A deliberately delayed or forgotten issue: North Korean human rights as an international legal problem

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Abstract
In spite of the recent bilateral peace talks and developments between South and North Korea and between the US and North Korea, it needs to be reminded that the human rights condition in North Korea is already an established legal subject, protected by both international and domestic law, and therefore, unless the human rights condition in North Korea is significantly improved, this issue cannot be legally terminated. In this vein, this paper intends to examine the ways that the issue on North Korean human rights is handled both in international law (especially by the UN, including criminal punishment) and domestic law (especially by the US, including human rights sanctions), and then identify some policy implications for addressing the human rights issue in the context of the Korean peninsula peace talks.

Keywords
Korean peninsula peace talks, human rights condition in North Korea, international law, domestic law, criminal punishment, human rights sanctions, UN, US

Introduction
Many people in South Korea seem hopeful, as such topics as the denuclearization of the Korean peninsula and the establishment of a peaceful regime are being discussed. For the first time in history, a North Korean leader has crossed the Military Demarcation Line in April 2018, which made possible the Summit of the Koreas. Following the Moon–Kim Summit, the Trump–Kim Summit took place in June 2018, representing strongman politics. While the experts’ predictions on the
future of the Korean peninsula vary from optimistic to pessimistic, many South Koreans seem to be enjoying the Korean peninsula peace talks, hoping that the reunification can be achieved soon. For this reason, almost a sense of astonishment can be felt, as the mood between the two Koreas has changed too fast. Even when the US–North Korea Summit was being prepared, tensions in the Korean peninsula were high; concerns about a possible war against North Korea were widely discussed.

A sense of astonishment can also be felt, as the issue of North Korea’s human rights is rarely discussed nowadays. Along with the North Korea nuclear problem, the human rights condition in North Korea used to be the main agenda for discussion among the Korean issues. Neither President Donald Trump, who has honoured the North Korean defector in his State of the Union address, nor President Moon Jae-in, a former human rights lawyer, seem to regard the human rights issue as a priority, as they approach talks with North Korea. Why is the issue of North Korean human rights rarely discussed? Has the condition dramatically improved? If not, two reasons can be suggested for this phenomenon. It is possible that either the issue of North Korea’s human rights is not regarded as important, and thus forgotten; or its importance is recognized, yet it is deliberately delayed in the peace talks for tactical reasons.

It can also be posited that the issue of North Korean human rights has actually been linked – although indirectly – to the Korean peninsula peace talks, which started abruptly early in 2018 to tackle North Korea’s nuclear problem. Below will be briefly discussed the link between the peace talks and the US unilateral human rights sanctions against North Korea.

The PyeongChang 2018 Winter Olympics drew attention from the international community not just as a sports festival but also as a means to provide a new wave in inter-Korean talks through the visit of a high-ranking North Korean delegation to South Korea from 9–11 February 2018. The composition of the North Korean delegation, led by the President of the Presidium of Supreme People’s Assembly, Kim Yong-nam, caught many people’s attention. In addition, Kim Yo-jong stood out not only for being First Vice Director of the Central Committee of Workers’ Party of North Korea but also for being an envoy and a sister to North Korean leader, Kim Jong-un. She handed President Moon Jae-in of South Korea a personal letter from Kim Jong-un. However, it is interesting to note that she is subject to sanctions by the US against North Korea, because of her alleged direct role in ‘human rights’ violations, being a Vice Director of the Propaganda and Agitation Department. It is true that Choe Hwi, another high-ranking visitor as the Chairman of National Sports Guidance Committee, was on the sanction list of the United Nations Security Council because of developing weapons of mass destruction (WMD) (UN Security Council Resolution 2356, 2017). But it is important to realize that he, too, is also subject to sanctions by the US because of ‘human rights’ violations for being Vice Director of the Propaganda and Agitation Department, like Kim Yo-jong. Although their visits and the inter-Korean dialogue took place with the approval of exemption from sanctions by the United Nations and the understanding of the US, some people argued that such unconditional exchanges and meetings with top aides of Kim Jong-un, responsible for human rights violations, are likely to have an adverse impact not only on the overall sanction regime against North Korea but also on international responses to the North Korean human rights issue.

Separate US sanctions are conducted for human rights abuse, besides the sanctions for WMD development. Unlike in the past, when an overall improvement in the human rights condition under the Kim regime was sought, the latest trend in the international community’s response seems to be designating specific individuals as violators in human rights and holding them accountable (Albert, 2018). Usually, the human rights issue in North Korea was approached by adopting the UN resolutions, which recommended some improvements towards the regime in the North, but recently
specific individuals have been targeted for criminal punishment and economic sanctions by the UN and also the US. These multilateral and unilateral measures are all based on either international or domestic law, or on both laws. In this sense, it needs to be emphasized that the human rights condition in North Korea is already an established legal subject, protected by both international and domestic law, and therefore unless the human rights condition in North Korea is significantly improved, this issue cannot be legally terminated.

In this vein, this paper intends to examine the ways that the issue of North Korean human rights is handled in both international and domestic law, and then identify some policy implications for addressing the human rights issue, in the context of the Korean peninsula peace talks. To this end, this paper first explains the overall human rights condition in North Korea. Second, it reviews a shift in international legal responses in the wake of the report released by the Commission of Inquiry of the United Nations. Third, it examines some substantial contents of related international crimes and possible procedural options. Fourth, the US human rights sanctions against North Korea are discussed in detail. Lastly, this paper concludes with some findings and suggestions on how to deal with this important but complicated human rights issue in the “last-chance” negotiating period with North Korea on denuclearization.

**Human rights violations in North Korea**

In one word, the human rights situation in North Korea is simply tragic. Recently under the lead of the UN, the international community has organized a Commission of Inquiry (COI), which is usually established to deal with armed conflicts, to investigate North Korea’s human rights infringements, despite there being an absence of armed conflicts at this time. This reaction can be evidence of a consensus among the international community that the human rights abuses in North Korea are so serious and widespread as to be considered as critical as a war. In addition, the UN Human Rights Council, the UN General Assembly and the UN Security Council quickly advanced their discussions on the human rights situation in North Korea straight after the release of the COI report. The stance that the international community has taken on the issue demonstrates that the situation is a weighty international issue that should be handled promptly as it has come out from behind the iron curtain.

The Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, which was established in March 2013 by the UN Human Rights Council and has engaged in extensive activities to fulfil its mandate, pointed out the extensiveness and seriousness of human rights violations there with a wide-ranging 400-page report released in February 2014 (UN Human Rights Council, 2014). This report draws attention to a variety of violations, such as that of the right to food (a social and economic right) due to the government’s discriminative distribution system and the resulting violation of the right to life (a civil and political right), as seen in the great famine. However, the report mostly focused on the infringement of a range of civil liberties.

The Commission identified that the country curtails freedom of thought, of conscience, of religious belief, as well as freedom of opinion, expression, access to information, and assembly and association. Discrimination based on the country’s sociopolitical classification system is also pervasive across all social sectors. The government allows no freedom to travel outside of the country or the right to change residence within the country. The report also found that arbitrary detention, torture and public execution are commonplace in a variety of detention facilities, and particularly in political prison camps. In addition, it raised further awareness that the regime systematically abducted people from South Korea, Japan and other states during the Korean War and up to the 1980s and deprived them of their basic human rights (COI Report, 2014: paras 26–27).
From serious human rights issue to international criminal problem

The UN Commission of Inquiry on Human Rights in the Democratic People’s Republic of North Korea went beyond simply uncovering the facts of the country’s wide-ranging infringement of human rights and concluded that the key violations may constitute ‘crimes against humanity’ as spelled out in international criminal law. Holding the perpetrators fully accountable for their crimes is one of the purposes of the Commission and is explicitly stated in its mandate. In the past decade, international efforts to protect human rights in the North have been in the form of constructive criticism over and dialogue with the regime. However, the Commission’s activity and its 2014 report demonstrate that the world has recognized that the existing cooperative methods have clear limits, at least with North Korea, and that there is no other way but to take more aggressive action against the regime to mitigate its grave human rights abuses. In short, in terms of human rights, the stage at which international human rights law guided interaction has passed, and now the actors are turning to a more aggressive approach based on international criminal law (Cho and Chang, 2014: 562–563).

In the meantime, the activity of the COI is neither a formal criminal procedure nor did it apply ‘beyond a reasonable doubt’ standard, which is usually required at criminal procedures. Instead, it asked for evidence based on ‘reasonable grounds’ – a more moderate standard of proof – and examined whether these alleged actions by the North constitute crimes against humanity, which are in breach of international law. Of course, the Commission’s conclusions are not binding, and a more authoritative institution will need to make a final decision on the issue. However, the conclusions are significant in that they can provide reasonable grounds for the commencement of an investigation and a formal legal procedure by a domestic or international justice institution later (COI Report, 2014: paras 22, 74).

The UN COI concluded that the North’s human rights record reveals actions that constitute crimes against humanity, which provides an opportunity to make a few practical suggestions. First, crimes against humanity are included in the four main crimes, over which the International Criminal Court (ICC) has jurisdiction: the crime of genocide, war crimes, crimes against humanity, and the crime of aggression (Rome Statute, 1998: Art. 5). The COI has already recommended that the UN Security Council bring the case to the ICC (COI Report, 2014: paras 87, 94), and the UN General Assembly, the UN Human Rights Council’s umbrella organization, has followed the recommendations and passed a resolution that urges the Security Council to do so.

Second, crimes against humanity are one of the four international crime categories (genocide, war crimes, ethnic cleansing, and crimes against humanity) covered by the global political commitment of Responsibility to Protect (R2P), which reiterates that the international community assumes the responsibility to protect the people of North Korea. R2P consists of three pillars: pillar 1 refers to the main protective responsibilities of the state; pillar 2 refers to the responsibility of the international community to help and assist the state in fulfilling its primary responsibilities to protect its people; and pillar 3 stipulates that when a state manifestly fails to carry out its responsibilities, the international community must resort to peaceful actions first, but can take collective and coercive measures as a last resort, in accordance with Chapter VII of the UN Charter. The UN COI stressed that as the North’s regime has failed to fulfil its primary responsibilities as a state to protect its people, the international community must come forward to perform its responsibilities (COI Report, 2014: para. 86).

Third, the fact that the North’s human rights violations constitute crimes against humanity means that a domestic solution such as a blanket amnesty is no longer available under international law. For example, if the Korean peninsula is reunited, and when efforts to consolidate the two societies into one state are made, the North’s high-ranking perpetrators would need to be sternly
punished according to international standards. However, as for the treatment of middle- or low-ranking officials who have infringed human rights, the focus should be on policies to promote reconciliation and social integration with the assistance of institutions such as a Truth and Reconciliation Commission rather than on criminal punishment (UN Human Rights Council, 2014: paras 1202–1203). The conclusions that have been made with regard to these crimes against humanity and other violations of international law provide some standards and policy suggestions as to how to set up ‘transitional justice’ mechanisms (Cho, 2015: 209–219).

### Related international crimes

#### Crimes against humanity

The chronic human rights abuses in North Korea may constitute a range of international crimes. The COI’s investigation has led to a conclusion that the crimes against humanity are perpetrated in accordance with the policies established by the highest-ranking officials of the state. First, the systematic and widespread attack against detainees at political prison camps and other detention facilities, against North Korean escapees, and against religious people are included in these crimes against humanity, which respectively constitute crimes stipulated by the Rome Statute of the International Criminal Court, such as imprisonment, enforced disappearance, extermination, murder, enslavement, torture and other inhumane acts, rape and other forms of sexual violence, persecution, and forcible transfer.

Second, the COI also pointed out that the state, in pursuit of sustaining its power, made no meaningful efforts to prevent the starvation of its people. On the contrary, its abnormal national budget allotment, discriminative food distribution and obstruction of humanitarian aid has resulted in the starvation of a huge number of people, which is considered another systematic and widespread attack on its people and a form of extermination and murder. Third, the North has engaged in systematic and widespread abduction and enforced disappearance of foreigners, which is also regarded as a crime against humanity (COI Report, 2014: paras 75–79). The findings of the UN Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea are summarized in Table 1.

As seen in Table 1, the major human rights violations of North Korea are multi-dimensionally related to each specific criminal act (with the exception of racial discrimination) that composes crimes against humanity. Naturally, the six major categories of human rights violations by North Korea are very likely to be recognized as constituting crimes against humanity. However, in terms of ‘starvation’, proving the subjective constituent elements will not be easy. This expectation is also supported by the inclination of the ICC, which usually does not accept recklessness or wilful negligence. However, the major human rights violations, such as the operation of political prison camps, will most likely amount to crimes against humanity under substantial laws.

#### Crime of genocide

North Korea has other cases of human rights violation that can be recognized as international crimes although they are not included in the COI report. First, with intent to destroy all or part of ‘religious groups’, murdering or exerting physical or mental harm on the members of these groups or intentionally imposing planned living conditions on them or taking actions intentionally to prevent childbirth among them constitute ‘crime of genocide’, over which the ICC has jurisdiction (Rome Statute, 1998: Art. 6). North Korea’s constitution explicitly states that its people have freedom to engage in religious activities; however, in real conditions, it is impossible to hold a faith
or engage in religious activities there. In particular, most evidence of Christianity, once widespread in the North, is gone, and it is reported that those who hold religious beliefs or have had contact with Christians during their stays overseas are usually sent to political prison camps. The contents related to the crime of genocide described above may refer to the agonies the North Korean Christians have suffered in these prison camps. In addition, though the number of relevant testimonies has decreased, repatriated female defectors have reportedly been forced to have abortions, or infanticide has been perpetrated on the grounds that the foetus is half-Chinese. Such acts can be interpreted as ethnic genocide.

**North Korean overseas workers**

If the forced labour of North Korean workers abroad, which is also not contained in the COI report, can be viewed as enslavement in a broad sense, this would also constitute a crime against humanity. Of course, it is not easy to prove the argument that workers who went abroad voluntarily to make money are forced into enslavement. But in practical terms, a close look at their actual lives overseas will provide strong indications that their situations could be included in the category of ‘contemporary forms of slavery’, ‘slavery-like practices’, or ‘servitude’ under international law (General Assembly of the UN, 1966: Art. 8). In addition, as the transfer of workers to about 50 countries has been conducted as part of a systematic plan of the state, the possibility cannot be excluded that these transfers will be considered enslavement constituting crimes against humanity. Indeed, workers are reportedly educated that they are dispatched not for their personal gain, but to collect funds for the Workers’ Party.

Of course, much uncertainty will arise should a strict legal standard be applied to the limited facts that are known so far. And given the socialist system of North Korea, excessive payments to the state are quite understandable, as such states require higher payments in the form of tax than democratic states. But such large payments (up to 90%) can be justified only when the government provides necessary social welfare services to its people. In other words, if the people are not provided with proper shelter, food and clothing and are deprived of the right to access adequate medical treatment for diseases and injuries, such excessive payments to the government can be regarded

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**Table 1. Human rights violations and crimes against humanity in North Korea: Findings of the UN Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea.**

| Article 7 of the ICC Rome Statute (Crimes Against Humanity) | Political prison camps | Ordinary detention facilities | Religious believers and dissidents | North Korean escapees | Starvation | International abductions |
|-------------------------------------------------------------|------------------------|-------------------------------|----------------------------------|----------------------|-----------|-------------------------|
| Murder                                                      | V                      | V                             | V                                | V                    | V         |                         |
| Extermination                                               | V                      | V                             | V                                | V                    | V         |                         |
| Enslavement                                                 | V                      | V                             | V                                | V                    | V         |                         |
| Forcible transfer                                           | V                      | V                             | V                                | V                    | V         |                         |
| Imprisonment                                                | V                      | V                             | V                                | V                    | V         |                         |
| Torture                                                     | V                      | V                             | V                                | V                    | V         |                         |
| Rape and sexual violence                                    | V                      | V                             | V                                | V                    | V         |                         |
| Persecution                                                 | V                      | V                             | V                                | V                    | V         |                         |
| Enforced disappearance                                      | V                      |                                | V                                | V                    | V         |                         |
| Racial discrimination                                       | V                      | V                             | V                                | V                    | V         |                         |
| Other inhumane acts                                         | V                      | V                             | V                                | V                    | V         |                         |

Source: Compiled by the authors based on UN COI Detailed Findings, paras 1022–1154.
as problematic according to international standards (Do, 2016: 189–194). Furthermore, the excessive restrictions on the freedom of movement, limitations on exchanges of letters with family members, stricter surveillance and forced inhumane communal living to which the North Korean overseas workers are subjected may, in practical terms, infringe on a range of human rights, if not constituting enslavement (Do, 2016: 465–490). It is also notable that this question of North Korean overseas workers has now been transformed from a human rights issue into a fund-raising problem for the North Korean nuclear weapons and ballistic missile development programme.

**Punishment of the perpetrators**

A variety of avenues can be considered in terms of punishing the perpetrators of human rights violations in North Korea: referring the cases to the ICC; establishing an ad hoc or special international criminal tribunal; establishing a mixed or hybrid tribunal that combines the functions of a domestic and international court; or bringing the perpetrators to a domestic criminal court based on universal jurisdiction.

**International Criminal Court (ICC)**

The ICC has jurisdiction over four types of crime: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (Rome Statute, 1998: Art. 5.1). The ICC has jurisdiction *ratione temporis* over these crimes committed after the Rome Statute came into effect, which means those that were perpetrated after 1 July 2002. If a state becomes a party to this statute after its entry into force, the ICC may exercise its jurisdiction only with respect to crimes committed after the entry into force of this statute for that state (Rome Statute, 1998: Art. 11). In addition to this provision, a rule against retroactivity is also provided (Cho and Chang, 2014: 551).

The issue of ICC jurisdiction should be examined in terms of admissibility, the preconditions for the exercise of jurisdiction, and the actual exercise of jurisdiction. When a crime is being investigated or prosecuted by the state, the ICC shall determine that the case is inadmissible according to the principle of complementarity, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution (Rome Statute, 1998). As for the preconditions to the exercise of jurisdiction, either the state in which the crimes were perpetrated or the state of which the person accused of the crime is a national shall be a party to the Rome Statute. If the state is not a party, it may accept the exercise of jurisdiction by the ICC (International Criminal Court, 2000). The exercise of jurisdiction is possible when the crime is referred by the state party to the Rome Statute, when the prosecutor has initiated an investigation in respect of such a crime, or when the case is referred by the Security Council acting under Chapter VII of the UN Charter. For the first and second cases, the preconditions mentioned above apply, whereas referral by the UN Security Council does not require such preconditions (Rome Statute, 1998).

As the COI has concluded, the human rights violations in North Korea can be treated as ‘crimes against humanity’ under the jurisdiction of the ICC. The regime’s persecution of religious groups may also be considered genocide. However, as stated above, the ICC has jurisdiction *ratione temporis* only over the crimes that were perpetrated after 1 July 2002, and not crimes that occurred before that, in principle. Article 27 of the Rome Statute stipulates that the current head of a state, such as Chairman Kim Jong-un, shall not be free of criminal responsibility, a provision that was acted upon in the issuance of an arrest warrant against the President of Sudan, Omar al-Bashir in 2009 (Cho and Chang, 2014: 551–552).

However, North Korea, where the crimes were perpetrated and the state of which the persons accused of the crimes are nationals, is not a party to the ICC Rome Statute. Therefore, even if North
Korean prosecutors or courts are deemed to be unable to genuinely carry out investigation or prosecution, a referral to the ICC by another state party or an initiation of investigation by an ICC prosecutor is basically impossible, because neither case meets the preconditions for ICC jurisdiction. However, in principle, North Korea may accept ICC jurisdiction, or the UN Security Council may refer the case to the court. There is only a remote possibility of either one: the former for obvious reasons, and the latter because the permanent members of the UN Security Council include China (Cho and Chang, 2014: 552).22

With respect to the abductions, which can be regarded as a continuous crime since they were perpetrated in South Korea and Japan, which are state parties to the Rome Statute, some have expected that the ICC may have jurisdiction. However, these expectations cannot be realized. When the abductions are separated into the two acts of kidnapping and subsequent arbitrary detention, the kidnappings allegedly committed by North Korea occurred before 1 July 2002 (when jurisdiction *ratione temporis* entered into force), while the arbitrary detentions are occurring within North Korea, which is not a party to the statute. Hence, the former is not covered by temporal jurisdiction, and the latter is not covered by spatial jurisdiction of the ICC. So, unless the UN Security Council intervenes, these abductions cannot be handled by the ICC (COI Detailed Findings, 2014: para. 1201).23

As reviewed above, it seems unfeasible that the ICC can exercise direct jurisdiction over human rights violations in North Korea, especially as both North Korea and China have officially declared their rejection of the COI report. As is well known, China, as a permanent member of the UN Security Council, plays a critical role in referring crimes to the ICC and implementing the third pillar of the R2P commitment. Unless China changes its basic stance toward North Korea, it is highly likely that the country will veto any plans related to such jurisdiction. In this light, a UN resolution and specific action plans would likely not be forthcoming, despite the issue of human rights violations in North Korea being adopted as an item on the official agenda of the Security Council (Cho and Chang, 2014).24 Furthermore, even should a breakthrough come regarding ICC jurisdiction, locating the suspects would remain another difficult undertaking. The ICC does not allow default judgments at the formal procedure stage, which it does at the pre-trial stage (Rome Statute, 1998: Art. 63).25

**UN ad hoc tribunals and mixed tribunals**

The UN Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea has also looked into establishing an ad hoc international tribunal, as was done with former Yugoslavia and Rwanda. Such a tribunal carries a certain advantage in that it is not subject to temporal limitations as is the ICC. But the establishment of an ad hoc tribunal requires significant time and efforts as well as a relevant UN Security Council resolution. However, as in the case of the tribunal for Cambodia, the UN General Assembly can serve to set up a tribunal, but this is possible only when the relevant state asks for or agrees to such establishment, and when a subsequent agreement is concluded between the state and the UN. An ad hoc international tribunal as enforcement measure that does not require the consent of the relevant state is possible only through UN Security Council actions (Cho and Chang, 2014, 559–600).26

The UN has directly or indirectly engaged in the establishment and operation of ad hoc or mixed international tribunals. The majority have been where the relevant state (Sierra Leone, Cambodia, Lebanon) asked for the establishment of tribunals and made subsequent agreements with the UN (Sierra Leone and Cambodia concluded, while Lebanon failed to ratify). When such arrangements have been impossible, the UN Security Council directly intervened in the set-up of ad hoc international criminal tribunals (former Yugoslavia, Rwanda, Lebanon), or indirectly ensured the set-up...
of mixed criminal courts through UN interim administrative organizations (East Timor, Kosovo). In Bosnia and Herzegovina, domestic tribunals have actually served as international criminal courts at the UN’s request (Cho and Chang, 2014: 559).27

In short, the efforts of the international community to establish an ad hoc international or mixed tribunal and exercise criminal jurisdiction over a state’s serious human rights violations should be based on the consent (or request) of the relevant state or a decision of the UN Security Council, which has the exclusive authority to take enforcement action. This is because such efforts infringe on the sovereignty of the state (Cho and Chang, 2014: 559).28 Although it seems almost impossible that North Korea will accept a mixed tribunal, a reunited Korea should consider both advantages and disadvantages of all plans to ensure accountability, and if necessary ask the UN or other international organizations to provide support for a mixed tribunal.

**Domestic tribunals**

Nations may bring international crimes to their domestic criminal courts employing universal jurisdiction (COI Detailed Findings, 2014: para. 1201).29 Of course, this is only possible when their domestic laws provide specific legal grounds for such arrangement. For instance, Article 3 of South Korea’s Act on Punishment of Crimes under Jurisdiction of the International Criminal Court defines its scope as applying to ‘any foreigner who commits an international crime outside the territory of the Republic of Korea and resides in the territory of the Republic of Korea’. This definition clearly provides the grounds for the application of universal jurisdiction.

However, criminal prosecution of a state’s highest-ranking officials by another country’s domestic tribunal creates complex legal issues. Although the application of universal jurisdiction has gained ground in abstract terms, there have been few cases where legal proceedings have been initiated based on it, except for a few related to piracy. In fact, there are many arguments against it. For example, Belgium once willingly provided for universal jurisdiction in its laws (Anti-Atrocity Act, 1993–2003), but abolished them due to conflict with other countries including the US and Democratic Republic of the Congo. In addition, in a trial after the arrest warrant issued by Belgium against Congo’s Minister for Foreign Affairs, the International Court of Justice (ICJ) held that immunity of an incumbent foreign minister takes precedence over universal jurisdiction. This decision by the ICJ clearly demonstrated the near impossibility of another country’s domestic jurisdiction, based on universal jurisdiction, being applied to the highest-ranking incumbent leaders of North Korea, whose privileges and immunity are generally respected.

On the other hand, criminal prosecution against leaders who do not represent their state by another country’s domestic tribunal is theoretically possible. Furthermore, the ICC stipulates the irrelevance of official capacity in Article 27 to clarify that a head of a state or a government shall not have their accountability waived.

**Targeted sanctions against the perpetrators**

**UN sanctions**

In addition to the measures mentioned above, other punishments besides criminal prosecution against the perpetrators of human rights violations may be considered. Under Article 41 of the UN Charter providing for the employment of enforcement measures not involving the use of armed force, economic sanctions against individuals may be imposed. But such actions have not yet been taken regarding North Korean human rights violations as they require a Security Council resolution.
However, the preamble to Security Council Resolution 2270 (UN Security Council Resolution 2270, 2016), adopted in response to the fourth nuclear test conducted by the North in March 2016,\textsuperscript{30} and the text body of Resolution 2321 (UN Security Council Resolution 2321, 2016), adopted in response to the fifth nuclear test conducted in November 2016,\textsuperscript{31} mentions North Korean human rights abuses, albeit indirectly, for the first time. This suggests that the Security Council may in the future impose economic sanctions such as travel ban and asset freeze against North Korean individuals and entities also for their human rights violations.

\textbf{US sanctions}

The US enacted the North Korea Sanctions and Policy Enhancement Act (H.R. 757) in February 2016. This Act provides the legal base that allowed North Korea to experience the human rights sanction for the first time (Hudson, 2016).\textsuperscript{32} It also required the State Department to release a report on North Korea’s prison camp network (Twoof, 2017). Fortunately, the awful living conditions of North Koreans, including children, caught many international citizens’ attention. In July 2016, Kim Jong-un himself became a target of the US sanction for the first time (Mills, 2016), blamed for the human rights abuse in North Korea. It is worth pointing out that the US is the only nation that came forward to impose the sanction on North Korea over the abuse of human rights (Robertson, 2018). As a result, not only were Kim Jong-un’s assets frozen in the US, but he also became the subject of a travel ban to the US.\textsuperscript{33} This perhaps explains why Washington was ruled out in the beginning, when the US and North Korea contemplated a location for the Trump–Kim Summit (Labott, 2018). Kim Jong-un was forbidden to enter the US; however, his visit to Singapore did not contradict the US sanction on him. Thus, from the US’s point of view, Singapore was a preferred choice for the Trump–Kim Summit (Labott, 2018), compared to locations within US territory.

After first being enforced in 2015, enormous progress has been made in this area. The number of North Korean individuals targeted for the US human rights sanction increased; as of December 2018, key North Korean figures including Kim Jong-un and Kim Yo-jong have been subject to the human rights sanction. However, Kim Jong-chul is missing from the list of targeted individuals under the human rights sanction category.\textsuperscript{34} Since the focus here is to analyse the progress only in the human rights sanction by the US, Kim Jong-chul, who has been on the US sanction list for facilitating North Korean trafficking in arms since 2010, is outside the scope of discussion in this paper.

\textbf{The legal framework for the US sanctions}

As mentioned above, the North Korea Sanctions and Policy Enhancement Act highlights the Kim Jong-un regime’s horrific record of human rights abuses, requiring the US administration to develop a strategy to promote North Korean human rights and publish a list of countries that use North Korean overseas forced labour (Committee on Foreign Affairs, 2016). The legal framework upon which the US human rights sanction is conducted is summarized in Table 2.

Based on H.R. 757, E.O. 13687 and 13722, the US Treasury Department designated 11 officials, including Kim Jong-un, as targets for travel ban and asset freeze mainly for ‘an abuse or violation of human rights’ and related control as of July 2016. Thus, these individuals’ use of property in the US, donations, and entry into US territory are all prohibited. Since then, the Treasury Department has been regularly adding officials and entities to the North Korean human rights sanction list, where Kim Yo-jong can be found as well.

Another US federal law, imposing sanctions on North Korea, is the Countering America’s Adversaries through Sanctions Act, which was enacted in August 2017. Before passing in Senate, this ‘package deal’ has been criticized for linking the sanctions on North Korea to the sanctions on
Russia and Iran. Section 104(a) of the North Korea Sanctions and Policy Enhancement Act of 2016 has been amended in Title III under the Countering America’s Adversaries through Sanctions Act. By this change, the US President is now required to sanction persons who ‘knowingly, directly, or indirectly, purchase from North Korea large quantities of certain materials; sell or transfer large quantities of rocket/jet fuel for non-commercial air travel’. However, this indicates that from the human rights violation perspective, no significant change has been made between the two laws (Stein, 2017).

The future of US–North Korea relations

For last three years, 31 North Koreans became designated targets of the US human rights sanction, as presented in Table 3. Adam Szubin, acting Treasury Undersecretary for Terrorism and Financial Intelligence, explained in 2016 the reason behind the sanction as: ‘North Korea continues to inflict intolerable cruelty and hardship on millions of its own people, including extra judicial killings, forced labor, and torture’ (Guardian, 2016). Under the North Korea Sanctions and Policy Enhancement Act, the US President has the authority to designate any person to be on the specially designated list that ‘knowingly engages in, is responsible for, or facilitates serious human rights abuses by the Government of North Korea’. This clause allows President Trump to have some leverage in sanction when he uses it against North Korea. In the same Act, it is mentioned that the ‘President may waive’ such prohibitions, for renewable periods between 30 days and 1 year, if ‘the waiver is important to the national security interests of the US’, again providing the legal ground for the possibility of Kim Jong-un being temporarily removed from the US sanction list (Associated Press, 2018).

However, it is important to remember that the termination of the sanction is impossible, for example, unless ‘releasing all political prisoners, including the citizens of North Korea detained in North Korea’s political prison camps’ is conducted. This is the clause stipulating that human rights is considered the value protected by US domestic law – in this case, the North Korea

Table 2. Legal bases of the US sanctions on North Korea for human rights violations.

| Date of entry into force | Act / Executive Order | Title |
|-------------------------|----------------------|-------|
| 1 Jan 2, 2015 | E.O. 13687 | Imposing Additional Sanctions with respect to North Korea |
| 2 Feb 18, 2016 | H.R. 757 | North Korea Sanctions and Policy Enhancement Act of 2016 |
| 3 Mar 16, 2016 | E.O. 13722 | Blocking Property of the Gov. of North Korea and Workers’ Party of Korea and Prohibiting Certain Transactions with respect to North Korea |
| 4 Aug 2, 2017 | H.R. 3364 | Countering America’s Adversaries through Sanctions Act of 2017 |
| 5 Sep 21, 2017 | E.O. 13810 | Imposing Additional Sanctions with respect to North Korea |

Source: Compiled by the authors based on information available on the website of the US Department of the Treasury, ‘North Korea Sanctions’, https://www.treasury.gov/resource-center/sanctions/Programs/pages/nkorea.aspx (accessed 25 June 2018).
Table 3. US Department of Treasury OFAC's SDN list for North Korean human rights violations (including officials responsible for the issue of overseas workers).

| Designated officials | Date issued | Title | Executive order | Reason |
|----------------------|-------------|-------|-----------------|--------|
| 1. RI, Won Ho        | March 2016  | Official, Ministry of State Security in Egypt | E.O. 13687 | Being officials of North Korea government |
| 2. JO, Young Chol    | 2016        | Official, Ministry of State Security in Syria |          | Facilitating NK's mining business blamed for exploiting employees |
| 3. KIM, Jong Un      | July 2016   | Leader, North Korea | E.O. 13722 | Having engaged in, facilitated, or been responsible for an abuse/violation of human rights by NK government/Workers' Party of Korea |
| 4. CHOE, Pu Il       | 2016        | Minister, Ministry of People's Security |          | |
| 5. RI, Song Chol     |             | Counselor, Ministry of People's Security |          | |
| 6. KANG, Song Nam    |             | Bureau Director, Ministry of State Security |          | |
| 7. CHO, Yon Chun     |             | Vice Directors, Organization & Guidance Dept., Workers' Party of Korea | E.O. 13687 | Being officials of NK government & Workers' Party of Korea |
| 8. KIM, Kyong Ok     |             | Director, Propaganda & Agitation Dept., Workers' Party of Korea |          | E.O. 13687 targets agencies, instrumentalties, controlled entities and officials of NK government & Workers' Party of Korea |
| 9. KIM, Ki Nam       |             | Vice Director, Propaganda & Agitation Dept., Workers' Party of Korea |          | |
| 10. RI, Jae Il       |             | Director, Propaganda & Agitation Dept., Workers' Party of Korea |          | |
| 11. CHOE, Chang, Pong|             | Director, Investigations Bureau, Ministry of People's Security |          | |
| 12. CHO, II U        |             | Director, 5th Bureau of Reconnaissance General Bureau |          | |
| 13. O, Chang Kuk     |             | Director, 1st Bureau of Reconnaissance General Bureau |          | |
| 14. KIM, Won Hong    | Jan. 2017   | Minister, Ministry of State Security | E.O. 13687 | |
| 15. KIM, Il-Nam      | 2017        | Chief, South Hamgyong Province Political Prison Camp for Ministry of State Security |          | |
| 16. KIM, Yo Jong     |             | Vice Director, Workers' Party of Korea |          | |
| 17. CHOE, Hwi        |             | Propaganda & Agitation Dept. |          | |
| 18. KANG, P'il Hun   |             | Director, General Political Bureau, Ministry of People's Security |          | |
| 19. JO, Yong Won     |             | Vice Director, Organization & Guidance Dept., Workers' Party of Korea |          | |
| 20. MIN, Byong Chol  |             | Member, Organization & Guidance Dept., Workers' Party of Korea |          | |
|                      |             |       |                  |  |

Table 3. (Continued)

| Designated officials | Date issued | Title | Executive order | Reason |
|----------------------|-------------|-------|-----------------|--------|
| 21. KIM, Tong-chol   | Aug. 2017   | Director, Mansudae Overseas Projects Architectural & Technical Services Ltd. Deputy Managing Director, Qingdao Construction | E.O. 13722 | Linked to Mansudae Overseas Projects Architectural & Technical Services Ltd.\(^{42}\) Linked to Qingdao Construction\(^{43}\) |
| 22. JO, Kyong Chol   | Oct. 2017   | Director, Military Security Command | E.O. 13687 | Being officials of NK government, Military Security Command, called 'military's own secret force' Monitoring military personnel for anti-regime activity and investigating political crimes in military |
| 23. JONG, Yong Su    |             | Deputy Director, Military Security Command |              |        |
| 24. SIN, Yong II     |             | Diplomat, NK Embassy in Vietnam |              |        |
| 25. KIM, Min Chol    |             | Consul General, Shenyang China |              |        |
| 26. KU, Song Sop     |             | 1st Vice Minister, Ministry of People's Security |              |        |
| 27. RI, Thae Chol    |             | Being officials of NK government & Workers' Party of Korea Being responsible for an abuse/violation of human rights by NK government, Military of People's Security |
| 28. KIM, Kang Jin    |             | Director, External Construction Bureau | E.O. 13687 | Being officials of NK government & Workers' Party of Korea |
| 29. CHOE, Ryong Hae  | Dec. 2018   | Director, Organization & Guidance Dept., Workers' Party of Korea | E.O. 13687 | Being an official of Workers' Party of Korea Dispatching an official to monitor a self-criticism session, when a Party official deviates from the official message in public remarks |
| 30. THAEK, Jong Kyong|             | Minister, Ministry of State Security |              | Directing abuses perpetrated by Ministry of State Security Involving directing abuses in the political prison camp, where torture, starvation, forced labor, and sexual violence is systematized |
| 31. PAK, Kwang Ho    |             | Director, Propaganda & Agitation Dept., Workers' Party of Korea |              | Maintaining oppressive information control Responsible for suppressing freedom of speech and furthering censorship in NK |

Source: Compiled by the authors based on information available on the website of the US Department of the Treasury, ‘Treasury Sanctions North Korean Senior Officers and Entities associated with Human Rights Abuses’, https://www.treasury.gov/press-center/press-releases/Pages/j0506.aspx; ‘Recent OFAC Actions’, http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/OFAC-Recent-Actions.aspx?utm_medium=email&utm_source=govdelivery; ‘Treasury Sanctions Additional North Korean Officers and Entities in Response to the Regime’s Serious Human Rights Abuses and Censorship Activities’, https://www.treasury.gov/press-center/press-releases/Pages/sm0191.aspx; ‘Treasury Targets Chinese and Russian Entities and Individuals Supporting the North Korean Regime’, https://www.treasury.gov/press-center/press-releases/Pages/sm0148.aspx (accessed 16 May 2018); ‘Treasury Sanctions North Korean Officials and Entities in Response to the Regime's Serious Human Rights Abuses and Censorship’, https://home.treasury.gov/news/press-releases/sm568 (accessed 26 December 2018).
Sanctions and Policy Enhancement Act. Because of this law, unless the human rights condition in North Korea is significantly improved, meeting the conditions listed in the law, the human rights sanction cannot be terminated. Furthermore, it is reminded that in July 2018, President Trump signed another law, the North Korean Human Rights Reauthorization Act of 2017 (H.R. 2061), intended to promote human rights and freedom in North Korea, again emphasizing the point that North Korean human rights is not a forgotten issue in the US. Thus, from the human rights perspective, the future of the US–North Korea relations does not seem to be rainbows and butterflies.

**Conclusion and policy suggestions**

The issue over North Korea’s human rights has not been resolved. Thus, it cannot be forgotten. For any agreement with North Korea to be effective, the human rights situation must be improved (Lee C, 2018). Not only to bring peace and finally reunification to the Korean peninsula but also to establish diplomatic relations between the US and North Korea, the issue over North Korea’s human rights should not remain unresolved. In this sense, it may not be true that either the US or South Korea has tried to bury the truth about the human rights condition in North Korea. However, it is more likely that both governments have deliberately delayed the time to address the human rights issue against North Korea for a tactical reason to continue the peace talks. Such an interpretation is also supported by the following facts. First, the issue over North Korean human rights has raised serious concerns in the international community, being a matter bound by international law. Furthermore, more specific legal obligations meant to improve the human rights condition in North Korea also exist in domestic law, both of the US and of South Korea. As discussed earlier, North Korean massive violations of human rights can be treated as crimes against humanity according to the relevant international law, and international law does not generally permit impunity of those most responsible for serious international crimes. Also, on a domestic level, the US has its own legal limitations based on not only the recently renewed North Korean Human Rights Act but also the North Korea Sanctions and Policy Enhancement Act of 2016, both enacted by the US Congress. South Korea also has its newly enacted North Korean Human Rights Act of 2016 stipulating various legal obligations of the South Korean government for improving the human rights situation in North Korea.

In future, how shall North Korea’s human rights be tackled? Taking the international community’s opinions seriously, the issue needs to be approached coherently with a long-term plan. Two main categories of civil/political rights and economic/social rights need to be taken together as an integral part of human rights. Depending on situations, they need to be approached in both direct and indirect ways, and through both assertive and cooperative mechanisms. Responsibilities also should be divided among states, international organizations and NGOs. Further, even within a state such as South Korea, proper roles should be coordinated among relevant ministries and organs.

It will be difficult for the South Korean government to raise the criminal punishment issue directly when the Korean peninsula peace talks with the North Korean high-ranking officials are in progress. Rather, the aggressive claims by international organizations and NGOs do deserve their place, if their arguments are still strong. Based on the relevant laws, the South Korean government should also pursue the measures at a low key, if necessary. Such assertive arguments can also be presented to North Korea as a leverage, so that the need for improvement in the North Korean human rights condition is emphasized continuously. Hopefully, being a nonpartisan issue, the US Congress will take a strong stance on its concerns about North Korea’s human rights and deliver a clear message. Considering the fact that the North destroyed the Punggye-ri nuclear test site during the peace talks in 2018, will it really be an impossible dream that North Korea also decides to shut down its political prison camps?
One of the points agreed in the Inter-Korean Summit on 27 April 2018 involved the issue of the reunion of separated families. South and North Korea agreed to proceed with reunion programmes, celebrating the National Liberation Day on 15 August. This plan is significant, being a concern not only from the humanitarian perspective but also that of human rights. While the survivors are still living, full efforts will be made so that the reunion of separated families occurs regularly, along with the exchange of letters. The issues of prisoners of war and abductees can perhaps be resolved together, as humanitarian agendas in a wider sense. Like the US, which exerts its best efforts to bring back its overseas detainees and the remains of soldiers missing in action, South Korea is also in a position to protect its citizens with its full efforts. Six or seven South Koreans currently detained in North Korea will return home as soon as possible.

When the Korean peninsula peace talks start delivering results over the nuclear issue, then the time will have come for South Korea to discuss the human rights issue with North Korea, starting with rather ‘soft’ topics. Identifying the economic and social rights issues that North Korea has lately shown some interest in improving can be a place to start – for example, providing humanitarian assistance to vulnerable groups such as infants, pregnant women, the disabled and the elderly in North Korea, with a direct or indirect connection with human rights advancement strategy. Cooperation with UN organs and European states needs to be sought, for the reason that they have many experiences in such technical cooperation areas as assisting the rule of law, training judges and judicial officials, assisting in writing state periodic human rights reports and establishing national action plans for the promotion and protection of human rights. Alternatively, human rights violations in political prison camps and the issue of religious freedom could be the top priority among the many North Korean human rights problems. However, while advocating these issues continuously, it is also important that the states concerned should consider what they can already achieve in practice for human rights through the official channels, and proceed step by step.

Again, even when inter-Korean dialogues and US–North Korean meetings about North Korean nuclear weapons and a peace regime start making progress, the human rights issue in North Korea should not be marginalized or disregarded. It needs to be monitored continuously by the international community so that the human rights condition in North Korea can substantially improve.

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**Notes**

1. Available at https://www.cfr.org/backgrounder/what-know-about-sanctions-north-korea (accessed 9 January 2018).
2. UN Human Rights Council (2014) Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, UN Doc. A/HRC/25/63, 7 February (hereinafter ‘COI Report’); UN Human Rights Council, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, UN Doc. A/HRC/25/CRP.1, 7 February (hereinafter ‘COI Detailed Findings’).
3. COI Report.
4. COI Report, paras 22, 74; COI Detailed Findings, paras 67–68, 1023.
5. Article 5 of the 1998 Rome Statute of the ICC.
6. COI Report, paras 87, 94; COI Detailed Findings, paras 1201, 1218, 1225.
7. COI Report, para. 86; COI Detailed Findings, paras 1024–1210.
8. COI Detailed Findings, paras 1202–1203.
9. For details, see Cho J (2015) Transitional justice in a reunified Korea: Some initial observations. In Buhm-Suk B and Teitel RG (eds) Transitional Justice in Unified Korea. New York: Palgrave Macmillan, pp. 209–219.
10. COI Report, paras 75–79.
11. Article 6 of the 1998 Rome Statute of the ICC.
12. Article 8 of the 1966 International Covenant on Civil and Political Rights.
13. Do Kyung-ok et al., *2016 White Paper on Human Rights in North Korea* (Seoul: Korea Institute for National Unification, 2016), pp. 189–194.
14. Do Kyung-ok et al., *2016 White Paper on Human Rights in North Korea* (Seoul: Korea Institute for National Unification, 2016), pp. 465–490.
15. Article 5.1 of the 1998 Rome Statute of the ICC.
16. Article 11 of the 1998 Rome Statute of the ICC.
17. Article 24 of the 1998 Rome Statute of the ICC; Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 551.
18. Article 17 of the 1998 Rome Statute of the ICC.
19. Article 12 of the 1998 Rome Statute of the ICC.
20. Articles 13 and 12.2 of the 1998 Rome Statute of the ICC; Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 551.
21. Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 551–552.
22. Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 552.
23. COI Detailed Findings, para. 1201; Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 552.
24. Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 552.
25. Article 63 of the 1998 Rome Statute of the ICC.
26. Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 559–600.
27. Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 559.
28. Cho and Chang, UN Commission of Inquiry on North Korean Human Rights: Its recommendations and international responses, 559.
29. COI Detailed Findings, para. 1201.
30. UN Security Council Resolution 2270 (2016) UN Doc. S/RES/2270 (2 March). In the preamble to this resolution, the UN Security Council expressed its deep concern at the grave hardship of the North Korean people.
31. UN Security Council Resolution 2321, UN Doc. S/RES/2321 (30 November 2016). In this resolution, the UN Security Council reiterated its deep concern at the grave hardship of the North Korean people, condemned North Korea for prioritizing nuclear weapons and ballistic missiles over the welfare of its people at a time when they had great unmet needs, and emphasized the necessity of North Korea respecting and ensuring the welfare and inherent dignity of people in North Korea (para. 45). In addition, it also expressed its concern that North Korean nationals were sent to work in other states for the purpose of earning hard currency that North Korea used for its nuclear and ballistic missile programmes (para. 34). Similar content containing the term ‘grave hardship’ can be found in the following UN Security Council Resolutions: UN Doc. S/RES/2371 (5 August 2017), para. 17; UN Doc. S/RES/2375 (11 September 2017), paras 24–25; UN Doc. S/RES/2397 (22 December 2017), paras 23–24.
32. UN Security Council Resolution 2270 (2016) UN Doc. S/RES/2270 (2 March).
33. This action is supported by Executive Order 13687 and E.O. 13722. In the US, an Executive Order is a directive issued by the President. Table 2 is provided as a reference to the legal framework for the US sanction on North Korea for the human rights violation. Available at http://www.treasury.gov/resource-center/sanctions/Programs/pages/nkorea.aspx (accessed 5 June 2018).
34. Formerly the head of North Korea’s Reconnaissance Bureau of General Staff Department, Kim Jong-chul is held responsible for certain activities relating to the proliferation of nuclear weapons. Specifically, he was included on the US’s sanction list for illegal trafficking in arms since August 2010.
35. US Department of the Treasury, North Korea Sanctions, http://www.treasury.gov/resource-center/sanctions /Programs/pages/nkorea.aspx (accessed 6 June 2018).
36. North Korea Sanctions and Policy Enhancement Act, Section 104(a)(5).
37. North Korea Sanctions and Policy Enhancement Act, Section 208(c).
38. North Korea Sanctions and Policy Enhancement Act, Section 402(2)(B).
39. SPUTNIK (2018) Trump Signs Law on Promoting Human Rights in North Korea, 21 July.
40. Office of Foreign Assets Control.
41. Specially Designated Nationals.
42. Mansudae Overseas Projects Architectural & Technical Services Ltd is a North Korean construction company, based in Pyongyang. It is estimated that the company earned more than $160 million between 2000 and 2010. For example, from a contract to construct the Presidential Palace and other buildings, it is known that North Korea earned about $66.03 million from Namibia alone. North Korean Economy Watch, Mansudae Overseas Development Group Projects, 23 June 2010.
43. Qingdao Construction is a Namibia-based subsidiary of a Chinese construction company, which has taken at least four Namibian government-sponsored construction projects. Carol Morello and Peter Whoriskey, US hits Chinese and Russian companies, individuals with sanctions for doing business with North Korea, Washington Post, 22 August 2017.
44. Panmunjom Declaration for Peace, Prosperity and Unification of the Korean Peninsula, 30 June 2018.

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