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Human Rights Diffusion in North Korea: The Impact of Transnational Legal Mobilization

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Abstract
This article asks how legal mechanisms are employed outside of North Korea to achieve human rights diffusion in the country; to what extent these result in human rights diffusion in North Korea; and whether measures beyond accountability can be pursued in tandem for more productive engagement. Specifically, it examines how the North Korean government has interacted with the globalized legal regime of human rights vis-à-vis the UN and details the legal processes and implications of the UN Commission of Inquiry report, including domestic legislation, and evidence collection. While transnational legal mobilization has gathered momentum on the accountability side, it is significantly weaker in terms of achieving human rights protection within North Korea given the government's perception of current human rights discourse as part of an externally produced war repertoire. Thus, efforts to engage the North Korean population and government require concurrent reframing of human rights discourse into more localized and relatable contexts.

Keywords: North Korea, human rights, legal mobilization, transnational advocacy, United Nations

1. INTRODUCTION

North Korea occupies an uncomfortable seat within the global narrative of international human rights. The country falls conveniently into the stereotypical savage-victim-saviour (SVS) metaphor,[1] in which North Korea is the savage state, its impoverished or imprisoned citizens the victims, and the international human rights community of UN agencies, Western governments, and non-governmental organization (NGO) activists the saviours. This metaphor has played out repeatedly over the years, from former US President George Bush's post-9/11 speech locating North Korea on the "Axis of Evil" to Hollywood spy films and Youtube parodies. Defectors' personal tales in English have surfaced online in TED Talks and in the real and virtual warehouses of Amazon.com, making the stories more accessible and saleable on a global scale and evoking popular revulsion toward the North Korean government. In addition to annual NGO and CIA reports, UN agencies have consistently addressed North

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1. Mutua (2002), pp. 10–12.

Korean human rights, culminating in the UN Commission of Inquiry (COI) report in 2014, which catalogues human rights violations into categories of crimes against humanity.

While social media helped to get information about North Korean human rights violations out into the world, the COI report on human rights in North Korea represents a critical turning point in elevating the North Korean human rights issue into the global political arena with unprecedented gravity as evidenced by the UN General Assembly voting to table the matter before the UN Security Council for its referral to the International Criminal Court. Political commentary, media, and academic attention have since focused on the report's contents, defector testimonies, and the transnational advocacy process involving civil society groups. European initiatives have also become more visible after publication of the COI report, such as EU dialogue with North Korea, the All-Party Parliamentary Group on North Korea, and the Leiden Asia Centre project on North Korean forced labour in EU countries.[2]

The current trajectory of transnational legal mobilization assumes eventual international prosecution of the North Korean leadership, thus regime termination from the North Korean perspective, causing further political retrenchment with and within North Korea on the subject of international human rights. The question is how to overcome the dilemma presented by the accountability approach and to engage constructively with North Korea on implementing human rights standards within the country, especially given the current climate of increasing security tensions. This paper first introduces the theoretical frameworks of transnational advocacy and legal mobilization. Second, it illustrates how the UN complex mobilizes law vis-à-vis North Korea, specifically how the judicialization of the COI process shifts legal discourse from compliance to accountability. Third, the paper examines subsequent legal undertakings such as domestic legislation in the US and South Korea as well as evidence documentation. Fourth, it analyzes how North Korea contends with transnational legal norms of human rights in relation to its national security. Fifth, the paper concludes with recommendations to reframe the human rights narrative to explore alternative discourses and channels for human rights engagement with and within North Korea. This paper proposes that, instead of centring on accountability measures to deal with North Korean human rights abuses, North Korean human rights discourse should also address more comprehensive and neutral efforts to achieve practical human rights improvement.

2. THEORETICAL FRAMEWORKS ON HUMAN RIGHTS AND LAW

The spiral model of human rights has been a popular theoretical framework to study transnational human rights advocacy in relation to North Korea.[3] Consistently with the SVS metaphor, the spiral model consists of a repressive regime—a transnational advocacy network that "names and shames" and partners with local advocacy groups to pressure the government from above and below to accept and institutionalize international human rights norms.[4] This model has been used to explain that human rights advocacy is working to shame North Korea into making tactical concessions, but that it has yet to move into the stage

2. See e.g. Boonen et al. (2016).
3. Chubb (2014); Chubb (2015), p. 53; Song, Jiyoung (2009), p. 190; Lee, Sang-soo (2012), p. 101; Yeo (2016).
4. Risse et al. (1999); Keck & Sikkink (1998).

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of institutionalizing human rights norm.[5] Progression into the next stage "depends on the feasibility of transnational networks between civil society in North Korea and NGOs outside."[6] North Korea is an uncooperative subject in this model because it stands at a paradigmatic standstill, forcing us to ask what accounts for the blockage and what factors are necessary to move forward. The state appears as if it is in "denial" whereby:

> the norm-violating government refuses to accept the validity of international human rights norms themselves and that it opposes the suggestion that its national practices in this area are subject to international jurisdiction. … The norm-violating government charges that the criticism constitutes an illegitimate intervention in the internal affairs of the country. … [It] may even succeed in mobilizing some nationalist sentiment against foreign intervention and criticism.[7]

At first glance, this description seems to accurately describe the case of North Korea. Based on the COI report, it appears to have resisted the "norms cascade" of international human rights despite participation in the UN and having signed six major international human rights treaties.[8]

Meanwhile, for the next stage of tactical concessions to work, the spiral model requires a strong transnational advocacy network to engage with oppositional forces in the state.[9] The spiral model assumes a local counterpart advocacy network to work from the "bottom up," and this is where it is problematic in the case of North Korea. While many countries have rights advocacy actors who can mobilize and work with a transnational network (e.g. South Korea being a relevant and prominent example since the democracy movement of the 1980s), this is not the case with North Korea. The transnational human rights advocacy network for North Korea is a strong and expansive one—a coalition of various NGOs, UN agencies, defectors, and religious groups working together to pursue extraterritorial political, legislative, and judicial initiatives (e.g. UN General Assembly measures, the COI report, International Criminal Court (ICC) referral, North Korean human rights legislation, sanctions enforcement, and transitional justice mechanisms).[10] But the network and activities exist primarily outside of North Korea, with their strongest nodes in the capitals of South Korea and the US. With the exceptions of subversive information infiltration and underground religious activism, North Korean human rights advocacy is more active extraterritorially, not domestically. The absence of a rights structure as well as rights consciousness within North Korea makes human rights diffusion in North Korea deeply challenging.[11]

The transnational community has not found North Korea's tactical concessions such as treaty report submissions and legal amendments to be satisfactory. The blockage between the concessional phase to the institutionalization phase can be attributed to North Korea's differing political ideology regarding human rights, but also to the absence of a domestic civil society structure in which legal mobilization can work. Human rights diffusion may be synonymous with the prescriptive stage where a state moves from commitment to compliance. Risse, Roppe, and Sikkink explain that "three processes—elite-initiated

5. Lee, Sang-soo, *supra* note 3.
6. Song, Jiyoung, *supra* note 3, p. 190.
7. Risse et al., *supra* note 4, p. 23.
8. Sunstein (1996).
9. Risse et al., *supra* note 4, p. 24.
10. For an explanation on how the movement started, see Chubb (2014), *supra* note 3, pp. 175–96.
11. For a discussion on moving from commitment to compliance, see Risse et al. (2013).

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agendas, litigation, and political mobilization—do the explanatory work between commitment (e.g. treaty ratification by a given state) and compliance."[12] Law is a critical component to the observance of human rights in terms of having lawyers, legislation, and enforcement of rights. The fight for human rights advancement usually goes hand in hand with political liberalism, and often involves a vanguard of activists and lawyers to contest state practices by framing grievances as rights violations.[13] This type of advocacy is usually empowered by allying with international organizations such as human rights NGOs, UN human rights mechanisms, and international or regional courts when available. Legal mobilization comprises a dynamic structure of a coalition of actors who frame grievances usually within a rights discourse, and mobilize other legal actors, networks, institutions, and legal or political processes to implement change.[14] Cause lawyering literature also explains the transformative role of the legal profession as critical actors in rights advancement,[15] with scholars noting the particular challenges of legal mobilization under authoritarian governments.[16] Tam argues that the "legal mobilization under authoritarianism requires both the legal complex and the rights support structure," referring to rights advocacy groups, government-funded legal programmes, a bar association, and an independent judiciary within these categories.[17] A general rights consciousness among the population would also be needed to implement rule of law via the legal complex and rights support structure. While a legal infrastructure in terms of courts, the procuracy, and lawyers exists in North Korea, these are state mechanisms that do not support politically contentious petitions against the government. This paper illustrates how the legal complex and infrastructure instead operate transnationally outside North Korea.

Given that information dissemination and awareness-raising are being addressed, the next objective is to identify ways for the North Korean government to accept and institutionalize human rights norms. The naming and shaming has worked to bring attention to human rights violations in North Korea, but the question remains as to how to constructively influence the North Korean government to improve human rights protection, especially in terms of policy strategy by other governments and transnational actors.[18] Is it possible for the North Korean government to accept international human rights standards? Or is it fundamentally impossible, thus requiring the collapse of Leader Kim Jong Un's rule? Is this necessarily a binary choice? With respect to the COI report, Danielle Chubb asks the important question of how to balance its two seemingly conflicting goals, these being "efforts to bring about accountability and efforts to bring about verifiable progress" versus "careful engagement designed to bring about changes in policy and the eventual institutionalization of human rights norms in North Korea."[19] Specifically, "can both these sets of goals be carried out simultaneously, or does progress in one area (e.g. referral to the ICC) inevitably lead to a stalemate in another

12. *Ibid.*, p. 11, citing the work of Simmons (2009).
13. Halliday et al. (2007), pp. 34–7.
14. *Ibid.*; Epp (1998).
15. Sarat & Scheingold (1998); McCann (1994).
16. Tam (2013); Moustafa (2007), pp. 193–217; Fu & Cullen (2008), pp. 111–27.
17. Tam, *supra* note 16, pp. 25–6. We see evidence of the legal profession being a threat to governments as human rights lawyers and staff are arrested, detained, and disappeared for protesting repressive practices by those in power.
18. Chubb (2015), *supra* note 3, pp. 51–72.
19. *Ibid.*, p. 69.

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(e.g. greater disengagement due to DPRK hostility over the ICC referral)?"[20] Dustin Sharp asks this on a global scale:

> To what extent should human rights reporting in the twenty-first century be (1) largely limited to shaming and denunciation, and (2) constructively propose and engage with the hard and pragmatic policy choices necessary to build a world where fuller enjoyment of human rights is genuinely possible?[21]

He argues that the two choices should be treated as "poles on a continuum rather than a simple binary," and that moving the discourse toward constructive engagement constitutes "an increasingly critical component of global governance."[22] What complicates constructive engagement is the security issue on the Korean peninsula as the North Korean government continues to test missile and nuclear capability in direct contravention of UN Security Council Resolutions. Resulting US and international sanctions and a hard-line approach by the former Park Geun-hye administration have further isolated the North Korean government into an increasingly defensive posture.

Notwithstanding variables of international politics, scholars across disciplines in political science, sociology, and anthropology recognize the importance of localizing international human right legal norms within domestic cultural contexts for more successful norm diffusion within society. For example, Hafner-Burton argues that foreign proponents of human rights can risk failure or backlash if they "use their power to coerce or persuade—without attention to the local context, perspectives of local partners, or preexisting normative frameworks."[23] Acharya calls localization a "congruence-building process" that focuses on the agency of "norm-takers," and includes the processes of framing language and grafting norms consistent with a "preexisting local normative order."[24] He explains that norm diffusion is quicker when the norm "resonates with historically constructed domestic norms."[25] Legal anthropologist Sally Engle Merry has also argued that it is crucial to translate global human rights discourse into the local vernacular for local adaptation to occur.[26] She pushes beyond the spiral model's focus on the relationship between transnational activists and governments by examining "the interface between global ideas and those of local groups."[27] Merry makes the same argument that "[t]his is the paradox of making human rights in the vernacular: in order to be accepted, they have to be tailored to the local context and resonate with the local cultural framework."[28] In the case of North Korea, the challenge is to standardize human rights norms not just as a matter of government policy in the form of reluctant tactical concessions, but as rights consciousness among the general population to raise expectations of human rights protection.

The perspective of legal mobilization may aid in parsing the nuances of accountability and engagement as parts of a continuum instead of exclusive priorities. This paper looks to the

20. *Ibid*.
21. Sharp (2016), p. 74.
22. *Ibid*.
23. Hafner-Burton (2013), pp. 153–4.
24. Acharya (2004), pp. 242–3.
25. *Ibid*., citing Checkel (1998), p. 4.
26. Merry (2006).
27. *Ibid*., pp. 221–2.
28. *Ibid*., p. 221.

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legal infrastructure employed outside North Korea to achieve human rights diffusion in the country, via UN judicial mechanisms, legislation, and other legal efforts; to what extent these result in human rights diffusion in North Korea; and whether measures beyond accountability can be pursued in tandem for more productive engagement.

3. LEGAL MECHANISMS FOR HUMAN RIGHTS COMPLIANCE

Given the intransigence of North Korea's position on human rights, institutional participation on the part of the UN vis-à-vis North Korea has escalated in the past decade. The failure of traditional UN human rights mechanisms, such as international human rights treaty bodies, the special rapporteur, and the Universal Periodic Review, to correct the most egregious human rights abuses in North Korea led to the creation of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK), an emerging quasi-legal mechanism that relies on judicialized processes, moving beyond treaty monitoring toward fact-finding and prosecution.

3.1 North Korean Response to Human Rights Mechanisms

On the one hand, North Korean participation on the international treaty level appears encouraging. Besides having ratified major treaties since 1981, it ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography in 2014, and the Convention on the Rights of the Persons with Disabilities (CRPD) in December 2016.[29] Signature or ratification, however, may often be a low-cost symbolic gesture as opposed to actual implementation via domestic legislation.[30] Treaty body reports have also been sporadic, though recent submissions were made in 2016 for the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). North Korea was also initially amenable to the Universal Periodic Review system (UPR) enacted in 2006 to monitor human rights among and with the participation of all its Member States, calling it "an effective and important mechanism for reviewing the human rights situation of all countries in [an] impartial and objective manner."[31] However, the North Korean government rejected all recommendations in 2009, only to respond shortly before the second UPR review in 2014 to accept about half, mostly in response to the COI report.[32]

29. Prior to UN membership in 1991, North Korea acceded to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1981, and the Convention on the Rights of the Child (CRC) in 1990. North Korea tried to withdraw from the ICCPR in 1997, but was denied by the Human Rights Committee on grounds that the treaty did not permit withdrawal. Evatt (1999), p. 259. It later acceded to the Convention on the Elimination of Discrimination Against Women (CEDAW) in 2001. See OHCHR (2016).

30. Simmons, *supra* note 12; Hathaway (2007).

31. UN Human Rights Council (2014c).

32. Of the 167 recommendations from participating countries, they rejected 50 at the outset for "slander" against the country and, of the remaining 117, the North Korean government stated acceptance of 81, partial acceptance of six, noting of 15, and rejection of 15. For a list and description of the recommendations, see OHCHR (2014). As for the 2014 UPR cycle, out of 268 recommendations, North Korea accepted 113 recommendations and rejected 93 because "they seriously distorted the reality of and slandered the country driven by sinister political motivation" or were found "incompatible with the social system and domestic law of the DPRK." *Ibid.*

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While North Korea had made attempts at treaty-related legal revisions via treaty body responses, overall unsatisfactory results led to the appointment of a special rapporteur on the situation of human rights in North Korea in 2004.[33] North Korea vehemently opposed the appointment and refused entry for Special Rapporteur Vitit Muntabhorn and his successor Marzuki Darusman, finding the country-specific rapporteurs to be "confrontational in nature."[34] Nearly a decade later, after a series of special rapporteur reports, the Human Rights Council established the Commission of Inquiry.[35]

In 2014, a wave of reports detailed the human rights situation in North Korea: the COI report, a third special rapporteur report, and the UPR report.[36] The North Korean government's response to these resolutions and reports has been strong and adamant, claiming that these are "the products of politically-motivated confrontation and conspiracy on the part of the US and its followers aiming at overthrowing, under the pretext of human rights protection, the sovereign State and a social system of its people's own choice."[37] Yet, in line with tactical concessions of the spiral model, North Korean representatives also tried to make amends, inviting the special rapporteur to visit, being more open to the second-cycle UPR recommendations at the outset, and agreeing to talks with Japanese and EU officials.[38]

3.2 Judicialization of the Commission of Inquiry

In listing evidence of human rights violations as crimes against humanity and in stating that the North Korean leadership must be held internationally accountable for its criminal culpability, the COI report represents what Kathryn Sikkink identifies as the emerging global, juridical norm or "new orthodoxy" that calls for accountability of those responsible for genocide, war, crimes, and crimes against humanity.[39] While the COI report is significant in its legal and political effect, being the most professional, comprehensive, and detailed report of human rights violations in North Korea to date, it is worth mining the purpose and methodology of the Commission itself to understand fully how it functions as a quasi-judicial body in the realm of international human rights institutions.

The UN Human Rights Council has resorted to Commissions of Inquiry in the past 20 years to send fact-finding missions to investigate violations of international humanitarian law and international human rights law in armed conflict areas.[40] Each Commission of Inquiry has had a slightly different character, scope, and methodology according to its respective mandate, but is basically tasked to identify legal violations, ensure accountability, and

33. For example, see the concluding observations of UN treaty body reports. OHCHR (2017).

34. Permanent Mission of the DPRK to the United Nations Office and Other International Organizations in Geneva, Opening Statement by H.E. Mr Ri Tcheul, Ambassador and Permanent Representative, at the 13th Session of the Human Rights Council, Consideration of the UPR Outcome Report on Democratic People's Republic of Korea, in National Human Rights Commission of Korea (2010), pp. 333–4.

35. UN Human Rights Council (2013).

36. These documents may be found at UN Security Council (2017).

37. UN Human Rights Council (2014a), p. 15.

38. For a review of North Korea's UN involvement, see Bellamy (2015).

39. Sikkink (2011), pp. 13–18.

40. These include the former Yugoslavia (1992–94), East Timor (1999), Togo (2000), Darfur (2004), Timor-Leste (2006), Lebanon (2006), Guinea (2009), Cote d'Ivoire (2011), the Syrian Arab Republic (2011–14), the Occupied Palestinian Territory (2012), DPRK (2013) Central African Republic (2013), Sri Lanka (2014), among others.

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propose remedies. The UN High Commissioner for Human Rights (OHCHR) Zeid Ra'ad Al Hussein explains their current role:

> Commissions of inquiry and fact-finding missions have proved to be valuable in countering impunity by promoting accountability for such violations. They gather and verify information, create an historical record of events, and provide a basis for further investigations. They also recommend measures to redress violations, provide justice and reparation to victims, and hold perpetrators to account.[41]

This is in line with public international law scholar Larissa van den Herik's argument that international Commissions of Inquiry have evolved from its original purpose of fact-finding for mediating and conciliatory purposes between two parties at conflict with each other to one of "*de facto* law-applying authorities."[42] Van den Herik follows the progression of the UN Human Rights Council's Commissions of Inquiry in the past decade and the increasing number of mandates requiring accountability, including recommendations that led to the respective creation of the international criminal tribunals for former Yugoslavia and Rwanda, as well as the referral of Sudan to the ICC.[43]

North Korea is no exception. The Commission was mandated to "investigate the systematic, widespread and grave violations of human rights in the [DPRK]…, with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity."[44] This mandate is instructive in that it presupposes human rights violations and tasks the Commission to find full, essentially criminal, liability for those violations deemed crimes against humanity.[45] In other words, it represents the most recent culmination of this increasingly juridical trend where the Commission of Inquiry has moved well beyond merely fact-finding to applying the law and proposing legal remedies of accountability:

> [T]he mandate instructed the commission to use international law, and in particular international criminal law language, to legally characterize given facts and thereby express a certain indignation and to evoke an external response rather than solely as a lens to select relevant facts.[46]

UN Human Rights Council Commissions of Inquiry have especially moved from a primarily fact-finding function to a *de facto* judicial or prosecutorial function. Justice Kirby states that the COI Commissioners "were not acting as UN judges or prosecutors."[47] However, it appears to act as an authoritative, quasi-judicial body.[48] In fact, its membership and

41. OHCHR (2015), p. V.

42. Van den Herik (2014), pp. 1–30.

43. *Ibid*., p. 28.

44. UN Human Rights Council, *supra* note 36.

45. Under Article 7 of the Rome Statute, crimes against humanity refer to the following: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law…; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

46. Van den Herik, *supra* note 43, p. 29.

47. Kirby (2014), p. 293.

48. OHCHR, *supra* note 42, p. 7.

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procedural guidelines display a strongly legal nature. Two of the Commissioners are jurists: Michael Kirby is a retired Australian judge, while Marzuki Darusman was the Attorney General of Indonesia during 1999–2001. (The third Commissioner is Sonja Biserko, a former diplomat and Serbian human rights activist who founded the Helsinki Committee for Human Rights in Serbia.) The Commission took a decidedly legal approach. It gathered evidence from over 240 witnesses (84 in public) according to a "reasonable grounds for belief" standard of proof; it applied rules of international human rights law to the facts reported by witnesses; and it pronounced the violations of law, with recommendations for prosecution and other institutional remedies. The COI shifted the human rights discourse on North Korea from investigation and monitoring of human rights violations to legal accountability: (1) delineating those institutions and individuals responsible for crimes against humanity and (2) demanding accountability of the perpetrators before an international tribunal. Van den Herik interprets that

> the main difference between traditional and contemporary commissions is thus not in their resort to international law, but rather the underlying purposes of their mission. … Where traditional commissions of inquiry aimed to conciliate and pacify, contemporary human rights commissions rather condemn and provoke.[49]

The COI recommendation to create a UN field office to continue investigations and documentation of North Korean human rights abuses sustains the accountability mechanism. After some politicking about the location, the UN field office opened in Seoul in 2015 for the practical need to access and interview North Koreans given its mandate to "[s]trengthen monitoring and documentation of the situation of human rights as steps towards establishing accountability in the DPRK."[50] With only half a dozen staff, the UN Seoul office is limited in its capacity. Therefore, other UN mechanisms were employed, such as sustaining the special rapporteur position with the 2016 appointment of Argentinean lawyer Tomás Ojea Quintana, as well as designating two independent experts to "explore appropriate approaches to seek accountability" and "recommend practical mechanisms of accountability … including the International Criminal Court" over a period of six months.[51] Quintana has encouraged the North Korean government to continue engaging with the existing UN human rights mechanisms,[52] while independent experts Sonja Biserko and Sara Hossain advanced the discourse on accountability by mapping the complexities and options for prosecution and transitional justice, ultimately recommending more extensive probing of international and domestic tribunal options.[53] Meanwhile, the COI members and former special rapporteurs, along with other senior advocates, launched a "Sages Group on North Korean Human Rights" to continue their active role in recommending strategies for human rights improvement in North Korea, including international prosecution.[54]

49. Van den Herik, *supra* note 43, p. 34.

50. OHCHR Seoul (2016).

51. UN Human Rights Council (2016), Arts. 10, 11, 12.

52. UN Human Rights Council (2017b).

53. UN Human Rights Council (2017a).

54. These include former ICC President Song Sang Hyun, US Special Envoy for North Korean Human Rights Ambassador Robert R. King, and Republic of Korea Ambassador for Human Rights, Lee Jung-Hoon.

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4. LEGAL MOBILIZATION AFTER THE COI

Besides further UN mechanisms, the COI report has helped to propel further action such as quicker passage of human rights domestic legislation in the US and South Korea, and a drive toward documentation of human rights abuses for future accountability purposes. This section explains the legislative and policy implications in both the US and South Korea for North Korean human rights abuses, and raises the issue of standardizing and harmonizing methodologies for appropriate evidence collection.

4.1 Legislation

As for legislation in the US, the North Korean Human Rights Act of 2004 has been reauthorized through 2017 to fund humanitarian assistance to North Koreans, information dissemination into North Korea, and NGO programmes supporting "human rights, democracy, rule of law, and development of the market economy in North Korea."[55] While the pre-existing North Korean Human Rights Act stands as separate legislation to promote human rights improvement in North Korea, the North Korea Sanctions and Policy Enhancement Act was passed in February 2016 to focus on trade sanctions due to continued North Korean missile and nuclear testing. The new law inextricably makes human rights improvement conditional to the lifting of US sanctions, permanently and effectively tying human rights to the security issue of North Korea. For example, it stipulates that the State Department should report to Congress about "each political prison camp in North Korea; and the identity of each person responsible for serious human rights abuses or censorship in North Korea."[56] Sanctions may be suspended if the president certifies to Congress the following human rights improvement, among others:

- significant steps toward accounting for and repatriating abducted or unlawfully held citizens of other countries;
- significant and verified steps to improve living conditions in its political prison camps;
- significant progress in planning for unrestricted family reunification meetings.[57]

Furthermore, sanctions may terminate conditional upon whether the North Korean government has:

- released all political prisoners, including detained North Korean citizens;
- ceased its censorship of peaceful political activity;
- taken significant steps toward establishment of an open and representative society;
- fully accounted for and repatriated all abducted or unlawfully held citizens of all nations.[58]

55. Lilley & Solarz (2012).
56. North Korea Sanctions and Policy Enhancement Act of 2016, Title III, Secs. 302–303.
57. *Ibid*., Sec. 401.
58. *Ibid*., Sec. 402.

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Pursuant to the North Korea Sanctions and Policy Enhancement Act and related Executive Orders,[59] this linkage has been further solidified in the US Department of the Treasury's Office of Foreign Assets Control designation of North Korean Leader Kim Jong Un, ten officials, and five entities for "ties to North Korea's notorious abuses of human rights."[60] Essentially, any property or interest thereof of the named individuals and entities is frozen in US jurisdiction, while transactions by US citizens that benefit the named individuals and entities are forbidden.[61] The Treasury designation appears to have more symbolic than practical effect, but it signals that human rights have been firmly incorporated as a priority in political dealings with North Korea, satisfying past calls for moving US and North Korean dialogue toward a Helsinki-type process.[62]

In South Korea, the North Korean Human Rights Act was enacted on 3 March 2016, after more than ten years of various bills being introduced in the National Assembly.[63] Not just in response to the COI report, but also recent nuclear tests by North Korea, the passage of the law represents a certain degree of bipartisan concession that North Korean human rights needs to be addressed in a more formal and unified approach by the South Korean government. Institutionally, it creates (1) a North Korean human rights advisory committee under the Ministry of Unification; (2) a North Korean Human Rights Foundation to help research, strategize, and fund for human rights improvement in North Korea; and (3) the appointment of a North Korean human rights ambassador-at-large by the Ministry of Foreign Affairs.[64]

Significantly, the North Korea Human Rights Act also changes the dynamics of evidence collection. It expands the responsibilities of the Ministry of Unification (MOU) to (1) formulate a basic plan every three years in the areas of inter-Korean human rights dialogue and humanitarian assistance; (2) establish a database archive to research and collect information regarding (i) the human rights situation in general, (ii) matters of abductees, prisoners of war, and separated families, and (iii) such other matters deemed necessary; and (3) report annually to the National Assembly.[65] Information from the database archive must be transferred to the Ministry of Justice every three months.[66] The MOU has traditionally subcontracted interviewing of North Koreans to an NGO called the Database Center for North Korean Human Rights (NKDB), but this is likely to be handled by the MOU directly. This calls into question what the procedures and standards would be in transforming the data into evidence for eventual prosecution by either a domestic or international mechanism, and again necessitates a discussion of harmonizing criteria, standards, and methodology in evidence determination. The North Korean Human Rights Foundation created under the law would have to address this task.

59. Executive Order 13722 of 15 March 2016; Executive Order 13687 of 2 January 2015.
60. US Department of Treasury (2016).
61. *Ibid*.
62. Cohen (2004).
63. 북한인권법 [North Korean Human Rights Act 2016], Law No. 14070 (enacted 3 March 2016, entry into force 4 September 2016).
64. *Ibid*., Arts. 5, 9, 10.
65. *Ibid*., Arts. 6, 13, 15.
66. *Ibid*., Art. 13(5).

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4.2 *Documentation and Evidence Collection*

With accountability as a legal priority in the discourse of North Korean human rights, data collection and documentation for prosecution and transitional justice measures have become increasingly significant. Fact-finding methodology, standards of proof, and evidentiary requirements often differ according to which accountability mechanism is being pursued, whether it be international criminal prosecution, South Korean prosecution, or other transitional justice mechanisms, such as truth and reconciliation Commissions. Discerning the most appropriate accountability mechanism, corresponding evidentiary requirements, and whether proper fact-finding methodology was employed would constitute the next important stage.

International human rights law scholar Philip Alston calls for "a far more systematic and critical analysis of the theory and practice underlying … the use of international fact-finding techniques such as international COIs."[67] This is especially pertinent in the accumulation and presentation of evidence in the event of future prosecution. The history of acceptance of COI documentation by international criminal tribunals is instructive. For example, the respective international criminal tribunals for Rwanda and the former Yugoslavia did not approve the use of COI documentation because they questioned its "integrity and probative value."[68] A decade later, the ICC prosecutor accepted Commission findings on Sudan "without the necessary first-hand verification or corroboration of information, without conducting *in situ* visits, and without adequately exploring possibilities for cooperation with the government."[69] Reliance on documentation that employed a lower standard of proof also met with criticism from the human rights community.[70] These criticisms could potentially be equally applied to the COI on North Korea. Regarding evidence collection, the COI report itself points out challenges with respect to gaining on-site access and direct input from the North Korean government.[71] Other issues exist with respect to the lack of a physical visit to North Korea, witness anonymity, and lack of published geographical sites and dates of incidents for testimonies. Because North Korea denied the COI members to visit, the Commission had to pursue "a novel, transparent, and innovative methodology," mainly the reliance on public hearings.[72] In relying heavily on personal testimonies, Judge Kirby explains that witness protection was the utmost priority according to its mandate, and that witness identities and identifying factors could not be divulged without risking their personal safety and that of remaining family members in North Korea.[73] While the lack of dates and named sites among testimonies in the COI report makes it difficult to determine the temporal and geographical patterns of human rights violations in North Korea, this too was for the sake of protecting witnesses and their families. To address some of the procedural difficulties in standardizing evidence for an eventual accountability mechanism, the COI recommended the creation of a UN field office to continue investigations partly for this purpose.

Jurisdictional venue also presents a challenge. The COI's first recommendation is referral to the ICC, failing that, then other hybrid or alternative tribunals. However, the ICC as an option is

67. Alston (2011), p. 85.
68. Neale (2011), p. 88, citing UN Security Council (1994) and UN Security Council (1992).
69. *Ibid*.
70. *Ibid*., citing to the *amicus curiae* briefs submitted to the ICC in 2006 relating to Darfur.
71. UN Human Rights Council (2014b), p. 4.
72. Kirby, *supra* note 48, p. 295.
73. *Ibid*., p. 296.

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difficult, given the statutory limit of 2002 for crimes committed before that year, and the unlikelihood of the UN Security Council approving referral to the ICC, though it has accepted to consider the COI report.[74] Meanwhile, the creation of an alternative ad hoc tribunal presents a host of challenges in securing the proper jurisdiction, budget, staff, resources, language capacity, as well as the same dilemma of presenting the accused before the tribunal. One matter that is hardly addressed is to what extent Leader Kim Jong Un would be responsible for crimes against humanity committed before he assumed power in 2011.[75] The scope and scale of abuses detailed in the COI report include decades of injustices under the rule of his father and grandfather, but criminal accountability pre 2011 would trace back to his forefathers and the senior and subordinate officers under their respective administrations. As for attributing criminal liability to North Korean individuals and organizations, especially the State Security Agency and the Organization and Guidance Department of the Korean Worker's Party, comparative precedents such as the post-transition soviet bloc states show that it has been extremely difficult to prosecute individuals in the security apparatus for accountability.[76] Some advocates find that a paper trail would be the critical evidence needed to find accountability against Leader Kim Jong Un and those in the State Security Office and the Organization and Guidance Department, such as currently sought in Syria against President Bashar al-Assad.[77]

The potential jurisdictional role of the Republic of Korea's Ministry of Justice Prosecutor's Office must also be weighed. Current public discussions are dominated by talk of ICC referral but very little regarding the principle of complementarity with respect to South Korean prosecutorial and judicial institutions, especially in the event of regime transition in the unforeseeable future.[78] NGOs have also deliberated the potential to apply universal jurisdiction of other states with official relations with North Korea.[79] Human rights advocates are actively searching for appropriate accountability and transitional justice mechanisms for the redress of grievances and injustices suffered by North Koreans, including truth and justice Commissions, memorials, and memory banks—essentially mechanisms that can give priority to North Korean voices and serve a healing purpose.

Many institutional actors have collected information from North Korean defectors in the past several decades, but the question is how to standardize and systemize this information in the eventuality of criminal prosecution, either internationally or domestically, or for other transitional justice mechanisms. The sheer number of institutions involved in this process raises the questions of (1) how all the data will be co-ordinated, standardized, and organized to avoid overlap, redundancies, inaccuracies, leading questions, exaggerations, changes in testimonies, inefficient questioning; (2) how standards of proof and qualifying evidence will be collected for both international and domestic criminal procedures; and (3) equally importantly, whether the interviewing of North Korean subjects is being conducted in an ethical manner to begin with.

74. *Ibid*., p. 311.

75. This contestability was recently addressed in the UN Human Rights Council, *supra* note 54.

76. Hosaniak (2016b).

77. Burt (2016); see also Taub (2016).

78. Among discussions for potential ICC referral, former ICC President Song Sang Hyun explained the difficulties of ICC referral, while panelist Christine Chung mentioned the role of the ROK prosecutorial system. OHCHR Seoul and Yonsei Center for Human Liberty (2016).

79. Kwon (2015).

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For example, upon arrival in South Korea, North Koreans are held at a detention facility and questioned by intelligence officials, prosecutors from the Ministry of Justice, and also by the government-approved think tank, the Korean Institute for National Unification (KINU), and, more recently, the National Human Rights Commission of Korea (the latter two for research purposes).[80] North Koreans who pass the initial stage of interrogation are then transferred to the Hanawon facility for three months of assimilation programmes where they have also been interviewed by NKDB upon their consent. NKDB has operated almost 20 years under contract with the MOU. It has interviewed over 20,000 North Koreans since 1994, and has an independent raw database of approximately 56,000 cases of 31,000 individuals (including those outside South Korea, such as overseas labourers, prisoners of war, etc.).[81] With the entry of the UN Seoul office, interviews are conducted on the same day at Hanawon by these two entities but with different interviewee groups. Despite the vast database of interviews and information of NKDB, the UN Seoul office must start fresh with its own standardized procedure for interviews in the event the information must be used for an international tribunal such as the ICC. However, it faces some difficulties in interviewing North Koreans, as many live outside Seoul, are not paid for their transportation or time, and many work, making it hard to visit the UN office during working hours during the week, thus making for the time-consuming task of the small UN staff visiting the homes of potential witnesses. Besides the South Korean government, think tanks, and the UN agency, numerous NGOs and researchers have also interviewed North Koreans after they leave Hanawon and resettled, often in exchange for payment.[82]

Of special concern is whether the distinction is being made between interrogation, questioning for criminal procedural purposes, and voluntary interviewing, and whether both the interviewers and the North Korean witnesses/subjects are fully aware of protecting their rights during these processes. For example, questioning by prosecutors from the Ministry of Justice also raises the issue of criminal investigation and interrogation, in which case, the applicability of North Koreans' various constitutional rights, such as the right to counsel, also merit attention. The involvement of a research think tank, KINU, in a governmental detention facility also deserves more scrutiny in terms of professional research ethics, especially as it is not clear whether North Koreans can discern the compulsory or voluntary nature of questioning and whether they are fully aware of their rights as research subjects. The recent addition of the National Human Rights Commission of Korea as an interviewer also calls into question similar concerns as well as its redundancy given KINU's White Papers on human rights gleaned from detained North Koreans.

Different actors gather and compile evidence on the assumption of future prosecution or transitional justice mechanisms:

> human rights lawyers, activists, and experts representing a variety of organization with different objectives ultimately share assumptions about the predominant role of the law and about certain methodological standards that need to be satisfied for the data to actually produce evidence.[83]

Toward this goal, the topics of information sharing, capacity sharing, and legal analysis must be seriously discussed among the UN agencies, South Korean governmental agencies, and NGOs,

80. Interview with NKDB Director (Seoul, Korea, 29 February 2016).

81. *Ibid*.

82. For a discussion of the credibility of defector testimonies, see Song, Jiyoung (2015).

83. Perugini & Gordon (2015), p. 7.

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given the legal precision needed for evidentiary and due process requirements in accountability mechanisms such as courts. Technological advances may assist in organizing and co-ordinating existing data and evidence, but due process requirements of international criminal tribunals must critically examine the methodology of evidence collection in the first instance. For example, founded in 2014, Transitional Justice Working Group (TJWG) maps mass execution and gravesites in North Korea, and also interviews North Koreans in its pursuit of data regarding crimes against humanity. TJWG is networking with Silicon Valley for technological innovation and assistance, as well as with international human rights lawyers, as it is keen to collect data according to evidentiary procedural rules required by international criminal tribunals.[84] TJWG is optimistic about organizing data and evidence for future prosecutorial purposes, citing software approaches such as by Benetech and the Human Rights Data Analysis Group (HRDAG), which can synthesize data from different sources. Nonetheless, all institutions involved with documentation and evidence collection would benefit from clear standards. While several international guidelines exist on monitoring, reporting, and fact-finding methodologies,[85] the Hague Institute for Global Justice is compiling a *Manual for Multiple Investigations of International Crimes: Guidelines and Best Practices*, which addresses the intricacies and harmonization of different fact-finding methodologies.[86] Those institutions collecting data and evidence would benefit from referencing these guidelines moving forward.

5. NORTH KOREA'S CONCEPTION OF HUMAN RIGHTS AS "LAWFARE"

The North Korean government is, of course, the biggest critic of the COI report, viewing it as explicitly and implicitly calling for the prosecution and thus removal of the North Korean leadership. The North Korean government considers the COI and its accountability measures a direct personal attack upon its leader, Kim Jong Un, but by extension an attack upon its national sovereignty and thereby a threat to its national security.[87] As such, "human rights" are fighting words to the North Korean government and contextualized as a matter of national security:

> It is of the view that as human rights are guaranteed by sovereign States, any attempt to interfere in others' internal affairs, overthrow the governments and change the systems on the pretext of human rights issues constitutes violations of human rights. … [T]he DPRK holds that human rights immediately mean national sovereignty.[88]

Human rights are perceived to be mere pretext or to have an instrumental purpose in the ultimate goal of deposing the current head of government and its administration:

> In the confrontation between the DPRK and US, the US learned that it was impossible to overthrow the people-centred system by mean of political and military threats and pressure as well as the economic blockade. What they found next was the human rights issue.[89]

84. Communications with TJWG members, Seoul, Korea (November 2015 to June 2016).

85. These include the *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (Abraham & Bassiouni (2013)), UN OHCHR's *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (*supra* note 42), and the *HPCR Advanced Practitioner's Handbook on Commissions of Inquiry* (2015).

86. The Hague Institute for Global Justice (2016); Grace & Coster van Voorhout (2014).

87. Korea Central News Agency (2014).

88. UN Human Rights Council (2009), II(2)(15).

89. Korea Central News Agency, *supra* note 88, p. 129.

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So offensive did the North Korean government find the COI report that the DPRK Foreign Ministry condemned a human rights conference held in Washington DC in February 2015 on the COI report's first anniversary.[90]

In a sense, human rights as employed by the COI and accompanying UN mechanisms are viewed as having been weaponized, or what may be termed "lawfare." The concept of lawfare is edifying as a broader lens to study North Korea's reaction. Lawfare was coined in the late 1990s, when US officials objected to and failed to ratify the Rome Statute establishing the ICC (despite then President Bill Clinton signing the treaty), basically resisting the idea of universal jurisdiction by international, national, and regional courts in any attempt to try US and Israeli officials.[91] The definition of lawfare by the US is similar in logic to the North Korean view of avoiding or defending against extraterritorial jurisdiction regarding rights violations committed in the name of national security. Perugini and Gordon explain this growing phenomenon of categorizing human rights in and of itself as a national security threat:

> One of the most common ways of challenging the existing human rights discourse is by pitting it against national security concerns and against real and constructed existential threats. This strategy has become pervasive among conservatives who attempt to limit the impact of human rights campaigns by reframing events … as a security threat to the government's authority or the country's territorial integrity.[92]

This excerpt can be easily referenced not only with respect to North Korea, but to any other state that has breached human rights in the name of national security or evaded court jurisdiction in the name of national sovereignty.[93]

The conception of international human rights gains little traction in North Korea because they are not seen as legitimate to the survival of the North Korean state, which prioritizes security over rights. Perugini and Gordon point out that "[T]he politics of human rights acquires an even more profound connection with sovereign politics since human rights is equated with the state's security."[94] Threats to national security often result in an "increase in discretionary authority" usually through "broad legislative authorizations or through the invocation of emergency powers."[95] In North Korea's case, the discretionary authority is based upon the founding family's fiat and *de facto* emergency powers. As political scientist Jiyoung Song explains about North Korea: "Externally, the regime is trying to abide by international human rights standards where they are acceptable and safe enough to defend the security of the regime."[96] This explains why the same rights it grants to its dutiful citizens are not applied equally to the hostile classes or those who flout government directives, which include those charged with crimes against the state. And yet it is precisely in how the state deals with those charged with crimes against the state that equates to crimes against humanity.

In NGO and media reports, rampant human rights violations in North Korea often equate to the idea that human rights have little conceptual legitimacy in North Korea. Rather than

90. Walsh & Cha (2015).
91. Perugini & Gordon, *supra* note 84, pp. 55–6.
92. *Ibid*., p. 54.
93. For the history and an analysis of US policy towards the ICC, see Fairlie (2011).
94. Perugini & Gordon, *supra* note 84, p. 14.
95. Roth (2008), p. 289.
96. Song, Jiyoung, *supra* note 3, p. 184.

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summarily dismiss that North Korea has no conception of human rights, some scholars have tried to understand the nation's socialist history of rights conception, differentiating the different evolution and conception of human rights in North Korea from that of the Western liberal democratic tradition.[97] Song argues that "the evolution of North Korean rights thinking is not at odds with the broad understanding of 'international' human rights,"[98] especially in noting how North Korea prioritizes cultural relativism over universalism, collective interests over individual rights, socioeconomic rights over civil and political rights, and duties before rights: "[T]he contemporary form of rights thinking in the DPRK, 'our style' of human rights, takes priority in cultural relativism, post-colonial sovereignty, collective interests, materialistic pragmatism and a duty-based language of human rights."[99]

From a socialist perspective, international human rights law is considered an instrumental tool of the Western imperialist bourgeois class, rather than a locally sensitive mechanism to protect workers' rights.[100] Instead of the rule of law that defines most liberal democracies, North Korea follows the Stalinist version of socialist legality whereby the ruler's decrees are considered law, and rights are earned or granted in exchange for the citizens' loyalty to the Korean Workers Party line. This socialist conception is combined with a revolutionary zeal and monarchical tradition particular to the sociopolitical history of the Korean peninsula. This is evident in the "Ten Great Principles of the Establishment of the Unitary Ideology System" (Ten Principles), which has more legal authority and popular observance than the nation's Constitution. Promulgated in 1974 by Kim Jong Il, the Ten Principles constitute a doctrine that all North Korean citizens must memorize and follow in revering Kim Il Sung and his revolutionary thoughts above all else.[101] As stated in one of the subprinciples: "Great Leader Comrade Kim Il Sung's instructions must be viewed as a legal and supreme order and unconditionally realized without excuses or trivial reasons, but with endless loyalty and sacrifice."[102]

The Ten Principles continue with other language such as unconditional acceptance, holy duty, collective spirit, and the words "revolutionary" and "fight" liberally sprinkled. As some of the clauses state, the Great Leader must be protected from attacks and criticism; others are to be judged according to their degree of loyalty to the Great Leader; and there should be no departure from or struggle against the Great Leader's sole leadership. Violating the Ten Principles is equivalent to lèse-majesté, subjecting one at the very least to self-criticism sessions (at which one can publicly confess their minor transgressions in order to pre-empt being informed against) or at worst punishable under the North Korean criminal code as crimes against the state, or treason. While Kim Il Sung is now deceased, the creed stays alive as part of the dynastic legacy and continues to apply to his successors Kim Jong Il and Kim Jong Un.[103]

The Ten Principles override the North Korean Constitution, which has a different function. While Constitutions in liberal democracies are the predominant foundations of rights

97. *Ibid.*; Kim, Soo-Am (2008); Hwang (2014).

98. Song, Jiyoung, *supra* note 3, p. 178.

99. *Ibid*., p. 190.

100. Tunkin (1974), p. 257; Tunkin was a soviet legal theorist as well as a soviet diplomat in Pyongyang during 1949–50.

101. English translation available by Citizen's Alliance for North Korean Human Rights (2016).

102. *Ibid*., Art. 5(1).

103. Han, Myung Sub (2014), p. 50.

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formation and implementation, this is not so with North Korea. Like many Asian Constitutions that are amended numerous times and usually in accordance with the policy objectives of the newer administration, North Korea is no exception.[104] Its Constitution illustrates the sacrosanctity of Kim Il Sung, outlines the structure of the government and policy objectives, and delineates citizens' rights in relation to their duties and loyalty to the state.[105] It is not a Bill of Rights as commonly understood in liberal democracies. The Constitution explains that:

> The laws of the DPRK are a reflection of the intents and interests of the working people and serve as a basic weapon in state administration. Respect for the law and its strict observation and execution is the duty of all organs, enterprises, organizations, and citizens. The state shall perfect the socialist legal system and strengthen the socialist law-abiding life.[106]

Thus, rights consciousness is not an intuitive or learned concept in North Korea given that rights are not promoted in North Korea in the same way as they are in liberal democracies that emphasize constitutional rights or civil liberties via history and classroom education. Instead, North Korea's legal creed is the Ten Principles, which requires allegiance to the Great Leader above all else. Tellingly, North Korea's treaty reports refer to its Constitution, not the Ten Principles, in claiming that the government has a legal framework of human rights.[107] This is not a new development. In his speech at the Supreme People's Assembly adopting a new Socialist Constitution in 1972, Kim Il Sung stated:

> The new Socialist Constitution correctly reflects the achievements made in the socialist revolution and in building socialism in our country, defines the principles to govern activities in the political, economic and cultural fields in socialist society and the basic rights and duties of citizens, and stipulates the composition and functions of the state organs and the principles of their activities. Its purpose is to give legal protection to the socialist system and the dictatorship of the proletariat established in the northern half of the Republic and to serve the revolutionary cause of the working class.[108]

Rights are mentioned from the beginning but only in relation to duties, and in preserving the socialist state and "the dictatorship of the proletariat." The Constitution was revised in 2009 to read that "the [S]tate … shall safeguard the interests of, and respect and protect the human rights of the working people,[109] introducing the words "human rights" into the Constitution for the first time. However, the conception of human rights here is being used within the North Korean socialist context. North Korean human rights discourse is based upon Marxian, Confucian, and *Juche* foundations, which prioritize the collective, familial, and sovereign state interests over that of the individual.[110] North Korea's history presents an argument for cultural relativism in the same vein as that of the Chinese government's long-standing critiques of Western human rights norms and the infamous Lee Kuan Yew "Asian values" debate, placing North Korea firmly within a family of nations that continue to

104. For more discussion on this point, see Goedde (2004).

105. *Ibid*., Yoon (2004).

106. Asiamatters.Blogspot.Kr (2009). Original Korean texts of the DPRK Constitutions are available at North Korea Laws Information Center (2017).

107. For example, UN Human Rights Council, *supra* note 89, Sec. III(1)(A).

108. Kim Il Sung (1972).

109. DPRK Constitution, Art. 8.

110. Weatherley & Song, Jiyoung (2008).

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contend with theories of universal human rights on the principle of subjugating individual rights for the greater collective good.[111] This suggests further academic space to discuss the domestic conceptualization of North Korean human rights from a comparative, socialist constitutional perspective, especially in relation to China, Russia, Vietnam, and other socialist states.

6. REFRAMING THE HUMAN RIGHTS NARRATIVE

As Justice Kirby has stated, at "the heart of the COI" is the "dilemma or paradox of reconciling two streams of accountability and promoting engagement."[112] While the accountability track is gathering momentum, engagement with North Korea is at a standstill. This refers us back to the spiral model where North Korea has been sufficiently shamed globally and has responded with some tactical concessions but not with significant transformations to protect its citizens' fundamental human rights as required under ratified international human rights treaties. According to the latest NKDB investigations, the human rights situation within North Korea does not appear to have improved since publication of the COI report.[113] As Marzuki Darusman has iterated: "The bottom line is we must make a difference for the people on the ground in North Korea. If we do not do that, then we have not succeeded."[114] Jared Genser put it more bluntly: "Justice in accountability is not going to change the lives of the North Korean people."[115] Thus, the question is how to engage with North Korea for the practical effect of improving human rights within.

Some advocates claim that accountability creates pressure on the North Korean state to respond to accusations of human rights violations and to be vigilant about its current and future behaviour on this front, termed "accountability anxiety."[116] This has arguably led to the North Korean government's increasing attention to human rights issues, such as in responding to the latest UPR, inviting High Commissioner for Human Rights Zeid Ra'ad Al Hussein, and submitting treaty reports for the CEDAW and the CRC.[117] More recently, in 2016, the Institute of Human Rights Issues was created in the North Korea Academy of Social Sciences. While the accountability mechanism forces the DPRK government to respond on some level, the accountability angle alone is not sufficient in changing the human rights landscape in North Korea. The deeper challenge is in creating rights consciousness within North Korean society.

Given the provocative nature of human rights discourse with the North Korean government and the lack of rights consciousness within the general population, the next stage of discourse could contemplate reframing human rights discourse in more neutralized contexts without sacrificing or negotiating away fundamental human rights principles. The point is not to avoid human rights language and principles to placate the North Korean government, but, as stated at a European Parliament workshop, it is "important to connect to North Korea

111. *Ibid.*; Zakaria (1994).
112. Kirby (2016).
113. Database Center for North Korean Human Rights (NKDB) (2016).
114. Cha & DuMond (2015), p. 13.
115. Genser (2016).
116. Walsh & Cha, *supra* note 91, p. 111.
117. Hosaniak (2016a).

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with its own narrative."[118] As stated earlier, Merry is concerned with how transnational knowledge of rights becomes localized: "Human rights must become part of local legal consciousness in order to fulfill their emancipatory potential, yet activists in several countries told me that the knowledge of human rights within village communities was quite limited."[119] Tellingly, North Koreans who are questioned upon arrival in South Korea do not say they left North Korea because of human rights violations.[120] The words "human rights" are not in the daily lexicon of the North Korean population. They have left for reasons of hunger, poverty, to support family members or in search of family, to escape imprisonment, or to have better life opportunities for themselves or their children. Thus, the critical issue is how to introduce or transform the language of international human rights into a more culturally relatable discourse for the North Korean population, while at the same time searching for depoliticized entry points for human rights engagement with the North Korean government, discussed below.

7. RECOMMENDATIONS

To address Sharp's continuum of accountability and engagement, the challenge lies in contextualizing human rights in more relatable terms to different sectors of North Korea: its government, its elites, and its mass population. For resonance with pre-existing cultural norms, this would require framing human rights in more economic and social terms consistent with socialist ideology and even with a sociohistorically Asia-centred approach to collective rights. Another way to engage on rights protection and improvement may be to employ alternative frameworks that incorporate human rights principles without necessarily using the words "human rights." This is not to say that the language of "human rights" cannot or should not ever be used in interacting with North Korea, but that rights diffusion may be more successfully localized if it resonates within an easily understood cultural context. Human rights objectives can be and are often addressed in many alternative discourses and frameworks, such as social welfare, development, health and safety, crime prevention, public interest, modernization, education, quality of life, governance, anti-corruption, equality, social justice, access to justice, professional standards, international best practices, and the UN Sustainable Development Goals.[121] Below are some initial recommendations in framing, grafting, and localizing human rights norms.

7.1 Information Campaigns

The transnational advocacy network for North Korean human rights is largely external to the country itself. Managed mostly by educated national and transnational elites consisting often

118. Pardo (2016).

119. Merry, *supra* note 26, p. 178.

120. Han, Dong-ho (2016).

121. In the US, for example, local narratives of gender violence are usually contextualized and addressed in terms of crime prevention, personal safety, gender equality, or feminist jurisprudence, rather than in terms of international human rights (though advocates try to leverage this) (Merry, *supra* note 26). Abolishing the practice of female genital circumcision translated better with some local African communities in terms of personal health and safety rather than what was perceived as a Western cultural condemnation when wielding the language of human rights violations. For a fuller discussion on this, see Steiner & Alston (2000).

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of politicians, UN officials, lawyers, NGO leaders, religious leaders, academics, and North Korean defectors, the actual interaction between this group and North Korean citizens in North Korea is minimal at best and at great risk for the latter. The North Korean human rights discourse has taken place largely without the North Korean people, dominated by advocacy nodes in Seoul, Washington DC, New York, Geneva, and London with legal mechanisms and procedures far removed from the informational realm, comprehension, and daily lives of the vast North Korean majority. One effort at increasing the international awareness of the North Korean population has been through information dissemination such as radio transmissions, leaflets, DVDs, and USB drives with content such as US and Korean films, South Korean Wikipedia, pro-democracy materials, and news about Leader Kim Jong Un.[122] Calls have been made to add human rights literature such as the Universal Declaration of Human Rights, international human rights treaties, accounts of postwar history, and easy-to-read summaries of the COI report.[123] The question is whether the literal transplanting of these texts or smuggling in via USB sticks would be adequate in translating the international human rights discourse into the cultural vernacular of the larger population, much less the rural poor. One recommendation may be to circulate North Korea's own laws and regulations more frequently, highlighting the portions claiming to provide for the economic and social welfare of the people, or even more specific provisions on the protection of workers, women, children, and the disabled.

7.2 Sustaining UN Mechanisms

Given North Korea's participation with the UN complex, institutional channels via international human rights mechanisms and humanitarian projects may be sustained and further maximized under the broader framework of the UN Sustainable Development Goals. North Korea's relationship with the UN regarding human rights is more multifaceted than it appears mainly because the North Korean government is involved with different UN agencies, channels, and programmes, some with relatively more success than others. On the one hand, the relationship seems contentious given North Korea's resistance to human rights monitoring and compliance as seen with UN General Assembly resolutions and the COI report, but institutional engagement nonetheless persists. North Korea has also been a constant recipient of humanitarian assistance since the 1970s and especially during the famine periods of the 1980s and 1990s (though on a restricted basis), which means long-term engagement and projects with UN aid agencies that address issues of economic and social welfare, such as famine, child and maternal health, sanitation, environmental protection, and other sustainable development projects. For example, the Strategic Framework for Cooperation Between the UN and the DPRK (2017–2021) explains the range of programmes with approximately a dozen UN agencies to achieve the UN Sustainable Development Goals.[124] The North Korean government has participated in numerous projects with these agencies on issues related to health, education, environmental protection, sustainable development, trade, and other training programmes related to best practices. Programmes consist of on-the-ground involvement in North Korea as well as bringing North Korean officials to third-party countries for

122. See e.g. the work of the Unificationmediagroup.org (2016) regarding radio broadcasts. For other NGO approaches, see Halversson & Lloyd (2014).

123. Lee, Dong-bok (2015), p. 145; Cha & DuMond, *supra* note 115, pp. XII, 25.

124. UN Division for Sustainable Development (2015).

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education and training workshops. The North Korean government views humanitarian agencies as politically less threatening, referring to technical co-operation as "an important tool of international cooperation for human rights."[125] Thus, smaller-scale aid projects have allowed more on-the-ground interaction with North Korea because they are couched in terms of humanitarian priorities and technical assistance under the umbrella of economic and social rights for the goals of alleviating poverty, famine, and medical issues.

Humanitarian and developmental aid projects are fundamentally about human rights protection and improvement but frequently operate without the words "human rights." Many rights protection issues in North Korea could be framed within the above contexts in relation to vulnerable groups such as women, children, the disabled, elderly, and infirm, especially the detained and imprisoned among these. Roberta Cohen, whose expertise covers both human rights and humanitarian protections in North Korea, has suggested that UN agencies such as WHO, UNICEF, and the World Food Programme (WFP) could initiate plans to help these particularly vulnerable groups.[126] With these types of frameworks, UN agencies can continue to introduce global standards and comparisons, and provide technical assistance and follow-up where necessary. How to reconcile a Human Rights Up Front approach with these alternate discourses is worthy of further debate,[127] the question being whether the language of human rights is necessary for every project proposal if it means sacrificing the project and thus the objective of human rights protection on the ground, especially if being on the ground allows the very opportunities to introduce human rights discourse to officials and recipients. Meanwhile, thematic rapporteurs and treaty body experts will have to continue to push to assist in monitoring and evaluations of subject groups, such as women, children, the disabled, and especially those who are detained. This can be achievable on an incremental level as illustrated by the visit of the special rapporteur on the rights of person with disabilities, Catalina Devandas-Aguilar, in May 2017 at the invitation of the North Korean government.

7.3 Professional and Cultural Exchanges

Non-political, people-to-people exchanges of course continue to be instrumental in building bridges and exposure in the fields of science, sports, arts, music, and environmental protection. Creative, critical, and non-politicized engagement should be explored and pursued with institutional bodies and individuals with a more neutral presence in North Korea, such as the Red Cross, long-standing humanitarian groups, and educators. In terms of collaborative venues, it may help to continue and organize more legal technical assistance and educational programmes via UN agencies and other intergovernmental organizations, academic institutions, and think tanks in countries outside the national security orbit of the US and South Korea, perhaps in countries such as Vietnam, China, and Mongolia with their socialist traditions, or Singapore, Sweden, or the Netherlands with their experiences hosting or interacting with North Korea.[128] For example, precedents exist for UN assistance in the fields of judicial and legal reform, such as with United Nations Development Programme (UNDP)

125. National Human Rights Commission of Korea, *supra* note 35, pp. 334–5.

126. Cohen (2015), p. 25.

127. See UN Secretary-General (2016).

128. For example, see Vietnam's potential role in King (2016). See also the role of NGOs such as Choson Exchange (Chosonxchange.org (2016)) in holding professional training workshops in Singapore and Pyongyang for North Koreans.

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projects on "strengthening legal capacity" in Vietnam.[129] Yanbian University or other North Korean universities could be sites for educational or professional workshops. In 2013, Mongolian President Tsakhiagiin Elbegdorj gave a speech at Kim Il Sung University mentioning freedom, fundamental human rights, and judicial reform,[130] which suggests a communication channel. Legal exchanges should in particular be encouraged and funded for purposes of exposure and to share best practices in both public and private sectors of law, especially concerning judicial processes and remedies. In addition, it is important to integrate the voices and experiences of North Koreans, and to train and empower future generations of North Koreans who can act as professional, legal, and cultural mediators between the two Koreas. The South Korean legal community has started to address this gap in legal consciousness among the North Koreans who have resettled in South Korea.[131]

7.4 Legal Mobilization in South Korea

As for the South Korean legal community on the issue of crimes against humanity in North Korea, the Korean Bar Association has been recognizably active, co-operating with Citizens' Alliance and in publishing reports about human rights and the legal system in North Korea.[132] In parallel, Korean legal professionals could propose academic and judicial projects with North Korean counterparts and can continue to engage generally with North Koreans residing in South Korea. A number of law firms and lawyers work pro bono to assist former North Koreans, a primary example being *Bae, Kim & Lee* and its nonprofit public interest law foundation *Dongcheon*. The UN Seoul office has involved the Korean legal profession via the judiciary and prosecutor's office by organizing a conference with the Judicial Policy Research Institute in December 2015 to publicize the COI report and to discuss legal issues pertaining to the North Korean community in South Korea.[133] Participants raised issues about improving rights consciousness and access to justice for North Koreans residing in South Korea about legal issues (e.g. bringing in their children from a third country, divorce, violence, drug possession and use, landlord-tenant issues, wage recovery), some of whom express deep distrust or fear of legal actors in both North and South Korea. Special training and sensitivity in dealing with North Korean women in particular are needed given many histories of sexual exploitation and abuse. One judge spoke of the need to protect properly the rights of North Koreans in South Korea, while an attorney suggested that the North Korean population in South Korea is a "test bed" for the challenges in how South Korea is likely to treat North Koreans with respect to law in the event of unification. The long-term administrative challenge for the South Korean government and legal community is to prepare a policing and judicial infrastructure in scenarios of transition and post-transition,[134] especially in mapping how North Koreans' human rights and constitutional rights would be protected in determining guilt or innocence, whether it be for individual crimes or crimes against humanity.

129. Gillespie & Nicholson (2012), pp. 211–13.
130. Green (2013).
131. OHCHR Seoul & Judicial Policy Research Institute (2015).
132. See e.g. Korean Bar Association (2014).
133. OHCHR Seoul & Judicial Policy Research Institute, *supra* note 133.
134. Song, Sang Hyun (2016).

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8. CONCLUSION

The transnational advocacy network on North Korean human rights has mobilized the legal framework of the UN complex, international human rights law treaties, and international criminal law to address human rights infringement in North Korea, yet to minimal practical effect. As Mutua explains: "The true test for effectiveness of human rights law is not at the vertical level ... but rather in the assimilation and adoption of human rights norms by and within states."[135] Thus far, North Korean human rights discourse has fixated increasingly on accountability. But the paradox is the effectiveness of this approach for actual diffusion or institutionalization of human rights in North Korea. The accountability paradigm is to some degree productive in extracting tactical, symbolic concessions from the North Korean government, but it is largely counter-productive in achieving on-the-ground results for rights protection of the general population. The question of whether the North Korean government would like to reform its human records can be seen in its attempts to revise laws, regulations, and policies in response to treaty body reports and processes, though NGOs and defector accounts of prior decades argue that, despite treat participation, the state has done little to improve the daily lives of North Koreans throughout the nation. This consequently calls for a more comprehensive approach to effect change. Embedded and complicated in the larger context of a divided Korea, the issue of human rights is difficult to resolve without also addressing national sovereignty, ideological warfare, national security, and military priorities involving regional and allied states. Nonetheless, if engagement openings are to be pursued, human rights discourse must concurrently be reframed in more localized and relatable narratives for the North Korean people and government by neutral parties other than entities based in the US and South Korea. This would mean working with the perspective of North Korean human rights as understood historically in terms of social, economic, and cultural rights; informing North Koreans toward holding their government accountable on the entire spectrum of economic, social, civil, and political rights; simultaneously pursuing rights protection within existing UN mechanisms, including the discursive framework of the UN Sustainable Development Goals; and continuing cultural and professional exchanges for exposure to global best practices.

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135. Mutua (2001), p. 256.

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