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978-0-521-87017-7 - International Refugee Law and Socio-Economic Rights: Refuge from Deprivation

Michelle Foster

Excerpt

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1 Introduction

The phenomenon of flight from poverty, economic degradation and disadvantage poses a range of difficult ethical, legal and policy challenges for decision-makers and policy-makers alike. How should states that receive such persons respond to claims based on economic and social deprivation? In particular, what international legal principles operate to constrain the decision-making authority of states receiving such persons, and what rights are provided in international law for those wishing to avoid repatriation to a situation in which they will be subject to economic deprivation?

This book explores the legal challenges created by the phenomenon of migration caused by the deprivation of economic and social rights. In particular, it directly engages with the question whether the 1951 Convention Relating to the Status of Refugees ('Refugee Convention')¹ – the key instrument in international law for the protection of refugees – is capable of encompassing claims based on economic destitution. In exploring this question, the book identifies the conceptual and analytical challenges presented by such claims and assesses the extent to which these challenges may be resolved or overcome by a creative interpretation of the Refugee Convention consistent with correct principles of international treaty interpretation. The hypothesis is that, notwithstanding the dichotomy between 'economic migrants' and 'genuine' refugees which pervades both the refugee and migration literature and refugee determination, the Refugee Convention is capable of accommodating a more complex and nuanced analysis that recognizes that many types of claims with an economic element are properly considered within the purview of the Refugee Convention.

¹ Geneva, 28 July 1951, in force 22 April 1954, 189 UNTS 150.

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Background

In considering international legal approaches to the problem of involuntary economic migration, the traditional position has been to construct a dichotomy between ‘economic migrants’ and ‘political refugees’, with the former falling outside the terms of the Refugee Convention. This distinction has been particularly evident at the political and rhetorical level of state policy and has underpinned the rejection of entire classes of applicants on the basis that their claims are clearly those of economic migrants rather than refugees.² Well-known examples include the US policy of interdiction in respect of Haitian refugees in the early 1980s, justified by the fact that Haitians were labelled as economic and not political refugees,³ and the forcible repatriation of Vietnamese refugees by Hong Kong in the late 1980s based on a similar presumption.⁴ In more recent times, the distinction has been relied upon by China as an explanation and justification for its decision to return thousands of North Koreans each year under bilateral diplomatic agreements with North Korea.⁵ It has also been used extensively in the media in Western refugee-receiving states, often as a

² See, for example, the description of the UK’s treatment of Roma asylum applicants in Dallal Stevens, ‘Roma Asylum Applicants in the United Kingdom: “Scroungers” or “Scapegoats”’, in Joanne van Selin et al. (eds.), *The Refugee Convention at Fifty: A View from Forced Migrations Studies* (Maryland: Lexington Books, 2003), pp. 145–60, where she explains that the perception of Roma as ‘economic migrants’ and ‘street criminals’ has led to the dismissal of many claims as ‘manifestly unfounded’: p. 154. The characterization of a vast number of asylum applicants as ‘economic migrants’ has also led to other state initiatives, such as the removal or reduction of welfare benefits for asylum seekers.

³ This was the case even though US sanctions had exacerbated economic destitution: see Tom Farer, ‘How the International System Copes with Involuntary Migration: Norms, Institutions and State Practice’ (1995) 17 *Human Rights Quarterly* 72. For the history and background to the practice, see Janice D. Villiers, ‘Closed Borders, Closed Ports: The Flight of Haitians Seeking Political Asylum in the United States’ (1994) 60 *Brooklyn Law Review* 841. For judicial consideration of the practice see *Haitian Legal Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

⁴ For the background to this issue and practice, see Janelle M. Diller, *In Search of Asylum: Vietnamese Boat People in Hong Kong* (Washington: Indochina Resource Center, 1988).

⁵ See generally Eric Yong-Joong Lee, ‘National and International Legal Concerns regarding Recent North Korean Escapees’ (2001) 13 *International Journal of Refugee Law* 142. Human Rights Watch explains that the Chinese Government ‘maintains that no North Koreans are refugees, and that its primary obligation lies under a 1986 agreement with North Korea on the repatriation of refugees. Accordingly, China arrests and expels North Koreans without the opportunity to seek asylum’: see Human Rights Watch, *The Invisible Exodus: North Koreans in the People’s Republic of China* (2002) <<http://www.hrw.org/reports/2002/northkorea/norkor1102.pdf>> at 31 May 2006.

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justification in support of the call for ‘tougher’ measures in respect of asylum-seekers.⁶

While the dichotomy is most clearly evident in these well-known and highly publicized examples of state practice, it is in fact an endemic and perennial problem that continues to challenge states presented with ‘economic’ claims, and to which there remains no satisfactory framework of analysis. The extent to which the dichotomy is entrenched in state practice is indicated in a study of refugee decision-making in the Netherlands, which concluded that ‘the opposition between “economic” and “political” refugees is so strong and so total in the context of refugee law that anything related to the economic is assumed to be non-political’.⁷ Moreover, the same study suggests that the distinction is ‘so ingrained in the asylum procedure that interview officials are scarcely aware of it’ and thus effortlessly reduce flight motives to economic ones.⁸ Indeed, the terms ‘economic refugees’ and ‘economic migrants’ continue to pervade contemporary refugee jurisprudence.

In addition to state practice reflecting a rather simplistic analysis of such claims, policy-makers and refugee and migration scholars have, in the main, tended to accept the distinction. While it is acknowledged in the literature that there are claims that challenge the simplistic dichotomy and suggest that the lines are not as clear as might be asserted in the rhetoric of states, it is nonetheless frequently assumed that the key international treaties – and in particular the Refugee Convention – are not able to encompass such claims and thus appropriate policy and legal responses lie elsewhere.⁹ For this

⁶ For example, Dummett describes the use of this term in the United Kingdom, explaining that ‘[a] favourite propaganda device’ of government employees ‘is to repeat incessantly that most of the asylum seekers are mere “economic migrants”’. He argues that ‘[t]his phrase has the benefit of blurring the distinction between refugees and immigrants: it also serves to convey that the motives of those claiming asylum are trivial and unworthy’: Michael Dummett, *On Immigration and Refugees* (London: Routledge, 2001), pp. 44–5. See also Tony Kushner and Katharine Knox, ‘The Kurds: A Moment of Humanity in an Era of Restriction?’ in Tony Kushner and Katharine Knox, *Refugees in an Age of Genocide: Global, National and Local Perspectives during the Twentieth Century* (London: Frank Cass, 1999), pp. 335–54.

⁷ Thomas Spijkerboer, *Gender and Refugee Studies* (Aldershot: Ashgate, 2000), p. 76.

⁸ *Ibid.*, pp. 76–7.

⁹ For example, in Katharina Rohl’s paper, ‘Fleeing Violence and Poverty: Non-refoulement Obligations under the European Convention of Human Rights’ (UNHCR, New Issues in Refugee Research, Working Paper No. 111, January 2005), she asserts that, ‘the refugee definition in the 1951 Convention “almost completely exclud[es] the violation of economic and social rights from the concept of persecution”, and thus immediately

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reason, the debate within international refugee law is drastically underdeveloped.¹⁰

However, while the conceptual problems raised by the simplistic distinction between political (and therefore ‘genuine’) Convention refugees and ‘economic migrants’ are not new, they are rapidly becoming impossible to avoid as a range of emerging refugee claims challenges traditional distinctions between economic migrants and political refugees. For example, is a child born outside the parameters of China’s one-child policy, and thus subject to deprivations of economic and social rights, such as education and health care, an ‘economic migrant’ or a refugee? What about a woman who ‘voluntarily’ agrees to be smuggled into a foreign country as part of a prostitution trafficking operation, because it is the only option for her survival, and who risks serious harm from traffickers if returned to her home country? Is a Roma man from the Czech Republic, who suffers extensive discrimination in education and employment, an ‘economic migrant’ or a refugee? What about a street child in the Democratic Republic of Congo whose government fails to provide him or her with the basic tools of survival, such as food and shelter? Or women who leave their country in order to earn a living when the major forces causing them to leave are ‘their educational disadvantage, their inability to inherit land under customary law, and their exclusion from serious involvement in coffee production’?¹¹

moves to the consideration of remedies under other treaties’ (p. 3, citations omitted). See also Peter Penz, ‘Economic Refugees and Political Migrants: An Ethical Analysis of “Forced Migration”’ (paper presented at the 7th International Conference of the International Research and Advisory Panel (‘IRAP’) of the International Association for the Study of Forced Migration, South Africa, 2001) (on file with author), p. 1; HRH Crown Prince El Hassan Bin Talal, ‘Refugee Law: Protection for the Minority’ (1993) 6 *Journal of Refugee Studies* 1 at 5 and R.J. Vincent, ‘Political and Economic Refugees: Problems of Migration, Asylum and Resettlement’ (1989) 2 *Journal of Refugee Studies* 504.

¹⁰ Even the UNHCR tends to accept the dichotomy to a certain extent, apparently assuming that refugees fleeing because of severe economic conditions are outside the bounds of the Refugee Convention. For example, in a recent consideration of the refugee–migration connection, the UNHCR appeared to treat separately the issues of ‘serious human rights violations or armed conflict’ from ‘economic marginalization and poverty’: see UNHCR, *Global Consultations on International Protection, Refugee Protection and Migration Control: Perspectives From UNHCR and IOM*, UN Doc. EC/GC/01/11 (2001), at para. 5. For an earlier example, see UNHCR, *Composite Flows and the Relationship to Refugee Outflows, Including Return of Persons not in Need of International Protection as Well as Facilitation of Return in its Global Dimension*, UN Doc. EC/48/SC/CRP.29 (1998), at para. 5.

¹¹ Charles David Smith, ‘Women Migrants of Kagera Region, Tanzania: The Need for Empowerment’ in Doreen Indra (ed.), *Engendering Forced Migration: Theory and Practice*

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These are just some of the examples of the types of claims that can be and indeed are being made at present under the auspices of the Refugee Convention regime. They raise controversial and difficult questions about different elements of the Refugee Convention definition, but all implicitly challenge the neat distinction inherent in the orthodox view. In particular, they indicate that there is a need for debate and analysis within the confines of international refugee law and that existing approaches, which treat claims involving economic deprivation as a point of departure from the refugee regime, ignore the fact that there is a grey area between the two extreme categories, which requires further exploration.¹²

The key conceptual challenge: economic migrants versus refugees

The primary challenge in attempting to deal with this emerging type of claim is the strong tradition of distinguishing between economic migrants or refugees and 'genuine' political refugees. Given that this distinction permeates many levels of decision-making, one might expect the definition of the term 'economic migrants' to be well established, and for the distinction between economic migrants or economic refugees and Refugee Convention refugees to be clear. However, one of the striking things that an investigation into the application of such labels reveals is that their meaning is seldom explained, nor are the distinctions between them made apparent. This is highlighted by the fact that the terms 'economic migrants' and 'economic refugees' are often used interchangeably, apparently under the assumption that their meaning is self-evident.

(New York: Berghahn Books, 1999), p. 162, discussing the situation of women in the Kagera region in Tanzania.

¹² The scope for development in this area has been noted in recent literature, particularly 'as the value of certain economic and social rights is increasingly accepted': Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), p. 79. There is a view emerging in the most recent literature that an analysis which implicates economic and social rights is the 'next- or current-stage' in the development of refugee law: see Deborah Anker, 'Boundaries in the Field of Human Rights: Refugee Law, Gender and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133 at 149.

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While the reasons for the clear and straightforward separation between the categories economic migrants/refugees and political refugees are seldom explicitly made clear, it is possible to separate out the implicit assumptions at work. Before analysing the various strands inherent in the dichotomy, it is important to emphasize that there are different rationales underlying the distinctions and there are different levels at which the differentiation operates. On one hand, there is a distinction that might be deemed rhetorical, rather than based on fine legal analysis. As Tuitt explains, the distinction between economic migrants and refugees is often ‘not perceived as the honest conflict between refugees and a narrow legal definition, but that which arises between genuine humanitarian refugees and fraudulent economic migrants. Synonymous with the notion of the new asylum seeker is the idea of the bogus asylum seeker who manipulates the rules governing domestic immigration’.¹³ The rhetorical invocation of these labels in respect of groups of asylum-seekers is widespread and has sometimes proven to be a convenient method for governments to justify minimizing their obligations under the Refugee Convention.¹⁴

However, on a different level, there are perceived underlying conceptual challenges to characterizing claims involving economic elements within the traditional refugee framework. First, underlying the lack of sympathy (and often hostility) towards persons deemed ‘economic migrants’ is a sense that they leave their home countries *voluntarily*, merely to attain a ‘better life’ in the destination state, and therefore have no legitimate reason for seeking protection.

¹³ Patricia Tuitt, *False Images: Law's Construction of the Refugee* (London: Pluto Press, 1996), p. 70. Erika Feller, Director of the Department of International Protection in the UNHCR, has recently explained that a ‘third assumption [underpinning waning public support for refugees and a harder line by governments] is that unsuccessful asylum seekers are all bogus’: Erika Feller, ‘The Evolution of the International Refugee Protection Regime’ (2001a) 5 *Washington University Journal of Law and Policy* 129 at 137.

¹⁴ For example, Goodwin-Gill explains in a recent article that ‘[o]ver the last twenty or so years, governments throughout the world have tried to avoid dealing with the difficult questions raised by refugee and related movements. One method is to seek to redefine the problem as one not involving obligation or responsibility’. He cites ‘illegal migrants’ and ‘boat people’ as examples of the terms engaged, but the term ‘economic migrants’ is used just as frequently: see Guy Goodwin-Gill, ‘Refugees and Responsibility in the Twenty-First Century: More Lessons learned from the South Pacific’ (2003) 12 *Pacific Rim Law and Policy Journal* 23 at 26–7. For a specific case study, see Stevens, ‘Roma Asylum Applicants in the United Kingdom: “Scroungers” or “Scapegoats”’, pp. 145–60.

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These concerns reveal an underlying distinction between forced or involuntary migrants responding to the ‘push’ factors of persecution (and thus deserving of protection) and voluntary migrants primarily influenced by the ‘pull’ factors of the attractions present in the receiving state (therefore undeserving of protection).¹⁵ As Zolberg, Suhrke and Aguayo have explained, the distinction is neatly encapsulated in the following simplistic formula: ‘voluntary economic = migrants’ and ‘involuntary political = refugees’.¹⁶

The reliance on *voluntariness* may not, at first glance, seem surprising since one would not expect that a woman who left her country because she was able to earn a higher salary as a doctor in a second country – the classic definition of an economic migrant – should need or deserve international protection. However, this fairly obvious and intuitive distinction between voluntary and involuntary migration becomes less apparent once one moves beyond obvious examples and attempts to apply it to more complex situations. For example, is it truly accurate to argue that while a political dissident who leaves her country fearing imprisonment and torture is an ‘involuntary’ migrant, a woman who leaves her country due to severe discrimination based on her HIV-positive status, which renders her unable to provide her family with food, is a ‘voluntary’ migrant? Moreover, is it not true that in both cases the applicants are, at least to some degree, seeking ‘a better life’?

Indeed, while migration theorists sometimes attempt to explain the phenomenon of migration according to a typology that is based, at least to some degree, on a distinction between voluntary and involuntary migration, they also acknowledge that making a binary distinction between the two categories is problematic, as it tends to mask

¹⁵ Anthony H. Richmond, ‘Reactive Migration: Sociological Perspectives on Refugee Movements’ (1993) 6 *Journal of Refugee Studies* 7 at 7. See also Penz, ‘Economic Refugees and Political Migrants: an Ethical Analysis of “Forced Migration”’. For a discussion of the ‘push–pull’ issue in the context of economic migration, see Bimal Ghosh, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (The Hague: Martinus Nijhoff Publishers, 1998), pp. 34–43.

¹⁶ Aristide R. Zolberg, Astri Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (New York: Oxford University Press, 1989), p. 30. See also Cecilia Menjívar, ‘History, Economy and Politics: Macro and Micro Level Factors in Recent Salvadorean Migration to the US’ (1993) 6 *Journal of Refugee Studies* 350. See also Susan F. Martin, *New Issues in Refugee Research: Global Migration Trends and Asylum* (2001) UNHCR <<http://www.unhcr.org/cgi-bin/texis/vtx/research/openssl.pdf?tbl=RESEARCH&id=3af66ccc4>> at 31 May 2006.

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complexities and subtleties in motivations for flight.¹⁷ On one level, it might be said that the only true involuntary or forced migrants/refugees are those subject to expulsion by their own governments or forcibly removed from a country as part of a trade in trafficking humans (such as a slave trade).¹⁸ In other words, even those fleeing the traditional forms of political persecution could be characterized as voluntary migrants to some degree. As Richmond explains, '[h]uman agency implies an element of choice and ensures that some degree of uncertainty is always present, even when the choices in question are severely constrained by external considerations'.¹⁹

Moreover, there is a 'voluntary' aspect to some kinds of traditional refugee claims. This is made explicit by Zolberg, Suhrke and Aguayo when they note that there is a category of 'traditional' refugees that challenges the voluntary/involuntary distinction, namely political and religious 'dissenters'. Responding to the suggestion by Vernant that refugees are distinguished from other migrants on the basis that a refugee is 'the victim of events for which, at least as an individual, he cannot be held responsible',²⁰ they point out that those who reject the alternative provided to them by their government of living within certain religious and political parameters make a choice to do so. They explain that 'it is precisely because dissent does entail the exercise of personal choice that those who engage in it are admirable'.²¹ Modern examples include those who live an openly homosexual life or openly practice prohibited elements of their religion, a category of claim that has raised this precise tension.²²

¹⁷ See, for example, Sally E. Findley, 'Compelled to Move: the Rise of Forced Migration in Sub-Saharan Africa', in M. A. B. Siddique (ed.), *International Migration into the 21st Century* (Cheltenham: Edward Elgar, 2001), p. 279.

¹⁸ Richmond, 'Reactive Migration', at 7.

¹⁹ *Ibid.*, at 9. See also Charles B. Keely, 'Demography and International Migration' in Caroline B. Brettell and James F. Hollifield (eds.), *Migration Theory: Talking across Disciplines* (New York: Routledge, 2000), where the author states that '[t]he problem [with the distinction between voluntary and involuntary migrants] is that all migration includes elements of choice and pressure. Not all people in groups targeted for persecution leave a country. Not all economic migration is without some coercion on the migrant's decision making. It is also clear that refugee flows are quickly followed by some returns. Why do some people return quickly, while others take longer or even struggle against ever returning?': p. 50.

²⁰ Zolberg, Suhrke and Aguayo, *Escape from Violence*, p. 31. ²¹ *Ibid.*

²² See Rodger P. G. Haines, James C. Hathaway and Michelle Foster, 'Claims to Refugee Status Based on Voluntary but Protected Actions' (2003) 15(3) *International Journal of Refugee Law* 430.

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Acknowledging these problems, Richmond concludes that ‘a distinction between voluntary and involuntary movements is . . . untenable’.²³ The richness and subtleties in the distinctions between different categories are reflected in his alternative method of distinguishing motives for flight. He constructs a typology of what he terms ‘reactive migration’ which comprises 25 categories of those ‘whose degrees of freedom are severely constrained’.²⁴ Zolberg, Suhrke and Aguayo similarly reject the simplistic distinction between voluntary and involuntary migrants, concluding that the determination of whether movement is voluntary or involuntary must refer to ‘some doctrine of rights’.²⁵

A second key conceptual challenge relates to the issue of intent. Specifically, it is assumed that there is a fundamental and clear distinction between those suffering economic hardship and ‘traditional’ refugees in that, while the situation to which a person is required to return may be unfortunate, persons fleeing economic degradation are not ‘deserving’ of protection since they are not obviously fleeing a single and identifiable aggressor, but rather indiscriminate hardship or natural disasters. As Jeremy Harding has explained:

In the past, refugees have won greater international sympathy than economic migrants. Theirs has been the more identifiable grievance: at its source there is often an identifiable persecutor. Yet the order of economic difficulty that prevails in some parts of the world is akin to persecution. No consensus exists about the identity of the tormentor, and so those who try to put it behind them are more easily reviled than others fleeing the attentions of secret police or state militias.²⁶

This points to the tendency to assume that persons fleeing situations in which they do not have access to basic economic and social rights do not need or deserve protection because their position is a result of natural conditions (for example, an ecological disaster, famine or insufficient resources to provide basic health care) and not the result of a positive act on the part of the government or any other person. The prevalence of this distinction is highlighted in a submission made on behalf of a number of non-government organizations to a conference conducted under the auspices of the Office of the United Nations High Commissioner for

²³ Anthony H. Richmond, *Global Apartheid: Refugees, Racism, and the New World Order* (Toronto: Oxford University Press, 1994), p. 58.

²⁴ Richmond, ‘Reactive Migration’, at 10; see at 19–21 for his typology of forced migration.

²⁵ Zolberg, Suhrke and Aguayo, *Escape from Violence*, p. 31.

²⁶ Jeremy Harding, *The Uninvited: Refugees at the Rich Man’s Gate* (London: Profile Books, 2000), p. 122.

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Refugees ('UNHCR') Global Consultations on International Protection, in which it was noted that:

People leaving their home countries because of violations of their economic and social rights have generally not been granted the same level of protection as those fleeing violations of their civil and political rights. The denial of civil and political rights is considered as a 'violation', while the denial of economic and social rights is generally viewed as an 'injustice'.²⁷

However, one might question how cogent and reliable this distinction is in assessing the category into which different claimants may fit. For example, it begins to break down in situations where a government uses starvation as a political tool, 'inducing famine by destroying crops or poisoning water in order to break the will of insurgency groups'.²⁸ Or in the situation where local warlords in civil conflicts withhold food from populations under their control in order to attract relief from international donors, which will then be sold in order to buy arms.²⁹

The quotation from Harding above also points to a third conceptual distinction which often underlies objections to economic claims, namely that the individual claimant is not in a unique position, but rather is in the same position as an entire class of persons within his or her society, and thus does not fit within the conception of a refugee as a person who

²⁷ Human Rights Watch, International Catholic Migration Committee and the World Council of Churches, *NGO Background Paper on the Refugee and Migration Interface* (paper presented to the UNHCR Global Consultations on International Protection, Geneva, 28–29 June 2001a) (on file with author).

²⁸ Susanne Schmeidl, 'Conflict and Forced Migration: A Quantitative Review, 1964–1995', in Aristide R. Zolberg and Peter M. Benda (eds.), *Global Migrants, Global Refugees: Problems and Solutions* (New York: Berghahn Books, 2001), pp. 82–3. Schmeidl argues that such tactics were used by Nigeria during the Biafra conflict and by Ethiopia during its conflict with Eritrea. See also David Marcus, 'Famine Crimes in International Law' (2003) 97 *American Journal of International Law* 245.

²⁹ See Myron Weiner, 'The Clash of Norms: Dilemmas in Refugee Policies' (1998) 11 *Journal of Refugee Studies* 433 at 437. The author says that this was the strategy of warlords in the civil conflict in Liberia in 1996 and 1997 (citing David Breyer and Edmund Cairns, 'For Better? For Worse? Humanitarian Aid in Conflict' (1997) 7(4) *Development in Practice* 363–74). In addition, Weiner says that the government of Iraq reportedly withheld food and medical supplies from civilians in order to force the United Nations to end its embargo: at 437. A more recent example is the situation in North Korea, where it has been suggested the severe food shortage is at least partly caused (and exacerbated) by the North Korean government: see Marcus, 'Famine Crimes in International Law', at 259–62; Eric Yong-Joong Lee, 'National and International Legal Concerns regarding Recent North Korean Escapees', at 143; see also Amnesty International, *Starved of Rights: Human Rights and the Food Crisis in the Democratic People's Republic of Korea (North Korea)* (2004b) <<http://web.amnesty.org/library/index/engasa240032004>> at 31 May 2006.