

The Nexus between Arms Control and Human Rights
in the Case of North Korea.
Implications for the human rights agenda

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Abstract

The exceptionally poor human rights record of North Korea has for long remained eclipsed by the issue of arms control. The Commission of Inquiry report of 2014 nevertheless centre-staged human rights, and there is increasing evidence to the fact that the two issues are connected. The international community has nevertheless been divided over whether to link human rights and arms control or not, in addition to by what means North Korea should be contained. This article seeks to explore international responses to the North Korean human rights situation from a normative-descriptive approach. The article will explore the rise of softer security concerns next to traditional ones by tracing the building of human rights momentum within the UN. This will be followed by analysis on the nexus between the issue of arms control or broader security concerns and human rights. The risks and opportunities involved in connecting the two subject matters will thereafter be considered from the prism of human rights, after which strategies for future international responses will be discussed. It will be argued that the human rights momentum built in the aftermath of the 2014 Commission of Inquiry report has placed human rights firmly at the centre of international attention. Moreover, the placing of North Korean human rights on the Security Council agenda was a step with long-term political and legal implications.

Keywords

North Korea, international law, arms control, human rights,
United Nations, securitization

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1. Introduction

The international community has long struggled with what to do with the Democratic People's Republic of Korea (DPRK or North Korea) in terms of the security concerns arising from the country's development of weapons of mass destruction. A cat-and-mouse game has been taking place for decades between the Kim Dynasty and various international actors pursuing arms control and the denuclearization of North Korea. In recent years international attention has also been paid to North Korea's human rights record, which commonly is described as the worst in the world and allegedly lacks any comparison in contemporary times. Of these two issues, arms control has traditionally constituted the primary concern of the international community, although the UN Commission of Inquiry (COI) report of 2014 built substantial momentum to address human rights with the Kim Jong-un regime. Despite the fact that there is a clear linkage between the two subject-matters, it has proven difficult to decide on feasible international responses and negotiation strategies, as well as whether these two concerns should be linked or not.

This article seeks to explore international responses to the North Korean human rights situation from the prism of international law, and in particular from a human protection framework. Though it examines the risk of securitization and its consequences upon the human rights project, the primary aim is not to analyze arms control and human rights from the theoretical framework of securitization. Rather, the approach will be normative-descriptive, seeking to unravel the current human rights situation while also exploring how to best reach a minimum level of international human rights law. Central to this is the question of legal implications rising out of the linkage between human rights and arms control.

In this pursuit, the article will first explore the rise of softer security concerns next to hard security by tracing the building of human rights momentum within the UN (Section 2). This will be followed by analysis on the nexus between the issue of arms control or broader security concerns and human rights. The risks and opportunities involved in connecting the two subject matters will thereafter be considered from the prism of human rights, after which strategies for future international responses aimed at improving the North Korean human rights situation will be discussed (Section 3). It will be argued that the human rights momentum built in the aftermath of the 2014 COI report has placed human rights firmly at centre of international attention, which nonetheless involves a risk of securitization of human rights. At the same time, the nascent linkage between arms control and human rights in the UN Security Council has given rise to legal effects that in the long-term can benefit the human rights agenda.

2. From Hard to Soft Security Concerns: The Rise of Human Rights

2.1. Traditional Precedence of Arms Control over Human Rights

North Korea has for years been considered a threat to international peace and security, as well as a potential source and site for great power confrontation due to the unresolved conflict of the 1950s.¹ The core of the threat lies in the proliferation of nuclear weapons, as well as developing arms able to deliver them, which is regarded by the UN Security Council (UNSC or SC) as a threat to international peace and security – both generally and with respect to North Korea.² North Korea has since the 1950s shown interest in and sought to develop its nuclear capabilities; a ‘nuclear inferiority complex’ has characterized the country’s strategic thinking from the start.³ One of the country’s basic survival strategies has been to use its nuclear programme for regime survival: by fabricating military crises and agreeing to solve them, North Korea has been able to receive almost unconditional economic aid from international actors, only with the aim to produce a new conflict once it runs out of money.⁴ At the same time, the nuclear weapons programme has ensured that the regime stays intact from outside interventions. Nuclear weapons have thus constituted a rational instrument whereby international actors are kept at distance, rather than being the pet project of a mad man.⁵

The international community has attempted to respond to North Korea’s nuclear yearn through various policies of engagement and coercion, but the issue has emerged as one of the most divisive foreign policy matters, in particularly for the U.S. and its partners in Asia.⁶ No lasting solution to the problem has been found; instead, North Korea has continued to hoax the international community with empty promises while proceeding with its nuclear weapons programme. The fast development of the programme has, however, taken the international community by surprise. The first nuclear test was conducted in 2006, and since then the pace of testing has only accelerated. So far the country has tested six nuclear devices, the latest testing occurring in September 2017 with a large enough explosion to be a thermonuclear weapon.⁷ Despite the fact that the nuclear explosions have been quite small by international standards the latest nuclear explosion was seven times the atomic bomb dropped over Hiroshima, and it demonstrated that North Korea has advanced in its nuclear technology.⁸ According to SIPRI statistics, North Korea may potentially have

1 For an in-depth discussion on the North Korean conundrum, see Sinkkonen 2017a.

2 Generally, see UNSC Res. 1540 (2004), and with respect to North Korea, see UNSC Res. 2407 (2018), preamble.

3 Clemens Jr. 2016, p. 90.

4 Lankov 2013, pp. 145–157.

5 Lankov 2017.

6 Cha and Kang 2004, p. 229.

7 Lewis 2017.

8 Berkowitz, Karklis and Schaul 2017.

produced 10–20 nuclear weapons,⁹ but the opacity of the country's nuclear programme makes it impossible to know.

What is more, progress has also been made in missile development, which is a necessary component of delivering the nuclear warheads. After 20 missile tests in 2017, including inter-continental ballistic missiles (ICBMs), the latest ICBM test in November 2017 stretched to a height of 4,500 km, thus making it potentially capable of reaching continental United States, including its capital Washington DC.¹⁰ North Korea has also increased its missile mobility by developing capabilities of both sub-marine and land-launched missiles.¹¹ Still, there appears to be disagreement with how far North Korea is from producing an ICBM with a nuclear warhead that could threaten the United States,¹² its main rival throughout its existence.

But the question of North Korea's nuclear programme is not the only concern of the international community when it comes to that country. The first reports about North Korean political prison camps were published in the 1980s,¹³ but it was not until 2003 that the UN human rights machinery placed North Korea on the agenda. Hence, arms control and denuclearization have constituted the primary concerns of the international community for decades.¹⁴ Although the interest in North Korea's human rights situation is of much more recent origin than that of denuclearization of the peninsula, it is of no less urgency. The general perception is that the human rights situation is exceptionally terrible in North Korea,¹⁵ and the recent years show no improvement.

Three generations of the Kim Dynasty have ruled North Korea with an iron fist. The rule has been grounded on the *Juche* state ideology, which places the military first, as well as the discriminatory social class system, *Songbun*. The extensive use of political prison camps and policies of mass starvation has resulted in the death of hundreds of thousands, if not millions, of North Koreans. For example, it is estimated that 500,000 starved to death in 1995, and still today up to 100,000 remain detained in the country's several prison camps.¹⁶ The use of collective punishment, malnutrition, public and secret executions, torture and no freedom of opinion or belief, leave North Korea generally described as the most repressive state in the world,¹⁷ a situation of *sui generis*.

9 SIPRI 2017.

10 Berkowitz, Karklis and Schaul 2017.

11 Sinkkonen 2017b, p. 30.

12 Id, p.31.

13 Kagan, Oh and Weissbrodt 1988.

14 Chubb 2014, p. 51; U.S. Congressional Research Service 2018, p. 25.

15 Some critical remarks have been made concerning this representation of North Korea as the worst place on earth. See, e.g., Hong 2013; Smith 2014; Shin and Choi 2013.

16 NKDB estimates there to be 80,000–130,000 persons imprisoned in political prison camps. See NKDB 2016a, p. 11.

17 For a recent overview of the situation, see, *ibid*.

But the deprivation of North Koreans does not stop at the country's borders. Its neighbouring states, China and Russia, both engage in a policy of repatriation,¹⁸ whereby North Korean defectors are not treated as refugees but as economic migrants.¹⁹ Those who are repatriated nevertheless face consequences, as they are likely to be punished with detention, forced labour or other forms of ill-treatment.²⁰ Another issue that North Koreans suffer from is the phenomenon of forced labour abroad. According to estimations, up to 50,000 North Koreans work for state-controlled firms in various sectors abroad in neighbouring states China and Russia,²¹ but also in many other parts of the world, such as Africa and Europe. These workers remain outside of international or domestic labour laws and are vulnerable to excessive working hours and to occupational accidents and diseases.²² The workers receive only a fraction of their salaries and the North Korean regime confiscates the rest, which may amount to up to 70 per cent. This practice resembles an unacceptable system of forced labour as they often work in 'slave-like conditions'.²³

2.2. The Building of a Human Rights Momentum in the UN

The international community has for the last 15 years resolutely condemned the North Korean regime for its human rights violations next to the persistent focus on arms control and denuclearization. Indeed, recent years show a tendency where more states are joining forces to this effect, both within the UN Human Rights Council (HRC) and the General Assembly (UNGA).²⁴ The UNGA has for 13 consecutive years adopted resolutions condemning the North Korean human rights situation, and for the last four years this has been done by consensus without a vote.²⁵ International responses to the issue of human rights violations have nevertheless been overshadowed by strategic concerns over North Korea's nuclearization.²⁶ Forceful actions beyond engagement and condemnation, such as intervening militarily, have so far been out of question because of the intimate connection to great power politics as well as North Korea's demonstrations of increased nuclear and missile capability.

18 U.S. Department of State 2017a, p. 126.

19 Haggard and Noland 2011, p. 3.

20 Amnesty International 2017, p. 220.

21 The estimations range from 50,000–70,000 dispatched North Korean laborers in about 40 countries worldwide. See, NKDB 2016b, pp. 4–5.

22 Amnesty International 2017, p. 220.

23 Luhn 2017.

24 This is visible, for instance, in the fact that the resolutions on North Korean human rights are getting stronger in terms of language, and at the same time more states rally up behind the resolutions. For voting results both in the UNGA and the HRC, see Korea Institute for National Unification 2015, pp. 43–44.

25 Oh 2017.

26 Yeo 2014, p. 84.

2.2.1. North Korea in the Multilateral Human Rights System

North Korea is formally part of the multilateral human rights system with its ratification of human rights conventions, namely the International Covenant for Civil and Political Rights (ICCPR), the International Covenant for Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and its Optional Protocol on the sale of children, child prostitution and child pornography, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). As late as December 2016 North Korea also ratified the Convention on the Rights of Persons with Disabilities (ICRPD). Despite these formal commitments, it is noteworthy that the country sought to withdraw from the ICCPR in 1997, but was not allowed to do so because the treaty lacks a withdrawal clause. Moreover, it has been claimed that North Korea has one of the worst cooperation records in the world with the UN human rights mechanisms.²⁷ It refuses to recognise the actions of the HRC or the UNGA condemning its human rights situation, and it has not extended a standing invitation to UN Rapporteurs to enter the country.

As a state party to the human rights treaties it has ratified, the country is nonetheless within the monitoring ambit of UN human rights treaty bodies. Despite the country's random and incomplete reporting, there have lately been some signs of North Korean participation in the UN human rights system, as it in 2016 issued two reports to treaty monitoring bodies. The first was submitted to the Committee on the Rights of the Child and the second to the Committee on the Discrimination against Women.²⁸ North Korea seems hesitantly willing to engage in discussions on the implementation of human rights treaties protecting the rights of vulnerable groups, as it also for the first time allowed a UN independent expert on the rights of persons with disabilities to visit the country in May 2017.²⁹ In fact, it has been claimed that North Korea has improved its human rights record in one field, namely the rights of persons with disabilities.³⁰ It has also been noted that the 2014 COI report motivated North Korea to increase its cooperation with the UPR in 2014.³¹

It is nonetheless indisputable that North Korea's formal commitment to multilateral human rights treaties has not translated into human rights protection on the ground, which is why the UN has paid extra attention to the North Korean situation. Next to the normal institutional mechanisms within the UN human rights machinery, the so-called Special Procedures have played a great role in addressing the North Korean situation. The first decisive step was taken with the establishment of a Special Rapporteur on the Democratic People's Republic of Korea by the former Commission on Human Rights.³² The mandate

27 Human Rights Watch 2013.

28 UN Doc. CRC/C/PRK/5, 25 October 2016, and UN Doc. CEDAW/C/PRK/2.4, 1 June 2016.

29 Catarina Devandas Aguilar visited Pyongyang from 3–8 May 2017.

30 Feffer 2017.

31 Chow 2017.

32 Situation of Human Rights in the Democratic People's Republic of Korea, Commission on Human Rights

was motivated by the concern for the ‘systematic, widespread and grave violations of human rights’, including torture, extrajudicial and arbitrary detentions, prison camps and forced labour,³³ and it has been renewed annually.³⁴ The first ten years of the mandate focused on following the situation without proposing any major concrete actions to be taken. The year 2013 constituted a turning point in this aspect, when the report urged the HRC to establish a Commission of Inquiry (COI) to investigate the systematic and widespread abuses committed in North Korea, which it did by consensus. With this move, a long overdue reluctance to scrutinize human rights in North Korea in any meaningful way was overcome, despite the uncertainties surrounding the situation due to the inaccessibility of the country.³⁵ North Korea’s unwillingness to cooperate with the UN was also seen as wearing the patience of international society thin.³⁶

2.2.2. Centre-staging Human Rights: The 2014 COI Report and Its Aftermath

The scrutiny of the North Korean human rights situation by the three member Commission of Inquiry, led by Australian Michael Kirby, lifted human rights from the shadow of the arms control issue. In its report of February 2014, the COI found in spite of North Korea’s non-cooperation that ‘systematic, widespread and gross human rights violations have been and are being committed’.³⁷ The level of abuses committed by the state machinery was in many instances seen to amount to crimes against humanity.³⁸ The COI further found that the policies taken at the highest state level that support torture, enforced disappearances, execution, starvation and much more ‘reveal a State that does not have any parallel in the contemporary world’.³⁹ Instead, the abuses were likened to the horrors committed by the Nazi regime.⁴⁰ Another notable feature of North Korea’s record was that its political system ensured impunity for all perpetrators of human rights violations, including those involved in the commission of crimes against humanity. The report also urged the Security Council to refer the situation for investigation to the International Criminal Court (ICC), or to alternatively create an *ad hoc* tribunal.⁴¹ It also recommended the Security Council

Resolution 2004/13, 15 April 2004, UN Doc. E/CN.4/RES/2004/13, para. 5.

33 Id, para.1.

34 The current Special Rapporteur on North Korea is Tomás Ojea Quintana from Argentina, who was appointed in 2017.

35 Cohen 2013.

36 Ibid.

37 UN Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, Summary Report, UN Doc. A/HRC/25/63, 7 February 2014, para. 24.

38 Id, para. 24.

39 Id, para. 80.

40 Statement by Inquiry Chairman Michael Kirby during the press conference, see, Walker 2014.

41 UN Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, Summary Report, UN Doc. A/HRC/25/63, 7 February 2014, para. 87.

to impose targeted sanctions on those who appear most responsible for the commission of crimes against humanity.⁴²

As a result of the egregious human rights situation reaching international headlines, important factual background and political momentum was gained for involving the Security Council in the matter. To that point the Council had only been engaged with the testing of nuclear and ballistic missiles. This unique move was mastered by excellent timing and hard diplomatic work, as the composition of the Security Council benefited the furthering of the human rights agenda. Before the first ever formal meeting on North Korean human rights violations, the report had been discussed at the Security Council in a so-called Arria formula meeting which China and Russia decided not to attend.⁴³ After numerous diplomatic twists and turns, the North Korean human rights situation was finally placed on the Security Council agenda on 22 December 2014.⁴⁴

The significance of this action lies in the fact that the North Korean human rights situation is now considered a threat to international peace and security, and that the SC is competent to take decisions with respect to the situation. One concrete measure which the Council could decide upon, and which is pursued by the human rights machinery of the world organization, is the importance of bringing the perpetrators to justice by way of a Security Council referral to the ICC. Although the Council has held four annual discussions about the human rights situation in North Korea, nothing concrete has come out of it as yet. Instead, some major powers have resisted even placing the topic on Council agenda, and a SC referral to the ICC seems remote, not to mention the imposition of UN sanctions due to human rights abuses.⁴⁵

The permanent members of the SC hold diametrically opposite stances on the issue. China and Russia have resisted the annual discussions, and even required procedural voting in order to stop North Korean abuses from being debated in the Council.⁴⁶ Since their veto power does not apply to procedural issues they have been unable to stop the deliberations. China has repeatedly pointed out that it rejects the ‘politicization of human rights issues’.⁴⁷ It has asked the Council to ‘focus on the big picture and avoid any rhetoric

42 Id, para. 93 (a).

43 Kirby 2015, p. 23.

44 UN Security Council Press Release, ‘Security Council, in Divided Vote, Puts the Democratic People’s Republic of Korea’s Situation on Agenda Following Findings of Unspeakable Human Rights Abuses’, UN Doc. SC/11720(2014), 22 December 2014. The decision was taken with China and Russia voting against, and Chad and Nigeria abstaining.

45 Willis 2017.

46 This was a noticeable move as it was the first demand for a procedural vote in this regard in eight years. See, International Coalition for the Responsibility to Protect (ICRtoP), 2015. See also, UN Security Council, ‘Security Council Narrowly Adopts Procedural Vote to Authorize Discussion on Human Rights Situation in Democratic People’s Republic of Korea’, SC/12615, 9 December 2016, <www.un.org/press/en/2016/sc12615.doc.htm> (accessed 28 June 2017).

47 U.N. Security Council, ‘Security Council Narrowly Adopts Procedural Vote to Authorize Discussion on

or action that might lead to the escalation of tensions’, because discussing the North Korean human rights situation is ‘contrary to the goal of stabilizing the Korean Peninsula’.⁴⁸ While Russia concurred with the Chinese statement that the SC should not deliberate on human rights, it also defended its pejorative position with claims on the necessity to maintain the effectiveness of the Council without ‘loading up its agenda’.⁴⁹ Many states nevertheless endorsed the discussion of human rights because the issue was seen to represent ‘a flip side of the country’s nuclear ambitions’.⁵⁰ All in all, the COI report ended up changing the discussion on North Korea,⁵¹ which must be understood as the momentum itself. Human rights are now an accepted and central part of the discussion on North Korea.⁵²

3. The Link between Human Rights and Arms Control

3.1. A principled and practical link

There is a clear connection between North Korea’s nuclear weapons programme and its dire human rights record, both in principled and practical terms: security and human rights are linked, as one cannot have one without the other. In the post-cold war era, security is no longer perceived only as inter-state security and the defence of the territorial integrity of states.⁵³ Neither should security be understood narrowly as ‘global security to be free from the threat of nuclear holocaust’.⁵⁴ Indeed, the question of security is much broader than the military perspective of it.⁵⁵ This is captured in the concept of human security, which understands security to have different components, including economic security, food security, health security, environmental security, personal security, community security and political security.⁵⁶ All individuals should thus enjoy not only ‘freedom from fear, but also freedom from want’.⁵⁷ Clearly, North Koreans fall short of many, if not all, aspects of human security,⁵⁸ human rights concerns being one integral part of the equation.

There is also an international dimension to the security and human rights nexus: if a regime does not respect the human rights of its own population, it will not respect those of others.⁵⁹ To start with, North Korea’s abductions and detentions of foreign nationals, such

Human Rights Situation in Democratic People’s Republic of Korea’, SC/12615, 9 December 2016, <www.un.org/press/en/2016/sc12615.doc.htm> (accessed 28 June 2017).

48 Ibid.

49 Ibid.

50 Id, statement by Ukraine.

51 Cha and Lloyd 2016.

52 Ibid.

53 Soh 2007, p. 4.

54 United Nations Development Programme (UNDP) 1994, p. 22.

55 Ryngaert and Noortmann 2014, p. 1.

56 UNDP 1994, pp. 24–25.

57 UN World Summit Outcome Document, UN Doc. A/RES/60/1, 24 October 2005, at para. 143.

58 Scarlatoiu 2015, p. 128.

59 Cha and Lloyd 2016.

as citizens from the U.S., Japan and South Korea, have made it clear that the rights of third country nationals are ignored and the sovereignty of the respective states are violated.⁶⁰ Next to the historic abductions of the 1970s and 1980s, there have also been recent cases of arbitrary detentions, which was demonstrated by the arrest and prosecution of the American student Otto Wambier in 2016–2017. In addition, the North Korean regime is seen as a danger to other populations, both regional and overseas, because of its possession of weapons of mass destruction. Any military confrontation between North Korea and another state could affect the lives of millions of people. It has been estimated that with his nuclear arsenal Kim Jong-un's regime could kill up to 3.8 million people, mainly in South Korea and Japan.⁶¹

The practical connections between the nuclear weapons programme and the rights of North Koreans are many, as the human rights violations underwrite North Korea's nuclearization.⁶² First, the forced labour practices abroad are directly used to finance the nuclear programme,⁶³ and according to estimations North Korea's forced labour practices bring in 120 million to 230 million USD to the regime annually.⁶⁴ Second, both nuclearization and human rights violations contribute to keeping Kim Jong-un's regime in place. Nuclear weapons are a shield towards outward interference, and the systematic human rights violations ensure state control back at home. Indeed, it has been claimed that the single end of the human rights violations is to keep Kim Jong-un in power.⁶⁵ Additionally, the state's official doctrine placing the military first has directly contributed to the starvation of millions of North Koreans, as resources are diverted to the million-man army and the nuclear programme.⁶⁶ According to estimations, the country spends as much as a third of its GDP on military expenditures. Militarization and the arms race thus affect both directly and indirectly the enjoyment of human rights.⁶⁷

The security-human rights nexus has also been expressly recognized by the United States and a number of other UN member states when they have noticed that the nuclear programme is being developed at the expense of the people of North Korea. U.S. Ambassador to the UN Nikki Haley has stated in the context of evaluating the SC's work that 'there is hardly an issue on our agenda that does not involve the concern for human

60 See, e.g., Government of Japan 2017.

61 Crilly 2017.

62 U.S. Department of State 2017b.

63 Cha and Lloyd 2016.

64 Database Center for North Korean Human Rights (NKDB) 2016b, p. 12.

65 U.S. Ambassador to the UN Nikki Haley, Speech delivered at the UNSC meeting on North Korean Human Rights, 11 December 2017, <https://usun.state.gov/remarks/8210> (accessed 28 August 2018).

66 Ulferts and Howard, 2017, p. 89.

67 Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/37/69, 9 March 2018, at para. 39.

rights'.⁶⁸ As late as December 2017 she also stated with respect to North Korea that '[w]e continue to think there is a separation between peace and security and human rights and there's not'.⁶⁹ Indeed, the U.S. has in its own national actions towards North Korea already early on recognised the need to address human rights alongside arms control.

In recent years the U.S. has moved towards a linkage between (peaceful) disarmament and human rights violations. Following Pyongyang's fourth nuclear test in January 2016, the U.S. government imposed sanctions upon North Korean key leadership and repressive state entities due to human rights abuses.⁷⁰ The North Korea Sanctions and Policy Enhancement Act of 2016 draws upon a connection between the issue of North Korean nuclear weapons programme and its human rights abuses, as its policy statement lays down: 'In order to achieve the peaceful disarmament of North Korea, Congress finds that it is necessary... (2) to sanction the persons, including financial institutions that facilitate... serious human rights abuses...'.⁷¹ Thus, the U.S. is the first country to impose sanctions on North Korean leadership due to its systematic human rights violations.

Similarly to U.S. Congressional action on human rights, the Trump administration also formally maintains that human rights are a U.S. priority in the case of North Korea.⁷² Despite this formal stance, President Trump reportedly failed to address the dire human rights situation with Kim Jong-un in the Singapore summit in June 2018. Foreign policy pundits as well as human rights organizations and activists have urged for the administration to keep human rights on the agenda despite the primacy of denuclearization. However, the reluctance by President Trump to raise the issue of human rights follows previous paths where U.S. negotiators have often been unwilling to raise human rights concerns at high-level meetings with foreign leaders.⁷³

Small signs of rapprochement between the two topics of arms control and human rights are also visible in the UNSC handling of the North Korean threats, despite the issues remaining separate agenda items. The human suffering of North Koreans has crept step by step into the Council's resolutions. In November 2016, when it condemned North Korea's nuclear arms testing, the Council urged North Korea to 'respect the welfare and inherent

68 Besheer 2017.

69 Nichols 2017.

70 North Korea Sanctions and Policy Enhancement Act of 2016, Public Law 114–122, 18 February 2016, H.R.757.

71 Id, sec. 101.

72 See, U.S. Ambassador to the UN Nikki Haley, Speech delivered at the UNSC meeting on North Korean Human Rights, 11 December 2017, <https://usun.state.gov/remarks/8210> (accessed 28 August 2018). President Trump also spoke about the brutalities committed by the North Korean regime in his 2018 State of the Union Address on 30 January 2018, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/> (accessed 5 November 2018). For more on the current U.S. policy on North Korea, see, Enos 2018.

73 Enos 2018, p. 8.

dignity’ of its people.⁷⁴ In 2017, the Security Council paid more detailed attention to the impact of the country’s nuclear pursuits upon the people of DPRK, noting that ‘over half of the people of the DPRK suffer from major insecurities in food and medical care’, in particular pregnant women and children under five.⁷⁵ It also condemned the overseas labour missions, and took action to hinder these. In its resolution 2397 (2017) the Council further highlighted the nexus between nuclearization and human suffering when it noted:

‘[The Council] [*r*]eiterates its deep concern at the grave hardship that the people in DPRK are subjected to, *condemns* the DPRK for pursuing nuclear weapons and ballistic missiles instead of the welfare of its people while people in the DPRK have great unmet needs, *emphasizes* the necessity of the DPRK respecting and ensuring the welfare and inherent dignity of people in the DPRK, and *demands* that the DPRK stop diverting its scarce resources toward its development of nuclear weapons and ballistic missiles at the cost of the people in the DPRK’.⁷⁶

To sum up, the topic of human rights is closing in on the denuclearization agenda also in the Security Council’s actions, despite China’s and Russia’s firm reluctance to perceive North Korea as a crisis of ‘human rights and peace and security’.⁷⁷ For these two countries it has always been more problematic to deal with human rights than arms control.⁷⁸

3.2. Implications of Linkage for Human Rights: Risk and Opportunity

Although most states share the view that North Korean human rights conditions are egregious, and that the topic is connected to the broader issue of security, it appears problematic to formulate common approaches to the problem of human rights.⁷⁹ Two central dilemmas feature in the debate on how to address the dual threat posed by North Korea; next to the thorny issue of bundling human rights and security issues together, there is also the dilemma of appropriate strategy, namely whether to use carrots or sticks on the North Korean state. This question is pressing as the human rights question is in the ascendant, and there are signs of increasing consensus ‘to pursue human rights and the nuclear issue simultaneously’.⁸⁰ Although the policy of linking human rights with arms control and denuclearization may appear logical and an inescapable development, there are both risks and opportunities with such an approach from the perspective of human protection.

74 UNSC Res. 2321 (2016), para. 45.

75 UNSC Res. 2371 (2017), para. 17.

76 UNSC Res. 2397 (2017), para. 23. (emphases in original).

77 U.S. Ambassador to the UN Nikki Haley, Speech delivered at the UNSC meeting on North Korean Human Rights, 11 December 2017, <https://usun.state.gov/remarks/8210> (accessed 28 August 2018).

78 Clemens Jr. 2016, p. 310.

79 Feffer 2005; Yeo 2014, p. 72.

80 Yeo 2018.

3.2.1. Risk of Securitization

There is a risk that human rights will be securitized when the link between human rights and security translates into policy-making. One example of evidence that the North Korean human rights situation is being brought into the realm of security logics is the fact that the UN Security Council, the primary international body charged with international peace and security, has addressed these concerns.

Securitization of non-traditional security issues, such as human rights or infectious diseases, is an extreme form of politicization where normal politics is suspended.⁸¹ It does not indicate that a factual existential threat is at hand, but rather that an actor seeks to bring a certain topic into the security sphere.⁸² The Copenhagen school posits that the central element of securitization is thus the so-called speech act, which defines securitization as an inter-subjective, discursive and dynamic process.⁸³ A successful process of securitization means that an issue becomes a priority requiring extra resources and measures outside of the normal toolbox.⁸⁴ Securitization of an issue thus signals that the stakes are raised.⁸⁵ For the North Korean case of connecting human rights with denuclearisation, the latter of which is markedly military and falls within the traditional concept of security, human rights are brought closer to the language and means of security, even if the two topics were to remain separate. This coupling may next to the benefits of greater visibility entail risks for the human rights agenda, especially since it has been claimed that conflating the two issues ‘reduces policy options to a choice between military intervention and economic sanctions’.⁸⁶

First, it is noticeable that the production of knowledge of North Korea in general, but also with respect to the North Korean human rights situation, is highly securitized and even militarized.⁸⁷ The dominant understanding of North Korea is that the country is a problem, both a nuclear and a humanitarian one, which the international community has to solve.⁸⁸ The humanitarian discussions are premised on the suffering and exploitation of North Koreans, not on serious research.⁸⁹ Hazel Smith, for example, claims that the international community’s perception of the North Korean human rights situation is skewed, as it contains ‘inconsistencies, misrepresentations, and sometimes downright untruths’.⁹⁰ To illustrate this point there are some available statistics and information on

81 Milani 2018, p. 15.

82 Hakala 2018, p. 27.

83 Buzan, Waever and de Wilde 1998.

84 Milani 2018, p. 15.

85 Balzacq 2005, p. 188.

86 Bell and Fattig 2018, p. 34.

87 Smith 2000, p. 593; Choi 2015, p. 14.

88 Choi 2015, p. 1.

89 Ryang 2009, p. 4.

90 Smith 2014, p. 134.

social and economic rights which show that recent charges of, for example, food violations might be exaggerated or at least not evidence-based.⁹¹

What is more, the human rights record portrayed by the international community often fails to see the country through contextual and historical lenses. The North Korean population has for decades indirectly suffered the consequences of sanctions and the withholding of humanitarian and development aid.⁹² The costs of this so-called violence of human rights have been born by the North Korean population.⁹³ Indeed, as has been noticed, ‘human rights critiques of North Korea have served hegemonic interests, cordoning off the North Korean state’s alleged crimes for discrete consideration, while turning a blind eye to the violence of human rights as well as the brutality of the world economic system’.⁹⁴ The lack of close analysis on North Korean human rights, or even portraying the human rights situation as being as bad as it is, contributes to the creation of ‘a febrile policy environment’.⁹⁵

Such a perception about North Korea in turn affects policy-making, narrowing policy options to the goals of national security instruments.⁹⁶ There is a danger that the human rights situation is used to instruct policy-making in support of interventionist policies, in ‘grand regime change strategy’,⁹⁷ which has been the case in particular in U.S. foreign policy-making. Indeed, the different U.S. administrations have differed on the linkage between human rights and nuclear talks. Whereas the Clinton regime pursued separation of the topics, the Bush administration had a comprehensive approach where human rights represented part of a larger comprehensive plan of getting rid of dictators.⁹⁸ This alternative makes human rights a tool or a weapon in the hands of national security strategists, triggering claims of the ‘weaponization of human rights’.⁹⁹

However, it is noticeable that human rights organizations and advocates are also divided on the correct way to meet the North Korean human suffering, not only with respect to the issue of linkage between arms control and human rights, but also in terms of appropriate policies. In particular, U.S. human rights organizations feature both pragmatists, who prefer long-term engagement and working with the current regime on human rights, as well as hardliners, who believe in coercion and more short-term action.¹⁰⁰ To this effect,

91 Id, esp. p. 133 et seqq.

92 Hong 2013, p. 516.

93 Ibid; See also the DPKR National UPR Report, UN Doc. A/HRC//WG.6//19/PRK/1, 30 January 2014, para. 125.

94 Hong 2013, p. 516.

95 Smith 2014, p. 141.

96 Ibid.

97 Feffer 2005.

98 Yeo 2014.

99 Feffer 2006, p. 3.

100 Yeo 2014.

human rights organizations themselves have contributed to the politicisation of human rights.¹⁰¹

The dichotomy in human rights advocacy is reflected also in the actions undertaken within the UN. The UN human rights machinery employs a two-track strategy of engagement and accountability for crimes against humanity, the latter objective now being actively pursued.¹⁰² Indeed, the primary goal of the international community next to a general improvement of the human rights situation is to hold the North Korean state leaders accountable for the international crimes committed. In furtherance of this aim, the HRC established a group of independent experts to explore mechanisms of accountability that would be suitable in the North Korean context. This group of two experts issued its report in February 2017,¹⁰³ which relies on several accountability strategies that complement each other. It noted that despite practical and political challenges there is a legal base for neighbouring states to prosecute North Korean perpetrators, while an *ad hoc* tribunal remains another viable alternative. The report further calls for efforts to continue to work for a referral by the Security Council to the ICC for the prosecution of high-level cases.¹⁰⁴ While awaiting tangible accountability avenues to open up, the UN has strengthened its Seoul field office with experts on legal accountability and an international repository preparing for a future accountability process of North Korean leaders.¹⁰⁵ The aim is not only to document the abuses but also to gain a better understanding of the North Korean system and to identify those most responsible for it.

There is thus in practical terms an increasing convergence between the aims of nuclear arms control and some of the human rights policies, namely to weaken the North Korean government,¹⁰⁶ or to even achieve regime change. This is due to the fact that international criminal justice is conditioned on an interventionist form of politics.¹⁰⁷ Although human rights actors, whether national or international, rarely explicitly demand regime change, the main line of focus in the UN human rights machinery is nowadays accountability of the main designers behind the state-based violence in North Korea, paradoxically next to the traditional policy of engagement. Holding perpetrators accountable naturally means that the regime would be ousted, and those responsible for crimes put behind bars and effectively removed from power. The consequences of accountability are in effect the

101 Ibid.

102 UNGA Res. 71/202 'Situation of Human Rights in the Democratic People's Republic of Korea', 19 December 2016. China dissociated itself from the consensus. See, Richardson 2017.

103 Report of the Group of Independent Experts on Accountability, UN Doc. A/HRC/34/66/Add.1, 24 February 2017 (hereinafter Accountability Report). The experts were: Ms. Sonja Biserko (Serbia) and Sara Hossain (Bangladesh).

104 Id, para. 68 et seqq.

105 Ibid.

106 Bell and Fattig 2018, p. 40.

107 Rodman 2013, p. 63.

same as regime change, although it might not entail a complete collapse of the North Korean state.

The linkage of human rights to hard security and the agenda of governmental breakdown may thus create greater human rights problems than they try to solve.¹⁰⁸ From a human rights perspective, regime change has rarely proved successful and would most likely entail a continuation of human suffering. Forcing a successful regime change from the outside is extremely difficult as has been witnessed recently in Iraq and Libya, the end-result being more instability and suffering for the ordinary people. As Paul Liem has stated: “Regime change” is a blunt instrument, allowing no paths to human security other than the collapse of state’.¹⁰⁹ Thus, one should be extremely careful to use human rights as a tool for other foreign and security policy goals, such as nuclear disarmament and non-proliferation.

3.2.2. Production of Legal Effects

Placing the North Korean human rights situation on the Security Council agenda is a serious step¹¹⁰ which has not only many political implications, but also legal ones. Thus, from an international legal standpoint it is not irrelevant that North Korean human rights have been brought within the realm of the Security Council. In fact, this may provide an opportunity to strengthen existing international legal obligations pertaining to the North Korean human rights situation, or even to create new ones.

The Security Council is able to take decisions that legally bind all the member states of the world organization within the realm of international peace and security.¹¹¹ As laid down in article 25 of the UN Charter, the member states of the world organization ‘agree to accept and carry out the decisions of the Security Council’. The International Court of Justice has in its case-law held that the decisive factor in determining whether Security Council resolutions are legally binding or not is the language adopted, as it is indicative of the Council’s intentions.¹¹²

In its primary task to maintain and restore international peace and security the Security Council is engaged in a variety of activities, the legal effects of which greatly vary,¹¹³ ranging from situation-specific measures to ‘the capacity to enact rules of a general nature when it acts to maintain international peace and security’.¹¹⁴ Indeed, it has exercised its powers to secure international peace and security so expansively and creatively in the post-

108 Feffer 2005.

109 Liem 2014, p. 124.

110 Kirby 2015, p. 32.

111 Popovski and Fraser 2014, p. i.

112 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, para. 114.

113 Breakey 2014a, p. 51.

114 Wouters and Odermatt 2014, p. 73.

cold war era that many academics as well as states have claimed that the Security Council exercises legislative powers.¹¹⁵ For example, the creation of the two *ad hoc* international criminal tribunals by UNSC resolutions directly obligating UN member states to cooperate with them has been understood as legislative activity.

The North Korean human rights situation is a country-specific situation, and any adopted measures will remain geographically limited to this particular state. This basic form of Security Council operation does not entail general law-making, but rather the creation of international legal obligations upon the parties to the particular situation.¹¹⁶ As the Security Council has not yet adopted any specific human rights resolutions on North Korea there are consequently no direct legal obligations placed upon the UN member states on how to address the particular case of North Korean human rights.

Despite the lack of concrete measures by the Security Council, the fact that human rights are discussed as a separate agenda item therein constitutes already a small, but important, step forward. The placement of human rights on the SC agenda will make it easier in the future to proceed with the possible prosecution of North Korean leaders in case a window of opportunity would open, as only one state can refer the matter to the SC debate.¹¹⁷ While the prospects of achieving consensus between the permanent members of the Security Council on, for example, adopting human rights based sanctions or a referral to the ICC are small at this point, this does not mean that the Security Council action has no legal impact on the situation.

The nascent linkage between human suffering in North Korea and the issue of denuclearization provided for by the Security Council's non-proliferation resolutions in recent years may prove a way to impose international legal obligations on UN member states to protect the human rights of North Koreans. First, UNSC resolution 2397 of 2017 with regard to non-proliferation took decisive action against the practice of forced labour abroad. By deciding that member states must repatriate North Koreans working abroad, as well as deciding that they shall report on the implementation of these measures, the Council clearly indicated the binding nature for all UN member states to put an end to this practice of forced labour. It further noted that repatriation may be prohibited 'subject to applicable national and international law, including international refugee law and international human rights law'.¹¹⁸ All UN member states with North Korean workers must hence refrain from repatriating North Koreans that may be persecuted back home.

Second, the same resolution imposes international legal obligations upon North Korea, since the Security Council 'demands that the DPRK stop diverting its scarce resources

115 Talmon 2005, p. 128; Popovksi and Fraser 2014.

116 Breakey 2014b, p. 203.

117 Kirby 2015, p. 26.

118 UNSC Res 2397 (2017), para. 8.

toward the development of nuclear weapons and ballistic missiles at the cost of the people in the DPRK'.¹¹⁹ The Security Council has previously used the word 'demand' in connection to previously existing international legal obligations of the addressee, but it can also be used to create new legal obligations,¹²⁰ in this case upon North Korea. From a legal point of view it is also noticeable that the Security Council has with respect to this issue escalated its wording; in previous resolutions it 'regrets the DPRK's massive diversion of scarce resources',¹²¹ whereas it in the latest resolution on non-proliferation it 'demands' North Korea to stop its policy of diverting resources away from its people.

All in all, despite the fact that the Security Council has so far failed to adopt any direct measures with regard to the North Korean human rights situation, the issue has been touched upon in legally binding Security Council resolutions on non-proliferation. The nascent linkage between arms control and human rights can thus serve to strengthen the international legal framework applicable to the North Korean human rights situation, in addition to which specific features of the situation, such as forced labour, may be addressed.

3.3. Future Strategies

The policy options with regard to North Korea are often presented in black and white terms where the policy of engagement is juxtaposed with that of coercion, including regime change, yet there exists a range of mixed options ranging from economic engagement to quiet diplomacy.¹²² The lack of knowledge about what tactic actually would relieve the suffering of ordinary North Koreans has generated calls for more research on the linkage between human rights and arms control,¹²³ but it has also prompted pundits to call for functional diversity,¹²⁴ where all the eggs are not placed in the same basket. Allegedly, a diversified approach would have the greatest chance of success, since the international actors involved in North Korea view the country differently and have distinctive operating conditions.¹²⁵ However, from the prism of human protection, any forcible regime change policies must be removed from the table.¹²⁶

Whatever policy option is chosen, the old constellation where human rights were completely in the shadow of nuclear arms control is gone. If human rights were before seen as a nuisance to be avoided in order not overload the agenda or jeopardize nuclear talks, the situation today is that few would disregard the question. The human rights momentum

119 *Id.*, para. 23 (emphasis in original).

120 Joyner 2017.

121 UNSC Res. 2375 (2017), para. 25 (emphasis in original).

122 Feffer 2005; Clemens Jr., 2016, pp. 329–352.

123 Cha and Lloyd 2016.

124 Feffer 2005.

125 *Ibid.*

126 *Ibid.*

shows that the subject matter is on the agenda to stay, which is shown by the numerous calls on President Trump to discuss human rights at his Singapore meeting with Kim Jong-un in June 2018.¹²⁷ Similarly, the embryonic link between arms control and human rights in the Security Council's non-proliferation resolutions attests to the heightened attention to the human suffering of North Koreans. In fact, binding Security Council resolutions on small, but specific, aspects of the human rights problems may help to take the human rights momentum one step further.

Interestingly, the failure of the international community to stop North Korea's nuclearization may tilt the balance from traditional security concerns to non-traditional. There have been claims calling for accepting North Korea as a nuclear state,¹²⁸ and to focus on the human rights situation instead.¹²⁹ Only in this way could North Korea arguably be socialized into the international community, and accept the obligations of a 'normal state'.¹³⁰ A nuclear recognition – whether tacit or explicit- would allegedly widen the opportunities at hand in spite of potential risks.¹³¹ Such an approach would potentially attract North Korea to the negotiating table, shift more money to the ordinary North Koreans, and alleviate human suffering. However, presently there seems to be no indication of such an option being viable among the main stakeholders.

A policy of engagement seems the preferred route as it would allow the possibility to 'create values for key stakeholders'.¹³² The route of engagement, however, requires cooperation from the North Korean regime: 'only in the context of ongoing relationships can issues of human rights and economic reform be addressed'.¹³³ It seems that the extensive human rights criticism has had some effect, albeit very limited, upon the willingness of the North Korean regime to engage with the human rights machinery. Although some feel that no changes have occurred in Pyongyang,¹³⁴ the shift to accountability in the UN human rights machinery upset Kim Jong-Un. The calls for a referral of the North Korean situation to the ICC in the COI report was said to have alarmed the North Korean leader to such an extent that Pyongyang abandoned its policy of non-engagement and launched 'a charm offensive'.¹³⁵ In fact, when the UN General Assembly's third committee focusing on human rights was drafting its resolution on North Korea in consideration of the COI report in October 2014, a North Korean delegation surprisingly met for the first time with the then UN Special Rapporteur on its country, Marzuki Darusman. Its representatives

127 Miles 2018; Bibbins Sedaca 2018.

128 Lankov 2013, p.252.

129 Bell and Fattig 2018; Ben-Meir 2017.

130 Bell and Fattig 2018, p. 40.

131 Jenkin 2018.

132 Clemens Jr. 2016, p. 329.

133 Feffer 2003, p. 166.

134 Clemens Jr. 2016, p. 121; Bell and Fattig 2018, p. 40.

135 Kirby 2014, p. 3; Fifield 2014.

tried to persuade the committee to drop a reference to the ICC in the draft resolution it was preparing in exchange for an invitation for Special Rapporteur Darusman to visit Pyongyang.¹³⁶ When the General Assembly nevertheless went ahead with the resolution containing a mention of referral to the ICC, North Korea withdrew its invitation to the EU's human rights official,¹³⁷ and the UN Special Rapporteur was never extended an invitation. Also, other political manoeuvres show that the COI report had an effect upon North Korea; in 2014 it increased its participation in the UPR and accepted 113 recommendations made to it,¹³⁸ and it also signed as well as ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.¹³⁹ There have also been some 'unconfirmed' reports about improvement of the conditions in detention facilities.¹⁴⁰

These engagement efforts from North Korea's side should be used for any human rights promotion and improved communication with the regime, which should be headed by the UN. The international community could in particular start to seek progress in human rights issues that are not a threat to the regime, as the issue of disability rights have demonstrated.¹⁴¹ At the same time extensive human rights pressure is continuously needed, as the tiny threads of optimism do not extend to the crimes of humanity revealed by the world organization.

One must, however, be wary of the fact that the policy of engagement, similarly to the opposite policy of coercion, is predicated on a desire to 'contain North Korea'.¹⁴² The policy of engagement comes with 'specific, pre-set goals', namely to disarm North Korea and transform its political, social and economic system into what the international community sees fit.¹⁴³ The North Korean human rights project is not to be seen as a neutral endeavour without strategic goals. It builds on a Western understanding of human rights, with an individualized conception of the right-holder in a social system grounded in free market and capitalism, which is distinct from a traditional socialist understanding of human rights. When the day comes that human rights issues are seriously addressed with and in North Korea the human rights agenda should be decided in an inclusive process where North

136 Bellamy 2014, p. 238; Security Council Report, Monthly Forecast, November 2014 – DPRK (North Korea), 30 October 2014, <www.securitycouncilreport.org/monthly-forecast/2014-11/dprk_north_korea_9.php> (accessed 29 June 2017).

137 'North Korea Says it Has Invited European Union Human Rights Official To Visit', South China Morning Post, 31 October 2014, <www.scmp.com/news/asia/article/1628934/north-korea-says-it-has-invited-european-union-human-rights-official-visit> (accessed 29 June 2017).

138 Report of the Working Group on the Universal Periodic Review, DPRK, UN Doc. A/HRC/27/10/Add.1, 12 September 2014, para. 5.

139 North Korea signed the Optional Protocol 9 September 2014 and ratified it in November the same year.

140 Roberta Cohen 2017.

141 Feffer 2017.

142 Choi 2015, p. 15.

143 Id, p. 17.

Koreans partake in the formulation of their own human rights system, with or without a touch of North Korean ‘otherness’.

4. Conclusions

The international community has clearly stepped up its engagement in the North Korean human rights situation with the COI report and the placing of the topic on the Security Council agenda. Awareness of past and present human rights violations has risen, and the vast majority of states seem prepared to condemn North Korea’s repressive government for its crimes against humanity. Human rights are now an integral part of the threats posed by North Korea to international peace and security, no longer to be shadowed by concerns over nuclear North Korea. In spite of the progress on the issue of human rights, the international actors involved are divided over how to deal with the multiple challenges. It appears unclear whether human rights and arms control should be dealt with jointly, as well as what the correct policies are in dealing with North Korea.

There are increasing signs of connecting the issues of arms control and human rights, although major powers such as China and Russia reject such a strategy. Such an approach entails both risks and opportunities. The strategy of linkage may increase the visibility of the important question of human rights, and even pave way for new international legal obligations on UN member states pertaining to the North Korean human rights situation. At the same time, linkage entails a risk of securitization, where human rights are at the danger of becoming tools for interventionist policies aiming to overthrow the North Korean regime. What is more, the human rights movement is not an innocent bystander with respect to the question of whether governmental collapse is to be aimed at or not. The recent focus on criminal accountability in the UN human rights machinery is also based upon a de facto removal of North Korean leaders from power, which stands in contradiction to the policy of engagement otherwise pursued.

The human rights momentum which exists today has guaranteed that human rights must be an integral part of any international responses to North Korea. The impact of the pressure upon North Korea since 2014 has triggered small, but important, openings of interaction with the UN human rights machinery. Although no quick improvements in the North Korean human rights situation are in sight, any opportunities for communication must be utilized as far as possible. It is important that there are concerted efforts via the world organization, where possible national responses, such as that of the U.S., stand supportive of communal engagement in order to suppress charges of the politicisation of human rights. It is also crucial that North Koreans are given ownership over their own human rights system, should that day come.

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