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## Fleeing to Persecution: North Korean Refugees in China

“A 26-year-old North Korean woman, Mun Yun-hee crossed the Duman or Tumen River into China in the dawn of Oct. 22 last year...guided by a human trafficker. She was being sold to a single middle-aged Chinese farmer into a kind of indentured servitude-cum-companionship. Both of them wore only panties, having stored their trousers and shoes in bags, because if you are found wearing wet clothes across the river deep at night, it is a dead giveaway that you are a North Korean refugee. Mun was led to a hideout, and the agent left. Asked why she crossed the river, she replied, ‘My father starved to death late in the 1990s, and my mother is blind from hunger.’ Her family owed 300 kg of corns, beans and rice so she sold herself for the sake of her blind mother and a younger brother. The middleman paid her 350 yuan, or W46,000 (US\$1=W939), equivalent to half of the grain debt.”<sup>1</sup>

Tragically, this is not uncommon. Millions are starving in North Korea. In the 1990s, North Korea experienced a famine that plagued its people, approximately taking the lives of 2.5 million (approximately 1/3 of its population).<sup>2</sup> Most died from starvation or hunger-related illnesses.<sup>3</sup> Currently, 62 percent of the total population, and 70 percent of the urban population, is entirely reliant on monthly or biweekly food rations.<sup>4</sup> Only the nation’s wealthy, elite and farmers are not reliant on the Public Distribution System (PDS).<sup>5</sup> With no prospect of improvement, thousands of North Koreans flee from such devastation in hopes of a better and healthier life, specifically to China and South Korea.<sup>6</sup> However, and against international law, China returns North Korean refugees forcing them to face detrimental, if not deadly, consequences. It is a serious crime in North Korea to leave the country, so when China repatriates North Koreans, refugees endure horrendous prison sentences, if not execution.<sup>7</sup>

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<sup>1</sup> *Human Trafficking Thrives Across N.Korea-China Border*, THE CHOSUNIBO (March 3, 2008 7:53 PM), [http://english.chosun.com/site/data/html\\_dir/2008/03/03/2008030361010.html](http://english.chosun.com/site/data/html_dir/2008/03/03/2008030361010.html)

<sup>2</sup> *Mass Starvation in North Korea, North Korea Now*, NORTHKOREANOW.COM (December 18, 2011), <http://www.northkoreanow.org/the-crisis/mass-starvations-in-north-korea>

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Gerald L. Neuman, *A Migrants' Bill of Rights—Between Restatement and Manifesto*, 24 Geo. Immigr. L.J. 311,320 (2010)

<sup>6</sup> *Id.*

<sup>7</sup> U.S. DEPT OF STATE, *The Status of North Korean Asylum Seekers and The Usg Policy Towards Them* (2005), reprinted in 2004 U.S.C.C.A.N. 1186, 118.

<http://www.house.gov/internationalrelations/109/NKReporttoCongress.pdf>.

The customary norm of non-refoulement and China's obligations under the Convention against Torture ( hereinafter "CAT") and the Refugee Convention-dictate that the government should not forcibly return any North Koreans to North Korea who may be subject to serious human rights abuses, including imprisonment, torture, execution or other punishment inflicted for leaving the country without authorization.<sup>8</sup> However, the Chinese government does not consider itself bound by paragraph 1 of article 30 and 20 of CAT.<sup>9</sup> Article 20 admits recognition, by the States, of the Committee against Torture.<sup>10</sup> Article 30 allows the International Court of Justice (ICJ) to interpret or apply this Convention when disputes arise that cannot be settled through the efforts of the involved States.<sup>11</sup> But because China does not recognize either article, hence tribunal, it is not bound by any committee, thus leaving it free from tribunal reprimand.<sup>12</sup>

To further justify its human rights violations, Beijing denies North Koreans international refugee status on the grounds that Article 1.A (2) of the Refugee Convention (as amended by the Protocol of 1967) defines a refugee as someone who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. China explains that international law does not recognize "economic refugee" status, which is what it considers North Koreans who flee to China since most go there in search of work. It also has not implemented any domestic law on refugee protections.

In addition, Kim Jong il and the North Korean regime have violated international law through the commission of "crimes against humanity," as defined by the International Criminal

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<sup>8</sup> United Nations High Commissioner for Refugees [UNHCR], States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (as of 1 Oct. 2008), *available at* <http://www.unhcr.org/pages/49da0e466.html>.

<sup>9</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: *Chapter IV: Human Rights* (April 22, 2013), [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec)

<sup>10</sup> UN Convention Against Torture and Other Cruel, Inhumane and or Degrading Treatment or Punishment. art. 20, Dec. 9, 1975, S. Treaty Doc. No. 100 20 (1988), 1465 U.N.T.S. 85.

<sup>11</sup> *Id.*

<sup>12</sup> See *supra* note 9.

Court (hereinafter “ICC”). The ICC was established by the Rome Statute on July 1, 2002. The ICC has the ability and responsibility to exercise jurisdiction over “persons for the most serious crimes of international concern,” including genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>13</sup> ICC jurisdiction may be exercised with the ratification of the Rome Statute, by declared state consent, or Security Council referral.<sup>14</sup> The DPRK has not ratified, and most likely will not ratify, the Rome Statute nor consented to jurisdiction; therefore, the ICC may only be afforded jurisdiction through Security Council referral, pursuant to Chapter VII of the UN Charter, which grants the UN authority to act with respect to “threats to the peace, breaches of the peace, and acts of aggression.”<sup>15</sup> Security Council referrals to the ICC Prosecutor instigate investigation without the guarantee of prosecution; this investigation itself creates increased awareness regarding human rights violations and crimes against humanity, while countering widely held beliefs of sovereign impunity.<sup>16</sup> However, given the constitution of the Security Council and its “permanent five” members (China, France, Russia, UK, US), international law continues to face the impediments of state sovereignty, politics and conflicting ideologies.

Furthermore, China and North Korea formed a bilateral treaty in 1965 called the Maintenance of National Security and Public Order in the Border Area.<sup>17</sup> Both countries agree to treat refugees who illegally cross the borders as criminals and send them back to their original

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<sup>13</sup> Rome Statute of the International Criminal Court art. 1(5), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

<sup>14</sup> Rome Statute of the International Criminal Court art. 12,13, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002)

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Song Ji Young, *The invisible refugees: North Korean Asylum Seekers in China*, HUMAN RIGHTS IN CHINA, <http://www.hrichina.org/content/4777> (last visited April 19, 2013).

country regardless of their reasons for fleeing.<sup>18</sup> Since the 2011 death of Kim Jong-il, former president of North Korea, Beijing has intensified border control, blocked off streets heading to embassies and instructed its armed police force to conduct almost continuous patrols.<sup>19</sup> Both North Korea and China declare themselves Communist states, although they vary practically in that North Korea is notorious for oppressing its people and remaining isolated whereas China attempts to grant its citizens more viable rights.<sup>20</sup> Still, both vigorously advocate state sovereignty, hold their government as supreme and unquestionable authority, and oppose heavy US influence.<sup>21</sup> For China to protect refugees from North Korea would, consequently, not only be offensive but also hypocritical to some of its own socialist values. Lastly, part of China's fear of North Korean refugees is economically based. China does not want North Korean migrants to further strain the already saturated Chinese labor market or swallow government funds. Thus, it is highly improbable that China will rectify its maltreatment towards North Koreans habiting in its country without added pressure or independently and successfully exhorting North Korea into ceasing its human rights violations against its own people.

For this reason, to remedy such violations, creative and universal approaches are crucial. Various countries must be looked to for assistance. Given that China and North Korea's ill-treatment of North Koreans has been persistent for so long, it is axiomatic that both need added direct and indirect pressure to improve. A direct route involves expanding the United States' North Korean Human Rights Act of 2008 into a multilateral international treaty, thus involving collaboration and cooperation from China, South Korea and, if possible, North Korea. Indirectly,

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<sup>18</sup> Benjamin Netherland, *Quandary on the Yalu: International Law, Politics, and China's North Korean Refugee Crisis*, 40 STAN. J. INT'L L. 143-145 (2004) (discussing Art. 27, Ch. VI, Law of the PRC on the control of foreigners entering and leaving the country)

<sup>19</sup> Young, *supra* note 17.

<sup>20</sup> Michael Wines, *A Village in Revolt Could be a Harbinger for China*, NY Times, Dec. 25, 2011, <http://www.nytimes.com/2011/12/26/world/asia/in-china-the-wukan-revolt-could-be-a-harbinger.html>

<sup>21</sup> Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, U. PENN. J. EAST ASIAN L. (2012), 1-38

the international community should agree to unofficially economically sanction North Korea until it ceases humanitarian abuses and nuclear testing-or a compromise is found. Since China has a supreme interest in maintaining the stability of North Korea, the collateral effect of my second recommendation would be to place a heavier burden on China to maintain this stability, which it cannot realistically sustain alone. Thus, China would need to vigorously urge North Korea to concede to the international community's request in order to resume international trading and aid. Vital to securing the success of both approaches—direct and indirect—is China being assured that the international community does not wish to overthrow the North Korean government or ignite any international chaos. The only goals, at the moment, are the cessation of China and North Korea's human rights violations, specifically against North Koreans, and achieving a compromise on North Korea's nuclear testing.

For the abovementioned reasons, the paper proceeds as follows. Part I sketches the history and current situation of humanitarian abuses against North Koreans by its government and China. Part II advises immediately expanding or revising the United States' North Korean Human Rights Act of 2008 (hereinafter "NKHRA") into a multilateral international treaty, including input from China, North Korea and South Korea, in order to secure the United States' goal: China and North Korea ceasing human rights violations against North Koreans. Here, I trace the purpose of the NKHRA and show how it actually plays out in the global community, including how the relationship between China, North Korea and South Korea influences the Act's success. To fortify the NKHRA, collaboration is imperative. This part recognizes the difficult but intertwined relationship of North Korea, South Korea, and China; thus, it concludes that the abovementioned collaboration is critical to the Act having a robust and effective bite. Part III recommends that the international community should unofficially economically sanction

North Korea. I demonstrate that, despite failed or insufficient official sanctions by the UN against China and North Korea for their human rights violations, North Korea's recent, and repeated, nuclear testing could be used as a channel to knock two birds with one stone—to cease North Korean nuclear testing and human rights violations. Currently, many countries trade with North Korea but, given international outrage over North Korea's nuclear testing, the community could suspend such trading until North Korea ceases such testing and human rights violations. Since China is heavily invested in securing North Korea's stability, should the international community significantly decrease their trade with North Korea, there is a higher chance there will be a greater influx of North Koreans into China and increased North Korean dependency on China's aid, which it would not be able to sustain. To prevent either outcome, China will feel more pressure to fervently encourage North Korean officials to consent to the international community's 2 goals—cease human rights violations, via obeying humanitarian treaties it has already signed, and nuclear testing. In succeeding, there will be considerably fewer North Korean refugees seeking solace in China since their basic human needs will have been met in North Korea. Consequently, China will feel less threatened by their numbers and could begin to treat them better. Ultimately, this paper, contends that because neither China or North Korea will improve on their own, successfully terminating human rights violations by those countries requires (1) expanding the NKHRA into a multilateral international treaty via collaboration between the United States, China, North Korea and South Korea and (2) the international community imposing unofficial economic sanctions on North Korea which will have the collateral effect of also rectifying such violations executed by China.

## **Part I: History and explanation of the current framework**

To grasp the importance and potential of the NKHRA, a brief history of North and South Korea must be sketched. After the defeat of Japan in World War II, the Northern Korean peninsula was occupied by the Soviet Union and the South was occupied by the United States, thus implanting differing political values in each region.<sup>22</sup> During the Korean War (1950-1953) China helped to push back UN forces into the South.<sup>23</sup> On July 27, 1953 The Korean Armistice Agreement was signed by UN Forces, North Korea, and China.<sup>24</sup> The Armistice is monitored by members of the Neutral Nations Supervisory Commission composed of members from the Swiss and Swedish Armed Forces.<sup>25</sup> Since then, the North Korean government has been mostly isolationist, allegedly becoming one of the world's most totalitarian and authoritarian societies.<sup>26</sup> It has not maintained relations with Japan, the United States, or South Korea.<sup>27</sup> Both Korean governments claim that the Military Demarcation Line (MDL) is only a temporary administrative line, not a permanent border.<sup>28</sup> Crossing the Demilitarized Zone is nearly impossible. It is the world's largest mine field, and it is constantly guarded.<sup>29</sup> Soldiers who police the zone are authorized to shoot illegal travelers on sight; this is why North Koreans flee to China first to reach South Korea.<sup>30</sup> North Korea maintains membership in a variety of multilateral organizations and became a member of the United Nations in September 1991 right before its famine.<sup>31</sup>

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<sup>22</sup> Daniel Schwekendiek, A SOCIOECONOMIC HISTORY OF NORTH KOREA 22-31 (McFarland & Company Incorporated Pub 2011)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Kieran Verboven, *How to Escape from North Korea Alive*, POLICYMIC, <http://www.policymic.com/articles/7015/how-to-escape-from-north-korea-alive> (last visited April 24, 2013).

<sup>26</sup> Schwekendiek, *supra* note 24.

<sup>27</sup> Samuel P Massingame, NORTH KOREA: ISSUES AND UNITED STATES POLICY 20-27 (Nova Science Publishers, Incorporated 2009).

<sup>28</sup> Verboven, *supra* note 27.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Schwekendiek, *supra* note 24.

The famine in the 1990s was caused by a deadly combination of factors: North Korea's monopoly on food and its discriminatory distribution to favored classes of the population, (particularly cadres of the ruling North Korea Workers Party and high ranking military, intelligence, and police officers), the degradation of the country's agricultural capacity; and environmental disasters, such as drought and flooding, that contributed to a series of poor harvests.<sup>32</sup> Prior to 1999, China was more lenient to North Koreans habiting there but that year it took a sudden shift and within 2 months, it had returned 6,000.<sup>33</sup> Since then, China turned a blind eye to tens of thousands of North Koreans seeking food and assistance from foreign aid agencies and churches located on the border of China.<sup>34</sup> While the food shortage has moderated in the past decade, the flow of North Korean refugees never ended. For instance, North Koreans who have come to the South now number more than 10,000.<sup>35</sup>

Unfortunately, refugees who leave North Korea and enter China are considered criminals in both countries. The North Korean Criminal Code states that, "A citizen of the Republic who defects to a foreign country or to the enemy in betrayal of the country and the people...shall be committed to a reform institution for not less than seven years. In cases where the person commits an extremely grave concern, he or she shall be given the death penalty."<sup>36</sup> Also, Article 117 states, "A person who crosses a frontier of the Republic without permission shall be

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<sup>32</sup> HUMAN RIGHTS WATCH, *A MATTER OF SURVIVAL: THE NORTH KOREAN GOVERNMENT'S CONTROL OF FOOD AND THE RISK OF HUNGER* 9 (2006), available at <http://www.hrw.org/en/reports/2006/05/03/matter-survival>.

<sup>33</sup> REF WORLD, *U.S. Committee for Refugees World Refugee Survey 2002 - China (Including Tibet)* <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?page=country&category=&publisher=USCRI&type=&coi=CHN&rid=&docid=3d04c14c10&skip=0> (last visited April 24, 2013).

<sup>34</sup> Netherland, *supra* note 18 at 143, 145-46.

<sup>35</sup> CHOSUN MEDIA: THE CHOSUNILBO, [http://english.chosun.com/site/data/html\\_dir/2008/03/03/2008030361010.html](http://english.chosun.com/site/data/html_dir/2008/03/03/2008030361010.html) (last visited April 24, 2013).

<sup>36</sup> T. Kumar, *China's Repatriation of North Korean Refugees*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/news/news-item/china-s-repatriation-of-north-korean-refugees> (last visited April 24, 2013).

committed to a reform institution for up to three years.”<sup>37</sup> This code is in clear breach of the fundamental right to leave one’s own country under Article 12 (2) from the International Covenant on Civil and Political Rights (ICCPR) to which North Korea is a state party.<sup>38</sup> It affirms that “everyone shall be free to leave any country, including his own.”<sup>39</sup> In China, North Korean refugees are also in a very precarious situation.

North Korean refugees are officially illegal migrants in China<sup>40</sup> so they possess no legal protection, and are sent back to North Korea if discovered.<sup>41</sup> Unfortunately, the Chinese government pays its citizens to turn in North Koreans or anyone helping them. In response, North Koreans are forced to hide, escape into South Korea or purchase false Chinese documents (the latter two are very expensive). It is estimated that there are currently as many as half a million North Koreans sheltering in China from famine and repression in their homeland.<sup>42</sup> Some find shelter in villages and farms where they are supported by China’s ethnic Korean community and ethnic Chinese people.<sup>43</sup> Several work in the service industry but are vulnerable to exploitation and discrimination given their lack of legal status.<sup>44</sup> Others are forced into begging. In China and Beijing, only seven North Korean asylum seekers have acquired refugee status from the United Nations High Commissioner for Refugees (UNHCR).<sup>45</sup> Neither China nor

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<sup>37</sup> *Id.*

<sup>38</sup> International Covenant on Civil and Political Rights, art. 12(1), Dec. 19, 1966, 999 U.N.T.S. 302

<sup>39</sup> *id.*

<sup>40</sup> Criminal Law, art. 35 (P.R.C.)

<sup>41</sup> Young, *supra* note 17.

<sup>42</sup> *Id.*

<sup>43</sup> Kumar, *supra* note 38.

<sup>44</sup> *Id.*

<sup>45</sup> *supra* note 43.

Beijing has granted political asylum to North Korean refugees.<sup>46</sup> Chinese authorities consider North Korean defectors to be migrant workers, since many of them are fleeing there for work.<sup>47</sup>

Although there are various international treaties that offer relief—CAT, UN Refugee Convention (contracting states are mandated to cooperate with the UN Refugee Agency (UNHCR), ICCPR, Universal Declaration of Human Rights (UDHR), ICC through the Rome Statute, International Covenant on Economic, Social, and Cultural Rights (ICESCR), UN-China Agreement of 1995—practically they have been unsuccessful because of the lack of cooperation from North Korea and China. For instance Article 33 (1) of the 1951 Convention relating to the Status of Refugees, states that, “No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>48</sup> International law prohibits the forcible return, either directly or indirectly, of any individuals to a country where they are at risk of persecution, torture or other ill-treatment, or death.<sup>49</sup> China is a party to this Convention. Additionally, national courts have the potential to prosecute human rights violations committed by the DPRK (Democratic People's Republic of Korea of North Korea) through universal jurisdiction or through jurisdiction established in a nation's constitution or statute.<sup>50</sup> The United States, for example, may initiate such a prosecution through the Alien Tort Claims Act (hereinafter “ATCA”).<sup>51</sup> It was enacted by US Congress in 1789 to grant foreign citizens the right to sue individuals through the US

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<sup>46</sup> *Id.*

<sup>47</sup> Albert Suh, *First Steps Are Better than None: Distinguishing the Practical from the Rhetorical in the North Korean Human Rights Act of 2004*, 37 Rutgers L. J. 585, 588-589 (2006).

<sup>48</sup> UN Refugee Convention. art. 12(5), April 22, 1954, S. Treaty Doc. No. 100 20 (1964), 1465 U.N.T.S. 85

<sup>49</sup> *Id.*

<sup>50</sup> NORTH KOREA NOW, <http://www.northkoreanow.org/international-law/> (last visited Dec. 11, 2011).

<sup>51</sup> Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

judiciary for injuries in violation of international law.<sup>52</sup> In *Filartiga v. Pena-Irala* (1980), the US Court of Appeals determined that a Paraguayan police officer could be sued in US courts for claims of torture and murder.<sup>53</sup> Secondly, national courts can gain jurisdiction to prosecute human rights violations perpetrated in other countries through universal jurisdiction. This is when such violations constitute international or grave crimes of a universal or jus cogens nature, hence creating the obligation “erga omnes” (in relation to everyone).<sup>54</sup> Crimes against humanity, torture, and genocide may thus be prosecuted since the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.”<sup>55</sup> This was employed in the prosecution of Chilean dictator Augusto Pinochet Ugarte by the House of Lords in 1999 for pervasive and systematic crimes including mass-murder, torture, kidnapping, illegal detention, and press censorship.<sup>56</sup> However, sovereignty and enforcement issues are encountered when contemplating usage of national courts.

Furthermore, the Chinese government worries that this refugee problem will further complicate its already difficult task of maintaining diplomatic relations with the two Koreas, and possibly draining government funds and its labor market.<sup>57</sup> It reasons that a possible collapse would threaten China’s economy, stability and peace.<sup>58</sup> It also prefers the current stability in Northeast Asia over a unified Korean, pro-U.S, government that might disturb the current balance of power in the region.<sup>59</sup> Thus, China aids in preventing the collapse of North Korea, and one way is by preventing widespread migration of North Korean refugees into China so as to not

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<sup>52</sup> Id.

<sup>53</sup> *Filartiga et al. v. Pena-Irala et al.*, 442 U.S. 901, 903 (1979).

<sup>54</sup> Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 Va. J. Int'l L. 829, 836 n.14 (2000)

<sup>55</sup> Id.

<sup>56</sup> Id

<sup>57</sup> Sirkin, *supra* note 22.

<sup>58</sup> John Lee, *A Well-Timed Currency Kowtow*, WALL ST. J., (June 20, 2010),

<http://online.wsj.com/article/SB10001424052748704050804575318163802704600.html>

<sup>59</sup> Byong-Chul Lee, *How Much Opposition Does the Young General Face in Pyongyang*, KOREA TIMES, (Oct. 29, 2010), [http://www.koreatimes.co.kr/www/news/nation/2011/01/117\\_75390.html](http://www.koreatimes.co.kr/www/news/nation/2011/01/117_75390.html).

offend its North Korean ally.<sup>60</sup> However, the benefits of collaborating with South Korea and the United States could ease its worries since the only immediate goal of the international community is not to politically overthrow North Korea or spark chaos, but to significantly lessen the human rights violations performed by China and the DPRK.

The international humanitarian community has also accused China of breaching the Vienna Convention on Consular Relations when its security forces forcibly removed refugees from the South Korean and Japanese consulates.<sup>61</sup> Such acts are illegal according to Article 31, Chapter II of the Convention which states, “The authorities of the receiving State shall not enter that part of the consular premises.”<sup>62</sup> However, Foreign Ministry spokesman Liu Jianchao of North Korea, claims the men who entered the South Korean Consulate and removed the asylum seekers were private security guards and not police officers, even though TV footage showed them wearing police and army uniforms.<sup>63</sup> He, then, accused South Korean diplomats, who attempted to block Chinese guards from capturing a North Korean man, of breaking Chinese domestic law commenting that, “Their behavior was extremely incompatible with their diplomatic status and violated international law.”<sup>64</sup> He was referring to Article 31, which states, “[T]he receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance to the peace of the consular post or impairment of its dignity.”<sup>65</sup> China’s reaction was viewed as a way of removing

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<sup>60</sup> See *Supra* note 18 at 236; and James Brooke, *World Briefing Asia: China: North Korea Refugees Secretly Ousted*, Sept. 30, 2003, N.Y. TIMES

<sup>61</sup> Young, *supra* note 17

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, opened for signature 24 April 1963, 596 UNTS 261.

the North Koreans as quickly as possible while avoiding taking any official position on the matter.<sup>66</sup>

The UNHCR addressed the issue in a Guidance Note on Extradition Treaties and International Refugee Protection.<sup>67</sup> The High Commissioner explicitly stated that non-refoulement has reached the status of customary international law, thereby binding all states whether or not they have ratified the Convention.<sup>68</sup> This statement supports the position that extradition is prohibited when the accused state is in breach of human rights obligations.<sup>69</sup>

The significance and role of the UN Charter has also been raised. One position is that no treaty can supersede the UN Charter. Articles 55(c) and 56 of the UN Charter require states to take joint action to promote the universal respect and observance of human rights.<sup>70</sup> Thus, the mandatory bar on refoulement overrules China's domestic law and the 1961 China and North Korean agreement.<sup>71</sup> An alternative perspective argues that, pursuant to the Vienna Convention, there is no hierarchy of treaties in international law, with the exception of the UN Charter.<sup>72</sup> This camp posits that Articles 55(c) and 56 of the UN Charter do not create explicit obligations for states to follow human rights obligations concerning extradition.<sup>73</sup> In other words, the Charter merely creates generic aims that member-states must pledge to carry out and promote. The third

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<sup>66</sup> Young, *supra* note 17.

<sup>67</sup> UN High Commissioner for Refugees, *Guidance Note on Extradition and International Refugee Protection* (Apr. 2008) available at: <http://www.unhcr.org/refworld/docid/48lec7d92.html>

<sup>68</sup> Id.

<sup>69</sup> Kees Wouters, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT, 30 (E.M. Meijers Institute of Legal Studies, Leiden Law School) Leiden University, the Netherlands (2009)

<sup>70</sup> Id. at 31.

<sup>71</sup> Elisa Gahng, *North Korean Border-Crossers In Yanbian: The "Protection Gap "Between The Economic Migrant And Refugee Regimes*, 24 Geo. Immigr. L.J. 361, 371(2010).

<sup>72</sup> Wouters, *supra* note 73.

<sup>73</sup> Id. at 31.

alternative conclusion is that human rights treaties should be given no more priority than any other treaties.<sup>74</sup>

Furthermore, many international non-governmental organizations (hereinafter “NGOs”) that were providing economic support to North Korea have now chosen to leave the country, citing the government’s failure to allow a transparent food distribution system and its reluctance to permit NGOs to monitor conditions on the ground and have access to the country’s most vulnerable people.<sup>75</sup> Accordingly, and unfortunately, as of 2010, a few NGOs have remained active in North Korea, most from European aid agencies.<sup>76</sup> Other active but non-resident NGOs include the Mennonite Central Committee (Canada), First Steps (Canada), the Eugene Bell Foundation (United States/South Korea), Christian Friends of Korea (United States), the Canadian Food Grains Bank, and the Hanns Seidel and the Friedrich Naumann Foundations (Germany). China has also prevented the UNHCR from accessing North Korean refugees and aiding them, which violates the Refugee Convention and the UN-China agreement, which mainly tackled and mandated access.<sup>77</sup>

## **Part II: North Korean Humanitarian Reauthorization Act**

To lessen this devastation suffered by millions of North Koreans, the United States enacted the NKHRA 2004, succeeded by the 2008 version. The NKHRA seeks “to promote respect for and protection of fundamental human rights in North Korea,” to create increased awareness with regard to humanitarian assistance inside North Korea, and to provide measures to allow North Korean refugees to win political asylum in the United States.<sup>78</sup> Passed unanimously

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<sup>74</sup> Id.

<sup>75</sup> Stephan Haggard and Marcus Noland, *Famine in North Korea: Markets, Aid, and Reform* 121 (New York: Columbia University Press, 2007).

<sup>76</sup> Miranda Weingartner, *Current NGO Projects in North Korea*, in *DIRECTORY OF DEVELOPMENT ORGANIZATIONS* (Vol. ILA, 2010)

<sup>77</sup> UN Refugee Convention. art. 12(5), April 22, 1954, S. Treaty Doc. No. 100 20 (1964), 1465 U.N.T.S. 85

<sup>78</sup> North Korean Human Rights Act, 22 U.S.C.A. § 7802 (2004).

by both houses of the United States' Congress, the NKHRA was signed into law by President George W. Bush on October 18, 2004 and again reauthorized under Obama in 2008.<sup>79</sup> In contrast to its predecessor, the North Korean Freedom Act of 2003, the North Korean Human Rights Act exclusively focuses on humanitarian and human rights, and does so by addressing both internal conditions in North Korea and the plight of North Korean refugees in China.<sup>80</sup> It forcefully expresses U.S disapproval of China's maltreatment of North Koreans within China's borders and the people who help North Koreans.<sup>81</sup>

Substantively, the NKHRA takes a multi-tiered approach. First, the NKHRA authorizes, but does not appropriate: (1) \$ 2 million to support programs by private and non-profit organizations promoting human rights, democracy, the rule of law, and a market economy in North Korea; (2) \$2 million to increase the availability of non-government-controlled sources of information (such as radios capable of receiving broadcasts from outside North Korea); and (3) \$ 20 million for humanitarian and legal assistance to North Korean refugees, orphans, and trafficking victims.<sup>82</sup> Congress contemplated the additional authorization of no less than \$ 100 million for humanitarian assistance inside North Korea through various non-governmental organizations (such as the World Food Program), but conditions any increases on “substantial improvements in transparency, monitoring, and access to vulnerable populations throughout North Korea.”<sup>83</sup>

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<sup>79</sup> Press Release, The White House, Office of the Press Sec'y, President's Statement on the North Korean Human Rights Act: President Signs the North Korean Human Rights Act (Oct. 21, 2004) *available at* <http://www.whitehouse.gov/news/releases/2004/10/20041021-22.html>

<sup>80</sup> Neuman, *supra* note 5 at 311-312

<sup>81</sup> Alison Carrinski, *The Other North Korean Dilemma: Evaluating U.S. Law Towards North Korean Refugees*, 32 SUFFOLK TRANSNAT'L L. REV. 647, 650 (2008)

<sup>82</sup> North Korean Human Rights Act of 2004 § 7833(c)(1); North Korean Human Rights Reauthorization Act of 2008 § 7833 (extending the appropriation to 2012).

<sup>83</sup> *Id.*

The Act also designates North Korean refugees who have been persecuted or mistreated as a “Priority 2” group of special humanitarian concern to the United States.<sup>84</sup> This classification allows them to apply for United States refugee consideration regardless of referral from the UNHCR. The NKHRA further urges the UNHCR to secure access to North Koreans in China, but China currently denies UNHCR access to North Korean refugees.<sup>85</sup> Lastly, it also seeks to grant asylum to those in China that aid North Korean refugees.<sup>86</sup> Essentially, the Act’s official purpose signals a policy shift by the United States from reactive to proactive with regard to North Korea because it affirmatively tackles the refugee problem. However, for many years, numerous decisions by the U.S. Federal Courts of Appeals have denied asylum to people who have suffered harm at the hands of Chinese officials for harboring and providing humanitarian aid to North Korean refugees in China, thus “schizophrenically contradicting the sentiments and goals embraced by Congress, as well as by the White House.”<sup>87</sup>

Consequently, there have been some concerns and doubts as to the NKHRA’s actual sought out goal. For instance, Section 7802 of the NKHRA states, “the purposes of this chapter are . . . (5) to promote progress toward the peaceful reunification of the Korean Peninsula under a democratic system of government.”<sup>88</sup> In other words, there is a broader and underlying objective: to spread democracy throughout the Korean Peninsula. President Bush's statement accompanying the signing of the Act also recognized this broader purpose.<sup>89</sup> While it may seem

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<sup>84</sup> H.R. REP. NO. 108-478, pt. 1, at 22, reprinted in 2004 U.S.C.C.A.N. 1186, 1196; see also 22 U.S.C.A. § 7843.

<sup>85</sup> 22 U.S.C.A. § 7844(a)(2) (“The United States, other UNHCR donor governments, and UNHCR should persistently and at the highest levels continue to urge the Government of China to abide by its previous commitments to allow UNHCR unimpeded access to North Korean refugees inside China . . .”).

<sup>86</sup> Neuman, *supra* note 5.

<sup>87</sup> Carrinski, *supra* note 85. (“The United States, despite political rhetoric pressuring China to amend its repatriation policy towards North Koreans residing within China, has not recognized the policy as persecution within its own courts.”)

<sup>88</sup> Suh, *supra* note 51 at 585, 586

<sup>89</sup> NKHRA, *supra* note 86 (“North Korea remains one of the most repressive countries in the world and stands in stark contrast to the march of freedom elsewhere in the region.”); Press Release, The White House, Office of the

possible for both goals to simultaneously occur—aid North Koreans and reunify Korea under a “domestic system”— and that neither objective negates the other, scholars stress that these concurrent goals might be counterproductive, in that trying to reunify Korea with a Western based strategy is disregarding the concerns and preferences of North Korea, China and South Korea.<sup>90</sup> Consequently, such reunification efforts would be thwarted by resistance and unsuccessful.<sup>91</sup> Scholars explicate that imposing Western values without understanding the differing goals of those nations will only hamper the potential benefits of the NKHRA to North Koreans.<sup>92</sup>

The paramount objective for both North and South Korea has been reunification since the end of the Korean War.<sup>93</sup> Nicholas Eberstadt, a political economist and Chairman of Political Economy at the American Enterprise Institute, stresses that “from its very first days of power, the DPRK had a clear and identifiable ‘national strategy’ to reunify Korea.”<sup>94</sup> It is critical for the United States —or any Western nation or establishment—to recognize this objective in considering a policy approach to Korean reunification.<sup>95</sup> Any reunification policy based on the principle of “you lost ha ha” is destructive, in that any such policy will only induce further North Korean withdrawal, which would be a detriment to anguished North Koreans.<sup>96</sup> The Act arguably exhibits this by financially supporting those that are disobeying North Korean and Chinese laws. The US should instead try to work with those countries rather than merely dictating to the Chinese and North Korean governments how they should specifically improve.

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Press Sec'y, President Discusses American and European Alliance in Belgium (Feb. 21, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/02/20050221.html>.

<sup>90</sup> Neuman, *supra* note 5.

<sup>91</sup> Carrinski, *supra* note 85 at 657-658

<sup>92</sup> 31 Suffolk Transnat'l L. Rev. 647, 657-658

<sup>93</sup> Nicholas Eberstadt, THE END OF THE NORTH KOREA 29 (1999).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Suh, *supra* note 51 at 599

This is not collaborating. Instead a Western-based policy agenda should incorporate input from South Korea, China and if possible North Korea. In doing this, the NKHRA's influence and scope would expand because it would be deemed more legitimate by those 3 countries, consequently causing more compliance and improvement of human rights in China and North Korea. While the U.N has tried this before (the six-party talks), it focused on another matter—ceasing nuclear testing altogether rather than making such testing conditional.<sup>97</sup> All countries, including the United States, must compromise to secure the necessary immediate goal—to terminate human rights violations executed by North Korea and China. Other concerns should be dealt with after this primary objective is achieved.

Absent this, South Korea's reaction will remain mixed, at best. For instance, months before the Act's signing the South Korean government was not very enthusiastic.<sup>98</sup> The Uri Party, in power at that time, expressed grave concerns over the NKHRA, believing that it offers little practical benefits "while unnecessarily irritating the North."<sup>99</sup> Chung Bong-ju, an Uri Party lawmaker, stated, "The legislation, which unduly interferes with North Korea's internal affairs, may even jeopardize the international community's efforts to promote peace and security on the Korean Peninsula."<sup>100</sup> This criticism from the leadership did not halt with the NKHRA's passage, but rather intensified with efforts to introduce declarations denouncing the NKHRA.<sup>101</sup>

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<sup>97</sup> Adam Eisenstein, *Free Trade, Tires, and Tariffs: Why Imposing Import Duties Against Chinese Goods is the Wrong Course of Action for the United States*, 20 Fed. Cir. B.J. 305, 332-333 (2010-2011).

<sup>98</sup> Suh, *supra* note 51 at 595

<sup>99</sup> *South Korea Divided on US North Korea, Human Rights Bill*, BBC MONITORING ASIA PACIFIC ( July 30, 2004)

<sup>100</sup> *South Korea Divided on US North Korea*, *supra* note 18; See Park Doo-sik, *Uri Party Wary over U.S. Human Rights Act*, DIGITAL CHOSUN ILBO (Sept. 30, 2004),

<http://english.chosun.com/w21data/html/news/200409/200409300045.html>.

<sup>101</sup> Park, *supra* note 104; *Parties Haggles over NK Human Rights Bill*, KOREA TIMES (July 24, 2004)

<http://www.koreatimes.co.kr/www/index.asp>.

China has responded by continuing to prohibit the UNHCR from having full access to North Korean refugees in China.<sup>102</sup> Still, the current diplomatic culture of China seems somewhat receptive to the progressive agenda for North Korean refugees. As noted by Benjamin Neaderland, current counsel in WilmerHein's Securities Department, "In all of the situations in which North Koreans have been able to get into foreign diplomatic compounds . . . the Chinese have eventually relented from their initial opposition and allowed the North Koreans involved to leave quietly for Seoul within a few weeks."<sup>103</sup>

Still, the strongest critique of the NKHRA is that it does too little, in that it raises awareness of the issues without taking further, definitive action to actually resolve them.<sup>104</sup> Clearly, encouragement and aspirations do not suffice. This is why I suggest that in order to rectify the human rights problems in North Korea and the plight of North Korean refugees in China, the NKHRA must provide a starting point for a long term, comprehensive, multi-state agreement or, for immediate action, promptly factor in the concerns of North Korea, South Korea and China so that neither country would interfere with the humanitarian efforts initiated by the United States. The latter involves immediate collaboration with those countries or incorporating recommendations from reputable political scientists into the NKHRA revision. Because of the urgency of the situation, I prefer this option. Upon completion, the act could be sent to those countries to gather their opinions; in response, the US could make any appropriate amendments. This option does not negate the alternative of simultaneously forming a multilateral treaty between North Korea, China, the United States and South Korea, but given that time is of the essence in this problem, some action is needed now. Anguished North Koreans do not have decades to wait while those countries formalize and enforce such a treaty.

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<sup>102</sup> U.S STATE DEPT REPORT, *supra* note 2, at 5.

<sup>103</sup> Neaderland, *supra* note 18 at 145-46,171 (2004)

<sup>104</sup> Suh, *supra* note 51 at 621

This collaboration is imperative to ensuring the Act's effectiveness in eliminating human rights violations by both China and North Korea. The impact of transforming this Act into an international agreement among with 3 countries could have an effect that spills over in the form of greater efforts and strides being accomplished, or at least concretely promising, by North Korea, causing China to feel less threatened by North Korean refugees, since there will be significantly fewer and seeking less assistance. As a result of the dwindling numbers, these refugees would be granted more legal protections and permission to receive aid from NGO's and the UNHCR. In other words, by rectifying the human rights situation in North Korea, China's maltreatment could also be remedied. In fact, prior to 1999, China was significantly more lenient with its harboring of copious North Korean refugees so there is hope that if a reasonable solution is found, China could revive this tolerance.<sup>105</sup>

This could be achieved through an added stipulation, which would grant refugees legal work permits in China according to already permissible conditions set forth by the North Korean government. To illustrate, North Korea maintains agreements with countries such as Russia, Mongolia, Saudi Arabia, China, some Eastern European and African countries, in which its government grants work permits to select North Koreans who are provided the opportunity to enter one of these countries to work in construction sites or factories.<sup>106</sup> It is estimated that there are currently 8,000 North Koreans in China as a result of this agreement.<sup>107</sup> By increasing this amount, both China and North Korea could benefit, and so it would be worth discussing in order to expand and strengthen the NKHRA. The North Korean government has been successful at

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<sup>105</sup> Young, *supra* note 17.

<sup>106</sup> Verboven, *supra* note 27.

<sup>107</sup> Stephan Haggard and Marcus Noland, *Follow the Money: North Korea's External Resources and Constraints*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS(2008)  
<http://www.piie.com/publications/papers/noland-haggard02081.pdf>.

supplying their citizens to those countries as an inexpensive source of labor.<sup>108</sup> According to a June 2011 report by the Japanese NGO Yonhap, North Korea receives an estimated 1.2 billion dollars annually from these arrangements, although experts at the Peterson Institute for International Economics question the accuracy of this number.<sup>109</sup> Their economists put the number at under 100 million dollars.<sup>110</sup> These arrangements help North Korea secure foreign currency while relieving their surplus of people into the foreign work force.<sup>111</sup>

Once in the partner country, North Korean workers usually earn minimum wage, or wages that are less than the equivalent for locals.<sup>112</sup> However, their earnings are also almost entirely kept by the DPRK, usually about 90 percent.<sup>113</sup> They are also supervised while they work by minders, who ensure they do not run away.<sup>114</sup> Still, they are usually granted greater freedom of travel than in North Korea. Because of this, many try to escape; but, this could lessen if the North Korean government stopped collecting such a large portion from the workers' earnings. Their citizens are fleeing because of starvation not because they do not love North Korea—their homeland. There are reports which highlight North Koreans, who have fled, loving their country and indicating that had conditions been better, they would have stayed.<sup>115</sup> If the government were to reduce the portion it takes from workers' earnings, citizens could afford a healthier lifestyle and, accordingly, stay in North Korea. A healthier lifestyle, at minimum,

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Verboven, *supra* note 27

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *This World Escaping North Korea*, *supra* note 47.

encompasses sufficient food and adequate healthcare, not fancy houses or extravagant cars. Its citizens are also entitled to these rights through the ICESCR, to which North Korea is a party.<sup>116</sup>

Another stipulation could be that both China and North Korea must obey the humanitarian treaties they have already signed. As a result, NGO's would be afforded full access to North Koreans located in North Korea and China, who are in dire need of assistance. North Korea and China would not be nudged into entering any new humanitarian treaties, but at least encouraged to live up to what they have already officially promised.

As previously explained, in improving the situation in North Korea, China will encounter significantly less refugees. To this effect, it is possible that China will become more receptive to those few remaining refugees entering its country. This could result in the creation of new laws that grant them work permits and legal protections. If China is worried that North Koreans would drain government funds, it could mandate registration upon entry and set a minimum, but fair, period of employment, such as 2 years, before North Koreans become eligible to receive government assistance.

Still, it seems unlikely that North Korea would participate in such a treaty if China does not persuade them. For this reason, in order for the United States to service the displaced North Koreans who are presently severely suffering, it must collaborate with China, South Korea and, if possible, North Korea in structuring and implementing a more effective NKHRA until an enforced multilateral treaty takes reign. Each of these countries has interests and concerns that could be fulfilled through respectful and creative negotiations.

### **Part III: Nuclear testing sanctions as a channel to abate human rights violations**

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<sup>116</sup> Int'l Covenant on Econ., Soc. & Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, 999 U.N.T.S. 302 at 59 (Dec. 16, 1966).

My second recommendation is for the international community to impose unofficial economic sanctions on North Korea, for both nuclear testing and violating human rights. Prior to its recent nuclear testing in 2012, many countries maintained a financial relationship with North Korea and only cared to interfere with North Korea's actions when it concerned nuclear testing. This made it difficult to impose meaningful sanctions on it or China based on human rights violations alone. France, the United States, and Latin America (except for Brazil) have, however, since refused to have any diplomatic relations with North Korea because of such abuses.<sup>117</sup> While commendable, these few countries have not sufficiently compelled North Korea or China to improve their laws or treatment of suffering North Koreans. More countries are needed to cause change.

To give context, in February 2005, the North Korean government admitted to possession of nuclear weapons.<sup>118</sup> Pyongyang reasoned that they were only for self-defense in the event that the Bush administration should exhibit hostility.<sup>119</sup> North Korea found the United States' objective of removing nuclear weapons from them severely offensive and thus guarded itself against possible attack.<sup>120</sup> In fact, North Korea first withdrew from the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") in January 2003, "declaring its total freedom from the binding force of the International Atomic Energy Agency."<sup>121</sup> Through its withdrawal, North Korea demonstrated that it is not bound by the political and social pressures from the international community. The 2012 testing indicates that North Korea will continue to exploit its reputation of unpredictability for its diplomatic advantage. This time, President Obama said,

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<sup>117</sup> *Democratic People's Republic of (North) Korea*, NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, (March 8, 2013) <http://www.mfat.govt.nz/Countries/Asia-North/North-Korea.php>.

<sup>118</sup> James Brooke, *North Korea Says It Has Nuclear Weapons and Rejects Talks*, N.Y. TIMES, Feb. 10, 2005, at A3

<sup>119</sup> Suh, *supra* note 51 at 603

<sup>120</sup> *N. Korea Withdraws from Nuclear Treaty: Nation Says It Will Not Produce Nuclear Weapons*, CNN.COM (Jan. 10, 2003), <http://www.cnn.com/2003/WORLD/asiapcf/east/01/10/nkorea.pact>.

<sup>121</sup> *Id.*

“This is a highly provocative act that ... undermines regional stability, violates North Korea's obligations under numerous United Nations Security Council resolutions, contravenes its commitments under the September 19, 2005, Joint Statement of the Six-Party Talks, and increases the risk of proliferation.”<sup>122</sup>

The international community becomes livid with and so reprimands North Korea when it performs a nuclear test. For instance in October 2006, Australian entry visas were not issued for North Korean citizens, North Korean ships were banned from Australian ports and most bilateral arrangements were stalled by Australia until the issue was fixed.<sup>123</sup> This time, even Russia, a North Korean ally, condemned the testing but also advised the global community to not respond with “a show of military might”.<sup>124</sup> However, the testing prompted united condemnation and a vow of tough action from the U.N. Security Council. Members, including China, will start work “on appropriate measures in a Security Council resolution” and will hold North Korea responsible for any consequences stemming from this nuclear testing.<sup>125</sup> In fact, China’s official statement is that it “resolutely opposes” the North's latest test.<sup>126</sup> However, North Korea responded by warning that if any other threats surface, they would react with more impactful force.<sup>127</sup> The international response is that military action is a last resort. In fact, the United States and China recently met and agreed that they will collaborate in encouraging North Korea to refrain from any provocative steps including military action.<sup>128</sup> The countries also concluded

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<sup>122</sup> Ed Payne, *World leaders react to North Korea's nuclear test*, CNN.COM (Feb.12, 2013), <http://www.cnn.com/2013/02/12/world/north-korea-nuclear-reax>.

<sup>123</sup> Cameron Stewart, *North Korea to close its lonely embassy*, THE AUSTRALIAN (Jan.26, 2008), <http://www.theaustralian.com.au/news/n-korea-to-close-its-lonely-embassy/story-e6frg6t6-111115403914>.

<sup>124</sup> Payne, *supra* note 126.

<sup>125</sup> Jethro Mullen, *Tough U.N. action vowed after North Korean nuclear test*, CNN.COM (Feb. 12, 2013), <http://www.cnn.com/2013/02/11/world/asia/north-korea-seismic-disturbance>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Jill Dougherty et. al., *China, United States to work together to calm down North Korea*, CNN.COM (April 14,2013), [http://www.cnn.com/2013/04/13/world/asia/china-kerry-koreas-tensions/index.html?hpt=ias\\_cl](http://www.cnn.com/2013/04/13/world/asia/china-kerry-koreas-tensions/index.html?hpt=ias_cl).

that they want to focus on a “peaceful solution, not ‘threat for threat or confrontational language.’”<sup>129</sup>

There have been Six-Party Talks which are a series of negotiations designed to end North Korea's nuclear program that involve the United States, China, North and South Korea, Japan, and Russia.<sup>130</sup> However, they have been continuously unfruitful. What was evident though is that China has tremendous power in convincing North Korea to participate in international negotiations.<sup>131</sup> China has brought North Korea to the Six-Party Talks on multiple occasions,<sup>132</sup> so it is hard to imagine North Korea willingly cooperating without at least some prompting from China.<sup>133</sup>

For this reason, I argue that to oblige North Korea into conforming to international humanitarian laws, and consequently China as well, the international community should piggy back humanitarian goals on its manifestation of disapproval on North Korea's nuclear testing. The international community should unite in deterring further testing and human rights violations, by China and North Korea, via unofficial economic sanctions. In other words the international community should evasively discontinue trading with North Korea to kill two birds with one stone—terminate North Korean nuclear testing and human rights violations. This suggestion could also encompass countries denying entry to North Koreans when traveling into their countries. Basically, my overall second recommendation embodies more of a passive-aggressive form of condemnation. Slowly, each nation could suspend agreements and trading with North Korea until it cooperates with them. This would greatly impact North Korea,

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<sup>129</sup> *Id.*

<sup>130</sup> Eisenstein, *supra* note 101 at 332-333

<sup>131</sup> Jayshree Bajoria, *The China-North Korea Relationship*, COUNCIL ON FOREIGN RELATIONS (Feb.21,2013), <http://www.cfr.org/publication/11097>

<sup>132</sup> Jayshree Bajoria, *The Six-Party Talks on North Korea's Nuclear Program*, COUNCIL OF FOREIGN RELATIONS (March 8, 2013), <http://www.cfr.org/publication/13593>.

<sup>133</sup> Eisenstein, *supra* note 101

especially if it were done from a main player such as India. Trade between these two countries has increased in recent years. Their average total trade augmented from \$100 million in the middle of the 2000s to over \$ 1 billion in 2009. The trade is overwhelmingly in India's favor, with its exports accounting for roughly \$1 billion while North Korean exports to India were worth \$57 million.<sup>134</sup> India's primary export to North Korea is refined petroleum products while silver and auto parts are the main components of its imports from North Korea.<sup>135</sup>

The possible effect is what China fears most—a massive influx of North Koreans into its country due to food shortage and economic decline. By triggering this, China would feel a greater burden to financially aid North Korea in maintaining stability. It could not realistically sustain this support and stability independently. As a result, it would need to increase its efforts in persuading North Korea to yield to the international community's needs—obeying humanitarian laws and ceasing nuclear testing. Should North Korea resist succumbing, China could have mountains of refugees flooding its borders. Accordingly, the spotlight on China's treatment of those refugees from the international community would intensify. China would, therefore, need to respond with better treatment of the mounting refugees since the international community has financially shown that it will manifest its disapproval of North Korea's nuclear testing and humanitarian violations.

Conditional to resuming international trade should be North Korea obliging to humanitarian treaties that it has already signed. One of the effects would be NGO's distributing aid as they see fit. The stipulation should mandate that North Korea must permit NGO's and other non-profits, wishing to care for distraught North Koreans superior authority in distributing aid such as food and health care. In exchange, these establishments will not advocate against or

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<sup>134</sup> Megha Bahree, *Look Who's Helping North Korea*, FORBES (July 22, 2010), <http://www.forbes.com/forbes/2010/0809/opinions-north-korea-india-blockade-heads-up.html>.

<sup>135</sup> *Id.*

challenge North Korean socialist values. Their sole purpose would be to distribute aid as they see fit. To be clear, the goal of this condition is not to reward ill behavior—not cooperating with the UN regarding nuclear testing or violating human rights—rather, it is enforcing humanitarian agreements that North Korea has already signed such as Article 11 of the Committee on Economic, Social, and Cultural Rights (hereinafter “CESCR”), which involves the right to food and the inherent dignity of human persons. Violations of such rights occur when “a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.” CESCR clarifies that the inability or unwillingness of a State’s compliance determines which actions or omissions amount to violations of the right to food. When states point to resource constraints rather than state willingness, CESCR explains that “the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.”

As shown above, threatening North Korea with military force raises tensions that could possibly lead to an international war. Thus, by not publically and officially chastising North Korea for its human rights violations and nuclear testing, and confirming that the international community’s immediate goal is not to politically overthrow North Korea or China, both countries will realize that the international community is merely seeking to accomplish humanitarian objectives and a compromise on North Korea’s nuclear testing. This requires all states to compromise—realistically North Korea will not agree to terminate such testing altogether. A possible alternative, for instance, could be that if North Korea wishes to perform a nuclear test, the permanent members, at least, must be informed of it and are welcomed to observe. Notification should be given with sufficient prior notice so that members can attend. Again, as long as North Korea feels secure that the international community is simply and

righteously trying to maintain peace and cease human rights abuses, rather than politically overthrow it, North Korea should feel comfortable in assenting to this provision.

Ultimately, the desired collateral effect is that once North Korea improves its treatment towards its people, China will do the same towards North Korean refugees, or at least to those that fled there for asylum before North Korea rectified its human rights violations. Discreetly cornering North Korean authorities in this manner, rather than officially sanctioning, (which North Korea detests and incites it) may in turn deliver a more productive and humane response.