Crafting a Multilateral Solution for North Korean Refugee Settlement

What American Policymakers Can Learn from the Indochinese Refugee Crisis

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* J.D. (Yale). The author would like to thank Professor Patrick Weil for his mentorship during the research and writing of this article. The author's deep appreciation goes to Aaron Kreaden and Dan Moore for their invaluable feedback and suggestions for improvement spanning several drafts, and to the editors of Volume 6 of the *Journal of International Law & International Relations* for their editorial assistance. Last but not least, the author is grateful to Dahoon Chung, Victoria Degtyareva, Alfred Piro, and Kimberley Piro for their helpful comments and friendships. Any errors are the author's alone.

Vol. 6, No. 2, pp. 53-82. ISSN: 1712-2988.

I. Introduction

A pressing humanitarian crisis is ongoing but lacks an adequate solution. Food shortages and human rights violations have driven many North Korean asylum seekers to cross the border into China. Once there, they are given no legal protection, categorically defined as illegal economic migrants, and subject to forced repatriation. The severity of the food shortage has been compared to that of the North Korean famine in the mid-1990s, which killed between one and three million people.[1] As of 2007, it is estimated that 300,000 North Korean migrants reside in China,[2] and those forcibly returned to North Korea "routinely face prison, torture, and sometimes execution."[3] The majority of North Korean refugees[4] in China do not wish to remain there permanently. The Peterson Institute for International Economics and the United States Committee for Human Rights in North Korea conducted a survey of these refugees in 2008. Out of a sample of 1247, the majority (64.3%) wished to resettle in South Korea and 19.1% wished to resettle in the United States.[5]

The United States is home to the largest Korean population outside of Northeast Asia and many in the Korean-American community have family ties to North Korea.[6] In 2004, the US Congress passed the *North Korean Human Rights Act* (*NKHRA*).[7] The enactment of the *NKHRA* was motivated by a concern both for human rights abuses that are pervasive in North Korea and for human rights issues facing North Korean refugees when they arrive in the United States.[8] The *NKHRA* grants refugee status to all eligible North

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[1] House Committee on Foreign Affairs, *North Korean Human Rights Reauthorization Act of 2008* (H.R. Rep. No. 110-628) (Washington, D.C.: United States Government Printing Office, 2008) at 5 [House Committee, *2008 Reauthorization Act Report*].

[2] Congressional Research Service, *North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Options* (26 September 2007) at CRS-4, online: <http://www.fas.org/sgp/crs/row/RL34189.pdf> [2007 CRS Report]. Press reports typically estimate the number of North Korean migrants residing in China to be anywhere between 100,000 and 300,000. The estimates used by the Chinese government, the U.S. State Department, and UNHCR have been significantly smaller than 300,000 but there are reasons to doubt the accuracy of the official estimates, such as UNHCR's lack of access to conduct a systematic survey.

[3] House Committee, *2008 Reauthorization Act Report*, *supra* note 1 at 5.

[4] The term "refugee" is defined by the two key international instruments governing refugee protection: *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954) [1951 *Refugee Convention*]; *Protocol relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223 (entered into force 4 October 1967) [1967 *Protocol*].

[5] Congressional-Executive Commission on China, "North Korea Executes 15 Attempting Escape, China Arrests 40 Refugees" (25 June 2008), online: <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=105687>.

[6] House Committee, *2008 Reauthorization Act Report*, *supra* note 1 at 2.

[7] *North Korean Human Rights Act of 2004*, Pub. L. 108-333, 118 Stat. 1287, 22 U.S.C. 7801 et seq. [*NKHRA*].

[8] See e.g. *NKHRA*, *ibid.*, s. 302(a) (clarifying that "North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of [South Korea]").

Koreans[9] and, for fiscal years 2005-2008, authorized an annual budget of up to $20 million for the assistance of North Korean refugees.[10]

However, implementation of the *NKHRA* has been ineffective and slow in the resettlement of North Korean refugees. In 2006, a bipartisan group of nine members of Congress expressed their concern over this issue as follows: "despite the fact that the [*NKHRA*] calls for the Department of State to facilitate the submission of North Korean refugee applications, not one North Korean has been offered asylum or refugee status in the 16 months since the unanimous passage of the legislation."[11] Indeed, the first North Korean refugees did not arrive in the United States until May 2006, nineteen months after the passage of the *NKHRA*, and as of 2009, the asylum claims of only 81 North Koreans have been recognized by the American government.[12]

In 2008, Congress passed the *North Korean Reauthorization Act* (2008 *Reauthorization Act*) to renew the *NKHRA* for the years 2009-2012, on the basis of its "longstanding commitment ... to refugee and human rights advocacy."[13] The renewal furthered Congress' intentions for the United States to "pursue an international agreement to adopt an effective 'first asylum' policy, modeled on the first asylum policy for Vietnamese refugees, that guarantees safe haven and assistance to North Korean refugees."[14]

"Vietnamese refugees" refers to the outpour of refugees, beginning in 1975, from Vietnam, Laos, and Cambodia. These refugees sought temporary first asylum—primarily in Thailand but also in Malaysia, Singapore, Indonesia, the Philippines, and Hong Kong—before moving to the United States and other countries for permanent resettlement. This mass exodus, known as the Indochinese refugee crisis, followed the end of the Vietnam War and the Communist takeovers in Vietnam, Laos, and Cambodia during the 1970s. Close to two million people fled their homelands in Southeast Asia for political or economic reasons. The resettlement of Indochinese refugees during this humanitarian crisis was achieved through international burden-sharing, with Thailand and the United States taking respective leadership in providing first asylum and permanent resettlement.

One important lesson from the Indochinese episode is that a multilateral solution to a humanitarian problem does not require all parties to share the same motivations, and a purely humanitarian rhetoric that fails to consider the national interests of the parties involved is not likely to effect actual change. Thailand served as the primary first asylum country in the

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[9] Eligibility for North Koreans seeking refugee and asylum status under the *NKHRA* is defined respectively by ss. 207 and 208 of the *Immigration and Nationality Act*, 8 U.S.C. 1157, Pub. L. No. 82-414, 66 Stat. 163. See *NKHRA*, *ibid*., s. 302(b).

[10] Congressional Research Service, *Congress and U.S. Policy on North Korean Human Rights and Refugees: Recent Legislation and Implementation* (22 October 2008) at CRS-2, online: <http://fpc.state.gov/documents/organization/112040.pdf>.

[11] House Committee, *2008 Reauthorization Act Report*, *supra* note 1 at 5-6.

[12] "No. of N.Korean Refugees in U.S. 'Reaches 81'" *Chosun Ilbo* (7 May 2009), online: Arirang News <http://english.chosun.com/site/data/html_dir/2009/05/07/2009050700644.html>.

[13] *North Korean Human Rights Reauthorization Act of 2008*, Pub. L. 110-346, 122 Stat. 3939.

[14] House Committee on International Relations, *North Korean Human Rights Act of 2004* (H.R. Rep. No. 108-478) (Washington, D.C.: United States Government Printing Office, 2004) at 7.

Indochinese crisis, and China is the natural candidate to assume similar leadership in the current North Korean crisis. An evaluation of Thailand's interests and motivations with respect to the Indochinese crisis reveals insights on how American policymakers can more effectively persuade China to take leadership in providing first asylum to North Korean refugees. Of course, there are limits to this analogy, and these limits will be canvassed in Part IV.

To the extent that the analogy between the two refugee crises is appropriate, this article will argue that even if motivated by humanitarian concerns, American policymakers should nevertheless take a pragmatic approach to the negotiation and implementation of a multilateral solution for the North Korean refugee crisis. Specifically, this article proposes policies for the current US administration by focusing on two key and related themes: i) as demonstrated by the Indochinese refugee crisis, successful negotiation and implementation of a multilateral solution requires a pragmatic awareness of the partner states' national interests; and ii) successful resettlement of North Korean refugees must engage China, a key partner, by understanding its interests and burdens arising from the provision of first asylum. American diplomatic dialogue with China might make more progress on the issue if it focuses less on human rights and more on, for example, the financial benefits that could potentially result if China were willing to recognize refugee status for qualifying North Korean refugees. Part of the *NKHRA*'s annual budget should also be pledged to the development of an effective domestic screening program, which would assure China that the rate of permanent resettlement in the United States would not lag behind China's admission of North Koreans.

As demonstrated by its role in the six-party talks over nuclear nonproliferation, China is a crucial player in any multilateral collaboration regarding North Korea. In the refugee context, China's importance derives from various factors including its negotiating power over North Korea, its partnership with South Korea, and its status as the primary first stop for North Korean refugees. The *NKHRA*, while well-intended, has made little progress in resettling North Korean refugees because, among other shortcomings, it has failed to garner China's partnership. While South Korea is bound to play an important role in any multilateral resettlement of North Korean refugees and should not be sidelined, this article will primarily focus on the potential progress that bilateral US-China leadership can make in resettlement efforts.

Part II will reflect on the lessons from Indochinese refugee resettlement, during which the United States and Thailand took respective leadership roles in providing permanent resettlement and first asylum. Thailand, like China, viewed refugees as illegal economic migrants and for the most part did not base its asylum policy on humanitarian concerns. A primary lesson from the Indochinese crisis is that a successful multilateral solution does not require the states that assume leadership roles to have completely identical motives. Rather, it is sufficient for them to have an overlap of interests, which is certainly conceivable in the North Korean scenario. Such an overlap of

interests is illustrated, for example, by the modern US-China cooperation in pressuring North Korea to abandon its nuclear program.

Part III will explain why it is crucial for the *NKHRA* or any future American foreign policy to engage China's partnership in the resettlement of North Korean refugees. It will examine the national interests that shape China's current policy of denying refugee status to all North Korean defectors. This will reveal that those crafting American foreign policy must address China's national interests first if they wish to be effective in seeking Chinese collaboration.

Part IV will point out the *NKHRA*'s shortcomings as well as the imperfections in current international law's protection of economic refugees. It proposes that effective US-China leadership in North Korean refugee resettlement should work with rather than in criticism of the Chinese legal system. This approach is adopted from the lessons offered by the Thai experience during the Indochinese refugee crisis. Part V will address the challenges in implementing these policy proposals and the difference in circumstances between the Indochinese episode and the North Korean situation at present.

II. Lessons from the Indochinese Refugee Crisis: US-China Leadership in Forming a Multilateral Resettlement Solution for North Korean Refugees

The 1990s saw a global trend of increasingly restrictive asylum policies and a general failure to comply with international treaty obligations toward refugees.[15] International burden-sharing schemes that allocate refugees to recipient states for permanent resettlement, such as the ones proposed for the Haitian refugee crisis of 1994, have been revived as solutions to this problem.[16] The last successful multilateral resettlement of a large Asian refugee population was that of the Vietnamese refugees following the end of the Vietnam War in 1975. Although small numbers of Laotians and Khmers were resettled as well during this period, the outflow primarily originated from Vietnam: roughly 700,000 Vietnamese resettled in Western developed countries during the 1980s and the early 1990s.[17]

Burden-sharing aims to distribute the burdens of refugee protection fairly among the members of the international community. It is rooted in broad participation by states, consent of participating states, and proportionality in each state's share of burdens relative to other states.[18] The principle of burden-sharing was key to the resettlement program for Indochinese refugees, for which countries like Thailand, Malaysia, and Indonesia agreed to grant first asylum as long as permanent resettlement

[15] Astri Suhrke, "Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action" (1998) 11 J. Refugee S. 396 at 396 [Suhrke, "Burden-sharing"].
[16] *Ibid.* at 396-97.
[17] *Ibid.* at 405.
[18] Peter H. Schuck, "Refugee Burden-Sharing: A Modest Proposal" (1997) 22 Yale J. Int'l L. 243 at 276-77.

would be provided elsewhere. Another distinctive feature of this resettlement program was the hegemonic role played by the United States, which rallied collective action among participating states while doing its own "fair share" of resettlement out of humanitarian and political considerations.[19]

Granted, past American leadership in the resettlement of Indochinese refugees is not indicative of future success with North Korean refugees; the circumstances underlying the Indochinese refugee outflow were very different from those corresponding to the North Korean refugee problem. The former was the result of war and political repression, while the latter was brought about by the North Korean famine during the 1990s. Also, the United States has different interests with respect to the two scenarios. Without an analogous sense of responsibility like that resulting from American involvement in the Vietnam War, the United States' interests in the successful resettlement of North Korean refugees are arguably less compelling. Thus, it cannot be claimed that a comparison of the two situations alone would provide a sufficient solution to the North Korean refugee crisis.

However, to the extent that effective implementation of the *NKHRA* complements the American tradition of humanitarianism and "voting with your feet" foreign policy,[20] the Indochinese refugee crisis offers valuable lessons for North Korean refugee resettlement. The passing of the *NKHRA* indicates that the United States is willing to take leadership in the permanent resettlement of North Korean refugees in a manner similar to what it did during the Indochinese refugee crisis of the late 1970s.[21] But to do so effectively, it must coordinate its policies and diplomacy with China in order to form a multilateral solution. The *Immigration and Nationality Act*,[22] which was amended by the *Refugee Act* of 1980,[23] authorizes the admission of refugees of special humanitarian concern to the United States based on the President's determination in consultation with Congress.[24]

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[19] Suhrke, "Burden-sharing", *supra* note 15 at 405, 413. For examples of burden-sharing schemes for refugee resettlement, see *ibid.* at 397.

[20] The American facilitation and encouragement of Cuban immigration following the Cuban revolution, for example, was based on humanitarian concerns and the wish to show the world that the revolution had failed democratic ideals. See Maria de los Angeles Torres, "The Politics of Cuban Emigrés in the United States" in Felix Padilla, ed., *Handbook of Hispanic Cultures in the United States: Sociology*, vol. 3 (Houston: Arte Publico, 1994) 133 at 136.

[21] Even though various US-based organizations like Human Rights Watch and North Korean Freedom Coalition have urged President Obama to take a stance on the North Korean human rights issue, the Obama administration has remained silent on the topic: Human Rights Watch, "US/South Korea: Obama Should Raise North Korea Rights Issues" (17 November 2009), online: <http://www.hrw.org/en/news/2009/11/17/ussouth-korea-obama-should-raise-north-korea-rights-issues>; "Obama pressed to raise NK refugee plight with Hu" *The Korea Times* (12 January 2011), online: <http://www.koreatimes.co.kr/www/news/nation/2011/01/116_79563.html>.

[22] *Supra* note 9.

[23] *Refugee Act of 1980*, Pub. L. No. 96-212, 94 Stat. 102.

[24] U.S. Department of State, Bureau for Refugee Programs, *Report of the Indochinese Refugee Panel* 7 (1986) [*Report of the Indochinese Refugee Panel*].

> One of Congress's goals in renewing the 2004 *NKHRA* is the following: [T]he United States should make it a priority to seek broader permission and greater cooperation from foreign governments to allow the United States to process North Korean refugees overseas for resettlement in the United States, through persistent diplomacy by senior officials of the United States, including United States ambassadors to Asia-Pacific nations[.][25]

The 2008 *Reauthorization Act* provides a similar statutory solution specific to the North Korea refugee crisis. Citing China's "increasingly aggressive campaign to locate and forcibly return border-crossers to North Korea," the House Committee Report accompanying the Bill called for the Chinese government to stop forcible repatriation of North Korean refugees, fulfill international treaty obligations, and allow the United Nations High Commissioner for Refugees (UNHCR) into its territory for refugee status assessments.[26]

This can be accomplished if the United States engages China to take leadership in serving as a temporary first asylum country and coordinates the permanent resettlement of North Korean refugees with South Korea. Before discussing the implementation of such a multilateral solution, it is necessary to first give an overview of the United States' involvement in the Indochinese refugee crisis of the late 1970s, which bears similarities to the present North Korean situation.

1. Background of the Indochinese refugee crisis

The end of the Vietnam War and subsequent communist takeovers in Vietnam, Laos, and Cambodia caused close to two million people to flee from their home countries and seek asylum in nearby ASEAN countries.[27] The influx of Indochinese refugees fled predominantly to Thailand, whose history of accepting Vietnamese refugees dates back to the Indochina Wars in the 1940s. Although some of the individuals who took part in the Indochinese exodus were genuine political refugees who feared imprisonment or execution under the communist regimes in their home countries, a significant number were economic migrants who escaped in order to avoid the deteriorating quality of life under the new regimes.[28]

During the decade following the fall of Saigon in April 1975, the United States led, more than any other country, the process of receiving Indochinese refugees for permanent resettlement. Between April 1975 and February 1986, 1.7 million refugees were recorded as reaching first asylum and over half

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[25] 2008 *Reauthorization Act*, *supra* note 13, s. 3(1).
[26] House Committee, *2008 Reauthorization Act Report*, *supra* note 1, ss. 2(4) and 3(5).
[27] Valerie O'Connor Sutter, *The Indo-Chinese Refugee Dilemma* (Baton Rouge: Louisiana State University Press, 1990) at 4 (Thailand served as the primary first asylum country, but other ASEAN (The Association of Southeast Asian Nations) countries such as Malaysia, Singapore, Indonesia, and the Philippine participated as well).
[28] Astri Suhrke, "Indochinese Refugees: The Law and Politics of First Asylum" (1983) 467 Annals Am. Acad. Pol. & Soc. Sci. 102 at 106, fn.4 (noting that State Department officials have estimated economic refugees to be somewhere between 40 to 60 percent of recent Indochinese refugee arrival at various times) [Suhrke, "Law and Politics of First Asylum"].

were received by the United States, which has continued its commitment to Indochinese refugees through generous admissions since 1986.[29]

Before 1979, however, the United States, France, and other countries had adopted selective resettlement policies that preferred only the most highly educated and skilled of the Indochinese refugees. Meanwhile, an increasing influx of refugees led the Thai government to adopt tougher deterrence measures, such as closing the Thai-Laotian border in September 1977 and turning large groups of Vietnamese boat people back to the sea in late 1977.[30] The July 1979 UN Geneva Conference on Refugees and Displaced Persons in South East Asia elevated the issue to the international spotlight; the international community felt that this was not a problem for the first asylum countries to cope with alone, but rather a humanitarian crisis that could only be solved through international cooperation and burden-sharing.[31]

The United States' response appeared to be consistent with the American tradition of humanitarianism, but it is naïve to evaluate any country's decisions without taking its national interests into consideration.[32] America's foreign policy since World War II has consistently encouraged "voting with your feet" in order to isolate Communist regimes. This trend is reflected in the liberal admission policies it has extended to refugees from the Soviet Bloc,[33] and in this light it is not surprising that the United States was willing to accept Indochinese refugees after the Communist unification of Vietnam.

In addition to the isolation of Vietnam, the United States' refugee policy was also motivated by strategic interests in the ASEAN countries' political and economic stability. The ASEAN countries had the fastest growing economies among developing states and, by 1984, collectively ranked as the fifth largest trading partner of the United States.[34] This alliance proved to be particularly important during the 1973 oil crisis, when Indonesia chose not to

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[29] *Report of the Indochinese Refugee Panel*, *supra* note 24 at 4; Sutter, *supra* note 27 at 53.

[30] Phuwadol Songprasert, *Thailand: A First Asylum Country for Indochinese Refugees* (Bankok: Institute for Asian Studies, Chulalongkorn University, 1988) at 39-40. Vietnamese boat refugees arrived at the rate of roughly 1,000 per month in Thailand during 1977.

[31] *Report of the Indochinese Refugee Panel*, *supra* note 24 at 3-4.

[32] *see* David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004) at 232 (notes that most foreign policy experts fall somewhere between the two extremes of realism and idealism, and that the default mode for the foreign policy establishment is realism). See also Kathleen Newland, "The Impact of U.S. Refugee Policies on U.S. Foreign Policy: A Case of the Tail Wagging the Dog?" in Michael S. Teitelbaum & Myron Weiner, eds., *Threatened Peoples, Threatened Borders: World Migration and U.S. Policy* (New York: The American Assembly, 1995) at 190, 192 (notes that even though the *Refugee Act of 1980* eliminated geographical and ideological grounds for granting refugee status, thereby changing the legal basis of refugee admission from political realism to humanitarianism, U.S. refugee admission changed very little in practice.).

[33] See e.g. Edwin Harwood, "American Public Opinion and U.S. Immigration Policy" (1986) 487 Annals Am. Acad. Pol. & Soc. Sci. 201 at 201, 204; Norman L. Zucker, "Refugee Resettlement in the United States: Policy and Problems" (1983) 467 Annals Am. Acad. Pol. & Soc. Sci. 172 at 172, 175-76.

[34] Kishore Mahbubani, "The Kampuchean Problem: A Southeast Asian Perception" (1983/1984) 62 Foreign Affairs 407 at 421.

participate in the OPEC boycott and continued to deliver its contracts to America.[35]

The United States also had a geo-strategic interest in ASEAN stability, due to the fact that the Philippines was hosting American military bases, which, in turn, covered significant sea straits.[36] In ASEAN and Hong Kong, the refugee flow was perceived as both economically and developmentally adverse. Refugees were potential recruits for local Communist insurgency groups and therefore a threat to domestic stability. Thailand, where the largest number of refugees sought asylum, was most concerned with spies who arrived under the guise of refugees but with the real purpose of infiltration, and a screening process was eventually set up to filter out such saboteurs.[37] The arrival of ethnically Chinese refugees from Vietnam fed existing racial tensions in Malaysia and Indonesia. Hong Kong and Singapore had high-density populations on limited physical space, which confined their ability to dispense housing, employment, and other services to refugees.[38]

It was in the United States' strategic interest to secure the goodwill of these countries by taking leadership in permanent resettlement efforts, especially since it was viewed as partially responsible for the refugee problem to begin with. The Indochinese migration began, after all, following the collapse of pro-American governments in Vietnam, Laos, and Cambodia—it was the result of a failed American military intervention.[39]

One important lesson from the Indochinese refugee episode was that a multilateral solution to a humanitarian crisis could be implemented without requiring all parties involved to share the same assumptions underlying their actions. The ASEAN countries provided first asylum primarily out of political rather than humanitarian concerns and did not deem it important that the refugees should have a non-Communist alternative.[40] The United States, in contrast, was driven by humanitarian concerns, "voting with your feet" foreign policy, and strategic interests in the ASEAN countries' political and economic stability. It also felt a certain sense of responsibility because the first waves of refugees out of Indochina were affiliated with the American-supported *anciens régimes* in Vietnam, Laos and Cambodia, and consequentially ASEAN countries saw the Indochinese refugee problem as ultimately an American problem.

The United States was the wealthiest non-Communist country with resources for permanent refugee resettlement, whereas ASEAN was made up of developing countries with limited means.[41] Like China's view on North

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[35] Sutter, *supra* note 27 at 97.
[36] *Ibid*.
[37] Songprasert, *supra* note 30 at 35, 38-39.
[38] *Ibid*. at 99.
[39] Jeremy Hein, *States and Migrants: The Incorporation of Indochinese Refugees in the United States and France* (Boulder, CO: Westview Press, 1993) at 19.
[40] See Astri Suhrke, *Indochinese Refugees: The Impact on First Asylum Countries and Implications For American Policy: a study prepared for the use of the Joint Economic Committee, Congress of the United States* (Washington, D.C.: United States Government Printing Office, 1981) at 3 [Suhrke, *Impact*].
[41] *Ibid*.

Korean refugees, Thailand saw the displaced Indochinese who had fled to its borders as illegal and economic migrants rather than refugees.[42] Thus, despite its concern over reducing the number of asylum seekers on its soil, Thailand was reluctantly willing to adopt a liberal refugee policy. This can be explained because of America's emphasis on the availability of first asylum, which was sufficiently persuasive to Thailand given the increasing importance of good US-Thai relations particularly with respect to security issues. Other factors that help explain the Thai policy are the influx of relief assistance from the international community,[43] the fact that a refusal to offer first asylum would violate international humanitarian principles,[44] and the international condemnation that could be expected to result from such a breach.

2. *Past US-China Leadership in Multilateral Collaborations Regarding North Korea*

The United States is now in a position to engage China's leadership in a multilateral resettlement solution to the present North Korean refugee problem. The United States and South Korea both have the capabilities to receive North Korean refugees for permanent resettlement, but China is the most significant first asylum country.[45] Indeed, Chinese consent to providing first asylum and UNHCR access to North Korean asylum seekers living near its border are essential to a multilateral solution.

The first instance of successful US-China collaboration regarding North Korea was in the application of pressure to prevent North Korean nuclear proliferation.[46] China's mediation through its facilitation of trilateral talks was not only crucial in opening a dialogue of negotiations between North Korea and the United States but also set the multilateral framework for the six-party talks that came later.[47]

Like the Indochinese refugee crisis, the US-China partnership on the North Korean nuclear issue demonstrates an important lesson: multilateral cooperation requires a sufficient overlap, but not a complete convergence, of

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[42] See Sutter, *supra* note 27 at 101; Suhrke, *ibid.* at 7, fn. 4.
[43] The UN conference in July 1979 on the plight of Indochinese refugees was held specifically in response to pleas of assistance from ASEAN countries. The economic costs of maintaining refugee camps were borne by foreign sources and the UNHCR.
[44] Suhrke, *Impact*, *supra* note 40 at 8-9**.**
[45] Paul Wolfowitz, "How to Help North Korea's Refugees" *The Wall Street Journal* (16 June 2009) A15.
[46] Bonnie S. Glaser & Wan Liang, "North Korea: The Beginning of a China-U.S. Partnership?" (2008) 31 Wash. Q. 165 at 165.
[47] See *ibid.* at 169-70. For a description of China's leadership in mediation since North Korea first disclosed its highly enriched uranium program in October 2002, see Cheng Qian & Xiaohui Wu, "The Art of China's Mediation during the Nuclear Crisis on the Korean Peninsula" (2009) 36 Asian Aff.: Am. Rev. 79 at 82. The fourth round of six-party talks in September 2005 produced a joint statement in which North Korea agreed to give up its nuclear programs. In return, the United States confirmed that it had no interest in attacking North Korea; China, Japan, Russia, South Korea, and the United States also agreed to provide energy assistance to Pyongyang. Even though its terms were vague enough to give rise to later disagreements, the joint statement was still the first of its kind to be accomplished at a six-party talk.

motives among participating states. Former Secretary of State Colin Powell had similar sentiments:

> American and Chinese interests on the Korean Peninsula may not overlap completely, but they do so considerably. Neither side wishes to see nuclear weapons developed and deployed there. Neither side enjoys the spectacle of the dilapidated North Korean economy. *Neither side wants the refugee crisis on China's border to worsen* nor relishes a North Korean regime that smuggles drugs and weapons, counterfeits currencies, and engages in the periodic extortion of its neighbors through brinkmanship. And neither side, to be sure, has any interest in another Korean war.[48]

The United States and China both considered the nuclear disarmament of Pyongyang a priority but differed in their preferred methods of deterrence. The American strategy of deterrence focused on hard-line economic sanctions such as cutting off Pyongyang's energy supply from foreign sources. The US policy was shaped by the threat that North Korea's nuclear development would pose to its allies in the region, the security risk of nuclear material ending up in the hands of terrorist groups, and the Bush administration's overall aversion to the North Korean regime.[49]

China, on the other hand, was strongly opposed to economic sanctions. It considered its regular supply of oil and food to North Korea to be a small premium to pay for ensuring stability on its northeastern border. This is consistent with Chinese diplomacy more generally, which has historically focused on noninterference, avoidance of direct conflict, and neutrality as long as it does not sacrifice the Chinese national interest.[50] However, China took on the uncharacteristic role of mediator on the North Korean nuclear issue for several reasons. First, North Korea's nuclear program was a direct security threat to China and other countries in the region. Nonproliferation was viewed as the ideal state for economic development; and China had additional motivation to intervene in order to stymie the escalating US-North Korea tension, which could accelerate the collapse of the North Korean regime and trigger an unwanted mass influx of refugees. Second, in addition to security concerns, mediation also provided an opportunity for China to improve its relationship with the United States, and China was a valuable partner in this regard because of the political and economic leverage that it had over Pyongyang. Lastly, China has a history of friendly relations with North Korea that goes back to the Korean War and therefore is well positioned to serve as a neutral third-party broker between the United States

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[48] Colin L. Powell, "A Strategy of Partnerships" (January/February 2004) 83 Foreign Affairs 22 at 32 (emphasis added).

[49] Glaser & Liang, *supra* note 46 at 173.

[50] See Qian & Wu, *supra* note 47 at 81. The Five Principles of Peaceful Coexistence, a set of international relations guidelines initiated by China, India, and Myanmar in 1954 and widely recognized as norms in the region since then, stresses the importance of mutual non-interference and peaceful coexistence in international affairs. See "Backgrounder: Five Principles of Peaceful Coexistence" (14 June 2004), online: China View, <http://news.xinhuanet.com/english/2005-04/08/content_2803638.htm>.

and North Korea—two ideologically divergent countries with a legacy for hostility and mistrust that has lasted for decades.[51]

III. China's Leadership Role in the North Korean Refugee Problem: International Obligations, Current Policy, and Negotiating Power

China shares a 1,300 km border with North Korea and has perhaps the most significant interest in the North Korean crisis. Moreover, Northeast China is the first stop for most North Korean defectors, who either remain in China or go on to Southeast Asia before obtaining transportation and travel documents to South Korea. Others are smuggled from China on boats to the area surrounding South Korea or depart directly from Chinese cities with forged passports and plane tickets.[52]

Despite its indispensable role in any multilateral solution to the North Korean refugee problem, China does not recognize refugee status for any North Korean defectors and categorizes them as economic migrants instead.[53] The Chinese government regularly repatriates them back to North Korea, where the punishment awaiting them can vary anywhere from a few months of "labor correction" to execution.[54] It follows that Beijing's cooperation is crucial if the United States wants to implement the *NKHRA* in ways that would make a meaningful contribution to the resolution of the North Korean refugee crisis.

1. *International Obligations Towards Refugees*

China is a state party to both the 1951 *Refugee Convention*[55] and the 1967 *Protocol*[56]—the two key guidelines for refugee protection in the international arena today. Article 1(A)(2) of the 1951 *Refugee Convention* in combination with Art. I(2) of the 1967 *Protocol* define "refugee" as someone who:

> [in] fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence … is unable or, owing to such fear, is unwilling to return to it.[57]

Often referred to as the bedrock principle of international refugee law, *nonrefoulement* is codified in Art. 33 of the 1951 *Refugee Convention*, which

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[51] Qian & Wu, *supra* note 47 at 81-82.
[52] Stephan Haggard & Marcus Noland, eds., *The North Korea Refugee Crisis: Human Rights and International Response* (Washington, DC: US Committee on Human Rights in North Korea, 2006) at 61.
[53] See *infra* notes 58-59 and accompanying text for discussion of the UNHCR's distinction between "economic migrants" and "refugees".
[54] Haggard & Noland, *supra* note 52, "Summary".
[55] *Supra* note 4.
[56] *Ibid*.
[57] 1951 *Refugee Convention*, *supra* note 4, Art. 1(A)(2). The original time limit of "before 1 January 1951" in the 1951 *Refugee Convention*'s definition of refugees was eliminated later by the 1967 *Protocol*, *supra* note 4, Art. I(2).

obligates member parties not to "expel or return ('refouler') a refugee … [to territories] … where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Guidelines released by the UNHCR distinguish between "economic migrants" and "refugees": one who "voluntarily leaves his country . . . exclusively . . . [for] economic consideration . . . *is an economic migrant and not a refugee*."[58] However, economic migrants who were not refugees at the time of departure from their own countries are still eligible to claim *sur place* refugee status if their subsequent actions or events arising in their home countries during their absences "justify a well-founded fear of persecution."[59]

China's current policy systematically views North Korean defectors as illegal economic migrants rather than refugees. This practice is at odds with China's obligations under Art. 33 of the 1951 *Refugee Convention,* which, according to the UNHCR guidelines, would normally require refugee status to be assessed on an "individual basis" before a potential refugee is returned to his/her home country.[60] Admittedly, there is no explicit requirement for individual assessment of refugee status in the text of the 1951 *Refugee Convention* or of the 1967 *Protocol*. Neither instrument requires specific procedures to be adopted for the determination of refugee status; each State is left with the discretion to establish its own procedures.[61] China's failure to conduct individual assessments of refugee status for North Koreans, therefore, is a violation of non-binding "soft law" norms as established by the UNHCR guidelines, but not an outright violation of binding international law.[62]

China's conduct does, however, violate Art. 35 of the 1951 *Refugee Convention* and Art. II of the 1967 *Protocol*, which require member states to cooperate with the UNHCR. In a 1995 bilateral agreement,[63] China further pledged its commitment to UNHCR's purpose of "providing international

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[58] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/REV.1 (January 1992) at para. 62 [*UNHCR Handbook*] (emphasis added).

[59] *Ibid*. at paras. 94-96. Particularly relevant to this article's focus on the Indochinese refugee crisis, groups of Vietnamese asylum seekers also faced forcible repatriation after Hong Kong had determined that they were economic migrants: Josh Briggs, "*Sur Place* Refugee Status in the Context of Vietnamese Asylum Seekers in Hong Kong", Comment, (1993) 42 Am. U.L. Rev. 433 ("Screening officials in Hong Kong apply an excessively narrow definition of 'refugee' in the case of individuals and subgroups of Vietnamese asylum seekers because they fail to consider *sur place* refugee claims adequately. The result is an unwarranted denial of refugee status to many of the Vietnamese asylum seekers screened out as economic migrants.").

[60] See *UNHCR Handbook, supra* note 58 at para. 44.

[61] *Ibid.* at para. 189.

[62] See Michael Alexander, "Refugee Status determination conducted by UNHCR" (1999) J. Int'l Refugee L. 251 at 284 (argues that individual refugee status determination is expensive and that it is the UNHCR's role to persuade governments to allocate to it the necessary resources, thereby implying that individual refugee status determination is not binding international law.)

[63] *Agreement on the Upgrading of the UNHCR Mission in the People's Republic of China to UNHCR Branch Office in the People's Republic of China*, United Nations High Commissioner for Refugees and China, 1 December 1995, 1899 U.N.T.S. 61, online: <http://untreaty.un.org/unts/120001_144071/6/9/00004988.pdf>.

protection and humanitarian assistance to refugees"[64] by upgrading the UNHCR Mission in China to a local branch office.[65] The agreement obligates China to allow UNHCR personnel "unimpeded access to refugees and to the sites of UNHCR projects" in consultation and cooperation with the Chinese government.[66] Contrary to these obligations, China currently does not allow the UNHCR meaningful access to determine the refugee status of North Koreans living in China.[67]

Generally, sovereign states that are parties to the 1951 *Refugee Convention* are given discretion in establishing processes for the evaluation of refugee claims within their own legal systems.[68] The UNHCR offers guidance on refugee status determination procedures but only plays a non-binding supervisory role in this regard.[69] China currently does not have a national refugee system or legislation specifically designed for the fulfillment of its obligations under the 1951 *Refugee Convention*. However, the 1986 *Law of the People's Republic of China on Entry and Exit of Aliens* does permit political asylum seekers to reside in China upon approval by the Chinese government.[70]

China is certainly capable of tolerance in its treatment of refugees. Indeed, it allows the UNHCR to take the lead role in refugee status determinations with respect to all asylum seekers other than those originating from North Korea. The Chinese government allows non-North Korean asylum seekers to approach the UNHCR offices in China, seek refugee status there, and remain on Chinese soil while they wait for third-country resettlement.[71] Upon the arrival of Vietnamese persons of Chinese ethnicity who fled Vietnam during the 1979 China-Vietnam Border War, roughly 260,000 Vietnamese refugees were given asylum in China, and that community has now grown to over 300,000. Although they do not possess formal citizenship, many are integrated into Chinese society and entitled to

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[64] *Ibid*., Art. IV(1).
[65] *Ibid*.
[66] *Ibid*., Art. III(5).
[67] *The North Korean Human Rights Act of 2004: Issues and Implications: Joint Hearing Before the Subcommittee on Asia and the Pacific and the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations Tribal Energy Self-Sufficiency Act and the Native American Energy and Self-Determination Act*, 109th Cong. (2005) at 13-14 (Arthur E. ''Gene'' Dewey, Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Department of State) [2005 *NKHRA Joint Hearing*] (pointing out that the UNHCR's Beijing office is hard to find, and that the UNHCR does not have access to North Koreans living at the China-North Korea border).
[68] *UNHCR Handbook, supra* note 58 at para 189.
[69] The *UNHCR Handbook* offers guidance on status determination procedures that is an authoritative interpretation of 1951 Refugee Convention obligations but not binding on member states: Haggard & Noland, *supra* note 52 at 37. See Deborah E. Anker, "Refugee Law, Gender, and the Human Rights Paradigm" (2002) 15 Harv. Hum. Rts J. 133 at 137 (pointing out "examples of inconsistencies and incomplete implementations" among States Parties of the 1951 *Refugee Convention*, and that the UNHCR provides non-binding norms on the legalized and non-legalized assessments of refugee claims).
[70] [22 November 1985] Standing Committee of the Sixth National People's Congress, Thirteenth Session (entered into effect 1 February 1986), Art. 15, online: <http://www.chinatoday.com/law/IMMLAW.HTM>.
[71] Haggard & Noland, *supra* note 52 at 37.

many rights given to Chinese citizens.[72] Of course, the fact that these Vietnamese refugees are ethnically Chinese is significant, and China might conceivably be less willing to extend the same generosity to non-ethnic Chinese refugees.

China's treatment of North Korean refugees is a stark departure from its general willingness to cooperate with the UNHCR, given that UNHCR reports from northeastern China in the late 1990s characterized some of the newly arrived North Koreans as refugees.[73] According to the Congressional Report Service, China has insisted that North Koreans who have crossed the border into China are illegal economic migrants in search of food rather than political refugees.[74] Suspicious of UNHCR's intentions, China has denied aid agencies access to the border region despite UNHCR's offer of assistance and South Korea's willingness to resettle North Korean refugees.[75] The legal basis for this policy lies in a 1986 bilateral border protocol that China signed with North Korea, the full official text has never been made public.[76] The 1986 protocol obligates China to prevent "the illegal border crossing of (North Korean) residents" and "cooperate on the issue of handling criminals."[77] China's forcible repatriation of North Koreans under the 1986 border security protocol is in direct conflict with China's obligations toward refugees under the 1951 *Refugee Convention* and 1967 *Protocol*.[78]

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[72] U.S., Congressional-Executive Commission on China, *The Rising Stakes of Refugee Issues in China: Roundtable Before the Congressional-Executive Commission on China*, 111th Cong. (Washington, D.C.: United States Government Printing Office, 2009) at 3 (Joel Charny). See also UN, "2005 UNHCR Statistical Yearbook Country Data Sheet - China" in *Statistical Yearbook 2005: Trends in Displacement, Protection and Solutions* (Geneva: United Nations High Commissioner for Refugees, 2007) at 291. The UNHCR has remained involved with the assistance of Vietnamese refugees in China long after 1979. A draft handover agreement between UNHCR and China was finalized in 2007. Under the agreement, $7 million was handed to China's Ministry of Civil Affairs in order to implement micro-credit schemes for the benefit of Indo-Chinese refugees in China: UNHCR, "East Asia and the Pacific: Operation Highlights" (2007) at 372.

[73] 2007 CRS Report, *supra* note 2 at 11.

[74] *Ibid.* at 10-11.

[75] *Ibid.* at 11.

[76] Michael Dillon, *Contemporary China—An Introduction* (New York: Routledge, 2009) at 227.

[77] *Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas*, 12 August 1986 (Democratic People's Republic of Korea, Ministry of State Security, and People's Republic of China, Ministry of Public Security) [1986 China-North Korea Border Protocol]. The document was obtained in December 2002 by the Rescue the North Korean People Urgent Action Network (RENK), and the unauthenticated English translation is available online: <http://www.nkfreedom.org/UploadedDocuments/NK-China-bilateral_treaty.pdf>. See also James D. Seymour, "China: Background Paper on the Situation of North Koreans in China" (WRITENET: 1 January 2005), online: <http://www.unhcr.org/refworld/docid/4231d11d4.html>.

[78] Seymour, *ibid.* at 5. This analysis assumes that the text of the 1986 China-North Korea Border Protocol is accurately reflected in the only English translation available, which is unauthenticated.

2. *National Interests That Shape China's Current Policy of Denying Refugee Status to North Koreans*

China is keenly aware of the consequences to its international relations and to its security, particularly on the Korean peninsula, that could follow from the acceptance of North Korean refugees. It is well known that Hungary's willingness to allow the entry of East German asylum seekers contributed to East Germany's collapse in the late 1980s.[79] This lesson is not lost upon China: granting refugee status to North Korean defectors would encourage more North Koreans to flee, which in turn could destabilize the North Korean regime.[80]

China's interests in avoiding such a collapse stem from both economic and domestic security concerns. John S. Park suggests that the fall of North Korea would interfere with South Korean foreign direct investment in China, since part of the investment would likely be redirected toward the reconstruction of North Korea.[81] China also has a domestic security interest in maintaining good relations with its neighbour on the northeast border—a neighbour that serves as a buffer between China and the American troops stationed in South Korea.[82] The Chinese tradition of providing political and economic aid to North Korea dates back to the Korean War in 1953, and China's customary attitude toward North Korea is one that prefers carrots over sticks. However, when China does feel the need to resort to punishment, such punishment tends to be minimal. For example, when UN Security Council Resolution 1718[83] imposed economic sanctions on North Korea following the October 2006 nuclear testing in Pyongyang, Beijing only signed onto the Resolution after economic sanctions on non-luxury goods were removed through revisions.[84]

Recognizing North Koreans as refugees also entails additional obligations for China. For example, China would have to come to terms with both the "loss of sovereignty" in allowing an international aid organization to set up and administer refugee camps on Chinese soil, and with the financial costs in complying with international standards for refugee treatment. Currently the North Koreans in China do not have legal status

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[79] See Andrei Lankov, "North Korean Refugees in Northeast China" (2004) 44 Asian Survey 856 at 868.
[80] See *ibid.*; David Shambaugh, "China and the Korean Peninsula: Playing for the Long Term" (Spring 2003) 26:2 Wash. Q. 43.
[81] John S. Park, "Inside Multilateralism: The Six-Party Talks" 28:4 Wash. Q. 75.
[82] See Lankov, *supra* note 79 at 873. But see Anne Wu, "What China Whispers to North Korea" (Spring 2005) 28:2 Wash. Q. 35 (pointing out that in the context of recent improvements in U.S.-China relations, "the traditional 'lips and teeth' relationship between China and the DPRK, in which Beijing envisioned using North Korea as a buffer against the United States, appears both obsolete and self-destructive"). For a discussion of the US-South Korea alliance and the Mutual Defense Treaty since 1953, see Bruce E. Bechtol, "The ROK-US Alliance During the Bush and Roh Administrations: Differing Perspectives and their Implications for a Changing Strategic Environment" (2005) 9 Int'l J. Korean Stud. 87 at 88-89.
[83] SC Res. 1718, U.N. Doc. S/RES/1718 (14 October 2006), online: <http://www.un.org/Docs/sc/unsc_resolutions06.htm>.
[84] Jayshree Bajoria, "Backgrounder: The China-North Korea Relationship" (Council on Foreign Relations, updated 7 October 2010), online: <http://www.cfr.org/publication/11097/>.

and are not entitled to any assistance from the Chinese government. If anything, the cheap labor they provide is a boost to the Chinese economy.[85] However, if recognized as refugees, the standard of living for North Koreans—as a result of UNHCR aid and other venues of international intervention—could conceivably be superior to what local citizens in Northeast China are accustomed to, and therefore a source of domestic tension.[86]

3. China's Negotiating Power over North Korea

It should be qualified that China's "big brother" patronage of North Korea is not unconditional. Chinese foreign policy has changed considerably since the Korean War more than 50 years ago, and is no longer ideologically dedicated to supporting socialist states and "exporting revolution."[87] For example, in August 2003, Chinese President Hu Jintao called for North Korea to make progress toward economic self-sufficiency, reform, and improvement of relations with neighbouring countries by putting an end to its nuclear program.[88] It is becoming increasingly apparent that, due to international interest over the nuclear issue, Beijing's ability and willingness in continuing aid to North Korea is contingent on Pyongyang's progress on nuclear disarmament. President Hu has indicated that even though Beijing values its historical alliance with Pyongyang, it is perfectly willing to collaborate with the international community on issues important to China's national interests such as the denuclearization of the Korean peninsula. This pressure was allegedly a major factor in North Korea's decision to return to six-party talks in 2003.[89]

As North Korea's primary ally and trading partner, China is in a unique position to exert negotiating power over Pyongyang. North Korea is highly dependent on foreign aid, which has essentially replaced the commercial importation of food.[90] The collapse of the Soviet Union resulted in the dissolution of economic benefits for North Korea, and, as a result, the effects of food shortages in North Korea became increasingly severe. Floods in 1995 catalyzed a nationwide famine that, based on some estimates, killed between five to ten percent of the population. This compelled North Korea to seek international food assistance despite its national ideology of self-reliance.[91]

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[85] Lankov, *supra* note 79 at 868.
[86] Park, *supra* note 81 at 83. For an analogy of this problem during the Indochinese refugee crisis, see disparities in standards of living between Indo-Chinese refugees, who lived under UNHCR's auspice in poor rural areas near Thailand's border, and the local villagers: Sutter, *supra* note 27 at 124.
[87] See Wu, *supra* note 82 at 41-42.
[88] Willy Wo-Lap Lam, "Time to act, China tells N Korea" *CNN International* (25 August 2003) online: <http://edition.cnn.com/2003/WORLD/asiapcf/east/08/24/willy.column>. See also David Kerr, "The Sino–Russian Partnership and U.S. Policy Toward North Korea: From Hegemony to Concert in Northeast Asia" (2005) 49 Int'l Stud. Q. 411 at 426 (citing examples of assertive Chinese diplomacy on the nuclear disarmament issue, such as reportedly disrupting the North Korean oil supply and convening several multilateral negotiations).
[89] See Lam, *ibid.*
[90] 2005 *NKHRA Joint Hearing*, *supra* note 67 at 46.
[91] 2007 CRS Report, *supra* note 2 at 6.

The World Food Programme (WFP) set up operations in North Korea soon after and the United States had been the largest donor in this effort until 2005.[92]

In August 2005, the North Korean government announced that it would no longer accept humanitarian assistance from the WFP. Later in the same year, it rejected aid from the European Union (EU) after the EU proposed a United Nations resolution on the human rights situation in North Korea. The WFP significantly reduced its operations in North Korea as a result, and no food or energy aid has gone to Pyongyang from the United States since 2006.[93]

As a result of this progressive isolationism, North Korea has become increasingly reliant on aid from China and South Korea. Those two countries continue to bypass the WFP, sending bilateral aid directly to Pyongyang out of fear that North Korea's collapse would trigger a mass influx of unwanted refugees into their territories.[94] North Korea's economic survival is becoming increasingly dependent on China, which, according to estimates, has since the early 1990s provided almost 90 percent of energy imports, 80 percent of consumer goods, and 45 percent of food.[95] Analysts and aid workers within and external to the WFP agree that bilateral aid from China and South Korea weakens the WFP's efforts to promote better internal access, monitoring, and transparency in North Korea.[96] South Korea gives concessional food assistance with little monitoring of the distribution and no effort to target the most vulnerable groups.[97] China, which has likely provided even more food than the United States has, does not appear to predicate its aid on any conditions, and certainly not on either policy reform or monitoring within North Korea.[98]

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[92] *Ibid.* See also Mark E. Manyin, Specialist in Asian Affairs, Foreign Affairs, Defense, and Trade Division, "CRS Report for Congress: U.S. Assistance to North Korea: Fact Sheet 1" (updated 3 January 2007), online: <http://www.nationalaglawcenter.org/assets/crs/RS21834.pdf> [2007 CRS Fact Sheet] (U.S. aid to North Korea has totalled over $1.1 billion since 1995—roughly 60% in the form of food aid and 40% in energy assistance processed through the Korean Peninsula Energy Development Organization).

[93] 2007 CRS Fact Sheet, *ibid.* at 1-3.

[94] James T. Laney & Jason T. Shaplen, "How to Deal with North Korea" (March/April 2003) Foreign Affairs 16 at 27.

[95] Bajoria, *supra* note 84. But see Wu, *supra* note 82 at 35, 42.

[96] Mark E. Manyin, Specialist in Asian Affairs, Foreign Affairs, Defense, and Trade Division, "CRS Report for Congress: Foreign Assistance to North Korea" (26 May 2005) at 10.

[97] 2007 CRS Fact Sheet, *supra* note 92 at CRS-4 (In 2005, South Korea conducted 20 monitoring trips to food distribution centers in North Korea. The WFP, in contrast, had a much more intrusive presence in North Korea. Before it reduced its operations in North Korea, the WFP conducted thousands of monitoring trips every year with over 40 expatriate staff and six offices in the country).

[98] *Ibid.*; Stephan Haggard & Marcus Noland, "Hunger and Human Rights: The Politics of Famine in North Korea" (US Committee for Human Rights in North Korea, January 2006) at 31-32, online: <http://works.bepress.com/marcus_noland/5> (noting that China provides concessional sales or grants of food to North Korea outside of the World Food Program, and that there is no evidence that China has conditioned its aid "on overall policy reform or more particular principles of programmatic design, implementation, or monitoring").

4. China-South Korea Partnership

China's strong relationship with South Korea—the country that has resettled the largest number of North Korean refugees[99]—adds to China's influence in coordinating any international resettlement solution. In 2002, China replaced the United States as South Korea's biggest trading partner, and two-way trade between the two countries had increased by roughly 20 percent over the preceding year, approaching US$100 billion.[100] As of 2003, South Korea was China's third largest trading partner and fifth largest foreign investor. Its expected investment in China that year was estimated at US$1 billion—half of South Korea's total overseas investment.[101] South Korea also has an active economic development presence in northeast China, the "rust belt" region that has the largest concentration of ethnic Koreans and is most vulnerable to the impact of a refugee influx from North Korea.[102]

In addition to economic considerations, China has a strategic interest in maintaining close ties with South Korea: there is a delicate and continually contested balance between Chinese and American influences over South Korea. If South Korea, the United States, and other countries set up a reassuring multilateral resettlement solution for North Korean refugees and jointly persuade China to provide first asylum, China would be unlikely to flatly refuse solely for the sake of appeasing Pyongyang. Its relations with Seoul are too important. As evidenced by its position on the North Korean nuclear disarmament issue, China is willing to support certain initiatives against North Korea to further its own national interests.[103]

IV. Policy Proposals for A Multilateral Solution

The remainder of the article will analyze the shortcomings of the *NKHRA*, highlight the Eurocentric nature and imperfections of current international refugee law, and address the burdens that China would take on by providing temporary first asylum. American diplomacy that is sensitive to these three issues can make a significant contribution to the resolution of the North Korean refugee crisis. Rather than criticizing China's international

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[99] Emma Chanlett-Avery, "Congress and U.S. Policy on North Korean Human Rights and Refugees: Recent Legislation and Implementation" (CRS Report for Congress, 30 January 2009) at 5, online: <http://opencrs.com/document/RS22973/> [2009 CRS Report]. South Korea's Unification Ministry record shows that in November 2010, there are approximately 20,000 North Korean defectors living in South Korea: "Kim Is Free! Defector No. 20,000" *The Wall Street Journal* (15 November 2010), online: <http://blogs.wsj.com/korearealtime/2010/11/15/ms-kim-is-free-defector-20000/>.

[100] James Brooke, "China 'Looming Large' in South Korea As Biggest Player, Replacing the U.S." *The New York Times* (3 January 2003), online: <http://www.nytimes.com/2003/01/03/world/threats-responses-northeast-asia-china-looming-large-south-korea-biggest-player.html>.

[101] *Ibid*.

[102] David Shambaugh, "China and the Korean Peninsula: Playing for the Long Term?" (2003) 26:2 Wash. Q. 43 at 49. As of 2003, northeastern China had "an annual per capita income of $1,154, about one-half that of the greater Beijing area and one-third that of Shanghai": Brooke, *ibid*.

[103] See *supra* notes 49-51 and accompanying text for a more detailed account of China's leadership in facilitating multilateral negotiations over the nuclear non-proliferation issue.

treaty violations outright, the United States might make more progress by seeking solutions within the Chinese legal system, and by pledging aid to the unique burdens that China would take on as a provider of first-asylum.

The repeated attention paid to North Korea's human rights record and China's violations of its international obligations toward North Korean refugees brings unwanted spotlight to the refugee issue and only puts China in a more defensive position. Despite the 1986 China-North Korea Border Protocol, Chinese officials have been willing to look the other way as long as refugee inflows and activities of foreign NGOs are carried out quietly.[104] The exception is with respect to North Koreans who, in trying to enter foreign diplomatic compounds, have made their way into the international spotlight as well. But even for such high-profile cases, China still tends to relent to external pressure eventually and allow the refugees subsequent passage to other countries.[105]

Reputational concerns may have led China to relent on its policy toward North Korean refugees in these cases,[106] but the high-profile embassy-stormings are outright embarrassments to the Chinese government, and have led to more heavily guarded embassy gates by Chinese security. North Koreans seeking passage to South Korea have attempted entry into the embassies and consulates of many countries, including Spain, United States, Canada, Japan, Germany, and South Korea.[107] The NGOs facilitating these undertakings made sure to alert foreign reporters beforehand in order to maximize the international community's attention and exert pressure on the Chinese government.[108] Chinese Foreign Ministry spokesman Kong Quang's statement regarding these efforts was not without a sense of irony: "I'm really surprised some of the correspondents knew the timing of the cases about a half-hour" before they occurred.[109] In December 2002, the Chinese government, not at all happy with the practice and wanting its end, renewed efforts of forced repatriation of North Koreans in collaboration with North Korean security forces.[110]

1. *Shortcomings of the 2004* North Korean Human Rights Act

The United States government is now in a position to start a new chapter in US-China relations by recognizing the *NKHRA*'s shortcomings and taking a conciliatory approach on the North Korean refugee problem. An awareness

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[104] 2007 CRS Report, *supra* note 2 at 11.
[105] In an embarrassing 2002 episode, an asylum seeker was dragged away from the South Korean Consulate after a scuffle between the Chinese police and South Korean diplomats. China finally relented after weeks of diplomatic gridlock and allowed 26 North Korean asylum seekers to leave the country: Elisabeth Rosenthal, "North Korea Asylum Seekers Leave China" *The New York Times* (24 June 2002) A6.
[106] See *supra* notes 104-105 and accompanying text.
[107] Benjamin Neaderland, "Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis" (2004) 40 Stan. J. Int'l L. 143 at 144.
[108] *Ibid*. at 169.
[109] Michael B. Lev, "Hectic day for imagemakers in Beijing" *Chicago Tribune* (4 September 2002).
[110] See Doctors Without Borders, "Urgent Appeal for Protection of North Korean Refugees in China" (Press Release, 19 January 2003), online: <http://doctorswithoutborders.org/press/release.cfm?id=374&cat=press-release>.

of the *NKHRA*'s shortcomings will enable American foreign policy to better engage China's leadership in resettling North Korean refugees. The *NKHRA* was an American effort to coordinate a multilateral solution to the North Korean refugee situation and to take leadership in the permanent resettlement process. Under Title III of the *NKHRA*, North Koreans are allowed to apply for refugee status and asylum regardless of whether they have any claim to South Korean citizenship.[111] Furthermore, the *NKHRA* encourages North Korea's neighbours to adopt similar humanitarian measures, the international community more generally to grant safe haven to North Korea refugees, and China to uphold its international obligations toward refugees under the 1951 *Refugee Convention* as well as the 1967 *Protocol*.[112]

In passing the *NKHRA*, part of Congress' intention was that "the human rights of North Koreans should remain a key element in future negotiations between the United States, North Korea, and other concerned parties in Northeast Asia."[113] However, China has not altered its treatment of North Korea refugees since the passage of the *NKHRA*, and only 81 North Korean defectors have been granted refugee status in the United States since May 2006.[114] Critics of the *NKHRA* have voiced concerns that the legislation not only worsens the plight of the refugees, but also damages North Korea-South Korea relations and weakens the six-party talks' progress on North Korean nuclear disarmament.[115]

The *NKHRA* has made little progress in garnering China's collaboration for four reasons. The *NKHRA* appears to i) endorse and encourage the collapse of the North Korean regime, an event that the Chinese government is willing to go to great costs to avoid;[116] ii) hinder six-party negotiations on North Korean nuclear nonproliferation; iii) impose economic sanctions on North Korea that are unlikely to effect real improvements of human rights within the country; and iv) lack sufficent mechanisms that enable the

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[111] *NKHRA, supra* note 7, Title I, s. 302(a). The *NKHRA* provision regarding South Korea citizenship responds to a provision in the South Korean constitution that grants *de facto* citizenship to North Koreans. See Nicole Hallett, "Politicizing U.S. Refugee Policy toward North Korea" (Winter/Spring 2006) 1 Yale J. Int'l Affairs 72 at 76 ("Because North Korean refugees technically could claim citizenship in a safe third country, requests for asylum in the United States were categorically denied. Consequently, very few North Koreans were admitted into the United States prior to the passage of the *North Korean Human Rights Act of 2004*. The State Department notes that only five North Koreans were granted asylum in 2002, three in 2003, and one in 2004.").

[112] *NKHRA*, *ibid*., ss. 304-308.

[113] *Ibid*., Title I, s. 101.

[114] "No. of N.Korean Refugees in U.S. 'Reaches 81'" *Chosun Ilbo* (7 May 2009), online: <http://english.chosun.com/site/data/html_dir/2009/05/07/2009050700644.html>.

[115] 2007 CRS Report, *supra* note 2 at 17. See Wu, *supra* note 82 at 35; Balbina Hwang, "Spotlight on the North Korean Human Rights Act: Correcting Misperceptions" (Heritage Foundation, February 2005) at 1, online: <http://www.heritage.org/Research/Reports/2005/02/Spotlight-on-the-North-Korean-Human-Rights-Act-Correcting-Misperceptions>.

[116] One of the ways that the *NKHRA* is distinguished from its predecessor, the *North Korean Freedom Act* of 2003, is "the supposed de-linkage of refugee 'exodus' with regime change": Jaeho Hwang & Jasper Kim, "Defining the Limits of the North Korean Human Rights Act: A Security and Legal Perspective" (2006) 23 E. Asia 45 at 47.

executive branch to collaborate with South Korea. Support and implementation from the executive branch have been tenuous at best. The Bush administration's emphasis on North Korea's human right record decreased as nuclear negotiations evolved, and the Obama administration has so far not taken a stance on the issue.[117]

While sponsors of the legislation have stated that the *NKHRA* was a purely humanitarian gesture without political motives,[118] it is naïve to believe that any post-War American immigration and refugee policy is implemented without foreign policy goals in mind.[119] This point was also illustrated by the United States' response to the Indochinese crisis. However, starting in the 1990s, Congress has increasingly shown a trend of implementing human rights legislations targeting specific "rogue states" with the goal of catalyzing political change.[120] Stephen Linton, who has visited North Korea 60 times since 1979 and serves as Chairman of the Eugene Bell Foundation that provides medical care to North Koreans, has expressed concerns that a 2005 conference on North Korean human rights, funded by the *NKHRA*, "might hurt those it is trying to help by painting non-governmental groups seeking to work in North Korea as 'agents of regime change.'"[121]

The second shortcoming of the *NKHRA* is that it hinders the six-party negotiations over North Korea's nuclear program without making substantial human rights improvements. Tempting as it may be, linking human rights to the international community's efforts toward North Korean nonproliferation is not a realistic way to help North Korean refugees. Section 101 of the *NKHRA* states that "[i]t is the sense of Congress that the human rights of North Koreans should remain a key element in future negotiations between the United States, North Korea, and other concerned parties in Northeast Asia." This implies that humanitarian concerns should be linked to future multi-party negotiations on the nuclear disarmament issue. In practice, however, the *NKHRA* does not appear to have a significant impact on how much emphasis the executive branch chooses to place on human rights issues during nuclear disarmament negotiations.[122] Perhaps using the NKHRA as a straw man, Pyongyang has cited the legislation as "evidence" of America's "hostile policy" of encouraging further defections from North Korean citizens and endorsing regime change in North Korea. In the past, Pyongyang has used this legislation as a justification for North Korea's

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[117] 2009 CRS Report, *supra* note 99 at 1.
[118] 2005 *NKHRA Joint Hearing*, *supra* note 67 (as evidenced by the language of Rep. James Leach).
[119] See Newland, *supra* note 32 at 190 ("Throughout the period of the Cold War, U.S. refugee policy [has served as]… a handmaiden of foreign policy. It was meant to contribute to the overarching objective of damaging and ultimately defeating Communist countries, particularly the Soviet Union.").
[120] Hallett, *supra* note 111 at 72, 76.
[121] Barbara Slavin, "Rights conference may be pitfall for N. Korea talks" *USA Today* (15 July 2005), online: <http://findarticles.com/p/articles/mi_kmusa/is_200507/ai_n14777034/>. The conference opposed economic aid solely in exchange for the North Korean regime's nuclear disarmament without addressing its human rights abuses.
[122] See *supra* note 117 and accompanying text.

withdrawal of participation in the six-party talks, which results in no net benefit for North Korean refugees.[123]

The Bush administration's confrontational attitude toward North Korea was a departure from that of the Clinton administration, which always treated security issues with North Korea separately from human rights discussions. The 1994 *Agreed Framework between the United States and North Korea*, which gave Pyongyang economic incentives in exchange for freezing its nuclear program, made no mention of human rights concerns.[124] In contrast, the Bush administration repeatedly criticized Pyongyang's human rights record and supported UN resolutions in condemnation of it. During six-party talks, the United States has insisted on a hard-line multilateral approach similar to the treatment of Libya, whose nuclear dismantlement was demanded in return for economic benefits following the Libyan-sponsored bombing of a Pan Am flight in 1988.[125] Observers have noted a correlation between an increased focus on human rights issues and stalled progress in nuclear weapons negotiations.[126] The Obama administration has stated a willingness to participate in nuclear negotiations but has not taken a clear stance on the human rights issue.[127]

Third, the economic sanctions that the *NKHRA* imposes on North Korea are unlikely to effect real improvements in the country's human rights policies. The *NKHRA* promises "significant increases above current levels of United States support for humanitarian assistance provided inside North Korea … conditioned upon substantial improvements in transparency, monitoring, and access to vulnerable populations throughout North Korea." The *NKHRA* further states that American non-humanitarian assistance to North Korea is contingent on North Korea's "substantial progress toward … basic human rights."[128] However, Steve Pape suggests that authoritarian governments subjected to economic sanctions tend to become more oppressive.[129] Economic sanctions are often not successful in effecting change in the target country's policies and likely to adversely impact the poorest segment of its population.[130] The correlation between economic deprivation and political willingness to change is weak, since factors other than the economic impact of sanctions, such as the military potential of the target country, play a primary role in determining political income.[131] None

[123] Wu, *supra* note 82 at 35.
[124] See 2007 CRS Report, s*upra* note 2 at 15; "U.S. 'North Korean Human Rights Act' Flailed" *Korean Central News Agency* (4 October 2004), online: <http://www.kcna.co.jp/item/2004/200410/news10/05.htm>.
[125] Park, supra note 81 at 79-80.
[126] See 2007 CRS Report, *supra* note 2 at 16.
[127] 2009 CRS Report, *supra* note 99 at 1. See "Obama urges North Korea to change" *BBC News* (19 November 2009), online: <http://news.bbc.co.uk/2/hi/8367585.stm>.
[128] *NKHRA*, *supra* note 7, ss. 202(b)(2)(A), 202(a)(2).
[129] See Steve A. Pape, "Why Economic Sanctions Do Not Work" (1997) 22:2 Int'l Sec. 90 at 91-93 (challenging the effectiveness of economic sanctions but acknowledging existing literature which takes the position that economic sanctions can achieve ambitious foreign policy goals).
[130] Semoon Chang, "The North Korean Human Rights Act of 2004" (2006) 2 N. Korean Rev. 80 at 87.
[131] Gary Clyde Hufbauer, Jeffrey J. Schott & Kimberly Ann Elliott, *Economic Sanctions*

of the economic sanctions imposed for political reasons by the United States on countries such as Afghanistan, Cuba, and Iraq accomplished their intended purposes, and this will most likely be the outcome for any American sanctions against North Korea.[132]

Lastly, the *NKHRA* is conspicuously silent with respect to collaboration with South Korea on the North Korean refugee issue. This is despite Congressional acknowledgement that the "principal responsibility for North Korean refugee resettlement naturally falls to the Government of South Korea."[133] One of the challenges to effective *NKHRA* implementation is that the vetting process of North Korean asylum seekers is complex. The United States has no official relations with North Korea and little information of the applicants' backgrounds, making close coordination with South Korea all the more essential to developing effective vetting mechanisms.[134]

South Korea, a party to both the 1951 *Refugee Convention* and 1967 *Protocol*, is currently the primary destination for North Korea refugees. The number of North Korean defectors arriving in South Korea since the end of the Korean War in 1953 has totaled more than 14,000.[135] South Korea grants *de facto* citizenship[136] to North Koreans, and under a 1962 law administers a generous resettlement program for all North Koreans who defect to the South.[137] What began as a single-digit annual flow of North Korean defectors in the early 1990s ballooned in the late 1990s as a result of the North Korean famine.[138]

Reconsidered: History and Current Policy, 2d ed. (Washington, D.C.: Institute for International Economics, 1990) at 94 (Of the 30 cases examined that involve high policy goals, only seven were successful as a result of implementing economic sanctions, and only three after discounting four cases that ended in world wars and civil wars.).

[132] See Michael Whitty, Suk Kim & Trevor Crick, "The Effectiveness of Economic Sanctions: The Case of North Korea" (2006) 2 N. Korean Rev. 50.

[133] *NKHRA*, *supra* note 7, s. 3(24). Rep. Leach has also stated that "South Korean cooperation will be important to our own efforts to assist North Korean refugees": 2005 *NKHRA Joint Hearing*, *supra* note 67 at 2.

[134] See Emma Chanlett-Avery, "Congress and U.S. Policy on North Korean Human Rights and Refugees: Recent Legislation and Implementation" (CRS Report for Congress, 22 October 2008) at 5-6, online: <http://fpc.state.gov/documents/organization/112040.pdf> [2008 CRS Report].

[135] See "Burma frees North Korean refugees" *BBC News* (1 January 2009), online: <http://news.bbc.co.uk/2/hi/7806925.stm>; 2008 CRS Report, *ibid*. at 6.

[136] *Constitution of the Republic of Korea* (1987), Art. 3. online: <www.asianlii.org/kr/legis/const/1987/1.html ("The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.").

[137] Prior to 1997, the aid payments were fixed in gold rather than South Korean won to assuage the defectors' distrust of paper currency: Haggard & Noland, *supra* note 52 at 55. The 1962 law was revised in 1978 and remained effective until 1993, when a new law was enacted and shifted to treating North Korean defectors more as economic refugees than as heroes: Byung-Ho Chung, "Between Defector and Migrant: Identities and Strategies of North Koreans in South Korea" (2008) 32 Korean S. 1 at 7-9.

[138] 2007 CRS Report, *supra* note 2 at 14. The latest estimate is that 2,809 North Koreans defected to the South during 2008: "North Korean Defectors Up 10% Last Year" *Chosun Ilbo* (6 January 2009), online: <http://english.chosun.com/site/data/html_dir/2009/01/06/2009010661029.html>.

2. *Imperfections of Current International Refugee Law*

Before making outright criticisms of China's noncompliance with its international treaty obligations toward North Korean refugees, it bears keeping in mind that many Asian countries are not signatories to the 1951 *Refugee Convention* and 1967 *Protocol*. These two instruments have been criticized as Eurocentric responses to displaced populations in Europe following World War II and inadequate solutions to Asian refugee problems.[139] The concept of human rights is, arguably, "legally international" but "historically Western"; and it has been argued that Asian states' viewpoints and interests were not sufficiently incorporated during the drafting process of international refugee law.[140] The scope of current international refugee law may not be comprehensive enough to cover all individuals in need of protection, regardless of China's compliance with its international treaty obligations toward North Korean refugees.

The drafting history of the 1951 *Refugee Convention* is dominated by three themes. First, the scope of the *Convention*'s protection was driven by a delegation of predominantly Western states, whose partisan interests were divided along Eastern and Western ideologies. As a result, the *Convention*'s protection applied only to refugees as defined primarily by Western ideologies rather than to all similarly situated persons.[141] Its refugee definition included only persons seeking civil and political rights and excluded those seeking basic socioeconomic rights like food, healthcare, and education.[142] Second, instead of embracing refugee populations originating from all parts of the world, the burden-sharing regime of refugee resettlement created by the *Convention* was Eurocentric in its focus on European refugees displaced by World War II. Third, the determination of refugee status is largely implemented at the state rather than at the international level, allowing the states considerable discretion in setting their own procedures, screening refugees with domestic interests in mind, and granting asylum to individuals who have been validated as refugees.[143] The cumulative product of these themes is a Eurocentric protection regime that neither recognizes socioeconomic rights nor obligates Western states to accept asylum seekers from most developing countries.

To this end, the current mechanism for refugee protection under international law has been criticized as too narrow to adequately cover all people in need of international protection.[144] The 1951 *Refugee Convention*

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[139] Sara E. Davies, "The Asian Rejection?: International Refugee Law in Asia" (2006) 52 Aust. J. Pol. & Hist. 562 at 563.
[140] *Ibid.* at 575.
[141] James C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 Harv. Int'l L.J. 129 at 144-46 (The Soviet Union and its allies condemned the Western states' grounding of refugee status in social and ideological incompatibility as politically motivated. Stateless persons, whose interests were sought after by the Soviet Union, were excluded by the 1951 *Refugee Convention* despite the United Kingdom's plea to include all unprotected persons.)
[142] *Ibid.* at 150.
[143] See *ibid.* at 166-74.
[144] Jose Alvin C. Gonzaga, "The Role of the United Nations High Commissioner for Refugees and the Refugee Definition" in Susan Kneebone, ed., *The Refugees Convention 50 Years On:*

and 1967 *Protocol* protect rights of an individual rather than of a collective nature: civil and political freedoms from persecution because of race, religion, nationality, and political affiliation are protected, while economic, social, and cultural freedoms are not.[145] Individual liberties are emphasized in Western democracies, but collective liberties such as the freedom from starvation are more relevant in socialist and communist states like North Korea.[146] A second imperfection of current refugee law is that it obligates member states to protect only those within, rather than those seeking entry into, their borders. This puts asylum seekers in the vulnerable position of risking dangerous escape routes and paying smugglers large sums of money along the way.[147] In short, even if China is compliant with its international treaty obligations, international refugee law in its current form is not well-suited to Asian refugee problems. As long as international refugee law continues to prioritize civil and political freedoms over socioeconomic freedoms, and to predicate protection upon the asylum seeker's entry into a member state, it will not offer sufficient protection for North Korean refugees.

3. Addressing China's Burdens of Providing Temporary First Asylum

Given the weaknesses of the *NKHRA* and the current international refugee law regime, this article proposes that convincing China to be what Thailand was to the Indochinese refugee resettlement process is essential to shaping an international solution to help North Korean refugees. During the Indochinese refugee crisis, the lofty humanitarian stance adopted by Western nations did not always match up with their actual practices of refugee resettlement. John Gunther Dean, upon becoming the American Ambassador to Thailand in 1981, announced that he "would be ambassador to Thailand, not to refugees" and set out to repair US-Thai relations that had become frayed as a result of focusing too much attention on the human rights of refugees over the adverse impact on Thailand.[148] Thailand agreed to provide

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Globalization and International Law (Burlington, VT: Ashgate, 2003) 233.

[145] Cara D. Cutler, "China's Provision of Temporary Visas to North Koreans" (2006) 6 Stan. J. E. Asian Aff. 63 at 65. See Michael J. Dennis & David P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (2004) 98 Am. J. Int'l L. 462 ("The content of economic, social, and cultural rights is generally said to comprise the following: an adequate standard of living, including food, clothing, housing, health, and medical care; education; work; fair conditions of employment; the opportunity to form and join trade unions; social security; and participation in cultural life.").

[146] See Costas Douzinas, *The End of Human Rights* (Portland, OR: Hart, 2000) at 122-24; Cornelius F. Murphy, Jr., "Objections to Western Conceptions of Human Rights" (1980) 9 Hofstra L. Rev. 433 at 439.

[147] Haggard & Noland, *supra* note 52 at 59 ("The typical total cost of an average 'arranged defection' in 2005-2006 was approximately $3,000 to $4,000, but in cases of a direct air flight from China the fees are likely to be $10,000, since this scenario requires a forged passport."). In response to the criticism that the two-thirds reduction in lump sum resettlement packages discourages defections, South Korean officials have defended the policy change as "necessary to discourage exploitative brokers who charge the defectors for facilitating passage from North Korea": 2007 CRS Report, *supra* note 2 at 14.

[148] Sutter, *supra* note 27 at 128.

temporary first asylum without selectivity but conditional on the commitment to permanent resettlement by other countries. When selective admissions criteria in resettlement countries rejected refugees, they remained Thailand's burden.[149] When the United States curtailed its resettlement rate and adopted more stringent INS screenings, Thailand reacted by adopting humane deterrence policies.

Effective implementation of the *NKHRA* requires Congressional recognition of the unique burdens that China would take on by serving as the primary first asylum base for North Koreans. This can be accomplished partially by pledging part of the annual $26 million *NKHRA* budget to the development of an effective screening program so that the resettlement rate in the United States does not lag behind the admission rate of North Koreans into China.[150] American diplomatic dialogue with China should also recognize that refugee status comes with its own benefits from the UNHCR and from countries such as the United States and South Korea. The UNHCR, for example, was financially responsible for the refugee camps in ASEAN countries and helped Thailand to implement a screening program that separated refugees from economic migrants.[151]

The United States also needs to take leadership in pledging financial support to the local population in northeastern China, the region whose economy and stability would bear the brunt of adverse impact from an inflow of North Korean asylum seekers. Some Indochinese refugees brought diseases like malaria, malnutrition, cholera, and leprosy to Thailand, which obligated the Thai government to not only send medical assistance to the refugee camps but also prevent the diseases from spreading into nearby villages. The negative impact of prostitution and narcotics smuggling stemming from the refugee camps spilled over into Thai society, and the significant inflow of refugees in the early 1980s necessitated the Thai government to purchase expensive land in order to expand the capacity of refugee holding centers.[152]

Indochinese refugees also brought problems to the local population of first asylum countries like slash-and-burn farming, deforestation, inflation, and corruption by politicians. In response, the Affected Thai Program was implemented in 1980 with international support in order to provide Thai villages located near refugee camps with emergency relocation services, agricultural development, water sources, education, public health, and road construction.[153] Indochinese refugee centers in Thailand were often located in rural border areas with low standards of living. The refugees received free food and services from the UNHCR and lived better than the local population, which were obvious sources of resentment and unrest for the Thai villagers. The UNHCR guidelines in Thailand reflected sensitivity to

[149] *Ibid.* at 130.
[150] *See* House Committee, *2008 Reauthorization Act Report*, *supra* note 1 at 9.
[151] Sutter, *supra* note 27 at 114.
[152] Songprasert, *supra* note 30 at 20-23.
[153] Sutter, *supra* note 27 at 125.

this issue by specifying that illegal aliens must not receive better treatment than that provided to Thai citizens in the same area.[154]

Lastly, fear of the North Korean regime's collapse—a primary driver behind China's unwillingness to recognize North Koreans as refugees—is not fear of an inconceivable scenario. Even though China is unlikely to engage in any multilateral dialogue about the prospect of regime collapse in North Korea, it is nonetheless aware of the possibility and has reportedly developed contingency plans for "possible humanitarian, peacekeeping, and 'environmental control' missions."[155] The United States and South Korea, most likely the top two destinations for North Korean refugees in any multilateral resettlement program, have recently made progress in negotiating the terms of Operations Plan (OPLAN) 5029, a contingency plan that prepares for the North Korean government's collapse and has been in development since at least 2004. OPLAN 5029 in its concept format plan reportedly outlines the ways in which South Korean and American forces would manage an inflow of North Korean refugees and other instabilities in the event of the North Korean regime's disintegration.[156]

V. Challenges in Implementation

Past American leadership in the resettlement of Indochinese refugees is not indicative of future success with North Korean refugees, and there are several crucial differences between the two events. The Indochinese refugee crisis, to begin with, was seen as America's responsibility largely because of its involvement in the Vietnam War and failed foreign policy.[157] There is no analogous source of guilt and obligation in the present North Korean situation. Some first asylum countries and particularly Thailand happened to be key American allies, but their relationships with the United States still felt strain when American refugee admissions declined.[158] US-China leadership in resettling North Korean refugees requires trust and collaboration in an area that has been the source of much tension between the two countries in the past.

Secondly, American policies regarding Indochinese refugees were responses to an emergency. The outflow from Indochina escalated to a crisis in 1979 when the Vietnamese government gave official encouragement to the exodus due to deteriorating Sino-Vietnamese relations and the wish to transform the commercially oriented South Vietnam into a socialist state.[159]

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[154] *Ibid*. at 124.
[155] Paul B. Stares & Joel S. Wit, "Preparing for Sudden Change in North Korea", Council Special Report No. 42 (Council on Foreign Relations Press, January 2009) at 6, online: <http://i.cfr.org/content/publications/attachments/North_Korea_CSR42.pdf>.
[156] GlobalSecurity.org, "OPLAN 5029 – Collapse of North Korea", online: <http://www.globalsecurity.org/military/ops/oplan-5029.htm>. See "Korea, U.S. Agree to Compromise N. Korea Concept Plan" *Chosun Ilbo* (5 June 2005), online: <http://english.chosun.com/site/data/html_dir/2005/06/05/2005060561013.html>.
[157] Hein, *supra* note 39 at 29-30.
[158] *Ibid.* at 30.
[159] Suhrke, "Law and Politics of First Asylum", *supra* note 28 at 102-105.

At the request of receiving countries attending the 1979 UN Conference in Geneva, Vietnam resumed its earlier policy of not permitting illegal departures and, as a result, the outflow stabilized. Increased compliance with the Orderly Departure Program in 1981 also demonstrated Vietnam's willingness to cooperate with receiving countries.[160] Unlike Vietnam, North Korea is not likely to facilitate any departure, let alone mass exodus, for its citizens; consequently there is much more inertia in coordinating a multilateral solution in the absence of an outflow emergency.

The ASEAN countries only gave first asylum conditional on the commitment to permanent resettlement by other countries. The United States imposed a ceiling of 100,000 Indochinese admissions for fiscal year 1982 and reduced it further to 72,000 for fiscal year 1983. Meanwhile, other permanent resettlement countries were showing signs of fatigue as well by citing economic depressions and the need to accommodate refugees from other countries. Selective resettlement policy meant that uneducated, unskilled, and handicapped refugees were least likely to be picked and continued to remain ASEAN's burdens.[161] To this end, enforcement of no local settlement in first asylum countries will be equally important in designing a resettlement process for North Koreans.

VI. Conclusion

The *NKHRA*, although passed with good intentions by Congress, must engage China's leadership to offer an effective humanitarian solution to the resettlement of North Korean refugees. An international burden-sharing scheme that permanently resettles refugees in recipient states after temporary stays in first asylum countries is a realistic solution, as illustrated by the successful multilateral resettlement of Indochinese refugees following the end of the Vietnam War in 1975. China's historical patronage of North Korea, alliance with South Korea, and status as first-stop destination for most North Korean asylum seekers make it a crucial player in any multilateral resettlement solution. If the United States, along with other key players such as South Korea, takes leadership in setting up a reassuring multilateral resettlement solution for North Korean refugees and jointly persuade China to provide first asylum, China likely would not flatly refuse to cooperate solely for the sake of appeasing the North Korean regime.

The resettlement of Indochinese refugees roughly three decades ago demonstrates that while underlying national interests usually shape humanitarian gestures, a multilateral solution does not require a complete overlap of interests among participating states. There are significant differences, to be sure, between the Indochinese refugee crisis and the North Korean refugee problem at present. The flow of refugees out of Southeast Asia was the result of war and political repression. It was largely seen as America's responsibility because of America's failed foreign policy and

[160] *Ibid*.
[161] *Ibid.* at 109.

involvement in the Vietnam War. Without an analogous sense of responsibility, the United States' interests in the successful resettlement of North Korean refugees are arguably less compelling. Nonetheless, Congress has shown commitment to the issue by passing the *NKHRA* in 2004 and renewing it in 2008 for four more fiscal years. To the extent that effective implementation of the *NKHRA* is complementary to the American tradition of humanitarianism and "voting with your feet" foreign policy, the Indochinese refugee crisis offers valuable lessons for the North Korean refugee problem.

The *NKHRA,* as it currently stands, has significant shortcomings. It has been criticized as an encouragement of the North Korean regime's collapse, an obstacle to the six-party nonproliferation talks without substantial improvement of the refugee situation, and a funnel of negative attention that could worsen rather than improve the plight of the very North Korean refugees it seeks to help. Additionally, even though the problem is outside the focus of this article, the *NKHRA* does not provide for collaboration with South Korea, a key player in any multilateral resettlement solution. Rather than confrontational criticisms of China's noncompliance with international refugee law, which is limited in its protection of North Korean asylum seekers, quiet American diplomacy that acknowledges and pledges aid to the adverse first asylum impacts on China would likely be more effective.