HUMANITARIAN PROTECTION ADVOCACY IN EAST ASIA: CHARTING A PATH FORWARD

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Abstract: In this article, I make the following three-part argument. First, I claim that despite the fact that a far greater number of asylum-seekers in Japan, Korea and Mainland China receive humanitarian protection status than receive refugee status, legal advocacy regarding asylum in East Asia disproportionately focuses on refugee law and policy. Second, I argue that by neglecting a potentially productive advocacy framework, this disproportionate focus on refugee law has deleterious consequences for the development of robust and humane asylum systems in the region, and for the provision of asylum protection to the greatest number of individuals. Third, I assert that international law provides tools for effective humanitarian protection-based advocacy, and outline four avenues for legal advocacy which I believe can lay the groundwork for progressive reforms of humanitarian protection law and policy in East Asia.

1. INTRODUCTION

If there is one characteristic feature of asylum policies in Japan, Mainland China and the Republic of Korea (Korea),[1] it is the reluctance of these countries to grant refugee status to significant numbers of asylum-seekers, despite the fact that each of these countries has ratified the Refugee Convention of 1951 and the Refugee Protocol of 1967.[2] In each country a significantly greater number of asylum-seekers are granted humanitarian protection status (defined here as "formal permi[ssion], under national law, to reside in a country on humanitarian

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[1] Japan, Korea and Mainland China are the three largest jurisdictions in East Asia and the most important asylum granting jurisdictions in the region. When I use the term 'East Asia' in this article, it is in reference to them only. Hong Kong, Macau and Taiwan have different refugee policies than the rest of China, and will be addressed here only in passing.

[2] Convention relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954); Protocol relating to the Status of Refugees, 606 UNTS 8791, 31 Jan. 1967 (entry into force: 4 Oct. 1967) (collectively, the 'Refugee Convention').

grounds"[3]) than refugee status. This disparity has grown in recent years, as Syrian asylum-seeker have begun to enter the region in large numbers.

Taking this disparity as my starting point, I make the following three-part argument in this article. First, I claim that despite the greater number of individuals who receive humanitarian status in the region, legal advocacy regarding asylum in East Asia disproportionately uses a framework based on the 1951 Refugee Convention to address issues of refugee law and policy rather than utilizing a humanitarian protection framework to promote stronger asylum policies. Second, I argue that by neglecting a potentially productive advocacy framework, this disproportionate focus on refugee law has deleterious consequences for the development of robust and humane asylum systems in the region, and for the provision of asylum protection to the greatest number of individuals. Third, I assert that international law provides tools for effective humanitarian protection-based advocacy, and outline four avenues for legal advocacy which I believe can lay the groundwork for progressive reforms of humanitarian protection law and policy in East Asia.

While there have been some studies of humanitarian protection in East Asia in the native languages of the region, this is the first article on the subject in the English language, to the best of my knowledge.[4] As such, it is intended to spark a wider discourse on the important but often overlooked issues related to humanitarian protection in the region. This paper can be generally placed within a tradition of critical thinking about asylum law, and specifically about the centrality of the 1951 Refugee Convention for legal advocacy. Some scholars, with David Kennedy perhaps most prominent among them, have argued that the focus on a refugee law

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[3] See United Nations High Commission for Refugees (UNHCR), *Protecting Refugees: A Field Guide for NGOs*, Geneva, UNHCR, Sep. 1999, 130, available at: http://www.unhcr.or.jp/html/protect/pdf/ProtectingRefugees-FieldGuideforNGOs.pdf (last visited 29 Dec. 2016). The terminology used by States for the protection of individuals who are not covered by the 1951 Convention varies considerably, and is sometimes known as 'complementary protection', 'subsidiary protection', or 'temporary asylum'. Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, Geneva, UNHCR, June 2005, viii, available at http://oppenheimer.mcgill.ca/IMG/pdf/b_Mandal-Protection_Mechanisms_Outside_of_the_1951_Convention.pdf (last visited 25 Dec. 2016).

[4] For Korean and Japanese-language introductions, see respectively, Bok Hee Chang, "국제인권법상 난민의 보완적 보호와 국내법제도 개선" [Complementary Protection of Refugees under International Human Rights Law and Improving National Legal System], *Anam Law Review*, 27, 2008, 651-680; Hitomi Kosaka, "日本における類似難民の保護の課題と展望―平等原則アプローチと EU Qualification Directive の 2011 年改正からの示唆―" [Problems with, and Future Prospects for, Complementary Protection in Japan: An Insight from the Principle of the Non-Discrimination Approach and the Revised 2011 EU Qualification Directive], *International Public Policy Studies*, 19(2), 2016, 37-53.

framework "can make it more difficult to contest the closure of borders to economic migration."[5] Martin Jones has likewise criticised a focus on the Refugee Convention for removing "from the debate alternate definitions of those to whom international protection is owed, including alternate definitions of "refugee" as well as the other human rights obligations owed to those seeking refuge by states."[6] My argument is different and more context-specific. I claim that in the current East Asian context, an increased focus on humanitarian protection-based advocacy has the potential to improve the lives of more people and is more likely to lead to beneficial law and policy reforms than is a continuation of the current level of focus on Refugee Convention-based legal advocacy. In this respect, my article both supports and builds upon the recent academic agenda-setting work of Elaine Lynn-Ee Ho, Laura Madokoro and Glen Peterson, who argue that academics must look beyond the Refugee Convention to explore the multiplicity of regimes affecting asylum-seekers in Asia, in order to explore their impact, gaps, and potentialities.[7]

2. ASYLUM IN EAST ASIA: THE LEGAL BACKGROUND

Japan, China and Korea are all State parties to the Refugee Convention and Protocol. Japan's ratification was the earliest, in 1981.[8] The following year, Japan integrated the Refugee Convention into its domestic legislation, through revisions of its 1951 Immigration Control Order.[9] Japan's engagement with the international refugee regime at this time was a direct response to pressures stemming from the Indochinese refugee crisis of the late 1970s and 1980s.[10] In 2004, Japan updated its regulations through a revised Immigration Control and Refugee Recognition Act; this law, as further amended several times in the interim, now forms the backbone of Japanese refugee policy.[11] In 2010, Japan also introduced a pilot refugee

[5] David Kennedy, "Reassessing International Humanitarianism: The Dark Sides", in Anne Orford (ed.), *International Law and its Others* Cambridge, Cambridge University Press, 2008, 131-155, 134.
[6] Martin Jones, "Moving Beyond Protection Space: Developing a Law of Asylum in South-East Asia", in James Simeon (ed.), *The UNHCR and the Supervision of International Refugee Law*, Cambridge, Cambridge University Press, 75-96, 89.
[7] Elaine Lynn-Ee Ho, Laura Madokoro, and Glen Peterson, "Refugees, Displacement and Forced Migration in Asia: Charting an Inclusive Research Agenda", ARI Working Paper No. 236, Apr. 2015, 14, available at: http://www.ari.nus.edu.sg/wps/wps15_236.pdf (last visited 25 Dec. 2016).
[8] Osamu Arakaki, *Refugee Law and Practice in Japan*, Aldershot, Ashgate, 2008, 19.
[9] *Ibid*.
[10] *Ibid*., 16-17. The Indochinese refugee crisis refers to a series of mass migrations from Vietnam, Laos and Cambodia in the years following the end of the Vietnam War as a result of conflict, persecution and geopolitical turmoil in the region. See, W. Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response*, London, Zed Books, 1998.
[11] Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 4 October 1951 (as amended).

resettlement program in 2010, which resettled 86 refugees from Myanmar during the ensuing four years.[12]

Mainland China acceded to the Refugee Convention a year after Japan, in 1982.[13] As with Japan, this took place in the shadow of the Indochinese refugee crisis, which saw China emerge as an important destination country for those fleeing violence against ethnic Chinese in Southeast Asia.[14] China provides for the possibility of granting political asylum in article 32 of its constitution,[15] but has not yet enacted domestic laws or regulations for refugee recognition.[16] The United Nations High Commissioner for Refugees (UNHCR) does have an office in Beijing, however, which is authorised to make refugee status determinations,[17] and the 2012 Exit-Entry Law allows asylum-seekers remain in the country during UNHCR's screening of their applications.[18]

Korea, meanwhile, ratified the Refugee Convention in 1992, shortly after joining the United Nations, and integrated provisions for refugee recognition into its Immigration Control Act in 1993.[19] However Korea did not recognise its first refugee until 2001.[20] Around this time, Korea made the first steps towards operationalising its commitments, with the assistance of UNHCR, although the number of refugees recognised remained quite small.[21] In 2009, the Immigration Control Act was revised to, *inter alia*, provide that refugees should be treated in line

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[12] Atsushi Kondo, "Migration and law in Japan", *Asia & the Pacific Policy Studies*, 2(1), 2015, 155–168, 161-162.
[13] Lili Song, "Who Shall We Help? The Refugee Definition in a Chinese Context" *Refugee Survey Quarterly*, 33(1), 2014, 44-58, 45. The scope of the Convention was later extended to include Macau, but not Hong Kong. Brian Barbour, "Protection in practice: The situation of refugees in East Asia", *Nanmin Kenkyu Journal* [Refugee Studies Journal], 2, 2012, 81-92, 88. (2012) [Published in Japanese; English original available at: http://www.refugeestudies.jp/].
[14] Song, "Who Shall We Help?", 45. China had accepted 260,000 Indochinese refugees during 1978-1979 and resettled an additional 2,500 Lao and Cambodian refugees in 1981-1982. UNHCR, *The People's Republic of China Factsheet*, Dec. 2016, available at: http://www.unhcr.org/5000187d9.pdf (last visited 25 Dec. 2016).
[15] Xianfa [Constitution] art. 32, § 2 (1982), 2004 Fagui Huibian 4–28.
[16] The Ministry of Civil Affairs has reportedly been working on drafting regulations for refugee status determination since 2013, but no details of this process have been made public. Cui Jia, "Refugees Look to End Life in Limbo", *China Daily*, 29 Dec. 2015, available at http://europe.chinadaily.com.cn/china/2015-12/29/content_22849660.htm (last visited 25 Dec. 2016). By contrast, Hong Kong and Macau do have laws and procedures in place to recognise refugees. See Lei n.º 1/2004, Regime de reconhecimento e perda do estatuto de refugiado (Macau); Government of Hong Kong, "Commencement of Unified Screening Mechanism for Claims for Non-Refoulement Protection", available at: http://www.info.gov.hk/gia/general/201402/07/P201402070307.htm (last visited 25 Dec. 2016).
[17] Song, "Who Shall We Help?", 51.
[18] Chujing Rujing Guanli Fa [Exit and Entry Administration Law] (Exit and Entry Law) (promulgated by the Standing Committee of the National People's Congress (NPC), June 30, 2012, effective July 1, 2013), 2012 Fagui Huibian 283–301, article 46.
[19] Law No. 4592 (10 Dec. 1993) (amended version of the Immigration Control Act, Law No. 1289 on Mar. 5, 1963).
[20] Andrew Wolman, "Korea's Refugee Act: A Critical Evaluation under International Law", *Journal of East Asia and International Law*, 6(2), 2013, 479–95, 481.
[21] Chan Un Park, "Refugees and Korean Practices Thereof, *Kanagawa Hogaku* 40, 2007, 1-9, 4.

with the requirements of the Refugee Convention.[22] In response to pressure from civil society groups, a new Refugee Act was passed by the National Assembly in 2011, and entered into force on July 1, 2013.[23] This Act established a new refugee determination process and specifies that asylum claims to be filed from ports of entry.[24] It also outlines a new appeals process, whereby denials, cancellations and withdrawals of refugee status may be appealed to the Minister of Justice within 30 days.[25] In addition, the Refugee Act established a fifteen-member Refugee Committee to review appeals from asylum denials or cancellations and provides for greater protections for the welfare of recognised refugees.[26]

Despite each country's ratification of the Refugee Convention and Japan and Korea's creation of a domestic law framework for refugee determinations, the number of individuals recognised as refugees in China, Japan and Korea is very low. According to the Japanese Ministry of Justice, during the year 2015, there were 7,586 applications for refugee status in Japan, and 27 refugees recognised.[27] According to UNHCR statistics for 2015, there were 11,584 applications for refugee status in Korea, with 24 refugees recognised and 488 applications for refugee status in mainland China, with 39 refugees recognised.[28] Thus, there were, in total, 90 refugees recognised in the East Asian region in 2015. This is evidently quite a small number, when compared to the total population of the region (slightly more than 1.5 billion people in 2016) or its economic capacity. It is also a small number when compared to the estimated

[22] Law No. 9142, arts. 76-78(1) (19 Dec. 2008) (amending the Immigration Control Act, Law No. 1289 (Mar. 5, 1963)).
[23] Law No. 11298 (proclaimed Feb. 10, 2012, enforced July 1, 2013).
[24] *Id*. art. 6.
[25] *Id*. art. 21.
[26] *Id*. arts. 21, 25, 31-37.
[27] Japan Association for Refugees, "Number of people granted refugee status in Japan in 2015: Preliminary figures from the Ministry of Justice", available at: https://www.refugee.or.jp/jar/news/2016/02/01-0000.shtml (last visited 27 Dec. 2016).
[28] Data downloaded from the UNHCR Population Statistics Database (http://popstats.unhcr.org) on 15 October, 2016. The refugee recognition rates are no better in Hong Kong and Macau. Under the new unified government screening procedure for both refugee claims and torture claims, 3,165 asylum-seekers were screened by the Hong Kong authorities between March 2014 and December 2015, only 18 of whom were granted asylum. Raquel Carvalho, "Hong Kong's Refugee Claim System Leaves Many Tough Questions", *South China Morning Post*, 28 Feb. 2016, available at: http://www.scmp.com/news/hong-kong/law-crime/article/1918025/hong-kongs-refugee-claim-system-leaves-many-tough-questions (last visited 27 Dec. 2016). Meanwhile in Macau, there have reportedly not been any refugees recognised between 2004 and June 2014, despite the existence of a domestic legal framework for refugee recognition. "Seis pedidos de asilo em Macau onde estatuto de refugiado continua a ser uma miragem", *Sapo Noticias*, 20 June, 2014, available at http://noticias.sapo.tl/portugues/lusa/artigo/17890926.html (last visited 27 Dec. 2016).

number of refugees in the world (21.3 million, in December, 2016).[29] This low number of refugees is not a temporary phenomenon; the number of refugees recognised has been consistently tiny in all these jurisdictions (although the large number of refugee recognition applications in Japan and Korea is somewhat of a recent phenomenon).[30]

Meanwhile, Korea and Japan have also developed domestic procedures for granting asylum without acknowledging refugee status. While this alternative status goes by different terms in each country, it is generally translated as 'humanitarian status' in Japan and Korea.[31] Although humanitarian status is awarded based on uncertain criteria, in many cases it has been used to provide protection to people fleeing war zones, such as Syria.[32] China has no general regulations on humanitarian protection, but in practice has provided protective non-refugee documentation to asylum-seekers at times, or tolerated their undocumented stay.[33] In all three countries, more people are granted humanitarian status than refugee status. In Korea, 522 asylum-seekers have been granted refugee status between 1994 and August 2015, while 879 individuals were granted humanitarian status during that time.[34] In Japan, 2,434 asylum-seekers were granted special protection on humanitarian grounds between 1994 and the end of 2015, while only 466 were recognised as refugees.[35] Although precise numbers are difficult to come by,

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[29] UNHCR, "Figures at a Glance", available at: http://www.unhcr.org/figures-at-a-glance.html (last visited 27 Dec. 2016).

[30] Barbour, "Protection in practice", 91-92.

[31] The Japanese term commonly used for humanitarian status is人道的配慮による在留特別許可 (or 人道的地位) and the Korean term is **인도적** 지위.

[32] Adam Taylor, "Japan Has Accepted Only Six Syrian Refugees: Meet One of Them.", *Washington Post*, 27 Oct. 2016, available at: https://www.washingtonpost.com/world/asia_pacific/the-singular-life-of-a-syrian-refugee-in-japan/2016/10/26/be0c6699-09f3-4a05-abeb-cad076b4cc02_story.html (last visited 29 Dec. 2016) ("almost all Syrians are allowed to temporarily stay in Japan for humanitarian reasons, even if they are not granted refugee status"); Paula Hancocks and KJ Kwon, "Syrian Refugees Stuck in Limbo at Seoul Airport", *CNN*, 2 June 2016, at http://edition.cnn.com/2016/06/01/asia/south-korea-airport-syrians/ (last visited 29 Dec. 2016) (668 Syrians granted humanitarian status from 2014 to June 2016). Syrians are now permitted to stay in Korea with humanitarian status without going through the usual refugee determination process. Heinn Shin, "Syrian Car Mechanic Struggles to Ply his Trade in the Safe Haven of Seoul", UNHCR, 24 Mar. 2015, available at: http://www.unhcr.org/news/latest/2015/3/551188109/syrian-car-mechanic-struggles-ply-trade-safe-haven-seoul.html (last visited 29 Dec. 2016).

[33] Guofu Liu, *Chinese Immigration Law*, Aldershot, Ashgate, 2016, 90-92 (noting occasional tolerance and provision of documentation to North Korean women in China, despite lack of regulations on humanitarian protection); Song, "Who Shall We Help?", 55 (discussing temporary protection of 2009 Kokang influx and 2011 Kachin influx of refugees from Myamar).

[34] Sarah Kim, "Korea's Borders Crack Open for Refugees", Joongang Daily, 16 Nov. 2015, available at http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=3011575 (last visited 29 Dec. 2016).

[35] Japan Ministry of Justice, "*我が国における難民庇護の状況等*" [*Status of Refugee Protection in Japan*], sched. 3, available at: http://www.moj.go.jp/content/001179573.pdf (last visited 29 Dec. 2016).

it is clear that thousands of asylum-seekers have been given protection in China in recent years without being given refugee status.[36]

3. ASYLUM ADVOCACY IN EAST ASIA

Despite the fact that more people are granted humanitarian status than refugee status in the region, asylum advocacy in East Asia is far more focused on refugee law than on the law of humanitarian protection. For local NGOs, this is evident from their names and mandates. For example, the Japan Association for Refugees assists and advocates for the rights of asylum-seekers and refugees, which it explicitly defines according to the Refugee Convention.[37] International NGOs tend to use the Refugee Convention as a framework for their critiques, and often focus on the low recognition rate in Japan and Korea.[38] International organisations such as UNHCR regularly criticise Japanese, Chinese and Korean refugee policies, but less frequently discuss each country's humanitarian protection programs, except in a favourable sense (i.e., explaining the lack of refugee recognition by the fact that governments utilise an alternative humanitarian status).[39] With certain exceptions, even academic studies tend to focus on refugee law and policy rather than humanitarian status law and policy.[40] To the best of my knowledge, there is not a single English-language academic article on humanitarian status in East Asia, while there are numerous studies of refugee law and policies in the region, many of which take an explicitly advocacy oriented perspective, oftentimes by pointing out how national policies conflict with the Refugee Convention and how they should be brought into compliance.

This predilection for refugee law-based advocacy can perhaps best be illustrated with three examples. First, there is the issue of protection for North Korean escapees in China. Even though China has no domestic refugee law and there is little chance of it recognising North

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[36] Song, "Who Shall We Help?", 55.

[37] Japan Association for Refugees, "Refugees and JAR", available at: https://www.refugee.or.jp/en/#02 (last visited 29 Dec. 2016).

[38] See, e.g., Amnesty International, "Japan 2015-2016", available at: https://www.amnesty.org/en/countries/asia-and-the-pacific/japan/report-japan/ (last visited 29 Dec. 2016); "Amnesty slams Japan's contentious secrecy law, low acceptance of refugees", Japan Times, 24 Feb. 2016, available at: http://www.japantimes.co.jp/news/2016/02/24/national/social-issues/amnesty-hits-japans-contentious-secrecy-law-low-acceptance-refugees/ (last visited 29 Dec. 2016).

[39] See, e.g., Alex Martin, "UNHCR Exec Lauds Refugee Strides, Urges More", *Japan Times*, 6 July, 2011, available at: http://www.japantimes.co.jp/news/2011/07/06/national/unhcr-exec-lauds-refugee-strides-urges-more/ (last visited 29 Dec. 2016); Masamo Ito, "Japan Helps Too Few Refugees: UNHCR Chief", *Japan Times*, 18 Nov. 2014, available at: http://www.japantimes.co.jp/news/2014/11/18/national/japan-helps-too-few-refugees-unhcr-chief/ (last visited 29 Dec. 2016).

[40] Elaine Lynn-Ee Ho et al, "Refugees, Displacement and Forced Migration in Asia", 14 (criticising "the preponderance of research on the 1951 Convention and UNHCR").

Korean escapees as refugees, the international community has often focused its advocacy on encouraging China to fulfill its obligations under the Refugee Convention. For example, the European Parliament recently urged China "in accordance with its obligations as a state party to the UN Refugee Convention, not to deny North Korean refugees who cross the border into China their right to seek asylum or to forcibly return them to North Korea"[41] and the US Congressional-Executive Commission on China stated that "[t]he Chinese government is obligated under the 1951 UN Convention relating to the Status of Refugees (1951 Convention) and its 1967 Protocol to refrain from repatriating North Koreans who left the DPRK for fear of persecution or who fear persecution upon return to the DPRK."[42] International NGOs likewise focused on the refugee convention. According to Human Rights Watch, China "defies its commitments to respect the 1951 Convention on the Status of Refugees and its 1967 Protocol -- both which were ratified by China in 1982 -- by denying North Koreans the right to seek protection from UNHCR and seek determination of their refugee claims, "[43] while Amnesty International's position is that "all North Koreans in China are entitled to refugee status because of threat of human rights violations if they were to be returned to North Korea against their will."[44] One notable exception is UNHCR itself, which has at times used the Refugee Convention to frame its advocacy on this issue, but has also been active in promoting other 'humanitarian' solutions.[45]

A second example of the focus on refugee law-based advocacy was the debate surrounding the drafting of Korea's Refugee Act of 2013. At the time of the law's drafting and passage, there were numerous analyses of whether the act fulfilled Korea's requirements under the Refugee Convention, from academics,[46] practitioners,[47] and UNHCR.[48] However, there was

[41] European Parliament, "European Parliament Resolution on North Korea" (2016/2521(RSP)), par. 8.

[42] Congressional Executive Commission on China, "Annual Report", 2013, 118, available at: http://www.cecc.gov/sites/chinacommission.house.gov/files/AR13DJ.PDF (last visited 25 Dec. 2016).

[43] Phil Robertson, Deputy Director, Asia Division, Human Rights Watch "The Problem of North Korean Refugees in China and Possible Solutions", speech at 2nd KINU Chaillot Human Rights Forum 2012 , 14 June 2012, available at: https://www.hrw.org/news/2012/07/19/problem-north-korean-refugees-china-and-possible-solutions (last visited 27 Dec. 2016).

[44] T. Kumar, International Advocacy Director Amnesty International, USA , "China's Repatriation of North Korean Refugees", presentation before the Congressional-Executive Commission on China, 5 Mar. 2012, available at: http://www.amnestyusa.org/news/news-item/china-s-repatriation-of-north-korean-refugees (last visited 27 Dec. 2016).

[45] Roberta Cohen, "Human Rights and the North Korean Refugee Crisis", Brookings Institution, On the Record Blog, 25 Oct. 2007, available at: https://www.brookings.edu/on-the-record/human-rights-and-the-north-korea-refugee-crisis/ (last visited 27 Dec. 2016) ("UNHCR has been proposing a special humanitarian status for North Koreans in China to increase their protection").

[46] Hyun Im, "An Evaluation of Korea's New Refugee Act and Future Challenges", *Korea Observer*, 43(4), Winter 2012, 587-615; Moon-Hyun Koh, "A Study on Refugee Status Determination Criteria and Procedures of Korea's

very little analysis of the new law using humanitarian protection frameworks, even though the law covers humanitarian status as well as refugee status and, as mentioned above, more people have been granted humanitarian status in Korea than have been granted refugee status. Unsurprisingly, the protections for humanitarian status holders (and applicants) in the law ended up being weak and largely discretionary.

A third example has been the recent focus in the international media on the low refugee recognition rate for Syrians in Japan. In fact, most Syrian asylum-seekers are given humanitarian protection. There is a need for greater attention to their well-being within Japan, and ensuring that their rights are protected and that they have access to needed employment and services. However, the media focus has largely been to upbraid Japan for the low refugee recognition rate for Syrian asylum-seekers, instead of these other issues.[49]

Of course, this focus on an international refugee law framework is neither unusual nor unexplainable. Asylum advocacy in most of the world focuses on refugee law and the Refugee Convention.[50] The Refugee Convention is a powerful and well-known normative document,

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Refugee Act", paper presented at World Congress of Constitutional Law 2014, June 2014, available at: https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws6/w6-moonhyun.pdf (last visited 27 Dec. 2016).

[47] Seongsoo Kim, "One Year After the Korean Refugee Act", RefLaw, 7 Jan. 2015, available at: http://www.reflaw.org/one-year-after-the-korean-refugee-act/ (last visited 27 Dec. 2016).

[48] UNHCR, "UNHCR's Comments on the Draft Presidential Decree and Regulations to the Refugee Act of the Republic of Korea", 26 March 2013, available at: http://www.refworld.org/docid/54100f8f4.html (last visited 27 Dec. 2016). Similarly, UNHCR only addressed humanitarian protection in three out of the 37 paragraphs of advice it gave to the Japanese government regarding the proposed 2004 reforms of its Immigration Control and Refugee Recognition Act. UNHCR, "UNHCR's Comments on the Bill to Reform the Immigration Control and Refugee Recognition Act of Japan", 19 May 2004, available at: http://www.refworld.org/docid/42b7f4894.html (last visited 27 Dec. 2016).

[49] See, e.g., Justin McCurry, "Japan Takes no Syrian Refugees Yet, Despite Giving 200m to Fight ISIS", *The Guardian*, 9 Sep. 2015, available at: https://www.theguardian.com/world/2015/sep/09/japan-takes-no-syrian-refugees-yet-despite-giving-200m-to-help-fight-isis (last visited 25 Dec. 2016); Anna Fifield, "As Europe Makes Room for Refugees, Some in Japan Ask Why Not Us?", *Washington Post*, 8 Sep. 2015, available at: https://www.washingtonpost.com/news/worldviews/wp/2015/09/08/as-europe-makes-room-for-refugees-some-in-japan-ask-why-not-us/ (last visited 25 Dec. 2016); Piya Muqit, "Refugee Crisis Requires a Global Response, and Asia's Powerhouses Must Reach out to the Needy", *South China Morning Post*, 11 Sep. 2015, available at: http://www.scmp.com/comment/insight-opinion/article/1857268/refugee-crisis-requires-global-response-and-asias (last visited 25 Dec. 2016); Justin McCurry, "Japan Says it Must Look After its Own Before Allowing Syrian Refugees In", *The Guardian*, 30 Sep. 2015, available at: https://www.theguardian.com/world/2015/sep/30/japan-says-it-must-look-after-its-own-before-allowing-syrian-refugees-in (last visited 25 Dec. 2016); "Japan Only Accepted 11 Syrian Refugees out of 7,500 Last Year", *Fox News*, 28 Dec. 2015, available at: http://insider.foxnews.com/2015/12/28/japan-accepts-only-11-syrians-applying-refugee-status (last visited 25 Dec. 2016).

[50] Susan Kneebone, "Governance Beyond Boundaries", *Refugee Survey Quarterly*, 29(1), 2010, 1-11, 2-3 ("despite the development of other protection regimes, the uniqueness of the international refugee protection regime has persisted and indeed become further entrenched").

which provides a widely accepted set of standards for making legal arguments. Western NGOs, academics and policy-makers are familiar with the Convention through its implementation in the West, and indeed many asylum advocates in Asia are quite familiar with the refugee law framework due to their education in Western countries where refugee law has long played a more prominent role in national policy. Nor is there a total neglect of alternative protection frameworks. For example, South Korean advocates and policy-makers rarely if ever view North Koreans through the lens of the Refugee Convention (because North Koreans are considered to be citizens of South Korea under that nation's domestic laws).[51] The Korean National Human Rights Commission has challenged the lack of rights for humanitarian status holders in Korea on occasion, while using treaty law to fortify its arguments.[52] Some Japanese academics and advocates have started to focus their attention more on improving the legal framework for humanitarian status over the past few years.[53] These are the exceptions to the rule, however.

4. IMPLICATIONS

This disproportionate attention to refugee law might not matter, if refugee law advocacy was more likely than humanitarian status advocacy to successfully prompt positive legal change that affects large numbers of individuals. But, this is not the case, for several reasons. First, as discussed above, refugee law-based advocacy affects a much smaller number of people than humanitarian status advocacy. Of course, one could argue that this disparity shows the need to pressure for more refugee recognition, and perhaps this is true. However, domestic and external sources have been advocating for a more liberal attitude towards refugee recognition for decades with little or no success. There is no reason to believe that future advocacy along these lines will be more productive.

Second, to the limited extent that one can predict future forced migration patterns, it seems likely that East Asia will see an even greater proportion of migrants seeking humanitarian

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[51] See, Andrew Wolman, "The South Korean Citizenship of North Korean Escapees in Law and Practice", *KLRI Journal of Law and Legislation*, 4(2), 2014, 225-253.

[52] See, eg, National Human Rights Commission of Korea, Press Release, "Excluding Humanitarian Residents from Local Health Ensurance is Human Rights Violation", 18 February 2014, at http://www.humanrights.go.kr/site/program/board/basicboard/view?currentpage=3&menuid=002002001&pagesize=10&searchcategory=violation&boardtypeid=7003&boardid=7001646 (last visited 25 Dec. 2016).

[53] Issue no. 5 (2015) of Japan's *Refugee Studies Journal* was devoted to complementary protection and the University of Tokyo's 2014 Refugee Law Comparative Forum hosted a session on humanitarian protection. See, CDR: The Project of Compilation and Documentation on Refugees and Migrants, "Refugee Law Comparative Forum 2014", at http://cdr.c.u-tokyo.ac.jp/documents/Refugee%20Law%20Comparative%20Forum%202014.pdf (last visited 25 Dec. 2016).

status rather than refugee status in the near future. This is due to the likelihood that climate change is going to result in significant displacement in the Asia-Pacific region, coming in particular from low-lying areas of developing countries in South and Southeast Asia.[54] While there is uncertainty regarding the numbers, timing, and destinations for these migrants, it seems likely that many will end up attempting to come to the relatively wealthy and less affected countries of East Asia. Climate change induced migrants are not normally though to qualify as refugees under the Refugee Convention definition, however, meaning that they will have to rely on humanitarian protection policies if they are to obtain protection.[55]

Third, there is more room for plausible improvement in humanitarian status laws and regulations, while the easy advocacy gains have been made for refugee law. Put simply, the laws and regulations regarding recognition and treatment of refugees are – on paper – already fairly adequate in Japan and Korea, and although China still lacks domestic refugee laws, it has also proven relatively impervious to external or internal advocacy on this issue. Thus from a refugee law perspective, the improvements that need to be made in Japan and Korea are more related to the inordinately skeptical attitudes of Justice Ministry officials and judges, but this is complicated by the fact that bureaucratic and judicial attitudes are difficult to reform through conventional civil society advocacy. On the other hand, there are significant law and policy improvements that can be plausibly advocated for in the realm of humanitarian protection in the region. As will be discussed in more depth in the next chapter, humanitarian protection policies lack transparency, do not adequately protect human rights, and improperly discriminate between similarly situated persons.

Fourth, there is at least some reason to believe that humanitarian protection-based asylum arguments might resonate more than refugee law-based arguments within East Asia. According to Payne, "new ideas are said to 'resonate' because of some ideational affinity to other already accepted normative frameworks."[56] Some have argued that refugee reception concepts have little

[54] See, Robin McKie, "Global Warming to Hit Asia Hardest, Warns New Report on Climate Change", *The Guardian*, 22 Mar. 2014, available at: https://www.theguardian.com/environment/2014/mar/22/global-warming-hit-asia-hardest (last visited 25 Dec. 2016).
[55] Angela Williams, "Turning the Tide: Recognizing Climate Change Refugees in International Law", *Law & Policy*, 30(4), 2008, 502-529, 510.
[56] Rodger Payne, "Persuasion, Frames and Norm Construction", European Journal of International Relations, 7(1), 2001, 37-61, 38.

cultural resonance in East Asia.[57] Sara Davies argues that non-Western understanding were largely ignored in the drafting process, thus systematically excluding Asian States from the construction of international refugee law.[58] Therefore, refugee law is sometimes seen as a Western import, imposed on Asian nations that did not traditionally embrace the concept.[59] As such, refugee reception norms arguably lack the legitimacy necessary to prompt compliance with international norms out of a sense or moral obligation.[60]

On the other hand, humanitarian protection advocacy can tap into long-standing and powerful traditions of humanitarianism in Northeast Asia that are not perceived to exist with respect to refugee protection. Humanitarian values are "deeply embedded in East Asia's social, cultural and religious traditions,"[61] and have deep roots in both Buddhist and Confucian thought.[62] Traditionally, in the Chinese socio-cultural system, a dynasty's "ruling legitimacy came to be predicated upon the fulfilment of its humanitarian obligations, defined in terms of an overarching duty to mitigate the suffering of others."[63] Humanitarian ideals have also long

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[57] Sara Davies, "The Asian Rejection?: International Refugee Law in Asia", *Australian Journal of Politics & History*, 52(4), 2006, 562–575; Sara Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia*, Leiden, Martinus Nijhoff, 2008, 18; Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility*, Cheltenham, Edward Elgar, 2016, 51; But see, Ho, Madokoro & Peterson, "Refugees, Displacement and Forced Migration in Asia", 5-6 (noting that the historical record suggests that "Asian countries, and refugee situations in Asia, were implicated in how the character of the [Refugee Convention] and the associated regime of protection and resettlement developed").

[58] Davies, *Legitimising Rejection*, 19.

[59] Davies, "The Asian Rejection?". Japan, Korea and China were not traditionally seen as immigration-welcoming countries prior to the 'forced openings' of the nineteenth century and some in Japan have still opposed refugee protection on the grounds that it is not an "immigration country". Petrice Flowers, "Failure to protect refugees? Domestic Institutions, International Organizations and Civil Society in Japan", *Journal of Japanese Studies*, 34(2), 2008, 333–361, 343.

[60] According to Hurd, "(w)hen an actor believes a rule is legitimate, compliance is no longer motivated by the simple fear of retribution, or by a calculation of self-interest, but instead by an internal sense of moral obligation". Ian Hurd, "Legitimacy and Authority in International Politics", *International Organization*, 53(2), 1999, 379-408, 387. See, generally, Thomas Franck, *The Power of Legitimacy Among Nations*, Oxford, Oxford University Press, 1990; .

[61] Pichamon Yeophantong, "Understanding Humanitarian Action in East and Southeast Asia: A Historical Perspective", HPG Working Paper, Feb. 2014, 7, available at: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8807.pdf (last visited 28 Dec. 2016) (noting, in particular, that the "notion that there is a moral obligation to assist others in need" has resonated in the region).

[62] Yukie Osa, "Seeking Japanese Conceptions of Humanitarianism", paper contributed to the Cultures of Humanitarianism: Perspectives from the Asia-Pacific project, Oct. 2012, 2, available at: https://www.nottingham.ac.uk/iaps/documents/project/osa.pdf (last visited 28 Dec. 2016) ("Mercy (*jihi*) and compassion (*awaremi*) to others are particularly important in the teachings of Buddhism."); Yeophantong, "Understanding Humanitarian Action in East and Southeast Asia", 5 ("Chinese scholars have drawn on key Confucian concepts like benevolence to demonstrate how 'humanitarian' values are not necessarily 'foreign' to Chinese society, but are in fact deeply embedded in indigenous cultural traditions.")

[63] Yeophantong, "Understanding Humanitarian Action in East and Southeast Asia", 8.

played a prominent role in Japanese political philosophy, dating back to the Japanese feudal era.[64]

Humanitarian values retain their relevance in the region today, too, although such notions have evolved with globalisation to reflect a more cosmopolitan worldview.[65] For example, humanitarian principles influence the foreign aid programs of Korea and Japan, as well as the growing Chinese concern with projecting an image of "responsible great power".[66] Humanitarian ideals also pervade the idea of 'human security', a concept which has distinct Asian roots[67] and has been primarily promoted by Japan as a worthwhile approach to international relations, including in the refugee arena.[68] On those few occasions of mass influxes of forced migrants in the post-war era, East Asian countries themselves have preferred to use the language of humanitarianism to characterise their responses.[69]

Fifth, humanitarian protection holds promise as a way for East Asian countries to provide needed protection while avoiding sensitive political judgments on their neighbours' actions. While in principle, awarding refugee status is not considered an unfriendly act,[70] in practice China has often used political and economic pressure to attempt (often successfully) to dissuade its neighbours from granting asylum to Chinese nationals.[71] Thus, the Japanese and Korean governments have traditionally avoided giving refugee status to Chinese asylum-seekers, in order to avoid political complications in an already fraught relationship.[72] China, also, would find it

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[64] *Ibid*., 10 ("three of the eight principles of the Bushido speak to overarching humanitarian sentiments: jin, developing sympathy for people; gi, maintaining correct ethics; and tei, caring for the aged and those of humble station").
[65] *Ibid*., 12.
[66] *Ibid*., 5.
[67] See, Amitav Acharya, "Human Security: East Versus West", *International Journal*, 56(3), 2001, 442-460, 444.
[68] Miki Arima "Asylum in Japan: An Overview of Government Commitments and Asylum Statistics", *CDRQ*, 5, 2012, 74–83, 75 (citing "Resolution Regarding Continued Commitment for Refugee Protection and Solutions to Refugee Issues", National Diet. 21 Nov. 2011).
[69] For example, according to its government, China accepted Indochinese refugees from 1978 onward "in the spirit of humanitarianism." Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, "China's Relationship with United Nations High Commissioner for Refugees," 16 Apr. 2004, available at: http://www.fmprc.gov.cn/ce/cegv/eng/rqrd/jblc/t85094.htm (last visited 28 Dec. 2016).
[70] UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, UN Doc. A/RES/2312(XXII), preamble ("the grant of asylum by a State to persons entitled to invoke article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State").
[71] See, Andrew Wolman, "Chinese Pressure to Repatriate Asylum Seekers: An International Law Analysis", forthcoming in *International Journal of Refugee Law*, 29(1), 2017.
[72] Arakaki, *Refugee Law and Practice in Japan*, 31; Wolman, "Korea's Refugee Act", 493. Korea has, on the other hand, awarded humanitarian status to Chinese nationals. Hans Schattle and Jennifer McCann, "The Pursuit of State

politically awkward to give refugee status to persecuted North Koreans, given that North Korea is a close ally. While it would of course be optimal for governments in the region to ignore politics in their consideration of refugee policy, advocates may be able to productively call for humanitarian status as a second-best solution, until that happens.

5. INTERNATIONAL LAW FRAMEWORK

Given that there appears to be a need for increased humanitarian protection advocacy as a means to protect asylum-seekers in East Asia, the final question I will address in this article is how international legal standards can be used to improve national policies related to humanitarian status. After all, there is no international treaty on humanitarian protection (like the Refugee Convention) that can easily be used to evaluate a country's policies and condemn violations. Here I will outline four avenues for advocacy that may prove useful in the region, along with specific problems that they can be used to address.

5.1.Lack of Substantive Protection against Refoulement

First, advocates can argue that some individuals are not being granted humanitarian status in East Asia even though they are entitled to receive protection against *refoulement* under international law. There are a number of different treaties that protect against *refoulement* in cases where the asylum-seeker may face torture or have their life threatened in their home country.[73] Most notably, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) provides that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.[74] China, Japan, and Korea are all parties to this convention. The International Convention on Civil and Political Rights (ICCPR) does not explicitly contain a *non-refoulement* obligation, but the Human Rights Committee (among others) has repeatedly emphasised that the treaty implicitly prohibits States from sending persons back to countries where they could be subjected to torture or cruel, inhuman or

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Status and the Shift Toward International Norms: South Korea's Evolution as a Host Country for Refugees", *Journal of Refugee Studies*, 27(3), 2014, 317-337, 324-325 ("Currently in South Korea there are multiple cases of Chinese Falun Gong practitioners who have been granted humanitarian stay rather than the more stable refugee status…[and its refugee policy] has elided the fundamental question of human rights in China.")

[73] In addition, the prohibition on return to torture, cruel or inhuman or degrading treatment or punishment would normally be considered part of customary international law. Mandal, *Protection Mechanisms Outside of the 1951 Convention*, para, 54.

[74] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1456 UNTS 85, 10 Dec. 1984 (entry into force: 26 June 1987), art 3(1).

degrading treatment or punishment or a violation of their right to life.[75] In some cases, the Human Rights Committee has extended the *non-refoulement* obligation to protect against all potential ICCPR violations.[76] The ICCPR has been ratified by Japan and Korea, and signed but not ratified by China (although it has been deemed applicable in Hong Kong).

For children, the Convention on the Rights of the Child (CRC), which has been ratified by all East Asian countries, protects against violations of the right to life (article 6) and torture or other cruel, inhuman or degrading treatment or punishment (article 37).[77] The CRC Committee has interpreted these provisions as providing a *non-refoulement* obligation.[78] Many experts would go a step further to argue that the article 1 requirement to act in the best interests of the child prohibits the *refoulement* of children in some circumstances.[79] Although less widely accepted, much the same argument regarding *non-refoulement* could be made for other treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).[80]

It seems clear that in Japan, Korea and China, many individuals in fact merit protection under these treaties but do not receive it from the government. At the individual level, these cases should receive attention from advocates, just like improper denials of refugee status. At the more systematic level, advocates can press for non-discretionary laws that prohibit the denial of asylum to those who are entitled to it under international human rights law. In China, such laws do not yet exist; there are no regulations in place for the protection of individuals in danger of torture or violations of the right to life in their home country.[81] Such laws could bring great benefits to North Korean escapees and Kachin refugees from Myanmar, who are currently at risk for *refoulement*.[82] In Korea, there is some lack of clarity in the relevant regulations, but

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[75] UN Human Rights Committee, General Comment 20 (Article 7), UN Doc. A/47/40, 10 Mar. 1992, para. 9; UN Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add. 1326, 29 Mar. 2004, para. 12.
[76] UN Human Rights Committee, *ARJ v Australia*, UN Doc. CCPR/C/60/D/692/1996, 11 Aug. 1997 ("[i]f a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.")
[77] Convention on the Rights of the Child (CRC), 1577 UNTS 3, 20 Nov. 1989, (entry into force: 2 Sep. 1990).
[78] Committee on the Rights of the Child, General Comment No. 6, UN Doc. CRC/GC/2005/6 (1 Sep. 2005), para. 27 (Parties "shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37").
[79] Jane McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2008, 173–4.
[80] See, Michelle Foster, "*Non-Refoulement* on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law", New Zealand Law Review, 2009, 257-310, 282.
[81] Liu, *Chinese Immigration Law*, 90.
[82] See, Lili Song, "Refugee Protection in China: Recent Legal and Policy Developments", Rights in Exile, 1 Sep. 2014, at http://rightsinexile.tumblr.com/post/96365498957/refugee-protection-in-china-recent-legal-and (last visited

according to a plain reading of the Refugee Law Enactment Ordinance, the provision of humanitarian status appears to be treated as a purely discretionary act.[83] In Japan there has since 2009 been statutory protection against *refoulement* where there are substantial grounds for believing that the individual would be subjected to torture in the destination country.[84] In other cases protection for non-refugees has traditionally been considered purely discretionary, based on undisclosed "special reasons".[85]

5.2.Lack of Procedural Protections against *Refoulement*

Second, advocates can work towards ensuring that the procedures for receiving humanitarian status in East Asia follow basic due process requirements and show transparency. As Linda Kirk and others have noted, procedural barriers can in practice often be as significant as jurisprudential barriers to declining asylum claims, or even more so.[86] Without adequate procedural protections, individuals who merit protection under the human rights treaties discussed above will in fact be unlawfully denied asylum. One can also make an argument that article 13 of the ICCPR independently imposes obligations upon States to guarantee access to a humanitarian status determination procedure, provide for an appeals process in cases of first-instance denials, and guarantee free legal assistance to asylum-seekers.[87]

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28 Dec. 2016). Elizabeth Eschbach, "The Refugee Convention and the Convention Against Torture: Failures of China and the United States", *Washington University Global Studies Law Review*, 13, 2014, 353-369.

[83] Article 2(1) of the Enactment ordinance of the Refugee Act indicates that the Minister of Justice "can" permit humanitarian stay in Korea. However, Judge Hung Joon Ha makes a policy-based argument that administrative agencies lack discretion. See Hung Joon Ha, "Humanitarian Protection Beyond the Scope of the 1951 Convention Related to the Status of Refugees in Korea", presentation before the International Association of Refugee Law Judges Asia Conference, Seoul, 11 June 2016 [on file with the author].

[84] Immigration Control and Refugee Recognition Act, Article 53(3)(ii) [Japan].

[85] Asia Pacific Refugee Rights Network, "APRRN Calls for Immediate Review of Japan's Domestic Refugee Protection Systems", 18 Apr. 2014, at http://aprrn.info/aprrn-calls-for-immediate-review-of-japan-s-domestic-refugee-protection-systems/ (last visited 28 Dec. 2016).

[86] Linda Kirk, "'It's about time': The role of time in protection status determination procedures under the Migration Act", presentation at Kaldor Centre 3rd Annual Conference, 24 Nov. 2017, available at: http://www.kaldorcentre.unsw.edu.au/event/save-date-annual-conference (last visited 28 Dec. 2016).

[87] David James Cantor, "Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence", Refugee Survey Quarterly, 34(1), 2015, 79-106. Article 13 states that "[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." ICCPR, art. 13.

In practice, however, there are few procedural protections for humanitarian status seekers in the region. One cannot appeal a denial of humanitarian protection in either Japan or Korea.[88] Lack of transparency in judgments is a related problem; after all, it is difficult to effectively make a case for humanitarian protection if one does not know the criteria for receiving it. In Japan, there has traditionally been 'little accessible information on the recent exercise of the discretion [in humanitarian status decisions], and even when the discretion is exercised in favour of an applicant, substantive reasons for permission are not provided.'[89] However, this has reportedly been changed by 2015 policy revisions requiring judges to provide reasons for positive humanitarian status determinations.[90] In addition, the Refugee Examination Counselors that are mandated to assist in refugee status appeals processes in Japan are not required to provide advice or guidance on humanitarian status, although some do so regardless.[91] In Korea, there is a similar fundamental uncertainty regarding when humanitarian status is awarded,[92] and it is even 'unclear whether the dangers from which the humanitarian protection regime aims to protect should be limited to those in the Torture Convention or expanded to cover all sorts of other forms of persecution as well.'[93]

This lack of clarity is also evident in China's treatment of asylum-seekers. While article 15 of the Law on the Control of Exit and Entry of Aliens states that "[a]liens who seek asylum for political reasons will be permitted to reside in China upon approval by the competent authorities of the Chinese Government", there is "no clarification as to what might meet the requirements set by the competent Chinese government authorities".[94] Nor are there any laws specifying the type of visa asylum recipients will receive, and whether they will receive a residence permit, work permit, or any benefits.[95]

5.3. Rights of Individuals with Humanitarian Protection Status

[88] Asia Pacific Refugee Rights Network, "APRRN Calls for Immediate Review"; Ha, "Humanitarian Protection Beyond the Scope of the 1951 Convention".
[89] Arakaki, *Refugee Law and Practice in Japan*, 101; See also Kosaka, "Problems with, and Future Prospects for, Complementary Protection in Japan".
[90] Ministry of Justice, "Outline of the Revisions for Operation of the Refugee Recognition System", Sep. 2015, 6, available at: http://www.moj.go.jp/content/001166543.pdf (last visited 28 Dec. 2016).
[91] Arima, "Asylum in Japan", 83.
[92] Ha, "Humanitarian Protection Beyond the Scope of the 1951 Convention" ("Korea lacks precedents from the Courts and administrative guidance concerning the definition of humanitarian protection which leaves the term too vague to reasonably foresee who would be eligible for humanitarian protection").
[93] *Ibid*.
[94] Liu, *Chinese Immigration Law*, 90-91.
[95] *Ibid*., 91.

Third, advocates can employ international law-based arguments to press for improved treatment to the hundreds of people who have been awarded humanitarian status already. International law places certain obligations on States regarding the treatment of humanitarian status holders. These obligations stem from international human rights law for all humanitarian status holders, as discussed below. Certain obligations also stem from international refugee law for individuals who are awarded humanitarian protection status despite actually being refugees according to international law (which is not an uncommon practice in the region).[96] This would entail (among other obligations) that they receive "the same treatment with respect to public relief and assistance as is accorded to their nationals"[97] and "the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment".[98] Finally, it is worth noting that human rights arguments can of course be made based on domestic constitutional norms as well, and in some cases this may in fact be the more effective route for advocacy.[99]

While virtually the entire corpus of international human rights law is applicable to all humanitarian status holders (as it is to all individuals regardless of immigration status),[100] arguably the two most significant human rights treaties in this context are the ICESCR and the CRC, each of which has been ratified by China, Korea and Japan. The ICESCR protects the right to work, right to housing, right to social security, right to health care, and right to education, among other provisions. The CRC also protects the right to education, and generally obliges States to protect the rights of parents and children to live together as a family.[101] In the specific context of immigration entry, the CRC states that "applications by a child or his or her parents to

[96] Asia Pacific Refugee Rights Network, "APRRN Calls for Immediate Review".
[97] Refugee Convention, art. 23.
[98] *Ibid*., art. 17.
[99] For example, the National Human Rights Commission of Korea concluded that because "employment, medical care, and the social welfare system exclude [humanitarian status holders,] Korea has infringed upon the dignity and value of human rights and the right to seek happiness, which are guaranteed in Article 10 of the Constitution." National Human Rights Commission, "Recommendations for Human Rights Protection of Approved Sojourners based on Humanitarian Reasons", 28 Jan. 2008.
[100] The few exceptions would include the rights to vote, serve in public office and have access to public service, which are limited to citizens. ICCPR, art. 25. In addition, developing countries may choose the extent to which they grant economic rights to non-citizens. International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 16 Dec. 1966, (entry into force: 3 Jan. 1976), art. 2(3).
[101] CRC, arts. 9, 10, 28.

enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."[102]

These rights are threatened across East Asia. With the exception of Indochinese refugees (from the 1970s-1980s), China does not generally provide work permits or social security for either recognised refugees or other foreigners who are formally or informally allowed to stay in the country.[103] In Korea, the Ministry of Justice "may provide a humanitarian status holder with employment activity permission'.[104] In practice, however, it has often been difficult for humanitarian workers to find work legally. Until recently, humanitarian status holders were required to submit an employment contract to the Ministry of Justice to decide whether or not to provide permission, and were only granted permits of a maximum of six months duration.[105] Thus, few employers were willing to offer an employment contract to someone who may or may not then be able to obtain legal permission to work, and even if they were, would only be given a working permit for such a short time.[106] Now, however, the regulations have been changed to allow work permits to be granted without a signed contract, allowing for a maximum duration of one year.[107] While this should improve the ability of humanitarian status holders to find work, there is reportedly still considerable reluctance among employers to hire humanitarian status holders, given their lack of familiarity with the current regulations.[108] In addition, Korean humanitarian status holders receive hardly any social security, lack a right to basic education, are denied access to regional health insurance, and are not allowed to bring their children into the country, if they are parents of minors.[109] While Japanese humanitarian status holders have a

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[102] *Ibid*., art. 10.
[103] Laney Zhang, "Refugee Law & Policy: China", U.S. Library of Congress Report, Mar. 2016, available at: https://www.loc.gov/law/help/refugee-law/china.php (last visited 28 Dec. 2016) ("Non-Indochinese refugees in China are generally treated as aliens who have no right to employment. They are supported by the UNHCR in terms of food, accommodation, health care, and children's education.")
[104] Law on the Status and Treatment of Refugees [Korea], Law No. 11298 (proclaimed Feb. 10, 2012, enforced July 1, 2013), art. 39.
[105] UNHCR, "Information for Employers: Asylum-Seekers and Humanitarian Status Holders' Right to Work", available at: http://www.apil.or.kr/904 (last visited 28 Dec. 2016).
[106] Advocates for Public Interest Law, "Alternative Report to the United Nations Human Rights Committee", 2014, para. 31, available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/KOR/INT_CCPR_ICO_KOR_19185_E.pdf (last visited 28 Dec. 2016).
[107] Korea Immigration Service, "Refugee Status Determination Procedures in Korea", Apr. 2015, at http://immigration.go.kr/HP/COM/bbs_01/Download.do?FileDir=/attach/imm80/f2016/&UserFileName=RSD guidebook_eng.pdf&SystemFileName=20160309249968_1_RSD guidebook_eng.pdf (last visited 28 Dec. 2016).
[108] Ha, "Humanitarian Protection Beyond the Scope of the 1951 Convention".
[109] *Ibid*; Advocates for Public Interest Law, "Alternative Report", para. 31.

somewhat more favorable legal situation, they too are unable to reunify with family until their immigration status changes to long-term of permanent resident, and are denied housing, language and employment support that may be necessary for their economic and social rights to be fully realised.[110]

5.4. Discrimination between Humanitarian Status Holders and Refugees

Finally, it is possible for advocates to argue that the differential treatment of refugees and humanitarians status holders, despite their identical material circumstances in all relevant respects, is a violation of the anti-discrimination mandate of the ICCPR, which states that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[111] This argument has been outlined most prominently by Jason Pobjoy,[112] and has been embraced in various forms by a number of other scholars and commentators.[113] Equality of treatment between refugees and humanitarian status holders has long been an objective of asylum advocates in the west, and has been attained, or very nearly so, in several countries.[114] In the East Asian context, the equal treatment of refugees and humanitarian status holders is of particular importance in order to avoid the State's temptation to simply award asylum applicants humanitarian status (and deny refugee status) as a means of maintaining flexibility and lowering costs, with the knowledge that appeal of the refugee status denial is very unlikely.[115]

In Korea and Japan, however, there is significant discrimination between refugees and humanitarian status holders. In Korea, as discussed above, the current law provides only one discretionary article allowing the Ministry of Justice to provide humanitarian status holders with permission to work, in contrast to articles 30-38, which provide for a much wider range of rights

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[110] Asia Pacific Refugee Rights Network, "APRRN Calls for Immediate Review"; Japan Association for Refugees, "FY 2014 Annual Report", available at: https://www.refugee.or.jp/about/postfile/jar-ar_2014_en.pdf (last visited 28 Dec. 2016).
[111] ICCPR, art. 26.
[112] Jason Pobjoy, "Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection", *Melbourne University Law Review*, 34(1), 2010, 181-229.
[113] See, e.g, Tom Clark and Jan Niessen, "Equality Rights and Non-Citizens in Europe and America: The Promise, the Practice and Some Remaining Issues", *Netherlands Quarterly of Human Rights*, 14(3), 1996, 245-275, 251; James Hathaway, "What's in a Label?", *European Journal of Migration and Law*, 5(1), 1-21, 7-8; McAdam, *Complementary Protection in International Refugee Law*.
[114] James Hathaway, "Leveraging Asylum", Texas Journal of International Law, 45(3), 2010, 503-536, 505.
[115] See Ha, "Humanitarian Protection Beyond the Scope of the 1951 Convention".

to refugees, some of which are phrased in obligatory terms.[116] Interestingly, the first draft of the 2013 Korean Refugee Act did provide for equal treatment between humanitarian status holders and recognised refugees, but this provision had disappeared by the time that the law was passed.[117] In Japan, there is also preferential treatment for humanitarian status holders in certain respects, such as the ease of obtaining permanent residence, access to settlement services, and availability of family reunification.[118] In addition, humanitarian status holders lack a legal guarantee of *non-refoulement*, unlike those with refugee status.[119]

In China, there is relatively equal treatment of individuals with and without refugee status: in neither case are asylees generally granted the right to work, access government services, or travel freely.[120] One area of discrimination is in education; refugees have been given equal access to Chinese school on the same conditions as Chinese nationals,[121] while Kachin asylees (for example) were not allowed to access local schools.[122] In the Chinese context, a somewhat different example of discrimination can be seen in the unequal treatment of Indochinese refugees and all others who have received some form of asylum in the country. According to Chinese authorities, Indochinese refugees are protected under the policy of "equal treatment, non-discrimination, equal remuneration for equal work" and their "basic rights with regards to life, production, employment, education, medicare, etc. are fully guaranteed".[123]

6. CONCLUSION

[116] Law on the Status and Treatment of Refugees, art. 30-38 (for example, article 33 guarantees primary education equal to that received by Korean nationals).
[117] Jong-Chul Kim, "Enactment of Refugee Law and Extended Suggestions on its Unsolved Issues", available at: http://www.apil.or.kr/1122 (last visited 28 Dec. 2016).
[118] Sayuri Omeda, "Refugee Law and Policy: Japan", U.S. Library of Congress Report, Mar. 2016, available at: https://www.loc.gov/law/help/refugee-law/japan.php (last visited 28 Dec. 2016) (the Minister of Justice has the discretion to grant permanent residence status to refugees who do not have sufficient income, assets, or the ability to support themselves, which is usually required for aliens to obtain permanent residence); Asia Pacific Refugee Rights Network, "APRRN Calls for Immediate Review".
[119] Asia Pacific Refugee Rights Network, "APRRN Calls for Immediate Review".
[120] UNHCR, "Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: People's Republic of China", Mar. 2013, 2, available at: http://www.refworld.org/docid/5135b0cb2.html (last visited 28 Dec. 2016) ("refugees have no legal status in China and as such do not enjoy any legal entitlement to be granted access to public services"); Song, "Who Shall We Help?", 54 (no travel documents or right to work).
[121] UNHCR, "Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report", 2.
[122] Human Rights Watch, "Isolated in Yunnan: Kachin Refugees from Burma in China's Yunnan Province", June 2012, available at: https://www.hrw.org/sites/default/files/reports/china0612_forinsertForUpload_0.pdf (last visited 28 Dec. 2016) ("[Kachin] children have no access to education.")
[123] Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, "China's Relationship with United Nations High Commissioner for Refugees".

This article is not intended to entirely dismiss the utility of refugee law advocacy in East Asia. The Refugee Convention remains the most well-known and influential set of norms for asylum-seekers, and advocates should insist it is complied with in East Asia, as elsewhere. The Refugee Convention has already led to important legal reforms in East Asian countries. However, refugee law-based advocacy should not be overemphasised while neglecting to press for greater substantive and procedural protections for humanitarian status applicants, or improved treatment of humanitarian status holders. As argued in this article, international law provides appropriate and binding standards that can be used to advocate for progressive reforms in the region, and this type of advocacy would be more likely to have a successful outcome and affect large numbers of people than would a continued near-exclusive focus on the Refugee Convention.