the Chapter**

This Chapter showed that sovereign states are more concerned about the protection of their borders than with not contradicting with the principle of non-interference. After examining whether responsibility to protect doctrine can be applied to state responses to refugees, it is possible to state that there is a connection between contemporary international refugee law and the responsibility to prevent pillar under responsibility to protect doctrine.

If individuals are at risk of one of the mass atrocities, the role of international community under responsibility to protect doctrine is to assist those individuals within the country of origin. However, the situation

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<sup>112</sup> United Nations General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.

between China and DPRK is a *sui-generis* case because if China changes its aggressive forcible repatriation policy towards the North Korean individuals and respects to the principle of non-refoulement, then it would be able to halt atrocities committed against North Korean individuals who flee DPRK.

Duty to prevent is an integral part of R2P. The protection of individuals after they flee their country is linked to refugee protection and prevention pillar of R2P. R2P could provide further refugee protection and diminish gray areas between standards and their implementation.

R2P's application to refugee protection can be interpreted in two ways: (a) obligation of states is to not create refugees, but to protect the those who cross their territorial border due to mass atrocities; and (b) the commitment or duty for international community to assist, support and ensure that the other states live up to their obligations, R2P can be triggered to strengthened. The goal of the Chapter was to introduce the core principles discussed in this Article. Upcoming Chapter will thoroughly analyze China's responsibility to prevent mass atrocities by respecting the principle of non-refoulement.

### **Chapter III – 1 Case: 1 Problem**

The previous chapter highlighted that R2P only triggers a duty for the international community in the cases where a sovereign state is unwilling to or unable to halt mass atrocities and it can only be triggered in the cases of mass atrocities, which are genocide, ethnic cleansing, war crimes and crimes against humanity. The first Chapter of the Article proved that the violations are carried out by the authorities as part of the North Korean Government's policies. Now, it is important to examine whether severity of the violations fulfill the high threshold of mass atrocities.

The first part of this Chapter will briefly introduce crimes against humanity and apply it to the current case. The focus will be on providing sufficient evidence that an individual who is forcibly repatriated by China faces crimes against humanity upon arrival to the territory of DPRK. The second part of the Chapter will analyze the extent of legal responsibility to

prevent under R2P attributable to China by respecting non-refoulement principle towards North Korean individuals who flee from DPRK.

### **I. Crimes against Humanity Targeting Persons Who Try to Flee the Country and Role of China**

The Resolution 22/13<sup>113</sup> mandated the COI to carry out its investigation “with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity” and demanded a “detailed examination and legal analysis of whether the crimes against humanity are being perpetrated.”<sup>114</sup> This Chapter will use most of the COI’s findings as primary source of evidence since the COI had access to many different information sources, conducted its research very recently and worked on the field.

Crimes against humanity were first articulated in the Charter of the International Military Tribunal at Nuremberg<sup>115</sup> in 1945. Later, the definition provided in the Charter became accepted by the International Criminal Tribunals for the Former Yugoslavia (ICTY)<sup>116</sup> and Rwanda (ICTR)<sup>117</sup>, the Special Court for Sierra Leone (SCSL)<sup>118</sup> and various national courts. State practice and the discussions played a great role in the adoption of the Rome Statute of the International Criminal Court.<sup>119</sup> Article 7 of the Rome Statute provides the most recognized definition of crimes against humanity whereas

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<sup>113</sup> Resolution A/HRC/RES/22/13 (n.1).

<sup>114</sup> United Nations Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People’s Republic of Korea, Marzuki Darusman, Resolution A/HRC/22/57, 1 February 2013.

<sup>115</sup> United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”), 8 August 1945.

<sup>116</sup> United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, art. 5.

<sup>117</sup> United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, art. 6.

<sup>118</sup> United Nations Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, art. 2.

<sup>119</sup> Rome Statute (n 112) art. 7.

the Elements of Crimes<sup>120</sup> specify the acts and possible interpretations. The definitions provided in these two documents mirror the customary international law.<sup>121</sup>

Crimes against humanity has a high threshold and the two cumulative elements are: (a) intentional inhumane acts; and (b) form part of a widespread or systematic attack. The inhumane acts defined under the ICC Statute will be provided below with examples from DPRK once the individuals are repatriated by China; (a) “*imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*”<sup>122</sup> -as it was discussed in the first Chapter, the punishment of attempted escape or flee from the home country is imprisonment.<sup>123</sup> Most of the time, the detainees are not brought before a judge and the opportunity of challenging the lawfulness of their detention is not allowed-<sup>124</sup>; (b) “*murder and torture*”<sup>125</sup> -repatriated persons often die in the detention facilities as a result of beatings and starvation.<sup>126</sup> Many detainees experience severe beatings and burnings using fire torture<sup>127</sup> - (c) “*rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*”<sup>128</sup> - the repatriated women who are pregnant are subjected to forced abortion<sup>129</sup> through forced labor, beatings or injections.<sup>130</sup> Furthermore, the male guards search for money from repatriated women and they often insert their hands

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<sup>120</sup> International Criminal Court (ICC), Elements of Crimes, 2011, publication RC/11.

<sup>121</sup> Antonio Cassese and Paola Gaeta, Cassese’s International Criminal Law (3rd edn, Oxford University Press 2013), 105.

<sup>122</sup> Rome Statute (n 112) art. 7(1).

<sup>123</sup> Text to n 27 in Chapter I.

<sup>124</sup> COI Report (n 3) 335.

<sup>125</sup> Rome Statute (n 112) art. 7(1).

<sup>126</sup> COI Report (n 3) 335.

<sup>127</sup> Tan, ‘North Korea, International Law and Dual Crises: Narrative and Constructive Engagement’ (n 32) 154.

<sup>128</sup> Rome Statute (n 112) art. 7(1).

<sup>129</sup> COI Report (n 3) 336.

<sup>130</sup> Tan, North Korea, ‘International Law and Dual Crises: Narrative and Constructive Engagement’ (n 32) 154.



into women's vagina using unsanitary techniques<sup>131</sup> (d) "*persecution*"<sup>132</sup> - repatriated individuals becomes part of the "three generation" policy which allows three generations of the same family to be punished, often work in labor camps due to their "bad seeds"<sup>133</sup>.

The perpetrator needs to have the criminal intent, which means perpetrator is aware of the consequences of his/her actions. Furthermore, the above-listed acts do not constitute crimes against humanity if they occur in isolation. The determination of whether the acts are part of widespread or systematic attack is the key to determine whether the crimes against humanity occurred. There is no requirement of armed attack.<sup>134</sup>

If the incidents are "*massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims*"<sup>135</sup> then the attacks are widespread. If the incidents are "*organized action, following a regular pattern on the basis of a common policy and involves substantial public or private resources [...] there must exist some form of preconceived plan or policy*"<sup>136</sup> then the attacks are systematic.

The individuals who try to flee or return to DPRK after leaving the country without permission are considered anti-state and the criminal code of DPRK supports the practice of punishing the escapees. "*All levels of the state bureaucracy, extending to the Supreme Leader himself, have devoted considerable attention and resources to the issue of people fleeing the DPRK since the issue became more prevalent in the 1990s.*"<sup>137</sup> Furthermore, the escapees are often labeled as "traitors" or "human scum" by the state media, which facilitates persecution. A significant amount of resources is devoted to

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<sup>131</sup> COI Report (n 3) 336.

<sup>132</sup> Rome Statute (n 112) art. 7(1).

<sup>133</sup> COI Report (n 3) 228 and section IV.C.2.

<sup>134</sup> Prosecutor v. Kunarac et al, IT-96-23& IT-96-23/1-A, ICTY Appeals Chamber, Judgment of 12 June 2002, para. 86.

<sup>135</sup> Prosecutor v. Akayesu, ICTR-96-4-T, ICTR Trial Chamber, Judgment of 2 Sept 1998, para. 580.

<sup>136</sup> Prosecutor v. Musema, ICTR-96-13-T, ICTR Trial Chamber, Judgment of 27 January 2000, para. 204.

<sup>137</sup> COI Report (n 3) 338

process and punish individuals who are repatriated to territory by China. The inhumane treatments are large-scale. According to NGOs working in the border area of China and DPRK, China repatriated around 6000 North Korean's in June and July 2001 alone.<sup>138</sup> Furthermore, the acts are systematic. On November 2, 2014, 17 North Koreans were forcibly deported from China to DPRK. On November 7, 5 North Koreans, and on November 15, 15 North Koreans were forcibly deported.<sup>139</sup> Thus, it is possible to state that the two cumulative requirements for crimes against humanity are satisfied.

## II. Application of the Responsibility to Prevent as part of Responsibility to Protect Doctrine

DPRK carries out systematic and widespread attack against individuals who are considered to pose a threat to the political system and leadership by fleeing the state. This Article does not suggest that North Korean individuals should be granted “refugee” status immediately upon their arrival. It argues that China should not forcibly repatriate North Korean individuals.

Although the norm of duty to prevent has been clarified in much detail and in many legal documents, such as ICISS Report, what all of them have been lacking is the definition of scope of duty to prevent. In other words, it is clear that each state has the duty to prevent crimes from perpetrated in their territory, however, the provision is silent on situations when a state is able to prevent mass atrocities from occurring outside of its territory, without violating another state's sovereignty or territorial integrity. Therefore, even if China has the ability to prevent crimes against humanity without violating DPRK's territorial integrity, it is not possible to conclude that China has the legal duty to do so. In the context of mass atrocities, prevention is a moral

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<sup>138</sup> Ji Young Song, “The Invisible Refugees | Human Rights In China 中国人权 | HRIC” (*Hrichina.org*, 2003) <<http://www.hrichina.org/en/content/4777>> (accessed 27 February 2017).

<sup>139</sup> Cecc.gov, “UN Report Criticizes China For Treatment Of North Korean Refugees Amid Worsening Situation | Congressional-Executive Commission On China” (2015) <<http://www.cecc.gov/publications/commission-analysis/un-report-criticizes-china-for-treatment-of-north-korean-refugees>> (accessed 27 February 2017).

duty that should be expressed in law to have both a real impact on state behavior and to ensure the halting of mass atrocities. Hence, the legal documents that discuss the duty to prevent should be amended; to place a duty on states having the ability to prevent atrocities, but without violating another state's territory to do so in cooperation with the international community.

Nevertheless, there are interpretations of duty to prevent that would recognize the state, in this case China, responsible to prevent the crimes in question. Although those interpretations might not have sufficient legal basis, it would be still insightful to address them, perhaps for ideas of further development of international law.

Rosenberg has raised an interesting idea in her discussion on the Responsibility to Protect and duty to prevent: "*More interestingly perhaps, is the fact that this collective obligation undertaken by the international community to take coordinated action to assist states to prevent atrocity crimes implies individual state responsibility to take reasonable steps to prevent the acts it seeks to prohibit.*"<sup>140</sup> She states that there is an emerging legal obligation of states having extensive amount of influence over another state, meaning, being in a real position to influence the course of events in another state should raise duty to prevent.<sup>141</sup> Under this argument, the United States of America, for example, would have a duty to use all means reasonably available to it to prevent mass atrocities from happening in Iraq because of its significant economic, military and political influence over Iraq. This argument is strongly in line with the BiH v. Serbia<sup>142</sup> test, although the test was established only to provide state responsibility for genocide. As aforementioned,<sup>143</sup> there is an emerging trend to use similar principles for CAH. Such influence can be identified also in relation to

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<sup>140</sup> Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (n 101) 472.

<sup>141</sup> *Ibid* 472.

<sup>142</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43.

<sup>143</sup> Text to n 106 in Chapter II.

China and DPRK. Hence, China would have this duty to “use all means reasonably available”.<sup>144</sup>

As Rosenberg suggested; “*the articulation of a standard for prevention based upon a duty to act when a state has objective knowledge of a ‘grave risk’, can guide the international community when it seeks to determine the evidentiary threshold for the relevance of R2P in respect of extraterritorial obligations.*”<sup>145</sup> If the “knowledge of grave risk” is essential, as was established by the COI, the obligation to prevent crimes against humanity from occurring is already triggered for the individual state, as well as for collective responsibility for the international community. The only question that remains is why China has the main duty to prevent?

The first reason is its geographical location; it borders the DPRK and could be the first safe haven for the North Korean individuals. The second main reason is connected to the above-given example on the US. It is well known that China, more than any other state, has contributed diplomatically and economically to DPRK. China is the most important ally of DPRK. It is the biggest trading partner and main source of food and fuel.<sup>146</sup> It is estimated that 67 percent of DPRK’s exports are to China and 61 percent of imports are from China.<sup>147</sup> Furthermore, 80 percent of North Korean consumer goods and 45 percent of its food is provided by China.<sup>148</sup> China also has direct investments in DPRK.<sup>149</sup> Therefore China has the relevant influence over DPRK and it has already been established that there are most certainly mass atrocities occurring in DPRK. In fact, China plays a great role in crimes against humanity targeting persons who flee DPRK by returning them. Moreover, due to China’s influence and control over the North Korean

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<sup>144</sup> Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’ (n 101) 473.

<sup>145</sup> Ibid 470.

<sup>146</sup> Tan, ‘North Korea, International Law and Dual Crises: Narrative and Constructive Engagement’ (n 32) 83.

<sup>147</sup> Ibid 84.

<sup>148</sup> Söng-ch’öl Ch’oe, *International Community And Human Rights In North Korea* (Institute of Unification Policy, Hanyang University 1996) 126-130.

<sup>149</sup> Tan, ‘North Korea, International Law and Dual Crises: Narrative and Constructive Engagement’ (n 32) 87-88.

individuals, China has the positive obligation to take steps to prevent crimes against humanity from being committed. The usage of “all means reasonably available” for China is simply applying the non-refoulement principle to the North Korean individuals.

As recognized in the ICISS Report, actions of the international community might be indispensable for a prevention to succeed. By its actions, China effectively prevents the international community from taking necessary steps to prevent atrocities from occurring. By sending the individuals back, other countries are unable to provide a safe haven even if they are willing to.

### **III. Conclusion of the Chapter**

The first part of the chapter introduced the crimes against humanity and proved that crimes against humanity are committed against North Korean individuals; specifically those who try to flee or are forcibly returned to DPRK after fleeing. Later, it established the key role of China in the commitment of crimes against humanity towards these individuals.

The second part of the chapter discussed the possible application of responsibility to protect doctrine and attributed duty to prevent to China. Although at first glance, the responsibility to prevent – the first pillar of the responsibility to protect doctrine – is duly related to the existing duty to protect individuals within their own jurisdiction, it could also be interpreted as the step towards establishing a positive duty to the members of international community.

### **Conclusion**

The first chapter provided the different approaches towards the North Korean individuals and tackled the factual issues and different positions. DPRK and China have similar perspectives towards the individuals, whereas the UN bodies urge for the recognition of “refugee” status to provide protection. The second chapter introduced the main principles discussed in the Article and connected R2P to contemporary international refugee law. The third chapter applied the rules to the situation between DPRK and

China. A discussion was created on whether China has the duty to prevent CAH or not.

In light of the research conducted for the Article, it is not possible to conclude that duty to prevent extends to states having an obligation to prevent crimes happening outside of their territory, when the state in question does not control the state in which the crimes against humanity happen. This leads to a striking result that it cannot be concluded that China legally has the duty to prevent crimes against humanity against individuals who are forcibly repatriated to North Korea. This is the case even though, China still has the ability to prevent CAH happening. This ability merely requires China to respect its international legal obligations, particularly the principle of non-refoulement.

*“Without a genuine commitment to conflict prevention at all levels – without new energy and momentum being devoted to the task- the world will continue to witness the needless slaughter of our fellow human beings, and the reckless waste of precious resources on conflict rather than social and economic development. The time has come for all of us to take practical responsibility to prevent the needless loss of human life, and to be ready to act in the cause of prevention and not just in the aftermath of disaster.”*<sup>150</sup>

Under development of laws, there should not be the reason for international community to shut their eyes. It is the submission of this Article that the scope of the duty to prevent should extend to states having ability to prevent CAH from happening outside of its territory alone or in cooperation with international community in situation that does not raise the question of sovereignty – such as in China DPRK scenario.

The fact that it is unclear whether a state has the responsibility to protect against human rights violations, even crimes against humanity, outside its jurisdiction should only mean that the contemporary international law is in need of development. The non-existence of the norms and laws do not make the issues disappear. On the contrary, already existing issues become even more problematic due to critical gray areas.

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<sup>150</sup> ICISS Report (n 22) para 3.43.

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**ABBREVIATIONS**

<b>CAH</b>	: Crimes against Humanity
<b>China, PRC</b>	: People's Republic of China
<b>DPRK, North Korea</b>	: Democratic People's Republic of Korea
<b>EXCOM</b>	: Executive Committee of the High Commissioner's Programme
<b>ICC</b>	: International Criminal Court
<b>ICISS</b>	: International Commission on Intervention and State Sovereignty
<b>ICTR</b>	: International Criminal Tribunal for Rwanda
<b>ICTY</b>	: International Criminal Tribunal for the former Yugoslavia
<b>R2P</b>	: Responsibility to Protect Doctrine
<b>Refugee Convention</b>	: 1951 Convention Relating to the Status of Refugees <i>AND</i> 1967 Protocol Relating to the Status of Refugees
<b>SCSL</b>	: Special Court for Sierra Leone
<b>The COI</b>	: Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea
<b>The COI Report</b>	: Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea (2014)
<b>UN</b>	: United Nations
<b>UNHCR</b>	: United Nations High Commissioner for Refugees
<b>UNHRC</b>	: United Nations Human Rights Council