

PROSECUTION AS A MERE PRETEXT OF
PERSECUTION: GRANTING REFUGEE STATUS TO
CHINESE CITIZENS WHO FACE PROSECUTION UNDER
UNSPOKEN, UNOFFICIAL CHINESE “LAW”

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INTRODUCTION

Clara Zheng is from Zilin, China, the closest providence to the China-North Korea border.¹ For the past several years, her church in Zilin has been operating a secret safe house for North Korean defectors. Clara has read in the Korean news and international reports that many North Korean families risk their lives by crossing the river from North Korea to flee to China.² In North Korea, being a Christian is considered one of the gravest political crimes.³ Clara wondered how anyone could sit idly by and watch the Chinese government force countless starving North Korean families to repatriate.⁴ In Clara’s church, people talk about how the Chinese government may punish Chinese citizens who help North Koreans. Last month, despite the well-planned church operation, Clara’s friend who accompanied her on many operations was arrested and put in jail. Fearful of being punished by the Chinese government, Clara paid

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¹ Clara Zheng’s story as portrayed in this Article is entirely fictitious. Her story serves to illustrate the typical plight of an individual who violates Chinese law in order to aid North Korean defectors. While not every story is the exactly the same, every Chinese citizen that gives assistance to a North Korean risks much in doing so, and if caught faces serious repercussions. The story of Clara Zheng is meant to personalize for readers the challenges such people encounter regularly.

² See, e.g., *Those Who Flee: North Korean Refugees*, N. KOR. NOW, <http://www.northkoreanow.org/the-crisis/those-who-flee-north-korean-refugees> (last visited Aug. 27, 2015).

³ Human Rights Council, Rep. of the Comm’n of Inquiry on Human Rights in the Democratic People’s Republic of N. Kor. on its Twenty-Fifth Session, U.N. Doc. A/HRC/25/63, at 7–8 (Feb. 7, 2014); see also HUMAN RIGHTS WATCH, WORLD REPORT 2013: NORTH KOREA (2013), <http://www.hrw.org/world-report/2013/country-chapters/north-korea> [hereinafter WORLD REPORT 2013: NORTH KOREA] (reporting that many North Korean defectors flee to neighboring countries because of serious food shortages, insecurity, and fear of torture and inhumane treatment, political prisoner/labor camps, and execution for “vaguely defined offenses such as ‘crimes against the state and crimes against the people.’”).

⁴ See *Those Who Flee*, *supra* note 2.

\$15,000 to travel to the United States, hoping for a safe haven. She was hopeful because, in the past, the U.S. government has granted refugee status to couples that faced forced sterilization of their second child under China's One-Child Policy.⁵ However, last week, an immigration judge denied Clara refugee status and ordered her to be removed from the U.S. Her lawyer told her that the court's decision is not surprising because the U.S. does not generally grant refugee status to a Chinese citizen who aided North Korean defectors, in violation of a generally applicable law.⁶

The 108th Congress, with the assistance of President George W. Bush, acted to lend American support to the North Korean refugees by passing the North Korean Human Rights Act of 2004.⁷ The congressional act implies that the U.S. will protect, or at least endorse, groups that support North Korean human rights, including the people who feed, house, and protect North Korean defectors.⁸ Ironically, however, the U.S. government still denied refugee status to many Chinese citizens who were punished by their government for aiding North Korean defectors.⁹ The Third Circuit Court of Appeals denied refugee status to the Chinese applicants because they violated a "fairly administered [Chinese] law" and the punishment did not amount to "persecution."¹⁰ However, is there really such a law that outlaws assistance to North Korean defectors? If there is, is this Chinese law and policy in violation of certain international human rights? How should the U.S. courts analyze "persecution" by non-democratic governments like that of China and North Korea? How do diplomatic relations between the U.S. and these two countries affect America's open disapproval of China's human rights violations?

The Third Circuit has held that if a law is (1) fairly administered or (2) generally applicable to all citizens, then the presumption is that the law is legitimate and may be rightfully enforced.¹¹ In other words, if a court decides that: (1) there is a Chinese law prohibiting assistance to North Korean defectors, and (2) such law is generally applicable to

⁵ Sun Wen Chen v. Att'y Gen., 491 F.3d 100, 108–09 (3d Cir. 2007), *overruled by* Guang Lin-Zheng v. Att'y Gen., 557 F.3d 147, 157 (3d Cir. 2009).

⁶ See, e.g., Long Hao Li v. Att'y Gen., 633 F.3d 136, 137–38 (3d Cir. 2011); *but see* Xun Li v. Holder, 559 F.3d 1096, 1110–11, 1113 (9th Cir. 2009).

⁷ North Korean Human Rights Act of 2004, Pub. L. No. 108-333, 118 Stat. 1287 (codified as amended at 22 U.S.C. § 7801–7845 (2012 & Supp. I 2013)).

⁸ See *id.* § 203, 118 Stat. at 1294 (codified as amended at 22 U.S.C. § 7833 (2012 & Supp. I 2013)).

⁹ Alyce S. Ahn, Note, *Prosecution or Persecution: Contradictions Between U.S. Foreign Policy & the Adjudication of Asylum Claims Involving the Harboring of North Korean Refugees*, 24 GEO. IMMIGR. L.J. 311, 311–12 (2010).

¹⁰ Long Hao Li., 633 F.3d at 138, 141, 147.

¹¹ *Id.* at 137–38, 141.

Chinese citizens, then no protection would be granted to the applicant, whose act was the exact behavior the North Korean Human Rights Act wished to protect.¹² As a result, the courts may deny asylum/refugee status to these Chinese citizens who then might be forced to return to China, where he/she faces the possibility of punishment, often severe, for aiding the defectors.¹³

Thus, the current analysis needs to include whether prosecution was a mere pretext for persecution. Specifically, is the punishment the applicants face upon return so severe, when compared to the crime, that the prosecution amounts to persecution? This Article suggests that China might be using criminal punishment as a pretext for persecution, and the evidence is based on disproportionately severe punishment compared to the severity of the actual crime.¹⁴ Hence, even if one assumes that a Chinese law was fairly and generally applied to all of its citizens, it is possible that the Chinese citizens who aid North Korean defectors are persecuted through disproportionately severe punishment.¹⁵ This Article argues that the courts should first examine an applicant's criminal history, if any, and secondly, use a hybrid approach for granting refugee status to Chinese citizens who would be prosecuted (*vis-a-vis* persecuted) for assisting North Korean defectors. These two approaches are of paramount importance especially when the courts are uncertain whether the Chinese penal code outlaws such activity.¹⁶

Part I of the Article begins with a brief discussion of U.S. refugee law, international human rights law, applicable Chinese law, and recent U.S. case law under *Long Hao Li v. Attorney General*. Part II analyzes whether criminal prosecution of Chinese citizens who assist North Korean defectors may be a mere pretext for political prosecution. Part III argues that the U.S. courts should consider a hybrid approach; a totality of the circumstances test that considers additional grounds of appeal for a refugee application.¹⁷ The hybrid approach is juxtaposed with the

¹² See *Xun Li*, 559 F.3d at 1112–13. However, “a generally applicable law can provide the basis for withholding of removal, but only where the petitioner establishes a connection between the prosecution and his or her political opinion . . .” *Long Hao Li*, 633 F.3d at 137.

¹³ See, e.g., *Long Hao Li*, 633 F.3d at 137–38, 143–44; see also *Xun Li v. Holder*, 559 F.3d at 1112 (finding clear evidence that the Chinese petitioner would be subjected to severe punishment upon return to China).

¹⁴ *Long Hao Li*, at 151 (Roth, J., dissenting).

¹⁵ *Xun Li*, 559 F.3d at 1109 (quoting *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996)).

¹⁶ Compare *Long Hao Li*, 633 F.3d at 144 (finding “that Chinese law penalizes people who assist others who cross the border illegally”), with *Xun Li* 559 F.3d at 1098 (stating that the court has not “discovered a Chinese law that prohibits providing assistance to foreign refugees”).

¹⁷ See *Ang v. Gonzales*, 430 F.3d 50, 55–56 (1st Cir. 2005).

dominant, current approach, where refugee status is denied or granted on account of five possible grounds (race, religion, nationality, membership in a particular social group, or political opinion).¹⁸ The Article will then explain how the hybrid approach can better reflect Li's situation and better complement the international human rights standard. Part IV applies the two approaches analyzed in Parts II and III to someone in Clara's situation. Finally, the Article will discuss prospects for human rights implementation and legal development in China.

I. INTERNATIONAL HUMAN RIGHTS STANDARD AND THE U.S. REFUGEE LAW

The Attorney General may grant refugee status to an alien who has suffered past persecution or has a well-founded fear of future persecution.¹⁹ The applicant must prove that he is unable or unwilling to return to the country of origin, because of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁰

A. Persecution

Even though the United Nations Handbook on Procedures and Criteria for Determining Refugee Status does not offer a definition of persecution,²¹ U.S. courts traditionally held that persecution means that there is a subjectively genuine and objectively reasonable threat to life or freedom that an ordinary person would regard as offensive (i.e., death, torture, confinement, or extreme economic deprivation).²² Also, the harm is "inflicted either by the government of a country or by persons or an

¹⁸ See *infra* section I(B).

¹⁹ 8 U.S.C. § 1158(b)(1)(A) (2012); 8 U.S.C. § 1101(a)(42)(A) (2012); see also 8 C.F.R. § 208.13(b)(1), (b)(1)(i)(A)–(B) (2013) (stating that the well-founded fear of future persecution is presumed when suffering from a past persecution is proved; however, the government can rebut this presumption by a preponderance of evidence that the conditions in the applicant's country have changed or that the applicant is reasonably expected to relocate to another part of country).

²⁰ 8 U.S.C. § 1158(c)(2) (2012).

²¹ Michel Moussalli (Director of International Protection), *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979) [hereinafter *U.N. Handbook*].

²² 13 Am. Jur. 3D *Proof of Facts* § 4 (1991) [hereinafter *Proof of Facts*]; see also *U.N. Handbook*, *supra* note 21, ¶ 52 ("The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed.").

organization that the government was unable or unwilling to control.”²³ In regards to the objective standard of “reasonable fear,” an applicant’s testimony without corroborating evidence may be sufficient, as long as it is “credible, persuasive, and refers to specific facts.”²⁴

Still, applying a general definition of persecution is not easy for the courts, as they are tasked with the challenge of determining whether a government had a “legitimate, prosecutorial purpose” in punishing people who allegedly committed a crime.²⁵ In deciding whether a government has a legitimate ground to prosecute a person or a group, some courts have focused their analysis on whether a government has reason to believe that the person was engaged in criminal activity.²⁶ Other courts have focused on whether a government has undertaken “any formal prosecutorial measures” regarding the actions committed.²⁷ A marginally smaller number of courts have also discussed whether a government was driven by a political motive in excessively or arbitrarily punishing a person.²⁸

B. Five Grounds of Persecution

An applicant may prove persecution on the grounds of “race, religion, nationality, membership in a particular social group, or political opinion.”²⁹ Currently, an application is either granted or denied based on an enumerated ground.³⁰ An applicant alleging the ground of political opinion must prove that:

- (1) the applicant has expressed a political opinion either overtly or by participating in political activities[;] . . .
- (2) the applicant’s opinion or activities are known, or have a likelihood of becoming

²³ *Proof of Facts*, *supra* note 22, § 4.

²⁴ *Tafreshi v. McElroy*, 112 F.3d 505, No. 96-2755, 1997 WL 234670, at *2 (2d Cir. 1997) (unpublished table decision) (quoting *Melendez v. U.S. Dep’t of Justice*, 926 F.2d 211, 215 (2d Cir. 1991); 8 C.F.R. § 208.13(a) (2013); *see also* *Doptante v. INS.*, 198 F.3d 253, No. 97-71408, 1999 WL 801509, at *1 (9th Cir. 1999) (unpublished table decision); *Velis v. INS.*, 47 F.3d 1178, No. 94-9526, 1995 WL 66536, at *3-4 (10th Cir. 1995) (unpublished table decision).

²⁵ *Proof of Facts*, *supra* note 22.

²⁶ *Ramirez Rivas v. INS.*, 899 F.2d 864 (9th Cir. 1990), *vacated*, 502 U.S. 1025 (1992) (mem.).

²⁷ *Blanco-Lopez v. INS.*, 858 F.2d 531, 534 (9th Cir. 1988) (holding that a government’s prosecution is “legitimate” if it has undertaken “formal prosecutorial measures”), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, *as recognized in* *Parussimova v. Mukasey*, 555 F.3d 734, 739-40 (9th Cir. 2008).

²⁸ *See, e.g., Ramirez Rivas*, 899 F.2d at 868 (citing *U.N. Handbook*, *supra* note 21, ¶ 85).

²⁹ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 241, 110 Stat. 3009, 583.

³⁰ *Proof of Facts*, *supra* note 22, § 2.

known, to the persecutor[; and] (3) the persecutor . . . has or is likely to persecute the applicant because of his or her political opinion or activity.³¹

Secondly, in order for applicants to allege social group membership they must prove that a government persecuted them based on their “similar background, habits, or social status.”³² Specifically, “particular social group [membership] may be at the root of persecution,” when the government represses certain organized religions and often equates religious connection as evidence of disloyalty to the government.³³

Thirdly, proving persecution on religious grounds requires an applicant to show the (1) government’s awareness of the applicant’s religious beliefs; (2) “special, individualized circumstances exist which increase the likelihood that [she would be] singled out for persecution beyond some general threat of harm affecting the entire population of the country;” (3) government’s past acts of punishment of members in her religious group; and (4) history of receiving specific threats due to her religious beliefs.³⁴

Fourth, race-based persecution is alleged when one’s race is being persecuted in his or her home country. Similarly, nationality-based persecution could be proven when there are “adverse attitudes and measures directed against a national ethnic [or] linguistic minority.”³⁵

C. *International Human Rights Standard*

The enumerated grounds for refugees are reflected in international human rights law and its developmental history. At the end of the Second World War, in 1948, the UN General Assembly adopted the Universal Declaration of Human Rights.³⁶ In that year, before Mao established his Communist Party, China adopted the Universal Declaration of Human Rights.³⁷ At that time, China declared that a citizen “has the right to

³¹ *Id.* § 10.

³² *U.N. Handbook*, *supra* note 21, ¶ 77.

³³ *Id.* ¶ 78.

³⁴ *Proof of Facts*, *supra* note 22, § 7.

³⁵ *U.N. Handbook*, *supra* note 21, ¶¶ 68–70, 74.

³⁶ United Nations, *The Universal Declaration of Human Rights: History of the Document*, <http://www.un.org/en/documents/udhr/history.shtml> (last visited Sept. 12, 2015); G.A. Res. 217 (III)A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

³⁷ Greg Moore, Book Note, *China’s Cautious Participation in the UN Human Rights Regime*, 1 HUM. RTS. & HUM. WELFARE 23 (2001) (reviewing ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE (1999)); *see also* U.S. DEP’T OF STATE, OFFICE OF THE HISTORIAN, *The Chinese Revolution of 1949*, <https://history.state.gov/milestones/1945-1952/chinese-rev> (last visited Oct. 14, 2015).

freedom of thought, conscience and religion . . . to change his religion or belief, and . . . to manifest his religion or belief in teaching, practice, worship and observance.”³⁸ When Mao’s Chinese Communist Party (CCP) first came into power, Chinese scholars and the government largely disregarded the international human rights standard.³⁹ For example, Chinese scholar Ch’ien Szu opined that the concept of human rights is a construct of “imperialism” and that what human rights are “intend[ed] to protect are the rights of the bourgeoisie to enslave and to oppress the laboring people.”⁴⁰ Even though China is a signatory on several international U.N. conventions, this does not necessarily indicate that China will prescribe a law consistent with international standards. Chiu Hungdah, professor at the University of Maryland School of Law, was concerned that some of China’s legislation and practices “are clearly inconsistent with certain human rights standards.”⁴¹

Three years later in 1951, the United Nations adopted the Refugee Convention (the “Convention”). The Convention recognized the right of the persecuted people to seek asylum.⁴² While China eventually signed onto the Convention, it took thirty-one years to do so.⁴³ Notably, even after signing onto the Convention, China maintained reservations.⁴⁴ Further, even after adopting the Convention, China consistently chose to continue repatriating North Korean defectors.⁴⁵

D. Chinese Law

Rather than abiding by international law to protect North Korean defectors as refugees, China characterizes the North Korean defectors as

³⁸ UDHR, *supra* note 36, art. 18.

³⁹ Hungdah Chiu, *Chinese Attitudes Toward International Law of Human Rights in the Post-Mao Era*, in CHINESE POLITICS FROM MAO TO DENG, 237–70 (Victor C. Falkenheim & Ilpyong J. Kim eds., 1989), reprinted in 94 OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMPORARY ASIAN STUDIES 5, 1, 24 (Hungdah Chiu, ed., 1984).

⁴⁰ *Id.* at 3–4 (quoting Ch’ien Szu, *Pipan Zichanjicji Guojifa Zai Jumin Wentishang De Zhuzhang*, 5 GUOJI WENTI YANJUI 40 (1960) translated in 1 JEROME ALAN COHEN & HUNGDAH CHIU, PEOPLE’S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 906 (1974)).

⁴¹ *Id.* at 21.

⁴² Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 28, 1951, 189 U.N.T.S. 138 [hereinafter 1951 Convention on the Status of Refugees].

⁴³ See UNITED NATIONS TREATY COLLECTION, Status of Treaties: Refugees and Stateless Persons, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en (last visited Sept. 11, 2015).

⁴⁴ *Id.*

⁴⁵ See *infra* section I(D).

“illegal economic migrants.”⁴⁶ In a sense, this means that the people who escape from the authoritarian ruling of North Korea are analogized to Mexicans who cross the U.S. border for better economic opportunities.⁴⁷ In 1998, China and the Democratic People’s Republic of Korea (DPRK/North Korea) signed the Bilateral Agreement on Mutual Cooperation for the Maintenance of State Safety and Social Order.⁴⁸ Under the bilateral agreement, China is obligated to repatriate the North Korean defectors who crossed the border.⁴⁹ A local Jilin province law also “requires the return of North Koreans who entered the province illegally.”⁵⁰ The law does not address any remedy for the North Koreans, who risk their lives to flee their homeland.

Further, nor does the law address the treatment that the defectors would face upon their repatriation. In North Korea, leaving the country without permission is considered a criminal offense that is punishable by death.⁵¹ According to Professor Cheng Gan-Yuan, former criminal law professor at the Nanjing Normal University School of Law, there is no penal code that provides any guideline on how much, if at all, those who are caught aiding North Korean defectors should be punished.⁵² Nevertheless, in an attempt to avoid criticism and judgment for ignoring human rights, the Chinese government has refused the United Nations High Commissioner for Refugees (UNHCR) any access to North Koreans residing inside its borders.⁵³ Even the U.S. Congress’s recommendation to the UNHCR to initiate arbitration proceedings with the Chinese government did not succeed in changing China’s attitude toward the UNHCR Commissioners.⁵⁴

⁴⁶ WORLD REPORT 2013: NORTH KOREA, *supra* note 3.

⁴⁷ Roberta Cohen, *Legal Grounds for Persecution of North Korean Refugees*, BROOKINGS (Fall 2010), <http://www.brookings.edu/research/opinions/2010/09/north-korea-human-rights-cohen>.

⁴⁸ KOREA INST. FOR NAT’L UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2011, 257–58 (Center for North Korean Human Rights Studies ed. 2011) [hereinafter WHITE PAPER].

⁴⁹ *China’s Repatriation of North Korean Refugees: Hearing Before the Cong.-Exec. Comm’n on China*, 112th Cong. 2 (2012) [hereinafter *Hearing*] (prepared statement of T. Kumar, Director for International Advocacy, Amnesty International); *see also id.* at 3 (opening statement of Rep. Chris Smith, Chairman, Cong.-Exec. Comm’n on China).

⁵⁰ Cohen, *supra* note 47.

⁵¹ *See* AMNESTY INT’L, Pub. No. ASA 24/002/2009, NORTH KOREA: FREEDOM OF MOVEMENT, OPINION AND EXPRESSION (2009); *see also* KOREA INST. FOR NAT’L UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2014, 565 (Center for North Korean Human Rights Studies ed. 2014).

⁵² *Xun Li v. Holder*, 559 F.3d 1096, 1110 (2009).

⁵³ CONG.-EXEC. COMM’N ON CHINA, 109TH CONGR., ANN. REP. 113 (2005).

⁵⁴ North Korean Human Rights Act of 2004, Pub. L. No. 108-333, § 304, 118 Stat. 1287, 1296 (codified at 22 U.S.C. § 7844 (2012)).

Certainly, North Korean defectors are not the only group whose human rights are violated by China. China fines and jails anyone discovered assisting the defectors as well.⁵⁵ For example, citizens of South Korea, America, and Japan have been imprisoned for sheltering and assisting North Korean refugees.⁵⁶ This track record reflects the sentiment that the Chinese government has toward the act of helping North Korean defectors: disapproval, regardless of nationality. In addition to the Bilateral Agreement and the Jilin local law, such records and personal testimonies demonstrate the China has not protected refugees, which is exactly what they agreed to do by signing the 1951 Refugee Convention and the UDHR. Thus, the Bilateral Agreement and the Jilin law are *de facto* violations of both international treaties.⁵⁷

Such records and personal testimonies, in addition to the Bilateral Agreement and the Jilin local law, demonstrate the fact that China has not protected refugees, which is exactly what they agreed to do by signing the Convention and the UDHR.⁵⁸ Thus, the Bilateral Agreement and the Jilin law are *de facto* violations of both international treaties.⁵⁹

E. Long Hao Li v. Attorney General

Long Hao Li, an ethnic Korean and a Chinese citizen who was denied refugee status in the U.S. From 2004 to 2006, drove numerous times to the Chinese border to escort North Korean refugees who had just crossed the river into Chinese territories. He transported them to a contact person, who arranged food, shelter, and work for the refugees. In May 2006, Li was carrying out another rescue mission. As he waited in his car for his colleague to bring the refugees, the Chinese police arrested the refugees and Li's colleagues. His colleague was sentenced to a ten-year jail term. When police came to the scene, Li quickly ran away and hid in a friend's house for ten days. During that time, his contact person (who provided food, shelter, and work for the refugees) also got arrested. Thereafter, the police came to Li's house and asked his mother of Li's

⁵⁵ See North Korean Freedom Coalition, *The List of North Korean Refugees & Humanitarian Workers Seized by Chinese Authorities* (2013), www.nkfreedom.org/UploadedDocuments/THelist2013_English.pdf.

⁵⁶ *Id.* at 2, 18–19 (“China’s illegal repatriation policy and its refusal to work with the UNHCR has led to North Koreans, who are fleeing starvation and persecution, to be further victimized: 70 to 90% of female refugees are subjected to sexual trafficking sold as ‘wives’ to Chinese men, forced into prostitution or into internet pornography.”).

⁵⁷ Human Rights Watch, *The Invisible Exodus: North Koreans in the People’s Republic of China*, 14 NORTH KOREA, Nov. 2002, at 5 n. 8, 16; Cohen, *supra* note 47.

⁵⁸ Human Rights Watch, *The Invisible Exodus: North Koreans in the People’s Republic of China*, 14 NORTH KOREA, Nov. 2002, at 5 n. 8, 16; Cohen, *supra* note 47.

⁵⁹ Human Rights Watch, *The Invisible Exodus: North Koreans in the People’s Republic of China*, 14 NORTH KOREA, Nov. 2002, at 5 n. 8, 16.

whereabouts.⁶⁰

The immigration judge concluded that Li should not be removed from the U.S. because he was likely to face severe punishment upon returning to China, and the police search for Li was an indication of the government's knowledge of Li's actions.⁶¹ However, the Board of Immigration Appeals (BIA) reversed the immigration court's holding. First, the BIA reasoned that Li would be subject to a "legitimate government [crime] investigation" effort, "not persecution."⁶² Second, there was no "clear probability of persecution," meaning the likelihood that Li would be subjected to persecution did not meet the "more likely than not" standard.⁶³ The BIA explained that there was a lack of evidence to show that the Chinese government was aware of Li's activities.⁶⁴ Further, it was not clear whether the government "still maintained an interest in persecuting" Li.⁶⁵ On appeal, the Third Circuit Court of Appeals affirmed the BIA's decision: the court held that there was insufficient evidence to show that Li would be prosecuted on account of political opinion.⁶⁶ Also, the court acknowledged that while "direct proof of [the] persecutors' motives" is not necessary, there must be some circumstantial evidence to demonstrate that the persecutors were politically motivated to punish Li.⁶⁷

I. PROSECUTION AS A MERE PRETEXT OF PERSECUTION

A. *Clear Probability*

In *Long Hao Li*, the majority decision of the Third Circuit Court of Appeals said that there was no clear probability that Li would be prosecuted for political opinions, because Li neither testified to his political opinions nor proved the government's awareness of his political stance. The court further held that the police only visited his house once and he received a Chinese passport without difficulty.⁶⁸ However, circumstantial evidence suggests that there is clear probability of Li's persecution; the "clear probability" test is met as long as it is "more likely

⁶⁰ *Long Hao Li v. Att'y Gen.*, 633 F.3d 136, 137, 139 (3d Cir. 2011).

⁶¹ *Id.* at 139.

⁶² *Id.* at 140 (quoting the record of the lower court's unpublished holding).

⁶³ *Id.* (quoting *INS v. Stevic*, 467 U.S. 407, 429–30 (1984)).

⁶⁴ *Id.* at 140.

⁶⁵ *Id.*

⁶⁶ *Id.* at 146 (affirming the BIA's finding of a lack of political motivation on the part of the Chinese government).

⁶⁷ *Id.* at 141 (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

⁶⁸ *Id.* at 147.

than not” that Li would suffer persecution.⁶⁹ Definitive evidence of persecution need not be proven.⁷⁰ First, Li’s two colleagues were arrested and then the police came to look for Li shortly thereafter.⁷¹ The chronology of the events following Li’s association reveals that the police knew about Li’s activities and the police wanted to capture everyone involved in the association. Second, when Li applied to get a passport, a paid “broker” (possibly a person with a connection in the Chinese embassy) helped him secure a passport.⁷² In fact, securing a passport without difficulty does not ensure Li’s safety once he returns to China. The circumstances together indicate that the government had indeed been searching for Li after his colleagues were apprehended and imprisoned. Thus, the court should reconsider the likelihood of Li’s persecution.

[T]he ten years of imprisonment that Li potentially faces indicates how severely China may punish such conduct and renders it unlikely that China would disregard such a perceived offense. Moreover, there is no evidence in the record that China’s interest in persecuting Li has lessened with time, nor of any amelioration in China’s treatment of those who assist North Korean refugees.⁷³

B. Persecution

The Third Circuit Court of Appeals has held that if a law was (1) fairly administered or (2) generally applicable to all citizens, there is a presumption that the law is legitimate and may be rightfully enforced.⁷⁴ However, determining whether a law was “fairly administered” requires the courts to scrutinize the severity of the crime in conjunction with the punishment for the crime.⁷⁵ This analysis is designed to establish whether the punishment was rightful prosecution or a pretext for persecution.⁷⁶

1. National Policy and the Absence of Law Hints at China’s Political Motivation

In analyzing the fair administration of law, examination of the

⁶⁹ See *id.* at 140.

⁷⁰ *Id.* at 141.

⁷¹ *Id.* at 139.

⁷² See *id.* at 149 (Roth, J., dissenting). The identity and the specific mission of a paid “broker” are unclear from the case, except to suggest that Li did not procure a passport on his own.

⁷³ *Id.* at 150 (Roth, J., dissenting).

⁷⁴ *Id.* at 141, 144.

⁷⁵ *Id.*

⁷⁶ *Id.*

history and the context of the law at issue is as important as the factual analysis. The Ninth Circuit has already examined whether there is a Chinese law that penalizes individuals who assist North Korean defectors.⁷⁷ The Third Circuit has acknowledged that the Chinese law forbids smuggling of North Koreans into China.⁷⁸ However, there is no law or penal code that outlaws assisting North Koreans who have already entered China:

In a sworn affidavit, UC Berkeley School of Law Professor Robert C. Berring, who specializes in Chinese law and the Chinese legal system, attested that, to his knowledge, “there is no published law forbidding Chinese citizens from providing food and comfort to illegal aliens.” Similarly, Professor Cheng Gan-Yuan, a specialist in Chinese criminal law who lived most of his life in China and formerly taught at the Nanjing Normal University School of Law, swears unequivocally that there “is no criminal law of any kind (written or verbal, formal or informal) in China prohibiting citizens from providing food, water, shelter, social assistance or other assistance to individuals who entered China illegally from another country.”⁷⁹

This means that Li’s actions cannot be characterized as illegal conduct *per se*, because there is no Chinese law outlawing assistance and Li did not smuggle the defectors. Furthermore, neither the courts nor the U.S. prosecutors could identify such law.⁸⁰ It is true that Li thought himself to be engaging in an illegal activity. Still, his subjective belief does not deem his action illegal, as it was based on general knowledge that the Chinese government has been imprisoning or punishing people who engaged in the same activity as Li.⁸¹ The lack of Chinese law on this issue indicates that China has been punishing individuals who help North Korean defectors without any legal support.⁸² Because of this, it is fair to conclude that Li deserves protection from this punishment, since he did not even violate any technical law.

Ironically, the Third Circuit Court of Appeals concluded that there was no evidence that China was politically motivated to “silence or punish [the] political dissent” of Li⁸³ because Chinese law in fact does exist that permits Li to be prosecuted. Here, the court made a deliberate,

⁷⁷ *Xun Li v. Holder*, 559 F.3d 1096, 1098 (9th Cir. 2009).

⁷⁸ *Long Hao Li*, 633 F.3d at 137.

⁷⁹ *Xun Li*, 559 F.3d at 1110.

⁸⁰ *Long Hao Li*, 633 F.3d at 147–48 (Roth, J., dissenting).

⁸¹ *See id.* at 143–44.

⁸² *See Xun Li*, 559 F.3d at 1110.

⁸³ *Long Hao Li*, 633 F.3d at 144.

paradigmatic shift in the issue. The court reasoned that because there *was* a legal basis, and the law was generally applicable, Chinese authorities could have no possible political motivation to punish Li should he return to China.⁸⁴ Yet, contrary to the court's majority opinion, Li's actions were protected from prosecution precisely because there was no Chinese law that prohibited him for assisting others; and therefore, the only possible motivation for punishing him—should he return to China—would be *ipso facto* political.⁸⁵ Li's potential political persecution is further evinced by that fact that while China may not have a penal code outlawing Li's actions *per se*, the punishment of such activities is consistent with China's bilateral agreement with North Korea.⁸⁶ Accordingly, the agreement implied that China would have to fight the counter-efforts of those who are helping the defectors—people like Li.⁸⁷ Since the bilateral agreement is so closely connected to the complex foreign relations between China and North Korea, it is not an overstatement to say that China would be politically motivated to punish Li is forced to return to China.

Still, the majority opinion concluded that China's punishment of those who assist North Korean defectors was a rational action.⁸⁸ The policy is reasonable, says the majority, because China sought to respond to an immigration problem caused by illegal economic migrants from North Korea.⁸⁹ However, the court failed to address the human rights implications of this seemingly rational economic policy. A 2005 report by the Congressional Executive Commission on China explained that, under international law, many of these illegal economic migrants from North Korea would be classified as "traitors" for defecting and face persecution upon their return to North Korea.⁹⁰ These so-called traitors, however, are often women and children who, regardless, end up in human trafficking, prostitution, and domestic violence—hardly an economic benefit to a defector.⁹¹ Despite this disheartening reality, China asserts that the defectors are illegal economic migrants who negatively affect China's economy.⁹² Subsequently, the government refuses to give the UNHCR

⁸⁴ *Id.* at 144–45.

⁸⁵ *Long Hao Li*, 633 F.3d at 147–50 (Roth, J., dissenting).

⁸⁶ WHITE PAPER, *supra* note 48, at 257–58.

⁸⁷ *See Hearing*, *supra* note 49.

⁸⁸ *Long Hao Li*, 633 F.3d at 144.

⁸⁹ *Id.*

⁹⁰ CONG.-EXEC. COMM'N ON CHINA, *Supra* note 53, at 114.

⁹¹ *Id.* at 113.

⁹² *Id.* at 6; *see also* Yu Bin Kim, *North Korean Defectors in China: Illegal Economic Migrants or Refugees?*, STAN. INT'L POL'Y REV. (July 10, 2014), <http://www.stanfordpolicyreview.org/international-security-and-cooperation/north-korean-defectors-in-china-illegal-economic-migrants-or-refugees/>.

access to the defectors, because they are technically migrants, not refugees.⁹³ Given the lack of protection for the defectors who are considered as illegal economic migrant, the court must understand the context of China's rational economic policy against North Korean defectors. Explicitly, this Chinese policy is a scheme to circumvent the international human rights standard.⁹⁴ This context is especially important when (1) the North Korean defectors are repatriated to North Korea under the title of illegal economic migrants, only to face severe punishment; and (2) the people who provided assistance to the defectors are punished and imprisoned.

It is not the focus of this Article to redress the accommodation of North Korean defectors and the international community's accountability. Again, China may have a valid argument that assisting North Korean defectors subverts its foreign policy with North Korea and dwindles the Chinese economy.⁹⁵ Nevertheless, the political persecution of Chinese citizens, who have to assist others in need under the guise of criminal prosecution due to a feigned economic fear, should be acknowledged as a human right violation. Thus, in the following section, this Article will address that the court's reasoning is misguided, even under an assumption that the purported Chinese law and rational policy exist, because potentially prosecuting Li amounts to politically-motivated persecution by the Chinese government.

2. Existence of the Law and Policy Does Not Prove the Absence of Persecution

Even if we assume that Li violated a Chinese law, a court must first analyze whether the law was (1) fairly administered or (2) generally applicable to all citizens.⁹⁶ Persecution and prosecution are two distinguishable concepts.⁹⁷ A mere existence of law and policy must not equate with the absence of persecution. A law should be considered fairly administered if the punishment is not severely disproportionate to the crime:

While enforcement of a law of general applicability—even against an offender who objects to the law because of his political

⁹³ CONG.-EXEC. COMM'N ON CHINA, *Supra* note 53, at 6.

⁹⁴ See Jeanyoung Jeannie Cho, Note, *Systemizing the Fate of the Stateless North Korean Migrant: A Legal Guide to Preventing the Automatic Repatriation of North Korean Migrants in China*, 37 FORDHAM INT'L L.J. 177, 204–05 (2013).

⁹⁵ Yu Bin Kim, *supra* note 92; see CONG.-EXEC. COMM'N ON CHINA *supra* note 53, at 6.

⁹⁶ Long Hao Li v. Att'y Gen., 633 F.3d 136, 141, 144 (3d Cir. 2011).

⁹⁷ See generally Jin Jin Long v. Holder, 620 F.3d 162, 166 (2d Cir. 2010).

opinion—might not be on account of a protected ground, pretextual prosecution on the basis of political opinion is. . . . [D]isproportionately severe punishment may indicate that a prosecution is a mere pretext for persecution.⁹⁸

For example, when China first began to crackdown on Chinese citizens helping the North Korean defectors, they were subjected to a \$3,600 fine.⁹⁹ In the past, the Third Circuit decided that eight days in confinement can be characterized as a deprivation of freedom and that a one year imprisonment is sufficiently severe.¹⁰⁰

In comparison, Li feared that if he were sent back to China, he would face the same severe punishment as his colleagues, and be sentenced to ten-years of imprisonment.¹⁰¹ It is not reasonable to believe that the ten-year imprisonment is proportionate to \$3,600 fine. If a one week imprisonment can be characterized as sufficiently severe, then a ten year imprisonment by a communist government should also be characterized as sufficiently severe.¹⁰² The analysis of disproportionate punishment demonstrates that the persecution of Li operates under the guise of government “prosecution” (for violating China’s law or policy).¹⁰³ As a result, Long Hao Li’s case should have been remanded, as there is evidence that suggests that the punishment of those who gave aid to North Koreans was a mere pretext for persecuting the North Korean human rights supporters.¹⁰⁴

3. Hopeful Lesson from the Forced Sterilization Precedent

In 1996, The Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA) amended the Immigration and Nationality Act (INA) § 101(a)(42) to provide that a woman who is forced to undergo involuntary sterilization, or who is persecuted for refusing to comply with a coercive population control program, is being persecuted for her political

⁹⁸ *Long Hao Li*, 633 F.3d at 151 (Roth, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 342 (3d Cir. 2008) (the applicant was detained by the Revolutionary Armed Forces of Colombia (FARC), a Marxist-Leninist group in Colombia); *Chang v. INS*, 119 F.3d 1055, 1067 (3d Cir. 1997), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, *as recognized in Long Hao Li v. Att’y Gen.*, 633 F.3d 136, 153 n.4 (2011).

¹⁰¹ *Long Hao Li*, 633 F.3d at 149 (Roth, J., dissenting).

¹⁰² *Id.*

¹⁰³ *Id.* at 152 (Roth, J., dissenting).

¹⁰⁴ *Id.* at 152–53, 153 n.9 (Roth, J., dissenting) (“[T]he case should be remanded to consider whether the prosecution Li fears is a mere pretext for persecution.”).

opinion.¹⁰⁵ While the BIA will examine each situation on a case-by-case basis, Chinese parents of two or more children may qualify as refugees under this provision. Accordingly, the evidence must show that: (1) the births of the children “violated family planning policies” based on the applicant’s local normative standard and that (2) the applicant has a “well-founded fear of persecution” by the current local family-planning enforcement efforts.¹⁰⁶ Initially, the U.S. government allocated a quota of one thousand persons per year who may be granted asylum/refugee status under this provision.¹⁰⁷ However, in 2006, the REAL ID Act eliminated the quota.¹⁰⁸ Consequently, the United States imposed a “higher standard of proof” for the asylum applicants to meet, which made it easier for judges to reject asylum or refugee applications *vis-a-vis* the One-Child policy.¹⁰⁹

This was a remarkable advancement for the international human rights standard, as it triumphed over a country’s legitimate policy. China’s One-Child policy was a rational decision for population control, resource allocation, food scarcity, and limited job market in China.¹¹⁰ Furthermore, the people supported the policy. A poll finding of “the 2008 Pew Global Attitudes Survey in China” acknowledged that seventy-six percent of Chinese citizens supported the One-Child policy, as the law was seen as helping the economy.¹¹¹ Despite the acknowledgement that China’s One-Child policy is a rational policy and a generally applicable law, the United Nations High Commissioner for Refugees (UNHCR) saw this law as a coercive family planning measure in violation of international human

¹⁰⁵ Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009, 3009x545, 3009x688 (1996).

¹⁰⁶ *Matter of J-H-S*, 24 I&N Dec. 196, 197–98 (B.I.A. 2007).

¹⁰⁷ Omnibus Consolidated Appropriations Act, *supra* note 105, § 601(b)(5).

¹⁰⁸ REAL ID Act of 2005, Pub. L. No. 109-13, § 101(g)(2), 119 Stat. 231, 301, 304–05 (2005).

¹⁰⁹ NAFSA: ASS’N OF INT’L EDUCATORS, *REAL ID Act and New Immigration Provisions* (May 11, 2005), http://www.nafsa.org/Resource_Library_Assets/Public_Policy/REAL_ID_Act_and_New_Immigration_Provisions.

¹¹⁰ Julie Grønberg Franck, et al., *Human Development and the One-Child Policy* (计划生育政策) 1, 33, <http://rudar.ruc.dk/handle/1800/7084> (Jan. 16, 2012) (unpublished thesis, Roskilde University House) (on file with Roskilde University Digital Archive, Roskilde University House) (“[I]f people could not make rational decisions about reproducing (or not reproducing), overpopulation would result in famine, diseases and war as a natural way of decreasing the size of the population and re-establishing the ideal balance of resources.”).

¹¹¹ Tom Blackwell, *Chinese Woman Opposed to One-Child Policy Given Asylum in Canada – Despite Having No Children*, NAT’L POST, June 20, 2013, <http://news.nationalpost.com/2013/06/20/childless-chinese-woman-granted-canadian-refugee-status-over-that-countrys-one-child-policy>; see The Pew Global Attitudes Project, *The 2008 Pew Global Attitudes Survey in China: The Chinese Celebrate Their Roaring Economy, as They Struggle With its Costs Near Universal Optimism About Beijing Olympics*, PEW RES. CTR. 5 (Tuesday, July 22, 2008, 2:00 PM EDT), <http://www.pewglobal.org/files/pdf/261.pdf>.

rights.¹¹² Subsequently, the U.S. decided to protect Chinese married couples who feared forced sterilization under the One-Child Policy.¹¹³ Currently, the discussion is not limited to forced sterilization, but it also includes China's other population control measures. For example, in 2011, the Second Circuit Court of Appeals remanded *Mei Fun Wong v. Holder* to the BIA to consider whether involuntary insertion of intrauterine devices (IUD) is considered persecution that violates the Convention.¹¹⁴

Compared to China's One-Child Policy, which is an explicit law based on a strong policy rationale, China does not have an explicit law or official policy that sanctions individuals from giving assistance to North Koreans.¹¹⁵ Moreover, compared to popular support for the One-Child Policy throughout China, no such extent of support is exhibited for punishing people like Li. Chinese citizens usually have insufficient information about what is happening in North Korea, and Chinese citizens just think of North Koreans as "people from the neighboring country."¹¹⁶ In fact, many churches inside and outside of China are working in coalition to protect and accommodate vulnerable North Korean defectors.¹¹⁷ China's unofficial policy for punishing those who aid North Korean defectors brings significant implications. Specifically, the implication extends not only to human rights violations in North Korea and China but also to the role of America and the U.N. in upholding international human rights. Further, this issue calls for a careful approach because of the triangulated relationship between China, North Korea, and America in the present time and into the future.

In analyzing the context of China's law and policy, the courts must acknowledge both China's rationale for economic well-being and border control and the international human rights law. First, it may be helpful for the courts to realize the extent of human rights violations when North Korean defectors are repatriated and when others try to assist the

¹¹² DEPT. OF INT'L PROT., *UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies*, THE UN HIGH COMMISSIONER FOR REFUGEES (UNHCR): THE UN REFUGEE AGENCY 3 (Aug. 2005), <http://www.refworld.org/docid/4301a9184.html>.

¹¹³ *Id.* at 12.

¹¹⁴ *See generally* *Mei Fun Wong v. Holder*, 633 F.3d 64, 65–66, 75–76 (2d Cir. 2011).

¹¹⁵ *Xun Li v. Holder*, 559 F.3d 1096, 1111 n.15 (9th Cir. 2009).

¹¹⁶ Corinne Dillon, *Chinese on North Korea Border Unaware of Conditions in Secretive Dictatorship*, FOX NEWS, Feb. 3, 2014, <http://www.foxnews.com/world/2014/02/03/chinese-on-north-korea-border-unaware-conditions-in-secretive-dictatorship>.

¹¹⁷ *See, e.g.*, Joseph Kim, *How I Escaped from North Korea: And the Crucial Role the Chinese Church Played*, CHRISTIANITY TODAY, May 26, 2015, <http://www.christianitytoday.com/ct/2015/may/how-i-escaped-north-korea.html?type=prev&number=25&id=128926&start=4>.

defectors.¹¹⁸ The treatment of North Korean defectors upon their return to North Korea is a blatant violation of the international human rights standard, and they are refugees, who deserve protection outside North Korea.¹¹⁹ For example, since Kim Jong-Un's succession as North Korea's supreme leader in December 2011, the country still suffers from dire human rights violations and outsiders can only imagine the extent of the people's sufferings.¹²⁰ Inside China, individuals who assist North Koreans are not the only ones subjected to persecution. The Chinese Communist Party (CCP) and the Chinese government have used severe penalties to discourage human rights lawyers, such as Gao Zhisheng.¹²¹ This evidence shows that the court failed to look at a dark facet of the legal and policy effects: the unspeakable struggles of the North Korean defectors, and human rights groups and advocates that help them.

Then, the courts should examine how individuals like Li are fighting to uphold the international human rights standard. They steadfastly carry out their mission, despite the deterrent measures of the Chinese government. Notwithstanding the lack of an adequate system to protect people fighting on behalf of the refugees, their efforts continue today.¹²² While people like Li are denied refugee status in the U.S., it is too early to give up hope. In fact, even though the One-Child policy is a rational population-control law, the U.S. decided that a country's rational policy could be defeated by the international human rights standard.¹²³ With growing international awareness and concern for human rights of Chinese human rights activists and North Koreans in China, the courts and the U.S. government should not be afraid to explore the thinly masked reality of China's policy and the manner of implementation of the law.

¹¹⁸ Long Hao Li v. Att'y Gen., 633 F.3d 136, 149 (3d Cir. 2011); *see generally* HUMAN RIGHTS WATCH, WORLD REPORT 2015: NORTH KOREA 408, 411–12, https://www.hrw.org/sites/default/files/wr2015_web.pdf.

¹¹⁹ *See generally* WORLD REPORT 2013: NORTH KOREA, *supra* note 3.

¹²⁰ *Id.*

¹²¹ Elizabeth Lynch, *The Rule of Law and China's Recent Assault on Lawyers*, THE WORLD POST (Feb. 21, 2011), http://www.huffingtonpost.com/elizabeth-lynch/reality-or-myth-chinas-ru_b_825921.html http://www.huffingtonpost.com/elizabeth-lynch/reality-or-myth-chinas-ru_b_825921.html (detailing how Gao was tortured for over fifty days and whose whereabouts were not disclosed for fourteen months); *see generally* GAO ZHISHENG, A CHINA MORE JUST: MY FIGHT AS A RIGHTS LAWYER IN THE WORLD'S LARGEST COMMUNIST STATE 221 (2007).

¹²² HUMAN RIGHTS WATCH, WORLD REPORT 2015: CHINA, 155, 155, <https://www.hrw.org/world-report/2015/country-chapters/china-and-tibet> [hereinafter WORLD REPORT 2015: CHINA].

¹²³ G.A. Res. 217 (III) A, Art. 16, ¶ 1 Universal Declaration of Human Rights (Dec. 10, 1948); Sean T. Masson, Note, *Cracking Open the Golden Door: Revisiting U.S. Asylum Law's Response to China's One-Child Policy*, 37 HOFSTRA L. REV. 1135, 1168 (2009).

II. HYBRID APPROACH

This section of the Article advocates the hybrid approach, which combines two or more bases for granting refugee status. The hybrid approach is contrasted with the current dominant approach, where the courts consider only one ground upon which an asylum/refugee status could be granted. Still, the approach should not be used in every case because that could result in inconsistent or arbitrary holdings.¹²⁴ Yet, under certain circumstances, the hybrid approach may better reflect an applicant's situation than the dominant approach. One instance is when the text of laws is not available to their citizens and the U.S. government or courts.¹²⁵ Such instance may arise when a court seeks laws and motives of non-democratic countries, like China and North Korea. The hybrid approach is not entirely new.¹²⁶ As an illustration, in *Ang v. Gonzales*, the First Circuit Court of Appeals ruled that the immigration court judge adequately considered the applicant's hybrid claim.¹²⁷ The judge considered both Ang's support for the democratic FUNCINPEC party¹²⁸ as well as the communist government (political opinion) and his membership in a group called Cambodian Supporters of the United States (social group membership).¹²⁹ In considering two bases for persecution, both the applicant and the court focused on the political opinion as the primary reason, and then, social group membership as the secondary reason.¹³⁰ While the social group membership aspect was weaker and "less clear-cut" than the political opinion, the political opinion by itself lacked credibility.¹³¹ Notwithstanding, the fusion of the two strengthened Ang's overall case and the court was allowed to consider the hybrid claim.

As in *Ang v. Gonzales*, Li may qualify under additional bases for persecution, in addition to the primary claim of political opinion. First, in regards to the basis of political opinion, the court held that Li does not have sufficient evidence to prove his application.¹³² Chinese legal experts

¹²⁴ See, e.g., *Ang v. Gonzales*, 430 F.3d 50, 56 (1st Cir. 2005).

¹²⁵ *Long Hao Li v. Att'y Gen.*, 633 F.3d 136, 150 (3d Cir. 2011); see, e.g., *Xun Li v. Holder*, 559 F.3d 1096, 1110 (9th Cir. 2009).

¹²⁶ See, e.g., *Ang*, 430 F.3d 50, 56 (holding that the hybrid claim was properly considered by the immigration judge).

¹²⁷ *Id.* at 56.

¹²⁸ *Id.* at 54.

¹²⁹ *Id.* at 55–56 (“Although the IJ focused primarily on Ang’s political opinion claim, he also took account of Ang’s social group membership claim Both Ang’s asylum application and his trial testimony stressed the former claim.”).

¹³⁰ *Id.* at 56.

¹³¹ *Id.* at 54–58 (holding that Ang did not prove future persecution and that the Attorney General had discretion as to whether to grant humanitarian asylum to him).

¹³² *Long Hao Li v. Att'y Gen.*, 633 F.3d 136, 147 (3d Cir. 2011).

have testified that there is no Chinese law that sanctions people who assist the North Korean defectors.¹³³ Accordingly, the dissenter in *Li*, Judge Roth, focused on Li's subjective belief of persecution.¹³⁴ Li subjectively believed that he was acting against China's interest and willfully disobeying what he thought was a law. Assisting North Korean defectors was based on his "conscientious—rather than pecuniary—motives" (meaning Li did not work to receive money from them but only to aid them).¹³⁵ Li was an active participant of the rescue mission for two years. Then, he fled to the U.S. after learning that his two close co-participants were arrested and each imprisoned for a ten-year term. Also, a letter from Li's mother in China said that the Chinese police came to the house looking for Li after the arrest of his two colleagues.¹³⁶ Under the circumstances, there is a rebuttable presumption that the police were looking for Li to imprison him as well. Thus, as explained above in Section I(A), there seems to be circumstantial evidence of China's political motive to punish Li because his activities are contrary to China's political relationship with North Korea.¹³⁷

In addition to the ground of political opinion, Li has secondary grounds of persecution, based on social group membership and humanitarian efforts. The majority in *Li* made an unsupported claim that "surely any prosecution involving a humanitarian act cannot be *presumed* to be politically motivated."¹³⁸ However, the converse is true: the hybrid claim goes hand-in-hand with Li's claim of political opinion.¹³⁹ For example, in *Jin Jin Long v. Holder*, Long Hao Li subjectively understood that he was engaged in a humanitarian aid effort for North Korean defectors.¹⁴⁰ However, China imprisoned Long for eleven days and hit him with electric batons, because his behavior was seen as a political resistance to China's "immigration policies."¹⁴¹ Like Long, Li provided humanitarian aid to North Korean defectors by assisting them with procuring basic food, shelter. The court recognized that Li's action was humanitarian in nature because there was circumstantial evidence in Li's

¹³³ *Id.* at 143 n.6; *Xun Li v. Holder*, 559 F.3d 1096, 1110 (9th Cir. 2009) (experts testifying that there is no Chinese penal law which prohibits the actions of Xun Li).

¹³⁴ *Long Hao Li*, 633 F.3d at 149 (Roth, J., dissenting).

¹³⁵ *Id.* at 148 (Roth, J., dissenting).

¹³⁶ *Id.* at 149 (Roth, J., dissenting).

¹³⁷ *See id.* at 141, 143, 148 (Roth, J., dissenting).

¹³⁸ *Id.* at 144.

¹³⁹ *Id.* at 148 (Roth, J., dissenting).

¹⁴⁰ *Jin Jin Long v. Holder*, 620 F.3d 162, 164, 167 ("Though he believed it was illegal to do so, Jin provided food, clothing, and shelter for a week [for a family of North Korean refugees].").

¹⁴¹ *Id.* at 164–65, 167.

testimony and his mother's letter.¹⁴²

Furthermore, Li's support for the North Korean defectors' safety and human rights is the common characteristic of a social group (a church group with mission to protect the North Korean defectors).¹⁴³ The First Circuit Court of Appeals said in *Ang* that "[s]upport for the Americans . . . is an identifiable characteristic that he should not be forced to change due to the actions of individuals who are hostile to the interests of the United States."¹⁴⁴ Likewise, Li's support for the North Koreans is an identifiable characteristic of his group.¹⁴⁵

This Article does not endorse Li's argument that withholding of removal or refugee status should be automatically granted to "any Chinese citizen who helps North Korean refugees."¹⁴⁶ Also, the court should be careful of an applicant's "bait-and-switch tactic" of presenting a hybrid claim.¹⁴⁷ However, this Article seeks to recognize that the hybrid approach can better reflect an applicant's situation, when the courts are uncertain whether a non-democratic government promulgated a particular law. In adopting the hybrid approach, the court should consider the secondary basis for persecution when the primary basis falls slightly short from meeting the standard of proof under U.S. refugee law.

III. PROSPECTIVE FOR CLARA, CHINA, AND THE WORLD

A. *Advocating for Clara's Appeal*

Based on the analysis of prosecution as a mere pretext of persecution (Part II) and of the hybrid approach (Part III), someone in Clara's situation may appeal his/her case based on hybrid claims of political opinion and religion. For example, if Clara were an active Christian advocate for the North Korean human rights, she must prove that the Chinese government is aware of her religious beliefs and it is likely to

¹⁴² *Long Hao Li*, 633 F.3d at 144 ("Li's testimony did not touch on his motivation to help the North Korean refugees, but the affidavit attached to his asylum application suggests that his concerns were humanitarian. After describing the Chinese government's policy of deporting North Koreans who enter China illegally, Li stated, 'I asked myself, since the Chinese government is unwilling to help, shouldn't I do my best to assist them?' Li's mother also cast his actions in humanitarian terms: 'All you did was to help pitiful people who were in awkward position. How can it be such a crime that police is after you to arrest[?]' (citations omitted)).

¹⁴³ See *Ang v. Gonzales*, 430 F.3d 50, 55 (1st Cir. 2005).

¹⁴⁴ *Id.* at 55–56 ("We agree with Ang's premise that his work at the embassy and his support for Americans potentially could form the basis for a claim of membership in a social group.").

¹⁴⁵ *Long Hao Li*, 633 F.3d, at 139.

¹⁴⁶ *Id.* at 145.

¹⁴⁷ *Ang*, 430 F.3d at 56.

punish her for her beliefs and activities. Fortunately, Clara can find lots of evidence and history of China's punishment of Chinese Christians.¹⁴⁸ Along with the Christians, Chinese human rights lawyers, who defend the persecuted Chinese churches, have also faced persecution by the government.¹⁴⁹ The history of persecution in China demonstrates that China seeks to punish not only the people who hold Christian beliefs, but also the lawyers who are determined to defend the churches.¹⁵⁰ This is another example of the Chinese legal and political systems in direct conflict with the human rights standard. The Chinese government sees advocates like Li and Clara as a threat to its political and ideology system.¹⁵¹ In this sense, the Chinese government is politically motivated to punish these human rights advocates, who are trying to expose China's human rights violations to the rest of the world.¹⁵²

If the secondary ground of religion does not prevail, other avenues are available for Clara. In non-democratic countries that repress certain organized religions, like China, social group membership in a church may be "at the root of persecution."¹⁵³ Here, an identifiable group characteristic is the church's effort to accommodate and protect North Korean defectors. Thus, if Clara alleges primary and secondary grounds of persecution and if a court adopts the hybrid approach, Clara may be awarded a refugee status in the U.S.

B. Awareness of Human Rights in the Global Community and in China

The "UNHCR has been holding workshops in China on the rights of refugees and the obligations of states to provide protection for them."¹⁵⁴ UNHCR has "proposed to China a special humanitarian status for North Koreans," so that the refugees can "obtain temporary documentation, access to services, and protection from forced return" to North Korea.¹⁵⁵ Even though China has rejected temporary protected status for the North Korean defectors in most areas, some local Chinese officials have begun

¹⁴⁸ See generally Pew Research Center, *Religious Hostilities Reach Six-Year High: Appendix 6: Results by Country* (Jan. 14, 2014), <http://www.pewforum.org/files/2014/01/RestrictionsV-results-by-country.pdf> (indicating China's high hostility for organized religion).

¹⁴⁹ WORLD REPORT 2015: CHINA, *supra* note 122; see Edward Wong, *Family's Visit Confirms Chinese Dissident is Alive*, N.Y. TIMES (Jan. 23, 2013), http://www.nytimes.com/2013/01/24/world/asia/visit-confirms-gao-zhisheng-chinese-dissident-is-alive.html?_r=0.

¹⁵⁰ WORLD REPORT 2015: CHINA, *supra* note 122.

¹⁵¹ See generally WORLD REPORT 2015: CHINA, *supra* note 122.

¹⁵² *Id.*

¹⁵³ *U.N. Handbook*, *supra* note 21, ¶ 78; *Proof of Facts*, *supra* note 22, § 9.

¹⁵⁴ Cohen, *supra* note 47.

¹⁵⁵ *Id.*

to offer some protection to a few married North Korean women and their children.¹⁵⁶

More remarkably, human rights awareness amongst the Chinese population is growing noticeably, and the change in China's attitude is hopeful. In November of 2013, the Chinese government was granted a seat at the United Nations Human Rights Council.¹⁵⁷ The election result was remarkable; the majority of the members of the General Assembly elected China through a secret ballot.¹⁵⁸

There are strong signs, however, that China is assuming a more active role within the UN Human Rights Council. Against the backdrop of power transitions associated with the Arab Spring, it has recently emerged as a spokesperson for states seeking to affirm the paramount responsibility of the state to enforce public order In the short term, the implications of China's rise for the international human rights system are likely to depend heavily on the country's internal trajectory. If its leadership is able to steer it through its many domestic challenges, it is conceivable that China will begin to adopt a less defensive attitude towards human rights both at home and abroad and that new possibilities will open up for joint working with Western states on international human rights issues.¹⁵⁹

In the same year, China's National Tourism Association reported that "the government granted 93,300 work visas to North Koreans." This was "a 17-percent increase from the previous year."¹⁶⁰ Although these North Koreans only work at Dandong's restaurant under the watchful eyes of the government, and ordinary Chinese citizens do not have an accurate perception of the conditions inside North Korea, more Chinese citizens are "slowly becoming aware of the real situation on the ground in North Korea."¹⁶¹

¹⁵⁶ *Id.*

¹⁵⁷ Jonathan Kaiman, *China Granted Seat on UN's Human Rights Council*, THE GUARDIAN, Nov. 13, 2013, <http://www.theguardian.com/world/2013/nov/13/china-granted-seat-un-human-rights-council>.

¹⁵⁸ Press Release, Human Rights Council, In Single Secret Ballot, General Assembly Elects 14 Member States to Three-Year Terms on Human Rights Council, U.N. Press Release GA/11454 (Nov. 12, 2013).

¹⁵⁹ Sonya Sceats & Shaun Breslin, *China and the International Human Rights System*, CHATHAM HOUSE (Oct. 1, 2010), <http://www.chathamhouse.org/publications/papers/view/186781>.

¹⁶⁰ Dillon, *supra* note 116.

¹⁶¹ *Id.*

C. Addressing Concerns that Many Chinese Citizens Living on the China-North Korea Border Will Flee to the U.S. Upon the Consideration of Pretext of Persecution and of the Hybrid Approach

The two approaches mentioned in Sections II and III of this Article will likely increase the success of the asylum/refugee application for the Chinese citizen who face punishment for supporting North Korean Human Rights or assisting defectors. There is a concern that there could be large, sudden influx of applications; however, the U.S. can counter this issue by setting a quota. In the past, when the U.S. first started accepting applications from those who feared forced sterilization, the government set a quota. With a quota, up to 1,000 people a year could be granted asylum/refugee status, upon proof that they faced persecution under coercive population control methods.¹⁶² Subsequently, in 2005, Section 101(g) of Title I of the REAL ID Act eliminated this quota.¹⁶³ Just like the precedent based on forced sterilization cases, the U.S. government may approach the concern by setting an initial quota. In years or decades to follow, the U.S. government can use its discretion to lift or keep the quota.

D. Measures that can be Implemented by the Chinese Government for “Economic Migrants”

According to the UN Commission of Inquiry, many North Korean defectors in China “are arguably either refugees fleeing persecution or become refugees *sur place* and are thereby entitled to international protection.”¹⁶⁴ A refugee *sur place* is “[a] person who was not a refugee when he left his country, but who becomes a refugee at a later date.”¹⁶⁵ Despite the acknowledgement by the international community, China remains active in enforcing the repatriation of North Koreans,¹⁶⁶ by characterizing them as illegal economic migrants.¹⁶⁷ While it is necessary for the international community to strongly encourage China to recognize them as refugees, some kind of measures must be enforced to protect this

¹⁶² Omnibus Consolidated Appropriations Act, *supra* note 105, § 601(b)(5).

¹⁶³ REAL ID Act of 2005, *supra* note 108, § 101(g)(2).

¹⁶⁴ Comm’n of Inquiry, Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/CRP.1, at 130, ¶ 447 (Feb. 7, 2014).

¹⁶⁵ *U.N. Handbook*, *supra* note 21, ¶ 94.

¹⁶⁶ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., China 2013 Trafficking in Persons Report, <http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215439.htm> (last visited Sept. 4, 2015) (“The Chinese government did not provide North Korean trafficking victims with legal alternatives to repatriation. Chinese authorities sometimes prosecuted citizens who assisted North Korean refugees and trafficking victims, as well as those who facilitated illegal border crossings.”).

¹⁶⁷ Cohen, *supra* note 47.

vulnerable group, at least until China revises its policy.

This section does not assume that the American immigration system should or could be implemented in China. It is nonetheless helpful to analyze the American model on treatment of illegal economic migrants, and ask how these measures may be altered for North Korean illegal economic migrants in China. According to the U.S. Committee on Refugees, immigrant children are often subjected to gang-related or domestic violence and women are also vulnerable to domestic violence.¹⁶⁸ Therefore, juvenile courts and state systems have installed protective measures for neglected, abandoned, and undocumented children, as some immigrant children were given protective status of Deferred Action for Childhood Arrival (DACA) and Special Immigrant Juvenile Status (SIJS).¹⁶⁹ T visas are available for human trafficking victims and U visas are available for immigrant victims of violent crimes, including domestic abuse, involuntary servitude, rape, and false imprisonment.¹⁷⁰ Given that the victims were helpful in a crime investigation, the T and U visas can help the illegal immigrants to receive work permits and permanent residency card (the documentation which helps to protect one's families and livelihood). As a result, there is a greater willingness on the part of the illegal economic migrants to cooperate with the U.S. government's crime investigation effort than in the past.¹⁷¹

While this Article does not argue that these U.S. measures could be directly replicated for North Korean defectors in China, it acknowledges that they face similar vulnerabilities as illegal economic migrants do in the U.S.¹⁷² The international community cannot just wait and see if China changes its policies to protect the North Korean illegal economic migrants as refugees. Meanwhile, the change starts by improving conditions for the most vulnerable groups, such as women and children. In this case, there

¹⁶⁸ *Introduction to Immigrant Children and Representation*, U.S. COMM. FOR REFUGEES AND IMMIGRANTS, <http://www.refugees.org/resources/for-lawyers/additional-case-support> (last visited Sept. 10, 2015); *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AMERICAN IMMIGRATION COUNCIL, <http://www.immigrationpolicy.org/just-facts/violence-against-women-act-vawa-provides-protections-immigrant-women-and-victims-crime> (last visited Sept. 10, 2015).

¹⁶⁹ *Guide to Common Forms of Legal Relief for Unaccompanied Immigrant Children*, U.S. COMMITTEE FOR REFUGEES & IMMIGRANTS, 3, 7.

¹⁷⁰ *Id.*

¹⁷¹ Christopher Sherman, *U.S. Hits Visa Limit for Crime Victims who are Immigrants*, EQUAL VOICE NEWS (Dec. 16, 2013), <http://www.equalvoiceforfamilies.org/u-s-hits-visa-limit-for-crime-victims-who-are-immigrants>; see Suzanne B. Seltzer, Suzanne Tomatore, Ivy Suriyopas, & Shonnie Ball, *Immigration Relief for Crime Victims: The U Visa Manual*, NY ANTI-TRAFFICKING NETWORK, (Mar. 2010), <http://www.refugees.org/resources/for-lawyers/human-trafficking-resources/u-visa-manual.pdf>.

¹⁷² CONG.-EXEC. COMM'N ON CHINA, *supra* note 90, at 113.

is hope that analogous applications may possibly facilitate a systemic protection of the vulnerable North Korean children and women defectors in China. If China has already extended 93,300 work visas to North Koreans in the last year,¹⁷³ perhaps the US government and the international community may now encourage the Chinese government to reconsider its policy of punishing the Chinese citizens like Li and Clara who are assisting North Koreans.

CONCLUSION

Over the past sixty-five years, China has transformed from a pre-Communist government in 1948, to a member of the United Nations Human Rights Council in 2006.¹⁷⁴ This transformation comes with a heightened responsibility for China to uphold the international human rights standard and to become a role model for non-democratic countries and developing nations. Now, as a sitting member of the UNHRC, an issue China is due to address is the treatment of its own citizens, who are punished for assisting North Korean defectors.¹⁷⁵ While the Chinese government discourages assistance to North Korean defectors, it is hard to argue that the U.S. courts have been an active supporter.¹⁷⁶ In *Long Hao Li v. Attorney General*, the Third Circuit Court of Appeals denied protection to Li because (1) the Chinese law was fairly administered and (2) Li, at best, faces prosecution not persecution.¹⁷⁷ This Article explains why Li should be remanded, based on the two approaches outlined above.

The first approach (Part II) suggests that the Chinese “law” was not fairly administered. First, if China has no legal basis to punish Li, it is more likely than not that Li would face persecution, not prosecution. Second, even if China has a legal basis and policy to punish Li, a severe disproportion between the punishment and the crime may suggest that prosecution was a “mere pretext of persecution.” The second approach (hybrid approach in Part III) explains that even if the first approach fails,

¹⁷³ Dillon, *supra* note 116.

¹⁷⁴ Press Release, Human Rights Council, United States Elected to Human Rights Council for First Time, with Belgium, Hungary, Krygyzstan, Norway, as 18 Seats Filled in Single Round of Voting, U.N. Press Release GA/10826 (May 12, 2009).

¹⁷⁵ See *UN Experts Alarmed by Reprisals Against Activists Linked to China's International Human Rights Review*, OFF. HIGH COMM'R FOR HUM. RTS. (Oct. 16, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13860&LangID=E>.

¹⁷⁶ Ahn, *supra* note 9, at 312.

¹⁷⁷ *Long Hao Li v. Att'y Gen.*, 633 F.3d 136, 137–38 (3d Cir. 2011) (“Because Li failed to adduce evidence that raises an inference of political persecution, as opposed to legitimate prosecution under Chinese law, and because substantial evidence supports the BIA's determination that Li failed to establish a clear probability of persecution, we will deny his petition for review.”).

Li should be granted a refugee status after analyzing secondary grounds of persecution.

To date, no court has ever granted asylum or refugee status to an individual who assisted North Korean defectors without any other evidence of persecution. However, there is some indication that China is planning to secretly allow North Korean workers to work in China. As the Chinese people learn more about the plight of the North Koreans, their contempt for the North Korean regime also grows.¹⁷⁸ These facts may suggest that China is moving towards an improved accountability system with respect to the human rights of its own citizens as well as the refugees. Accordingly, the U.S. courts should protect those who aid North Korean defectors, who are risking their lives to uphold the human rights standard. The U.S. government rendered a major victory in human rights law when it declared that China's One-Child policy contradicted the international human rights standard.¹⁷⁹ As a result, even though the Chinese law legitimately addressed legitimate national concerns, people who feared forced sterilization were granted refugee status. Once again, it is time for the U.S. government and the courts to bring justice on behalf of international human rights law.

¹⁷⁸ WORLD REPORT 2015: CHINA, *supra* note 122.

¹⁷⁹ DEPT. OF INT'L PROT., *supra* note 112, at 3.