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Politicizing U.S. Refugee Policy toward North Korea

BY NICOLE HALLETT

The Democratic People’s Republic of Korea (DPRK), one of the poorest and most isolated countries in the world, has recently attracted significant international scrutiny as a result of its flirtation with a nuclear weapons program and evidence of severe human rights violations. The North Korean regime, led by the enigmatic Kim Jong-Il, has provoked almost universal condemnation for its actions against its own people and for the threat it poses to international security.

In response to recent reports detailing atrocities committed in concentration camps, where it is presumed hundreds of thousands of North Koreans are imprisoned, President Bush signed the North Korean Human Rights Act (NKHRA) into law on October 18, 2004. This bipartisan legislation contains provisions related to the promotion of human rights, including support for human rights and democracy programs operating outside of North Korea, increased radio broadcasting through Radio Free Asia, and humanitarian assistance to international organizations operating within North Korea such as the World Food Programme. Additionally, the measure includes a radical reassessment of U.S. policy toward North Korean escapees, offering them political asylum in the United States for the first time and allocating funds to help them settle permanently in the United States.¹

Conspicuously absent from the NKHRA is the overtly political language of regime change or any mention of the ongoing negotiations over North Korea’s nuclear program. These omissions contrast with earlier versions of the bill, most notably the North Korean Freedom Act of 2003, which contained explicit political rhetoric on these issues in addition to provisions linking refugee status to knowledge about North Korea’s weapons of mass destruction pro-

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grams. Representative James Leach (R-IA), one of the primary sponsors of the bill in the House of Representatives, tried repeatedly to convince the United States’ skeptical allies that the NKHRA had no political overtones: “I would like to reaffirm that the motivations for the North Korean Human Rights Act were (and are) solely humanitarian, not geo-strategic. The law is not a pretext for a hidden strategy to provoke North Korean collapse or to seek collateral advantage in ongoing negotiations.”

Earlier versions of the bill and the political rhetoric surrounding relations with North Korea call into question the pure humanitarianism proffered by the NKHRA’s sponsors. In fact, the NKHRA represents the merging of two trends in U.S. foreign policy: the use of asylum policy to promote political goals and the more recent emergence of country-specific human rights legislation designed to bring about political change in so-called “rogue states.” Although the NKHRA will not likely bring about any demonstrable improvements in human rights in North Korea, it stands to have a substantial impact on relations between the United States and regional actors such as South Korea and China. Yet the greatest consequence of the NKHRA’s passage may be the effect it will have on the future development of U.S. human rights and refugee policy.

North Korea’s Human Rights Record

The U.S. State Department’s 2004 country report on human rights practices for North Korea describes the situation of human rights violations in the country:

The Government’s human rights record remained extremely poor, and it continued to commit numerous serious abuses. Citizens did not have the right to change their government….There continued to be reports of extra-judicial killings, disappearances, and arbitrary detention, including of many persons held as political prisoners. Prison conditions were harsh and life-threatening, and torture reportedly was common….Citizens were denied freedom of speech, the press, assembly, and association; all forms of cultural and media activities were under the tight control of the KWP [Korean Workers’ Party].

The gravest violations involve concentration camps where 100,000-200,000 political prisoners are held. Reports suggest that more than one million people have died in at least twenty different camps. Situated deep in the mountains
are two types of camps: “re-education” camps, where minor offenders are sent, and “closed” camps, from which no one returns. The worst punishment is inflicted on those deemed “counterrevolutionaries” or those convicted of crimes against national sovereignty, opposing the national liberation struggle, or concealing or failing to report anti-state crimes.

Leaving the country without authorization is considered a state crime, and many illegal economic migrants face torture and sometimes even death should they return, or be returned, to North Korea. According to Article 47 of the 1987 North Korean penal code, “A citizen of the Republic who defect 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 offence, he or she shall be given the death penalty.” Evidence suggests that North Korean authorities do enforce these penalties for returned migrants. Indeed, Human Rights Watch has found that “once repatriated, North Koreans face detention, torture and even execution if they are found to have had contact with Westerners or South Koreans, especially missionaries.”

China has become a key player in the plight of North Korean refugees because of its 1,300-kilometer border with North Korea, most of which is unguarded and easy to cross. As many as 300,000 North Koreans fled to China in 1995 and more than 200,000 remain there today, most of them hiding with relatives and supported by local communities. The Chinese government released a statement in 2000 after a summit with Kim Jong-Il detailing its official policy towards North Koreans in China: “In recent years, a small number of DPRK citizens did illegally cross the Sino-DPRK border and enter China due to economic difficulties. According to international law and their purpose for crossing the border, this small number of DPRK citizens cannot be regarded as refugees.” China does not officially recognize the North Koreans as refugees and instead refers to them as “economic migrants.”

Until 1999, Chinese authorities had been lenient with North Korean refugees. At that time, the United Nations High Commissioner for Refugees (UNHCR) was forced to leave northeast China and denied access to the refugees. Since then, and especially after Kim Jong-Il’s 2000 visit to Beijing, the Chinese government has been repatriating North Koreans by the thousands and instituting harsh penalties for Chinese citizens found to be hiding them. Some evidence suggests that the Chinese government has permitted North Korean agents to operate on its soil to apprehend and return North Koreans in hiding. Moreover, several humanitarian workers attempting to aid North Koreans hiding in China have been detained, convicted, and imprisoned.
Meanwhile, the Republic of Korea (ROK) does not legally consider North Koreans refugees, but gives them de facto South Korean citizenship on the basis of Article 3 of the 1987 Constitution, which affirms, “The territory of the Republic of Korea shall consist of the whole Korean peninsula and its adjacent islands.” Despite this political statement, South Korea has always been reluctant to accept North Koreans into the country for fear of conflict on the peninsula and because of the perceived threat that a large influx of poor North Koreans poses to South Korea’s current standard of living. Unsurprisingly, only about 6,000 North Koreans have successfully migrated to the South in the fifty years since the Korean War. For those escapees who do make it to South Korea, the ROK government has a wide range of services available to help integrate them into South Korean society.

Yet North Koreans can make a claim of asylum in any country with the exception of China and Russia, the countries of first asylum for most escapees. Thus, many are forced to take circuitous routes through China to Southeast Asia, before making a claim of asylum at a South Korean embassy. Because of the recent increased attention to North Korean human rights abuses, the United States has emerged as another possible safe haven for North Korean refugees who cannot gain asylum in South Korea.

**Politicizing U.S. Refugee Policy**

The North Korean Human Rights Act of 2004 represents the convergence of two distinct trends in U.S. foreign policy. The first involves the use of U.S. immigration and refugee policy to achieve foreign policy goals, a strategy that the United States has employed frequently since the end of World War II, first in its fight against global communism and more recently with individual nations deemed hostile to the United States. As Kathleen Newland has written, “Throughout the period of the Cold War, U.S. refugee policy was consciously and...explicitly 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.” The second trend, the emergence of country-specific human rights legislation aimed at provoking political change in rogue states, surfaced as a common congressional tactic in the 1990s. The North Korean Human Rights Act represents the first attempt to employ both strategies—domestic asylum procedures and international human rights promotion—in a single piece of legislation.

Until the Refugee Act of 1980, U.S. immigration and refugee laws were one and the same. Immigration and asylum decisions were made on identical grounds: domestic, economic, and political interests. Until 1980, a refugee was
defined under U.S. law as “a person fleeing a communist country or a natural disaster.” Throughout the 1950s and early 1960s, the United States welcomed anyone arriving from a communist country regardless of their individual circumstances or proof of persecution. This policy was maintained until the early 1980s, when a mass exodus from Cuba and large resettlement schemes for refugees from Indochina led the United States to apply more restrictive policies toward refugees from communist countries. Nevertheless, people seeking asylum from states hostile to the United States had a far better chance of having their requests granted. For instance, in one study of asylum cases from 1974 to 1979, applicants from “hostile states” were more than 500 percent more likely to be granted asylum than applicants from “friendly states.”

The Immigration Act of 1990 afforded the attorney general the option of granting “temporary protected status” to people fleeing countries experiencing violent conflict. This served as another mechanism by which the United States could reward people escaping from unfriendly regimes, even if these individuals did not strictly fall under the definition of a refugee found in the 1951 United Nations Convention on the Status of Refugees. The number of refugees seeking asylum in wealthy countries exploded in the early 1990s mainly due to heightened conflict in the developing world and the ease of air travel. With the exception of refugees fleeing Cuba and Haiti, however, the United States remained relatively immune to becoming a popular country of first asylum and continued its reputation as a main resettlement country.

Throughout the early post-Cold War era, North Korean refugees experienced difficulties when seeking asylum in the United States. Under the previous Immigration and Naturalization Service (INS) guidelines, North Koreans were ineligible for asylum in the United States because of a provision in the South Korean constitution giving them de facto ROK citizenship. 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.

The Emergence of Country-Specific Human Rights Legislation

The fall of the Soviet Union altered the ideological underpinnings of U.S. foreign policy and marked the emergence of two new challenges for U.S. policymakers. The first was the proliferation of intra-state conflict and the collapse of many post-colonial and post-communist states. The second was
the rise of authoritarian, isolated regimes that constituted security challenges to the United States either through their support of hostile non-state actors or through proliferation of weapons of mass destruction.

The increase in intra-state conflict and civil wars initially raised the hopes of some foreign policy officials that the lack of a geopolitical element in many conflicts would allow the United States to make human rights a priority in its relations with states. However, intra-state conflict posed new dilemmas for the promotion of human rights in U.S. foreign policy. Whereas the United States had generally ignored violations by its allies and condemned violations by its enemies during the Cold War, all violations tended to receive equal inattention in the post-Cold War era. The explosion of non-state actors as human rights violators also complicated enforcement of human rights standards since existing international mechanisms did not apply to them.

Meanwhile, the increasing role of isolated rogue states resulted in a renewed politicization of human rights policy for several reasons. As states remained the principal actors in international relations, sanctions and other traditional foreign policy tools retained efficacy. While public support for humanitarian intervention waned, security concerns took center stage after a string of terrorist attacks in the 1990s. As a result, human rights policy that doubled as effective security policy received a higher priority. Since each rogue state presented unique challenges and problems, country-specific human rights legislation became the new trend.

The first legislation of this type appeared in 1992 with the Cuba Democracy Act, and was followed by the Iraq Liberation Act of 1998, which set the stage for U.S. military intervention in 2003. The popularity of country-specific human rights legislation has increased recently, with legislation for Burma, Iran, and North Korea taking effect in the last two years. With the exception of Burma, the State Department has included every country for which Congress has passed human rights-related legislation on its list of states sponsoring terrorism.

These particular measures, passed by the U.S. Congress and signed into law by the president of the United States, generally consist of several components. One section details the human rights abuses and other crimes of the country in question. For instance, the Iraqi Liberation Act of 1998 provides an account of the Iraq-Iran War and the invasion of Kuwait in addition to outlining Saddam
Hussein’s crimes against his own people, including the Kurds. Another section articulates existing policy toward the country in question. The Iran Democracy Act of 2003, for example, states that U.S. policy “support[s] transparent, full democracy in Iran” and seeks to “help the Iranian people achieve a free press and build an open, democratic, and free society.”

In separate sections, these measures also typically provide operational components that aim to improve human rights. Common mechanisms include economic sanctions, humanitarian support, funds for increased radio broadcasting, as well as support for democratic opposition organizations and civil society groups devoted to protecting and promoting human rights. Some of the legislation contains more explicit support for regime change, including appropriations for military support, which usually becomes one of the more contentious sections of the legislation. Sometimes, as in the case of the Cuba Democracy Act, the goal of regime change is implicit. In many instances, the legislation does not so much create new policy as catalogue and emphasize existing policy. However, whatever practical effect country-specific human rights legislation may ultimately have on policy, the most definitive outcome of this type of legislation is a clear political message against the state in question. Table 1 provides a brief comparison of the legislation.

**Table 1: Comparison of Human Rights Acts of Five Countries**

<table>
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<tr>
<th></th>
<th>Cuba</th>
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<th>Iran</th>
<th>Burma</th>
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**NKHRA: Legislative History and Reactions**

The impetus for the North Korean Human Rights Act came in the summer of 2002, when several North Koreans, aged sixteen to nineteen, entered the U.S. consulate in Shenyang, China, and requested asylum. When refused, they went on hunger strike, prompting international coverage. The refugees were eventually resettled in South Korea, but the event sparked debate in the U.S. Congress over what role the United States should play in promoting
human rights in North Korea and protecting North Koreans who manage
to flee human rights abuses. In June 2002, the House of Representatives
passed a resolution that called on China to stop the forced repatriation
of North Korean refugees and allow UNHCR access to them.

In November 2003, ongoing developments on the Korean peninsula con-
cerning security matters and increased pressure from international human
rights organizations led Senators Sam Brownback (R-KS) and Evan Bayh
(D-IN) to introduce a comprehensive bill in the Senate entitled the North
introduced a similar but markedly less incendiary version of the bill in the
House, the North Korean Human Rights Act. This version found greater
support in both chambers of Congress. On July 21, 2004, the bill passed
in the House in a voice vote and went to the Senate, which passed it with
unanimous consent on September 28, 2004. President Bush signed it into
law on October 18, 2004.

Perhaps the part of the NKHRA with the most potential to influence human
rights in North Korea is the section detailing changes to U.S. asylum policy.
Section 302 contains the provision that allows North Koreans to apply for
asylum in the United States, thus rectifying their previous exclusion under
U.S. asylum law. It also includes criticism of China’s treatment of North
Korean refugees and urges the UNHCR to begin arbitration procedures to
force China to allow international monitoring and protection of refugees
currently hiding in the rural border area between China and North Korea.
Under Section 203, it authorizes $20 million of assistance to North Korean
refugees in the United States and in third countries. The NKHRA continues
the precedent of identifying South Korea as having primary responsibility
for North Korean refugees because of its historical and cultural ties to North
Korea.

The NKHRA also contains many different provisions concerning the
promotion of human rights in North Korea. The first section concerns
the ongoing regional six-party talks, affirming 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.” Previously, negotiations had excluded any mention of
human rights abuses because of North Korean threats to halt progress on
security issues if human rights were added to the agenda. In addition, the
NKHRA authorizes up to $2 million each fiscal year for appropriation to
organizations that promote human rights in North Korea and another $2
million for radio broadcasting similar to other Radio Free Asia programs.
This provision does not automatically appropriate the funds but provides the authorization if the president and Congress decide to include it in the budget. Which organizations would even be eligible for this funding were it appropriated is unclear since not a single human rights organization exists in North Korea. Although South Korean NGOs are possible recipients, the lack of information and access to North Korea makes it extremely difficult for international human rights organizations to have any discernible effect on conditions within the isolated country.

Although North Korea has reacted negatively to the passage of the NKHRA, concluding that it “proves that the U.S. administration has neither intention to roll back its hostile policy towards the DPRK nor any willingness to co-exist with the DPRK,” the reactions from within the United States and from other regional allies have been mixed. The main critics of the bill from within the U.S. government came from certain segments of the Department of State, which believed that the NKHRA was likely to hinder progress in the negotiations with North Korea while not improving human rights in any meaningful way. The document sent to Congress also expressed concern that the NKHRA would prompt North Koreans to storm U.S. embassies and consulates in neighboring countries. The White House was at first ambivalent about the bill. Although the Bush administration had been vocal in its criticism of the North Korean regime’s human rights record, it did not want a Congressional directive to hinder its efforts on the security front. The White House eventually adopted a neutral position: the NKHRA was a priority of the administration’s Congressional agenda, but it was made clear that President Bush would sign the NKHRA if it reached his desk.

In the House, Representatives Leach and Tom Lantos (D-CA) led the campaign. The bill had many outspoken supporters, and few representatives were willing to express their dissent. The issue proved so politically popular that the House passed the bill without a formal vote. In the Senate, however, passage of the NKHRA faced many obstacles. Because 2004 was an election year, the Senate agenda included many other items. Moreover, several Democrats on the Senate Committee on Foreign Relations threatened to keep the bill in mark-up until at least the next legislative session. In response, Senator Brownback, who was pressing for the bill to go straight to the Senate floor for consideration, threatened to attach the NKHRA as an amendment to an omnibus appropriations bill that was likely to pass. Once it became clear that this tactic would succeed, Democrats on the committee worked with Brownback to amend the bill to their satisfaction.

Human rights organizations were generally supportive of the bill. Senator...
Brownback had called a meeting of the Senate Committee on Foreign Relations to hear the testimony of human rights organizations in November 2003 and again in March 2004. The largest organizations, Amnesty International, Human Rights First, and Human Rights Watch, all expressed support for the NKHRA, as did North Korea-focused organizations such as the U.S. Committee for Human Rights in North Korea. Evangelical Christian groups engaged in particularly forceful lobbying as did Jewish organizations such as the Simon Wiesenthal Center.35

Within the South Korean government, the ruling center-left Uri Party and its coalition partner, the Millennium Democracy Party, both expressed opposition to the legislation. The Uri Party issued a statement saying “the act may have dire consequences for peace on the Korean peninsula” and “is perceived as aiming to overthrow the Kim Jong-Il government.”36 The left-wing Democracy Labor Party’s statements went even further, arguing that the NKHRA represented the first step in a U.S. invasion of the peninsula.”37

In contrast, the Grand National Party (GNP), the center-right minority party, expressed cautious support for the NKHRA and even suggested that they might introduce similar legislation in the South Korean National Assembly in 2005.38 Despite GNP member and Unification Minister Chung Dong-young’s caution that “[h]uman rights problems in communist countries have never been solved by applying pressure,” the GNP remains the force within the South Korean government most consistently pressing for more human rights dialogue with North Korea.39 However, once it became clear that the NKHRA would become law, Ban Ki-Moon, the foreign minister, expressed the government’s intent to work with the U.S. government: “Now that the human rights law has taken effect, we will work closely together with the U.S. government and the Congress in the course of its implementation so that it will not have negative effects on inter-Korean relations and the six-party talks.”40

Among North Korea’s other neighbors, reaction to the NKHRA also varied. In Japan, the ruling Liberal Democracy Party supported the bill and announced plans to introduce similar legislation. In a press conference, Japanese Foreign Minister Nobutaka Machimura declared, “We greatly welcome the U.S. legislation. This is a message to North Korea to deal with human rights issues as a decent country.”41 China has remained entirely silent on the NKHRA, despite being explicitly criticized in the text. Yet China’s previous
refusal to work with the UNHCR and its ban on humanitarian aid to North Korean refugees in northeast China gives some indication of Beijing’s probable perspective.

**Impact of the NKHRA**

Reactions to the legislation aside, the question remains of what, if any, demonstrable effect the North Korean Human Rights Act of 2004 will have on the human rights situation in North Korea and the protection of North Korean refugees. Although the NKHRA has grand ambitions, most observers envision very little change in the human rights conditions in North Korea.

The well-intentioned provision of funds for radio broadcasting and support for human rights organizations stand very little chance of ever being implemented, let alone initiating any tangible improvements in North Korean human rights. Moreover, the tactic of encouraging a mass exodus of refugees to weaken the regime’s legitimacy has dubious utility. Despite the amended asylum policies, the United States is unlikely to see large numbers of North Korean refugees arriving any time soon: North Korean refugees still face the nearly impossible task of fleeing North Korea, and even if they succeed, they must also find a way to escape northeastern China. Most refugees who do make it to the United States under the new law will come by way of South Korea. Negotiations have already been completed to send 10 percent of the approximately 1,800 North Korean defectors who arrive annually in Seoul to the United States for resettlement. Although the success of these refugees may encourage more people to defect from North Korea, it is unlikely to result in a mass exodus that would weaken the North Korean leadership. Even if such mass migration did occur, it would not necessarily destabilize the regime. As Michael Teitelbaum notes of the Soviet bloc, “departure of political dissidents often weakened opposition to the regime and may have made political change less rather than more likely.”

Even if the NKHRA is unlikely to have much effect on human rights in Korea, it is poised to have a significant impact on the ongoing nuclear crisis on the Korean Peninsula. For six months after the passage of the NKHRA, North Korea refused to participate in the six-party talks because the United States insisted that human rights be added to the agenda. It seems reasonable to assume that North Korea could use the NKHRA as an excuse to boycott
future negotiations, leading to a potential standoff on the Korean peninsula. Continued contact with North Korea is essential for any successful strategy. If North Korea uses U.S. human rights policy to justify its resistance to an agreement concerning its pursuit of nuclear weapons, then the purpose of the NKHRA will have been thwarted.

The NKHRA also stands to affect relations among the U.S., South Korea, and China. The disagreement over the NKHRA represents both a cause and a symptom of the growing split between the U.S. and South Korea on North Korea policy. U.S. efforts to allay South Korean worries that the NKHRA signals an intention to force regime change in North Korea, either through destabilization measures or military invasion, do not change the fact that U.S. and South Korean perspectives on this issue have been moving apart for some time. Similarly, relations with China are likely to be strained, making China even less likely than before to cooperate with the U.S. on security issues.44

Most significant are the implications the North Korean Human Rights Act holds for the future of U.S. human rights and refugee policy. In terms of refugee policy, the N KHRA solidifies the use of asylum as a post-Cold War foreign policy strategy for dealing with rogue states in an era with few clear ideological lines. In terms of human rights promotion, the N KHRA represents a move away from the overt politicization of the early country-specific human rights legislation and toward a more subtle assertion of political goals. This trend looks likely to proliferate in coming years as policymakers rely more on human rights as justification for foreign intervention. As a result, while the North Korean Human Rights Act will not likely accomplish the goals it explicitly sets forth—the promotion of human rights and democracy in North Korea—the unintended consequences of its passage will have a reverberating effect on U.S. foreign policy for many years to come.

NOTES
1 Kay Seok, “Put Human Rights First in North Korea,” The Observer, 11 September 2004.
3 Christian F. Mahr, “North Korea: Scenarios From the Perspective of Refugee Displacement,” The Inter-University Committee on International Migration (Cambridge, MA, 2002).
7 Ibid.
13 David Haines, Refugees in America in the 1990s (Westport, CT: Greenwood Press, 1996).
19 Guthrie, “Human Rights Act a Miracle.”
21 Kang, “South Korea, U.S. Discuss Political Asylum.”
27 Kang, “South Korea, U.S. Discuss Political Asylum.”